



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 21-207

**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 Office of Elisa Hyman, PC, attorneys for petitioners, by Erin O'Connor, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Gail M. Eckstein, 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 for independent educational evaluations (IEEs) and compensatory educational services for their son for the 2018-19, 2019-20, and 2020-21 school years. The appeal must be sustained in part.

### **II. Overview—Administrative Procedures**

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

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

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

### **III. Facts and Procedural History**

The student has received a diagnosis of autism (Parent Exs. D at ¶ 21; GG at ¶ 21). Through the Early Intervention Program (EIP), the student attended a center-based program for two hours per day and received applied behavior analysis (ABA) services in the center-based program and at

home, together with speech-language therapy and occupational therapy (OT) (Parent Ex. K at p. 1; Dist. Ex. 3 at pp. 8, 23, 26, 34).<sup>1, 2</sup>

The parents and EIP team referred the student to the Committee on Preschool Special Education (CPSE) for an evaluation "due to concerns with language development, social development, fine-motor skills, sensory functioning, and autism spectrum disorder" (Dist. Ex. 3 at pp. 7, 9). On April 3, 2018, a social history, a psychological evaluation, an educational evaluation, and a classroom observation were conducted (id. at pp. 7-24). On April 6, 2018, a CPSE convened "so that the child would not lose services" through the EIP during the 2017-18 school year (see Tr. p. 383; Dist. Ex. 1).<sup>3</sup> The April 2018 CPSE determined that the student was eligible for special education as a preschool student with a disability and recommended that the student attend a 12-month school year program consisting of an 8:1+2 special class placement in a State-approved "early childhood program" (Dist. Ex. 1 at pp. 1, 9, 11). According to the IEP, the CPSE agreed to reconvene to determine the "[a]dequacy of [the] program recommendation" and to review related services evaluations, which had not yet been completed as of the date of the April 2018 CPSE meeting (id. at p. 1).

A speech-language evaluation, an OT evaluation, and a physical therapy (PT) evaluation were thereafter completed on April 7 and April 10, 2018, respectively (Dist. Ex. 3 at pp. 25-36). On April 19, 2018, the student and the parents toured the Block Institute (Block), a State-approved preschool program (Dist. Ex. 3 at pp. 3-5).

The CPSE reconvened on June 7, 2018, to review the student's programming for the 2018-19 school year (see Dist. Ex. 2). The CPSE recommended that the student attend a 12-month school year program consisting of an 8:1+3 special class placement together with three 30-minute sessions per week of individual speech-language therapy, three 30-minute sessions per week of individual OT, and three 30-minute sessions per week of individual PT at a State-approved "early childhood program" (id. at pp. 1, 20-21, 23). In a letter dated June 7, 2018, the district identified

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<sup>1</sup> According to an April 2018 social history report, the student was, at that time, receiving two hours per day of home-based ABA, in addition to the ABA services he received at school (Tr. pp. 393-94; Dist. Ex. 3 at p. 8).

<sup>2</sup> The hearing record contains duplicative exhibits. For purposes of this decision, only district exhibits are cited in instances where both a parent and district exhibit are identical in content. The IHO is reminded that it is his responsibility to exclude evidence that he determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]). With respect to evaluations of the student conducted during April 2018, the parent's copy of the evaluations is contained within two exhibits (Parent Exs. I-J); while the first four pages of the April 2018 educational evaluation appear in exhibit J, the last two pages appear as part of exhibit I (Parent Exs. I at pp. 9-10; J at pp. 21-24). The district's copy of the evaluations is contained within one exhibit and also has an issue in that the pages of the speech-language evaluation are paginated out of consecutive order (Dist. Ex. 3 at pp. 25-30). With respect to the speech-language evaluation, the pagination added by the district is cited, notwithstanding that it is not consecutive.

<sup>3</sup> Generally, a student's eligibility for early intervention services ends as of his or her third birthday (see 20 U.S.C. § 1432[5][A]; 34 CFR 303.21[a]); however, State law provides that children in EIPs who are evaluated by the district's CPSE before their third birthday and found to be eligible for preschool educational services under the IDEA, and turn three years of age on or before the last day of August, are eligible to continue receiving early intervention services until the first day of September of the same calendar year (see Tr. pp. 377-79, 383; Pub. Health Law § 2541[8][a][i]). The student turned three before August 31, 2018 (Dist. Ex. 1 at p. 1).

Block as the preschool program to which it assigned the student to attend (id. at pp. 24-26). The student attended the recommended program at Block for the 2018-19 school year (see Parent Ex. L; Dist. Ex. 4).

On April 18, 2019, a CPSE convened for the purpose of conducting the student's annual review (see Parent Ex. B). The CPSE continued to recommend a 12-month school year program in an 8:1+3 special class placement with related services of three 30-minute sessions per week of individual speech-language therapy, three 30-minute sessions per week of individual OT, and three 30-minute sessions per week of individual PT at Block (compare Parent Ex. B at pp. 1, 18-19, 21-22, with Dist. Ex. 2 at pp. 1, 20-21, 23). The student attended the recommended program at Block for the 2019-20 school year (see Parent Exs. M; UUU; Dist. Exs. 5-6).

In preparation for the student's transition to school-aged programming, the district conducted a psychological update on January 13, 2020 (Parent Ex. K). On February 24, 2020, the CSE met to determine the student's eligibility for special education for kindergarten (2020-21 school year) and developed an IEP with a projected implementation date of September 10, 2020 (see Parent Ex. F). The CSE found the student eligible for special education as a student with autism (Parent Ex. F at p. 2).<sup>4</sup> The CSE recommended a 12-month school year program consisting of a 12:1+1 special class placement in a specialized school with two 30-minute sessions per week of individual OT, three 40-minute sessions per year of group parent counseling and training, two 30-minute sessions per week of individual PT, and three 30-minute sessions per week of individual speech-language therapy, as well as daily group paraprofessional services for toileting (id. at pp. 12, 14-15).

School buildings were shuttered statewide in March 2020 due to the COVID-19 pandemic. In a prior written notice dated May 4, 2020, the district summarized the February 2020 CSE's recommendations and notified the parents of the particular public school site to which it assigned the student to attend for the 2020-21 school year beginning in September 2020 (Dist. Ex. 7). The parents disagreed with the proposed public school site and requested a different school location (see Parent Exs. U at p. 9; JJJ ¶ 94). The student continued to attend Block during summer 2020 (App'x C Ex. XII at p. 2).<sup>5</sup>

On October 1, 2020, the district provided the parents with a "school location letter," identifying a different public school site for the student to attend (Parent Ex. G).<sup>6</sup> In an email to

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<sup>4</sup> The student's eligibility for special education as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

<sup>5</sup> The IHO appended three exhibit lists to his decision, titled appendixes A through C, as well as an appendix D identifying titles of individuals referenced in the decision (IHO Decision at pp. 12-18). Appendixes A and B list the parent and district exhibits. Appendix C is a list of "additional items in the record" and includes various orders and communications between the IHO and the parties. Notwithstanding that the documents in appendix C were not numbered or otherwise marked for identification during the impartial hearing, for ease of reference, the district provided a numbering scheme (using roman numerals) for the items in appendix C. Documents in appendix C will be cited using the roman numerals assigned by the district (see App'x C Exs. I-XXIII).

<sup>6</sup> According to the parents, the October 2020 school location letter was delivered to Block, rather than to the parents' address (Parent Ex. JJJ ¶ 99)

the district dated October 2, 2020, the parents requested more information about the assigned public school site identified in the October 2020 school location letter, including information about how services would be delivered remotely until the school reopened (Parent Ex. Q). The parents did not receive a response from the district.

### **A. Due Process Complaint Notice**

The parents filed a due process complaint notice dated October 9, 2020, which they amended on May 7, 2021; in the amended due process complaint notice, which consisted of 16 pages and 98 enumerated paragraphs together with approximately 145 lettered subparagraphs, the parents asserted that the district failed to appropriately evaluate the student, failed to provide the student with an appropriate placement, and failed to develop appropriate IEPs for the 2018-19, 2019-20, and 2020-21 school years, thereby denying the student a free appropriate public education (FAPE) (see Parent Exs. A, PPPP).<sup>7</sup>

The parents alleged that the April 2018, June 2018, and April 2019 IEPs failed to offer the student a FAPE based on various procedural and substantive deficiencies (Parent Ex. PPPP at pp. 4-7). The parents also asserted that, to the extent that the February 2020 CSE developed an IEP for the 2020-21 school year, the district failed to offer the student a FAPE based on various procedural and substantive deficiencies (*id.* at pp. 8-11). The parents further asserted claims concerning various district policies, including systemic violations of the IDEA and section 504 of the Rehabilitation Act of 1973 ("section 504"), 29 U.S.C. § 794(a), affecting the CPSEs' and CSEs' ability to offer specific programming and services (*id.* at pp. 2, 12-13).

As relief, the parents requested: a declaration that the district violated the IDEA, section 504, and State Education Law, and that the student was denied a FAPE for the 2018-19, 2019-20, and 2020-21 school years; a pendency placement consisting of the services set forth in the April 2019 IEP (8:1+3 special class in a State-approved nonpublic school, three 30-minute sessions per week of speech-language therapy, three 30-minute sessions per week of PT, three 30-minute sessions per week of OT, small bus, 12-month services); issuance of an interim decision ordering the district to fund interim educational evaluations (IEEs), including neuropsychological, speech-language, auditory processing, PT, OT, and assistive technology evaluations, as well as an observation of the student by a "Ph.D.-level expert in behavior," an assessment by an "expert in remediation," and a "private" functional behavioral assessment (FBA) and behavioral intervention plan (BIP); and an award of compensatory educational services (Parent Ex. PPPP at pp. 14-15). Regarding compensatory education, the parents requested: a bank of 1:1 instruction, ABA therapy, Prompts for Restructuring Oral Muscular Phonetic Targets (PROMPT) therapy, "additional" special education itinerant teacher (SEIT) services, tutoring, behavior therapy, "services to improve executive functioning," assistive technology and assistive technology training, related services (i.e., OT, PT, speech-language therapy, counseling, social skills training, and/or feeding therapy), and "any other services recommended as a result of" the IEEs (*id.* at p. 15). The parents also requested that the district "fund an increase in 1:1 instruction and related services" and develop an IEP that included, "at a minimum, [the student's] pendency services, as well as additional 1:1

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<sup>7</sup> The parents also filed an amended due process complaint notice on November 25, 2020; however, the parents withdrew the November 2020 amended due process complaint notice (Tr. pp. 73-74).

instruction, ABA, PROMPT, SEIT, [speech-language therapy] services, OT services, PT services, counseling, [a] 12-month [school year program], behavioral support," and special transportation "to and from school and home-based services" (*id.*). Finally, the parents requested reimbursement/funding of private school tuition as "equitable and/or compensatory relief" for the district's violations of the IDEA and section 504 (*id.*).

In response to the parents' due process complaint notice, the district submitted the prior written notice for the February 24, 2020 IEP which was previously sent to the parents on or about May 4, 2020 (*see* Parent Ex. FF).<sup>8</sup>

## **B. Impartial Hearing Officer Decisions**

An impartial hearing convened on November 19, 2020, and concluded on August 20, 2021, after eleven days of proceedings, four of which were devoted to the presentation of documentary and testimonial evidence concerning the merits of the parents' claims (Tr. pp. 1-987).<sup>9</sup> In an interim decision dated November 19, 2020, the IHO originally assigned to preside over this matter (IHO I) determined that the student's last agreed upon IEP was the April 18, 2019 IEP (Parent Ex. E at pp. 3-5). The 8:1+3 special class preschool program at Block that the student had attended pursuant to the April 2019 IEP was no longer available to the student (*id.* at p. 4).<sup>10</sup> Relying on the testimony of Block's director of children's services (Block director), IHO I found that an 8:1+2 special class available at Block was "substantially and materially the same" as the 8:1+3 special class program recommended in the April 2019 IEP (*id.* at p. 5). Accordingly, IHO I found that the student's pendency placement consisted of an 8:1+2 special class at a State-approved nonpublic school together with three 30-minute sessions per week of individual speech-language therapy, three 30-minute sessions per week of individual PT, three 30-minute sessions per week of individual OT, transportation on a small bus to and from school, and 12-month services, effective October 9, 2020 (*id.*).

IHO I recused himself, on or about December 23, 2020, due to scheduling conflicts and his "inability to timely conclude [the] case" (Tr. p. 115; Parent Ex. NN). On January 21, 2021, a new IHO was appointed to preside over the matter (the IHO) (Tr. p. 119; App'x C Ex. I at pp. 1-2).

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<sup>8</sup> State and federal regulations provide that, if the school district has not sent a prior written notice to the parent regarding the subject matter of the parent's due process complaint notice, the district shall provide a response to the parent within 10 days of receiving the complaint (8 NYCRR 200.5[i][4][i] *see* 34 CFR 300.508[e]).

<sup>9</sup> The parents presented affidavit testimony of several witnesses (*see* Parent Exs. D; GG; III; JJJ; VVV), who were also available during the impartial hearing for further examination. State regulation provides that "[t]he [IHO] may take direct testimony by affidavit in lieu of in-hearing testimony, provided that the witness giving such testimony shall be made available for cross examination" (8 NYCRR 200.5[j][3][xii][f]).

<sup>10</sup> According to a discussion between counsel for the parent and the representative for the district during the hearing, the student was going to age out of his pendency placement at Block in August 2021 because Block is a preschool and the student was already held over at Block for the 2020-21 school year (Tr. pp. 422-26).

During the impartial hearing, the IHO addressed multiple requests and motions by the parties.<sup>11</sup> The following is a brief outline of some of the issues raised by the parties:

1. On December 4, 2020, the parents made an application for an interim order of 40 hours of 1:1 home-based ABA, two hours per month of home-based supervision by a Board-Certified Behavior Analyst (BCBA), two hours of parent counseling and training per month, and an assistive technology evaluation; after receiving opposition from the district, the IHO held that ABA services during pendency were not warranted and denied the parents' motion (Parent Exs. JJ; KK; OOO).
2. On December 22, 2020, the district made a motion to partially dismiss the parents' due process complaint notice as the applicable statute of limitations barred the parents' claims for the 2018-19 school year, which the parents opposed; in an interim decision dated, May 10, 2021, the IHO denied the motion without prejudice (Parent Exs. LL; MM; OO; QQQQ). Thereafter, on August 18, 2021, the district renewed its motion to partially dismiss the parents' claims pertaining to the 2018-19 school year based upon the statute of limitations (Parent Ex. IIIII at p. 4). In an interim decision dated August 20, 2021, the IHO held that this second motion to dismiss was brought after the district concluded its direct case on August 12, 2021 and that the district failed to raise the issue of statute of limitations during the presentation of its case; therefore, the IHO denied the motion (Parent Ex. NNNNN at pp. 1-2).
3. The parties made multiple adjournment and/or extension requests, several of which were denied by the IHO for failure to comply with the IHO's case rules (Parent Exs. PP; QQ; RR; SS at pp. 1-2, 5; TT; XX; WW; BBB-DDD, EEE ; EEEEE at p. 1; GGGGG at pp. 1, 4-8; IIIII at pp. 1-2; MMMMM; App'x C Exs. II; X; XIV-XVII; XXI).
4. On February 11, 2021, the parents made a motion for certain interim IEEs: a speech-language evaluation, auditory processing evaluation, neuropsychological evaluation, OT evaluation, PT evaluation, assistive technology evaluation, observation of the student by an expert in behavior, and assessment by an expert in remediation (see Parent Ex. VV). On March 22, 2021, the IHO denied the parents' request, finding that parents had a right to IEEs "if they express disagreement with an evaluation conducted by the school district" and that the parents presented no evidence that they requested IEEs prior to commencement of the impartial hearing (Parent Ex. NNN).
5. On February 15, 2021, the IHO set forth an order setting rules for the parties to abide by during the impartial hearing (see Parent Ex. YY at pp. 1-2).
6. On five separate occasions (February 15, 2021, March 10, 2021, March 11, 2021, March 30, 2021, April 22, 2021), the parents made applications to compel the district to produce

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<sup>11</sup> The organization of the hearing record leaves something to be desired in terms of presenting the procedural history of the matter. The IHO included some documents pertaining to the procedural history as appendix C. The parents included several such documents as parent exhibits. In addition, the hearing record submitted on appeal includes more documents, including motions and interim decisions of the IHO that were not listed in the IHO decision. Several of the documents are duplicative.

certain documents, and except for the parents' motion on April 22, 2021, the IHO denied the parents requests (Parent Exs. ZZ; AAA; HHH; KKK; MMM; PPP, RRR; SSS; May 4, 2021 Interim IHO Decision).<sup>12</sup>

7. The parents filed additional due process complaint notices on March 26, 2021 and April 28, 2021; the IHO declined to consolidate those matters with the pending proceeding (Parent Ex. QQQ; RRRR).

8. The parents made a motion dated March 16, 2021 for the IHO to execute witness subpoenas, which was denied, and the IHO directed parents' counsel to "execute and serve" the subpoenas (Parent Exs. LLL; TTT).

9. On May 4, 2021 the parties stipulated to undisputed facts (App'x C Ex. XII).

In a decision dated September 3, 2021, the IHO determined that the district offered the student a FAPE for the 2018-19 and 2019-20 school years but failed to offer the student a FAPE for the 2020-21 school year; however, the IHO declined to order any of the relief requested by the parents (IHO Decision at pp. 8-11). The IHO did, however, order the district to convene a CSE meeting and develop an IEP with a specific program and related services for the student (*id.* at p. 11). Furthermore, the IHO held that the parents' 504 claims lacked merit (*id.* at p. 10).

Initially, the IHO discussed his order for the district to produce the testimony of two witnesses: a related services provider and a CPSE chairperson (IHO Decision at p. 6). Although the district failed to produce these witnesses, and the IHO found the conduct of the district "uncooperative and unprofessional," the IHO declined to issue sanctions or draw an adverse inference against the district as such remedies would be "too drastic" (*id.* at p. 7).

Regarding the 2018-19 and 2019-20 school years, the IHO found that the IEPs which recommended an 8:1+3 special class together with related services "were based on detailed evaluations that covered psychology, cognition, speech, motor skills, and behavior" (IHO Decision at p. 8). The IHO next held that the "progress reports from 2019 and 2020" from Block demonstrated the student's progress in "speech, motor skills, and adaptative skills, even though significant delays persisted" (*id.* at pp. 8-9). The IHO found that, this "improvement, despite the challenges that remained" demonstrated that the student benefitted from both the 2018 and 2019 IEPs (*id.* at p. 9).

As for implementation of the IEPs for the 2018-19 and 2019-20 school years, the IHO found that the issues were not "significant enough to constitute a deprivation of FAPE" (IHO Decision at p. 9). The IHO referenced the testimony of the Block director that, although related services were missed, they "were provided to the maximum extent possible" (*id.*). Additionally, the IHO noted the Block director's testimony that teachers, such as the teacher assistant in the student's classroom, could "be assigned to different roles if they [we]re qualified" (*id.*). Accordingly, the IHO held that "despite any administrative challenges at [Block], . . . overall,

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<sup>12</sup> Although appendix C, exhibit XIII is listed as the order granting the motion to compel, the document received by the Office of State Review is an email regarding the district's motion to dismiss. The May 4, 2021 interim decision was, however, separately included in the hearing record on appeal.

reasonably calculated programs were implemented in a manner that conferred an educational benefit to the [s]tudent" (id.).

The IHO held that the district did not establish that the meeting notices were adequate for each of the CPSE meetings, however, he found that the district did provide the parents notices each school year of the services provided to the student (IHO Decision at p. 9). The IHO also found that the parents participated in the CPSE meetings in a "meaningful way" (id.). Ultimately, the IHO did not find that any procedural violations rose to the level of a deprivation of a FAPE for either the 2018-19 or 2019-20 school years (id.).

As for the 2020-21 school year, the IHO found that, although the student made progress at Block, his delays remained significant, and the district presented "no convincing reason" for the February 2020 CSE's recommendation of a class size "so drastically increased" to a 12:1+1 ratio or for the reduction in related services (IHO Decision at pp. 9-10). In connection with the district's denial of a FAPE for the 2020-21 school year, the IHO ordered the CSE to convene and develop an IEP to include a 12-month school year program in an 8:1+3 special class placement, along with individual speech-language therapy, OT, and PT, with each to be provided three times per week for at least 30 minutes, parent counseling and training, to be provided 10 times per year for 40-minute sessions, and daily paraprofessional services for toileting (id. at pp. 10-11).

The IHO denied the remaining relief requested by the parents and reiterated his prior ruling denying requested IEEs (IHO Decision at p. 10).

#### **IV. Appeal for State-Level Review**

The parents raise the following issues on appeal:<sup>13</sup>

1. Whether the IHO conducted the impartial hearing in a manner that provided the parents due process and permitted them to develop the hearing record.
2. Whether the IHO erred in denying the parents' requests for IEEs.
3. Whether the IHO erred in finding that the district's evaluations were appropriate.
4. Whether the IHO erred in finding that the district offered the student a FAPE for the 2018-19 school year based on the parents' claims that the June 2018 IEP was not developed in accordance with the IDEA's procedures, the district predetermined the

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<sup>13</sup> The parents allege that the IHO erred in finding that the district did not violate section 504. An SRO's jurisdiction is limited by State law to matters arising under the IDEA and Article 89 of the Education Law (Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Courts have also recognized that the Education Law makes no provision for State-level administrative review of IHO decisions with regard to section 504 (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 & n.17 [E.D.N.Y. 2012] [noting that "[u]nder New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"], aff'd, 513 Fed. App'x 95 [2d Cir. May 12, 2013]; see also F.C. v. New York City Dep't of Educ., 2016 WL 8716232, at \*11 [S.D.N.Y. Aug. 5, 2016]). Therefore, I do not have jurisdiction to review any portion of the parent's claims regarding violations of section 504 and they will not be further discussed.

recommendations, the annual goals were inadequate, the CSE failed to address the student's behavioral needs, the CSE's recommendations were inappropriate and did not include 1:1 instruction, and the district materially failed to implement the IEP, thereby denying the student compensatory educational services.

5. Whether the IHO erred in finding that the district offered the student a FAPE for the 2019-20 school year based on the parents' claims that the April 2019 IEP was not developed in accordance with the IDEA's procedures, the district denied the parents the opportunity to meaningfully participate in the CSE meeting and predetermined the recommendations, the annual goals were inadequate, the CSE failed to consider the student's progress leading up to the April 2019 CSE meeting, the CSE failed to address the student's behavioral needs, the CSE's recommendations were inappropriate, and the district materially failed to implement the IEP, thereby denying the student compensatory educational services.

6. Whether the IHO erred in denying the parents' request for compensatory education services to remedy the district's failure to offer or provide the student with a FAPE for the 2018-19, 2019-20, or 2020-21 school years, for pendency violations, and to make-up for the student's regression related to remote delivery of instruction during COVID-19.

7. Whether the IHO erred in directing the CSE to develop an IEP with a specific program and related services for the 2021-22 school year.

Regarding compensatory education, while not stated in their request for review, the parents elaborate in their memorandum of law that they seek the following: 5,520 hours of 1:1 ABA instruction, 72 hours of ABA supervision, 72 hours of parent counseling and training, a calculation of the student's missed services for the 2018-19, 2019-20, and 2020-21 school years, or in the alternative an award of the following: 200 sessions (100 hours) of speech-language therapy, 177 sessions (88.5 hours) of OT, and 163 sessions (81.5 hours) of PT. Finally, the parents seek a reversal of the IHO's denial of IEEs and an order directing the district to fund the following independent evaluations: comprehensive neuropsychological, speech-language, OT, PT, assistive technology, and auditory processing, as well as behavioral observation by a BCBA (*id.* at pp. 9, 20).

The district answers, generally denying the parents' material allegations.<sup>14</sup> The district concedes that it denied the student a FAPE for the 2020-21 school year.<sup>15</sup> The district requests that the IHO's findings that the district offered the student a FAPE for the 2018-19 and 2019-20

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<sup>14</sup> This matter has been pending before the Office of State Review for several months, during which time the district requested multiple extensions of the timeline to answer the parents' request for review in order to engage in good faith settlement negotiations with the parent (*see* 8 NYCRR 279.10[e]). According to representations from the district, the parties had discussed a framework for settlement and the district was ready to seek "pre-approval from the comptroller." However, without further explanation, the district served and filed an answer, apparently representing the end of the attempts to settle the matter.

<sup>15</sup> Accordingly, since the district has not appealed the IHO's findings that it denied the student a FAPE for the 2020-21 school year, the IHO's determination on this issue has become final and binding and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; *see M.Z. v. New York City Dep't of Educ.*, 2013 WL 1314992, at \*6-\*7, \*10 [S.D.N.Y. Mar. 21, 2013]).

school years be upheld, the parents' request for compensatory relief for the 2020-21 school year be granted in part, district funding of the requested IEEs be ordered, and the remainder of the parents' appeal be dismissed (*id.*). With respect to compensatory education, the district argues that the compensatory award sought by the parents is "unreasonably high" and more akin to a "default relief," than a reasoned award; the district further asserts that since it conceded a FAPE for the 2020-21 school year, the student "is entitled to a lower, more reasonable amount of compensatory instruction to compensate solely for that school year" and proposes 460 hours of compensatory 1:1 ABA instruction, as well as 24 hours of ABA supervision and 24 hours of parent counseling and training.

## 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]).<sup>16</sup>

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).

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<sup>16</sup> The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

## **VI. Discussion**

### **A. Preliminary Matter—Conduct of Hearing**

The parents allege that they were denied due process and prevented from developing the hearing record as a result of the IHO denying their motions to compel the district to produce the student's educational records, limiting cross-examination of the district's witnesses, denying the parents' request to submit written closing briefs, and failing to draw an adverse inference against the district when it failed to produce two witnesses for the impartial hearing.

Unless specifically prohibited by regulations, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, with how they conduct an impartial hearing, in order that they may "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46704 [Aug. 14, 2006]). An IHO must provide all parties with an opportunity to present evidence and testimony, including the opportunity to confront and cross-examine witnesses (34 CFR 300.512[a][2]; 8 NYCRR 200.5[j][3][xii]). Furthermore, each party "shall have up to one day to present its case" (8 NYCRR 200.5[j][3][xiii]). While an IHO is required to exclude evidence and may limit the testimony of witnesses that he or she "determines to be irrelevant, immaterial, unreliable or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]-[e]), it is also an IHO's responsibility to ensure that there is an adequate and complete hearing record (see 8 NYCRR 200.5[j][3][vii]). And an IHO has the authority to issue a subpoena if necessary (see 8 NYCRR 200.5[j][3][iv]).

Upon my independent review of the impartial hearing record, there is insufficient evidence to support any of the parents' contentions that the IHO prevented the development of the hearing record, violated the parents' due process rights, or otherwise abused his broad discretion regarding the conduct of the impartial hearing. Moreover, my review of the hearing record demonstrates that the parents had the opportunity to present a case at the impartial hearing and that the impartial hearing was conducted in a manner consistent with the requirements of due process by the IHO (see Educ. Law § 4404[2]; 34 CFR 300.514[b][2][i], [ii]; 8 NYCRR 200.5[j]).

### **B. 2018-19 School Year**

#### **1. Parent Participation and Predetermination**

The parents assert that the IHO should have found a denial of FAPE for the 2018-19 school year as the CPSE "failed to develop in the IEP in accordance with most of the IDEA's procedures" and the "CPSE predetermined that ABA was not available to the student" (Req. for Rev. ¶ 13).

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. v. New York City Dep't of Educ., 2015 WL 4597545, at \*8, \*10 [S.D.N.Y. July 30, 2015]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676 at \*17 [E.D.N.Y. Aug. 19, 2013] [stating that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] [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. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at \*11 [E.D.N.Y. Sept. 2, 2011], *aff'd*, 506 Fed. App'x 80 [2d Cir. Dec. 26, 2012], quoting A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208, 216 [D. Conn. 2006]; see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [noting that the IDEA gives parents the right to participate in the development of their child's IEP, not a veto power over those aspects of the IEP with which they do not agree]).

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

According to the meeting attendance sheet, attendees at the April 2018 CSE meeting included the CPSE administrator, a district school psychologist, a special education teacher or provider from the student's day care program, an EIP service coordinator, and the student's mother (Tr. p. 331; Dist. Ex. 1 at p. 2). The CPSE administrator testified that, because of the timing of the referral of the student for an evaluation through the CPSE, it "was really an emergency case," in that the CPSE meeting had to occur to determine the student's eligibility for special education as a preschool student with a disability before the student's third birthday so that the student would not lose services through the EIP (Tr. pp. 333, 377-79, 383). The student's mother testified that she participated in the student's April 2018 CPSE meeting by phone while riding on public transportation, which made it difficult for her to hear, but she was able to express her concerns regarding the student's toileting needs (Tr. p. 663; Parent Ex. JJJ ¶¶ 31, 34). The parent asserted that she did not receive the student's evaluations or any notices prior to the meeting (Parent Ex. JJJ

¶ 32). The parent stated that the CPSE chairperson described the recommended program and suggested the parent "look into" Block (Tr. pp. 663-64; Parent Ex. JJJ ¶¶ 33, 37). The parent reported that the documents she did receive were not explained to her (Parent Ex. JJJ ¶ 39).

According to the meeting attendance sheet, attendees at the June 2018 CPSE meeting included the CPSE administrator, a speech-language pathologist, and the student's mother (Dist. Ex. 2 at p. 2). Although the parent was present at the June 2018 CPSE meeting, she was unable to recall or provide specific testimony as to her participation in the meeting; however, she was aware of the recommendation for a program and services at Block (Tr. p. 666). In June 2018, the parent received the student's finalized IEP and agreed to the recommendations (Tr. p. 666; Parent Ex. JJJ ¶¶ 42-43; Dist. Ex. 2 at p. 24).

With regard to predetermination, the parents allege that the CPSE failed to consider ABA services. The student's mother testified that, during the April 2018 CPSE meeting, she told the other committee members that she wanted the student to continue getting ABA therapy (Parent Ex. JJJ ¶ 35). The parent indicated that she was told that the district "does not offer ABA, but preschools usually offer it" (*id.*). The CPSE administrator testified that ABA was "one of the methodolog[ies] that's used by some of the teachers" in the district but that it was not something the CPSE put on the IEP (Tr. pp. 788-79).

Here, by calling the student's mother for the April 2018 CPSE meeting, without notice, and expecting the meeting to go forward despite that she was traveling on a bus with her child, the district failed to ensure the parents were afforded the opportunity to meaningfully participate in the CPSE process. It is less clear whether or not the district followed procedures to ensure the parents' attendance and ability to participate at the June 2018 CPSE meeting. Ultimately, however, the parents expressed their desires for the student and, at the June 2018 CPSE meeting, the CPSE recommended a substantively appropriate IEP as discussed below. Accordingly, even if the district committed a procedural violation of the IDEA, in this instance, it would not support a finding that the district denied the student a FAPE or warrant an award of equitable relief in the form of compensatory education (see *J.N. v. Jefferson County Bd. of Educ.*, 12 F.4th 1355, 1366 [11th Cir. 2021] [right to compensatory education as relief turns on whether a procedural violation resulted in a loss of educational opportunity for the student]). Similarly, although the CPSE administrator's statements regarding the district's ability to recommend ABA on an IEP were overly broad, the evidence in the hearing record supports a finding that the June 2018 IEP was appropriate for the student despite the lack of a recommendation for ABA therapy. Thus, even if the CPSE predetermined the student's programming with respect to ABA, it would not support a finding that the district denied the student a FAPE.

## **2. Sufficiency of Evaluative Information**

On appeal, the parents challenge the IHO's determination that the district successfully defended its evaluations in the context of the parents' request for IEEs, relief which the district concedes to on appeal. However, to the extent the parents allege that the evaluative information before the CPSEs was inadequate—and in order to offer a summary of the student's needs as background to addressing the remaining issues on appeal—the evaluative information before the June 2018 CPSE will be discussed.

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

With respect to preschool students with disabilities, State regulation requires a parent to select an "approved program with a multidisciplinary evaluation component to conduct an individual evaluation"—as defined in 8 NYCRR 200.1(aa)—and the completion of a "summary report" that must include a "detailed statement of the preschool student's individual needs, if any" (8 NYCRR 200.16[c][1]-[c][2]). State regulation defines an individual evaluation as "any procedures, tests or assessments used selectively with an individual student, including a physical examination . . . , an individual psychological evaluation, . . . , a social history and other appropriate assessments or evaluations as may be necessary to determine whether a student has a disability and the extent of his/her special education needs" (8 NYCRR 200.1[aa]).

The June 2018 CPSE had before it and considered evaluations conducted for the purpose of the student's transition from the EIP to CPSE services, comprising an April 3, 2018 psychological evaluation report, an April 3, 2018 educational evaluation report, an April 3, 2018 classroom observation report, an April 3, 2018 social history report, an April 7, 2018 speech-language evaluation report, an April 10, 2018 OT evaluation report, and an April 10, 2018 PT evaluation report (see Dist. Ex. 3).

The April 2018 psychological evaluation was conducted using the Bayley Scales of Infant Development-Third Edition (BSID-III), the Vineland Adaptive Behavior Scales-Third Edition (VABS-3), and the Childhood Autism Rating Scale-Second Edition (CARS-2) (Dist. Exs. 2 at p. 3; 3 at p. 10). The resultant report noted that due to the student's lack of compliance and reluctance to fully participate, the results were possibly an underestimate of his abilities (Dist. Exs. 2 at p. 3; 3 at p. 11).

As measured by the BSID-III, the student attained a standard score of 55 in the cognitive development domain, which was more than two standard deviations below the mean (Dist. Ex. 3 at p. 11). Specifically, the evaluator reported that the student was able to assemble legos, place coins in the slot of a piggy bank, complete a pegboard, and place a circle and square in a form board (id.). In contrast, the student was unable to thread a bead on a string, complete a three-piece formboard, or imitate various written strokes (id.). In addition, the student was unable to match pictures, colors, or objects by size, sort by shape, assemble four nesting cups in correct order, recall pictures, or assemble a two-piece puzzle (id. p. 12). The psychological evaluation report stated that the student's score on the CARS-2, coupled with the evaluator's clinical opinion, indicated that the student met the criteria for an autism spectrum disorder (Tr. p. 411; Dist. Ex. 3 at pp. 10, 15). On the VABS-3, the student attained the following standard scores: communication skills 57, daily living skills 69, socialization 73, motor skills 83, and 67 for the adaptive behavior composite (id. at p. 10).

With regard to language development, the evaluator reported that the student inconsistently imitated new words but was unable to incorporate and use the new words independently (Dist. Ex. 3 at p. 12). The student was able to use a small number of single words, call for attention, make requests, refuse, label some objects, greet and respond when directly prompted, and comment (id.). The student did not spontaneously use two-word phrases, pose simple questions, respond to yes/no or "wh" questions, use size words, convey messages, reciprocate in a brief "conversation," relate simple experiences, or shake his head "no" or nod "yes" (id.). The evaluator noted that the student did not recognize word labels for pictures of objects but that he could identify and retrieve some common objects on request given visual cues or physical prompts (id.). The student could follow a few very familiar and simple directions without gestures or contextual cues but was unable to follow one step directions without cues, follow directions with spatial concepts, or follow two step directions (id. at pp. 12-13). In the area of adaptive development, the student was unable to independently use utensils to eat and did not understand or avoid potential danger (id. at p. 13). The student wore a diaper and was unable to communicate that he needed his diaper changed (id.).

Turning to the student's social development, the evaluator reported that the student readily accepted and sought hugs from his family members, noticed and tolerated new people but did not interact with them, was self-directed in social situations, and tended to cling to his father (Dist. Ex. 3 at p. 14). According to the evaluator, the student did not show interest in his social environment or play interactively with other children, nor did he use gestures or language to facilitate social interaction (id. at pp. 14-15). The student demonstrated mostly sensory-motor manipulation, physical exploration, and cause and effect play (id. at p. 14). The evaluator reported that the student did not engage in pretend play and strongly resisted transitions at home but not at school (id.). During testing, the student engaged in repetitive behaviors such as making repeated vocalizations and noises, or repeating words over and over (id.). The evaluator indicated that the student was indifferent to praise, did not seek attention, and did not show empathy (id.). He engaged in tantrums several times a day which consisted of screaming, falling on the floor, flailing, as well as hitting others and himself, when he did not get his way (id.). The evaluator judged the student's motor skills to be within normal limits (id. at pp. 10, 14-15).

The April 3, 2018 educational evaluation report described the student's results on the Mullen Scales of Early Learning (AGS Edition) and the Carolina Curriculum for Preschoolers with Special Needs (Second Edition) (Dist. Ex. 3 at p. 17). The special education teacher who evaluated

the student reported that he exhibited a very short attention span and did not use any spontaneous speech during the evaluation (*id.* at p. 18). She noted that on the visual reception scale of the Mullen Scales of Early Learning, the student demonstrated skills in the very low range (*id.* at pp. 18-19). Specifically, the student did not demonstrate consistent eye contact, object permanence, or functional play skills (*id.* at p. 18). The student did not give an object when requested by the evaluator, look at pictures in a book, or attempt to turn the pages (*id.*). The student was unable to sort or match objects by size, shape, or color (*id.*). The student required maximum prompts to nest cups or place shapes in a formboard (*id.* at pp. 18-19). With regard to the student's social/emotional skills, the special education teacher described the student as noninteractive and disinterested in the evaluator or the testing materials (*id.* at p. 19). The student reportedly tolerated playing next to other children but did not play interactively with other children, and he did not use gestures or language to facilitate social interaction, or consistently respond when his name was called (*id.*). The April 2018 special education teacher described the student as active and self-directed (*id.*). She indicated that the student fell two standard deviations below the mean in the areas of visual reception, receptive and expressive speech skills, and fine motor skills (*id.* at pp. 19-21). The special education teacher reported that the student's gross motor skills appeared to be within normal limits (*id.* at p. 20).

According to the April 2018 classroom observation, the student's classroom teacher reported he was not yet using any language consistently and struggled with behaviors which interfered with his ability to complete tasks (Dist. Ex. 3 at pp. 23-24). During the classroom observation, the student attended well and participated with assistance and redirection during a circle time activity (*id.* at p. 24). The student was observed to follow routine directions in the classroom with prompts and physical assistance (*id.*).

The April 2018 speech-language evaluation report indicated that the student had a limited expressive vocabulary, and exhibited poor relatedness, joint attention, and eye contact during the evaluation (Dist. Ex. 3 at pp. 25-26). The student was able to follow some verbal commands at home such as "give me five" or "come with me" (*id.* at p. 26). He needed physical prompts to complete tasks and was unable to follow simple one step directions (*id.*). The student was unable to recognize an object by its label, complete a six-piece shape puzzle, identify shapes or colors, point to most pictures, or engage in pretend play (*id.*). According to the report, the student exhibited object function and could use cause effect toys (*id.*). The student did not demonstrate the ability to point to body parts or articles of clothing, comprehend inhibitory words such as "stop," identify objects by function, understand spatial concepts such as "in" or "on," or understand pronouns or descriptive concepts (*id.* at pp. 28). With respect to the student's expressive language, the report indicated that the student pointed and vocalized with intent to make a request, produced open vowels and repetitive babbling (mama) (*id.*). The student was unable to imitate words or sounds on command (*id.*).

According to the student's April 2018 OT evaluation report, the student was "self-directed," "strong-willed," and "difficult to engage" (Dist. Ex. 3 at p. 32). The report indicated that the student exhibited only brief eye contact and a short attention span (*id.* at pp. 31-33). He was able to hold a crayon using a fist grasp, and to scribble on paper, but he was unable to copy a circle, vertical line, or horizontal line (*id.* at p. 32). The student was able to stack a tower of 3-4 small wooden cubes, place rings on a stacker, clap his hands, turn the pages of a book, and isolate his index finger to press buttons (*id.*). He was unable to use scissors to cut paper, remove a screw top

from a container, string beads, or copy a block pattern (*id.*). According to the OT evaluation report, the student used his fingers to feed himself and drank mainly from a sippy cup (*id.*). He was not toilet trained (*id.*). The student was reportedly able to remove his socks and shoes and at times he was able to assist with dressing by appropriately positioning his limbs (*id.*). In terms of sensory processing, the student rarely responded to his name when called, "tuned out" at times, and covered his ears when frightened (*id.*). The student fleetingly established appropriate eye contact and was easily distracted (*id.* at p. 33). The report indicated that the student would touch and explore a variety of arts and craft textures with his hands (*id.*). The student often tripped and fell, occasionally walked on his tip toes, exhibited a high threshold for pain, and engaged in self-stimulatory behavior such as flapping his arms and spinning in circles (*id.*).

The April 2018 PT evaluation was conducted to determine the student's need for PT services due to concerns regarding his gross motor development (Dist. Ex. 3 at pp. 34-36). During the evaluation, the student exhibited fleeting eye contact, responded inconsistently to his name, did not communicate verbally, and required repeated prompts to participate in structured activities (*id.* at p. 34). The PT evaluation report indicated that the student's range of motion and muscle tone were within normal limits, but his muscle strength was insufficient for attaining some higher-level, age-appropriate skills and his posture was difficult to assess due to his "very limited tolerance for therapeutic handling" (*id.* at p. 35). The report described the student as an independent ambulator on level and uneven surfaces and noted that he walked quickly and was able to run, although only for a short distance and generally on tip toes (*id.*). The student required adult assistance to use stairs and by parent report fell frequently as he negotiated his environment (*id.*). He was reportedly able to jump in place when excited but would not do so upon request (*id.*). The student was unable to jump forward, over a small hurdle, or down from a step (*id.*). The student was unable to catch a ball, walk a straight line, pedal a tricycle, or use a ride on toy (*id.*). According to the Peabody Developmental Motor Scales, the student's gross motor skills fell at the first percentile, denoting a greater than 33 percent delay (*id.* at p. 36).

On appeal, the parents argue that the district did not conduct sufficient evaluations to comprehensively evaluate the student and his needs related to autism, his need for assistive technology, or the degree to which he required 1:1 instruction or ABA therapy (Req. for Rev. ¶ 4).

The CPSE administrator testified that there was no ABA assessment per se; instead, a psychologist "would run an assessment tool that would diagnose the child with autism[,] [a]nd if the child was diagnosed with autism, ABA [wa]s one of the methodologies that could be used to help him" (Tr. pp. 402-04). She indicated that the assessment tool used for such a purpose was "usually the CARS," which was a "screening tool to diagnose the child with autism informally" (Tr. p. 404). The CPSE administrator further shared that "a lot of the research" supported an approach of giving a student "this young" who presents "with symptomology of autism" an intervention and, then, if the student continued to present with symptoms consistent with autism, a medical doctor such as a developmental pediatrician or a neurologist could offer a student a formal diagnosis (Tr. pp. 404-05). As described above, the April 2018 psychological evaluation included administration of the CARS-2 (Dist. Ex. 3 at p. 10). Overall, the district was not obligated to conduct a separate assessment or otherwise refer the student to either rule out, or to diagnose, whether he met the criteria for a diagnosis of autism (see *MB v. City Sch. Dist. of New Rochelle*, 2018 WL 1609266, at \*12-\*13 [S.D.N.Y. Mar. 29, 2018] [finding no procedural violation arising from a lack of a specific "autism evaluation" where the CSE had sufficient information about the

student's individual needs and noting, in any event, that "there has been no showing that an autism-specific evaluation (or formal autism diagnosis) would have changed [the student's] recommended suite of special education services in any respect").

At the time of the April 2018 speech-language evaluation, the student communicated his needs via vocalizing with intent and pointing and did not verbalize many words or follow commands that were not part of his routine (Dist. Ex. 3 at pp. 25, 29). The CPSE administrator testified that, in order for the CPSE to recommend a speech augmentation device, the student needed to receive an assistive technology evaluation (Tr. p. 791). She testified that, as of the June 2018 CPSE meeting, the student had not received services pursuant to an IEP, so the district could not have known whether the student needed an assistive technology evaluation (Tr. pp. 793-94). She elaborated that, once services started, a student could be observed to see how he or she progressed with language, at which point it could be determined whether an assistive technology evaluation was necessary (Tr. pp. 794-95). To address the student's speech-language needs, the June 2018 CPSE recommended three 30-minute sessions of individual speech-language therapy per week and developed annual goals targeting the student's ability to use single words to request, comment and respond, and assign meaning to verbal instructions such as words, sentences or simple stories (Dist. Ex. 2 at pp. 13, 20). Given the student's age and the IEP recommendations, the lack of an assistive technology evaluation does not, in this instance, support a finding that the district denied the student a FAPE (see D.B. v. Ithaca City Sch. Dist., 690 Fed. App'x 778, 782 [2d Cir. 2017] [finding that, while a further evaluation was not conducted to consider potential benefits of assistive technology, the IEP addressed the student's needs]).

Based on the foregoing, the evidence in the hearing record shows that the June 2018 CPSE had before it a thorough and detailed description of the student's performance in all areas (see Dist. Ex. 3).

### **3. Annual Goals**

The parents assert that the 2018 IEP annual goals were vague and inadequate, not based on the student's abilities, required prerequisite skills, did not contain objective measures, failed to address major areas of delay, including toileting, and failed to address "academic or preacademic skills" (Req. for Rev. ¶ 11).

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

The student's June 2018 IEP contained 23 annual goals and approximately 85 short-term objectives/benchmarks designed to address the student's needs in the areas of pre-academics, fine and gross motor skills, social/emotional functioning, speech-language development, and self-help

skills (Dist. Ex. 2 at pp. 7-20). Specifically, to address the student's needs related to pre-academic skills, the June 2018 IEP included goals and objectives for the student to improve his skills in matching pictures, colors, and objects by size, and ability to imitate block designs (*id.* at p. 7). The IEP addressed the student's fine motor needs with goals and objectives related to imitating written strokes, using utensils for eating, using scissors, using a tripod grasp with a crayon, tracing, and lacing beads and cards (*id.* at pp. 8, 15-17). The student's attention and social/emotional needs were addressed with goals and objectives related to attending to adults, transitioning between activities when prompted, following directions, sharing, turn taking, play skills, attention to tasks, eliminating self-stimulating behaviors, and maintaining eye contact (*id.* at pp. 9-12, 16-18). The student's speech-language needs were addressed with goals and objectives for imitating speech sounds and words, labeling and requesting, following directions, and pointing to objects (*id.* at p. 14). The student's gross motor needs were addressed by goals and objectives that targeted his need to improve skills in running, jumping, and using stairs, throwing, and catching a ball, and balance (*id.* at pp. 19-20).

The CPSE administrator testified "that every single thing said [in the present levels of performance] [wa]s not necessarily going to be a goal" (Tr. p. 820). She explained that if a student had a lot of needs across the five developmental domains that goals related to earlier, foundational skills might be developed as part of the IEP because the student would need those earlier skills to reach the "ultimate goal" referenced in the present levels of performance (Tr. pp. 819-21).

Regarding the measurability of the annual goals, review of the June 2018 IEP shows that each annual goal included evaluative criteria (e.g., 80 percent or 90 percent accuracy on eight out of ten assessments or worksheets over four weeks; 90 percent of the time over three weeks or 10 sessions; 75 percent accuracy over four weeks; success for three out of four trials over three weeks), evaluation procedures (e.g., formal and informal testing, observations of the targeted skills during class or related services sessions, charting of student responses), and the schedule to be used to measure progress (e.g., weekly, quarterly, or every three months) (*id.* at pp. 7-19). In addition, the inclusion of short term objectives in this case cured any lack of specificity in the annual goals (*id.*; see E.F., 2013 WL 4495676, at \*18-\*19 [finding that, although the goals were vague, they were modified by more specific objectives that could be implemented]; see also M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*6 [S.D.N.Y. Mar. 21, 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at \*10-\*11 [S.D.N.Y. Mar. 19, 2013]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at \*8 [S.D.N.Y. Sept. 22, 2011]).

Even if the parents were correct in their allegation that the June 2018 IEP did not include annual goals in specific need areas (i.e., "did not address major areas of delay, including toileting" or "target academic or preacademic skills" or include goals to address "maladaptive behaviors") (Req. for Rev. ¶¶ 11, 28), the IDEA does not require that a district create a specific number of goals for each of a student's deficits, and the failure to create a specific annual goal does not necessarily rise to the level of a denial of FAPE; rather, a determination must be made as to whether the IEP, as a whole, contained sufficient goals to address the student's areas of need. (J.L. v. New York City Dep't of Educ., 2013 WL 625064, at \*13 [S.D.N.Y. Feb. 20, 2013]; see C.M. v. New York City Dep't of Educ., 2017 WL 607579, at \*20-\*21 [S.D.N.Y. Feb. 14, 2017]).

In sum, the hearing record demonstrates that the June 2018 CSE reviewed initial evaluations and reports, determined the student's present levels of performance, and recommended

numerous annual goals and short-term objectives to address those concerns. Accordingly, the June 2018 annual goals were specifically designed to enable the student to make meaningful progress.

#### 4. Special Factors – Interfering Behaviors

The parents allege that the IEP failed to address the student's behavioral needs by failing to recommend "positive behavioral supports, evidence-based behavioral interventions, ABA, appropriate behavioral goals and even failed to conduct an FBA and develop a BIP" (Req. for Rev. ¶ 28).

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ. of Shenendehowa Cent. Sch. Dist., 361 Fed. App'x 156, 160 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider developing a BIP for a student that is based upon an FBA (8 NYCRR 200.4[d][3][i], 200.22[a]-[b]). Additionally, a district is required to conduct an FBA in an initial evaluation for students who engage in behaviors that impede their learning or that of other students (8 NYCRR 200.4[b][1][v]). State regulation defines an FBA as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and includes, but is not limited to:

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

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

The Second Circuit has indicated that, when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F.3d at 190; see L.O. v. New York City Dep't of Educ., 822 F.3d 95, 113 [2d Cir. 2016]). 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 (R.E., 694 F.3d at 190).

With regard to a BIP, the special factor procedures set forth in State regulations note that the CSE or CPSE shall consider the development of a [BIP] for a student with a disability when:

- (i) the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions; (ii) the student's behavior places the student or others at risk of harm or injury; (iii) the CSE or CPSE is considering more restrictive programs or placements as a result of the student's behavior; and/or (iv) as required pursuant to 8 NYCRR 201.3

(8 NYCRR 200.22[b][1]).

If the CSE determines that a BIP is necessary for a student "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]).

As with the failure to conduct an FBA, the district's failure to develop a BIP in conformity with State regulations does not, in and of itself, automatically render the IEP deficient, as the IEP must be closely examined to determine whether it otherwise addressed the student's interfering behaviors (see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 80 [2d Cir. 2014]; F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 6-7 [2d Cir. Jan. 8, 2014]; M.W. v. New York City Dep't of Educ., 725 F.3d 131, 139-41 [2d Cir. 2013]; R.E., 694 F.3d at 190).

At the time of the June 2018 CPSE meeting, the student reportedly had tantrums several times a day when he did not get his way (Dist. Ex. 2 at p. 4). The tantrums included screaming, dropping to the floor, flailing, and hitting others and himself (id.). However, at that time, the student was receiving services through the EIP and was not yet in a preschool program (see Dist. Ex. 3 at p. 3). The June 2018 IEP indicated that it would be implemented beginning in September 2018 (Dist. Ex. 2 at pp. 20, 26). The June 2018 IEP also indicated that the student did not need a BIP (id. at p. 6).

The CPSE administrator testified that, in order to develop a BIP, an FBA was needed, which required that data be taken over time; therefore, she explained that an FBA would typically be initiated once the student began receiving services (Tr. pp. 406-07). The June 2018 IEP was the student's initial IEP, and therefore conducting an FBA prior to the student starting his placement did not "make sense in this case" (Tr. p. 407). The CPSE administrator testified that the student did not need a BIP, and therefore the CPSE did not recommend one (Tr. pp. 847-48). She explained that a request for an FBA and BIP typically comes from the school, "because they're the ones actually with the child every day" and that if the school saw the student exhibiting maladaptive behaviors they would refer him for an FBA and a BIP (Tr. p. 848).

The rationale that the FBA needed to be conducted in the setting in which the IEP would be implemented highlights a tension that exists between the environment-focused nature of an FBA and its relationship to when an FBA should be conducted. State guidance suggests that the decision of timing and the environment in which an FBA should be conducted is a matter under State policy that has been left to the CSE to decide ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 22, Office of Special Educ. [Dec. 2010] [noting the student's need for a BIP must be documented in the IEP, and, prior to the development of the BIP, an FBA either "has [been] or will be conducted"] [emphasis added], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). As an FBA is defined as the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment (8 NYCRR 200.1[r]), it is understandable that a district may want to wait for the student to transfer school environments prior to completing the evaluation (Bd. of Educ. of Wappingers Cent. School Dist. v M.N., 2017 WL 4641219, at \*12 [S.D.N.Y. Oct. 13, 2017] [finding that, where the district evaluated the student at his out-of-State residential program and the out-of-State placement differed from the possible district placements, "the sole fact that [the district] did not conduct an FBA prior to the implementation of an IEP does not amount to a denial of FAPE"]).<sup>17</sup> On the other hand, in its opinion in R.E., the Second Circuit Court of Appeals stated that "the entire purpose of an FBA is to ensure that the IEP's drafters have sufficient information about the student's behaviors to craft a plan that will appropriately address those behaviors" (694 F.3d at 190 [emphasis added]; see L.O., 822 F.3d at 111), evincing a view that an FBA should be drafted prior to or at the time of the development of the IEP, which must, by definition be completed before a student is placed.<sup>18</sup>

Considering the above, with particular emphasis on the student not beginning a school program until September 2018, the failure to conduct an FBA while the student was receiving

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<sup>17</sup> Once, in a summary order only, the Second Circuit explicitly addressed the timing for conducting an FBA in light of parallel IDEA and State regulatory standards then in effect, holding that it does not follow that in every circumstance an FBA must be conducted and a BIP developed at the same time as the IEP (see Cabouli v. Chappaqua Cent. Sch. Dist., 202 Fed. App'x 519, 522 [2d Cir. Oct. 27, 2006] [noting that it may be appropriate in some circumstances to address a student's behaviors in an IEP by noting that an FBA and BIP will be developed after a student is enrolled at the proposed district placement]). However, that decision was issued prior to and could not have addressed the timing factor in light of the State's subsequent promulgation of program standards in 8 NYCRR 200.22 and the addition of explicit definitions for the terms FBA and BIP to 8 NYCRR 200.1. Although FBAs and BIPs have become frequently litigated issues in New York in the special education context, none of the case law of which I am aware in New York has discussed in any significant detail either the timing factor or the environmental factor of the FBA, although a handful of cases have recognized and mentioned that such factors exist with respect to FBAs and BIPs (see, e.g., Bd. of Educ. of Wappingers Cent. School Dist., 2017 WL 4641219, at \*12; B.K., 12 F. Supp. 3d at 365; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at \*13 [S.D.N.Y. Aug. 5, 2013]; M.M., 583 F. Supp. 2d at 510).

<sup>18</sup> In R.E. and L.O., the Second Circuit indicated that, if a student has interfering behaviors, a BIP must be developed, citing 8 NYCRR 200.22 (R.E., 694 F.3d at 190; L.O., 822 F.3d at 111; see A.M. v. New York City Dept of Educ., 845 F.3d 523, 535 [2d Cir. 2017]; however, the Second Circuit did not discuss the whole of the text of the regulation, which indicates that the CSE "shall consider the development of a [BIP]" in certain instances, such as when "the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions" (8 NYCRR § 200.22[b]), which language is less absolute.

services through the EIP does not support a finding that the district failed to offer the student a FAPE.

### **5. 8:1+3 Special Class with Related Services**

The parents claim that due to his needs, the student required 1:1 instruction and ABA therapy and, since he received 20 hours per week of 1:1 ABA through the EIP, he should have continued to receive a similar level and type of services for preschool (Req. for Rev. ¶¶ 13-15). The parents also alleged that the student required more speech-language therapy, toileting services, feeding services, and assistive technology (*id.* ¶ 14).

At the April 2018 CPSE meeting, the committee recommended that the student attend an 8:1+2 special class (Tr. p. 333; Dist. Ex. 1 at p. 9). On April 19, 2018, after the April 2018 CPSE meeting, the student's mother visited Block with the student and visited an "ABA 8:1:3" special class setting (Dist. Ex. 3 at p. 4; *see* Parent Ex. JJJ ¶ 46). Within a tour summary report, the BCBA who led the tour opined that, based on information provided by the student's mother and grandmother and her observations of the student during the tour, an 8:1+3 special class would be an appropriate placement for the student (*id.* at p. 5). The June 2018 CPSE recommended the student attend an 8:1+3 special class at Block and receive related services consisting of three 30-minute sessions per week each of individual speech-language therapy, OT, and PT (Tr. pp. 333-34; Dist. Ex. 2 at pp. 21). According to the June 2018 IEP, the CPSE considered an 8:1+2 special class for the student but concluded that, after the tour at Block, the student "functioned" in a classroom with more adult support (Dist. Ex. 2 at p. 1). The IEP reflected that the CPSE also considered recommending an increased frequency of speech-language therapy but determined that the recommendation of three 30-minute sessions per week provided the student with opportunities to use speech-language skills in the classroom setting (*id.*).

The CPSE administrator testified that she believed the June 2018 IEP recommendations were appropriate to address the student's needs (Tr. p. 335). Although she could not precisely recall her rationale for the recommendation, she indicated that, assuming she was aware that the student had been receiving 20 hours of ABA services per week and was "presenting with severe developmental delays in all domains," the student needed a "small, specialized education program with the related services" (Tr. p. 335).

The parents focus on the discrepancy between the services the student received through the EIP and the recommendations of the June 2018 CPSE. The difference between an EIP under Part C of the IDEA and an initial educational program provided under Part B is an important distinction. A school district's responsibility to provide a FAPE to a child under the IDEA (*see* 20 U.S.C. §§ 1400[d][1][A]; 1401[9]) is different from the responsibility of the lead agency, which in New York State is the Department of Health (*see* Pub. Health Law § 2541[12]), to provide early intervention services (*see* 20 U.S.C. § 1432[4]). In order to provide a FAPE a school district must provide appropriate special education and related services to meet the educational needs of school-age children with disabilities in the least restrictive environment (*see* 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]). By contrast, early intervention regulations require the lead agency to provide services to assist the family and meet an infant or toddler's developmental needs, to the maximum extent appropriate in natural environments, including the home and community (20 U.S.C. § 1432[4][G]; 34 CFR 303.13[a][4],

[8]; Pub. Health Law § 2541[7][c], [g]). State guidance highlights the distinction, noting that, the EIP "focuses on enhancing the development of infants and toddlers with disabilities, and minimizing their potential for developmental delay" and their "need for special education services when children reach school age," whereas preschool special education "focuses on children's educational needs," such as ensuring access to the general curriculum for all children" ("The Transition of Children from the New York State Department of Health Early Intervention Program to the State Education Department Preschool Special Education Program or Other Early Childhood Services," at p. 3 [DOH & VESID Feb. 2005], available at <https://www.p12.nysed.gov/specialed/publications/preschool/transitionguide/transitionguidance.pdf>). Given the different underlying purposes of the EIP and preschool special education, a district is not necessarily required to continue to provide the same services that a child received through the EIP under Part C when transitioning to the CPSE (see OSEP Memorandum 14, 19 IDELR 1130 [OSEP 1993]).

Regarding ABA, the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher's discretion—absent evidence that a specific methodology is necessary (Rowley, 458 U.S. at 204; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 575-76 [2d Cir. Oct. 29, 2014]; A.S. v. New York City Dep't of Educ., 573 Fed. App'x 63, 66 [2d Cir. July 29, 2014]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 86 [2d Cir. July 24, 2013]; R.E., 694 F.3d at 192-94; M.H., 685 F.3d at 257). As long as any methodologies referenced in a student's IEP are "appropriate to the [student's] needs," the omission of a particular methodology is not necessarily a procedural violation (R.B., 589 Fed. App'x at 576 [upholding an IEP when there was no evidence that the student "could not make progress with another methodology"], citing 34 CFR 300.39[a][3] and R.E., 694 F.3d at 192-94).

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

The parent testified that, due to the student receiving individual ABA services in the EIP, he began using words, responding to his name, and was close to being toilet trained (Tr. pp. 673-74; Parent Ex. JJJ ¶ 25). In addition, according to the parent, the student's behavior had improved and he was starting to use a spoon and fork (Tr. p. 674). The student's mother testified that, when she attended an "open house" at Block, she was informed that students received ABA and other services at Block, and she thought that, if the student attended Block, he would receive ABA during the entire school day, as he had through the EIP (Parent Ex. JJJ ¶¶ 46-47).

The CPSE administrator testified that ABA was "one of the methodolog[ies] that's used by some of the teachers" in the district but generally was not included on a student's IEP (Tr. pp. 788-89). Although the documents before the CPSE showed that the student had received ABA services in school and at home through the EIP (see Dist. Ex. 3 at p. 8), there was no recommendation before the June 2018 CPSE that the student required instruction using ABA methodology for preschool (see Dist. Ex. 3). Accordingly, this is not an instance where there was a clear consensus that the student required a certain methodology in order to receive an educational benefit.

As for self-help skills, the parent testified that the student could not "feed himself independently with utensils and was not [toilet] trained" (Parent Ex. JJJ ¶ 56). The June 2018 IEP indicated that the student had "no difficulty with biting, chewing, and swallowing," drank from "a lidded cup, a straw, and with help from an open cup" (Dist. Ex. 2 at p. 3). The IEP further referenced that the student was wearing diapers at the time and would not yet communicate when it was time for a diaper change (id. at p. 4). The IEP reflected that the student needed to "increase independence with mealtime, dressing and toileting" (id.). The IEP also included an annual goal that provided the student would complete a meal with utensils without reverting to fingers or spilling (id. at p. 14). Overall, the IEP sufficiently addressed the student's self-help skills and there is nothing in the hearing record to support a finding that the student needed separate services in his IEP to address feeding or toiling. The need for the assistive technology evaluation was discussed in more detail above, and the parents point to no evidence in the hearing record to support their view that, based on the information available to the CPSE, three 30-minute sessions of speech-language therapy per week was not appropriate to address the student's needs.

Based on the foregoing, the evidence in the hearing record supports a finding that the June 2018 IEP recommendations were appropriate to meet the student's needs.

## **6. Implementation**

The parents contend that the district materially failed to implement the student's June 2018 IEP.

Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if there was more than a de minimis failure to implement all elements of the IEP, and instead, the school district failed to implement substantial or significant provisions of the IEP (Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]; see also Fisher v. Stafford Township Bd. of Educ., 289 Fed. App'x 520, 524 [3d Cir. Aug. 14, 2008]; Couture v. Bd. of Educ. of Albuquerque Pub. Schs., 535 F.3d 1243 [10th Cir. 2008]; Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 [8th Cir. 2003]). Accordingly, in reviewing failure to implement claims under the IDEA, courts have held that it must be ascertained whether the aspects of the IEP that were not followed were substantial or "material" (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010]; M.L. v. New York City Dep't of Educ., 2015 WL 1439698, at \*11-\*12 [E.D.N.Y. Mar. 27, 2015]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007] [holding that a material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled student and the services required by the student's IEP]; see also Catalan v. Dist. of Columbia, 478

F. Supp. 2d 73, 75-76 [D.D.C. 2007] [holding that where a student missed a 'handful' of speech-language therapy sessions as a result of the therapist's absence or due to the student's fatigue, nevertheless, the student received consistent speech-language therapy in accordance with his IEP, and the district's failure to follow the IEP was excusable under the circumstances and did not amount to a failure to implement the student's program]).

First, the parents contend that the district failed to provide the student any special education during summer 2018; however, the student was eligible to continue receiving early intervention services until the first day of September 2018 (see Tr. pp. 377-798, 383; Pub. Health Law § 2541[8][a][i]), and there is no indication in the hearing record that the student was without services during summer 2018.

Next, the parents contend that the student did not receive all of his related services during the 2018-19 school year. The June 2018 IEP mandated that the student receive three 30-minute sessions each of individual speech-language therapy, OT, and PT (Dist. Ex. 2 at p. 20). According to a document generated by Block, for the 2018-19 school year, the student missed 34 sessions of speech-language therapy, 38 sessions of OT, and 10 sessions of PT (Parent Ex. HH).<sup>19</sup> According to the Block director, the student missed the related services "because therapists weren't available" (Parent Ex. III ¶ 82). The related services missed represents more than a handful and amounts to a material deviation from the mandates of the student's June 2018 IEP.

The parents also allege an implementation failure because the 8:1+3 special class at Block did not have a special education teacher. The June 2018 IEP recommended an 8:1+3 special class consisting of eight students, one special education teacher, and three supplementary support personnel (see Dist. Ex. 2 at p. 20). The Block director testified that a teaching assistant took over teaching responsibilities in the student's classroom during the 2018-19 school year because the special education teacher left (Tr. pp. 628-29, 631; Parent Exs. III ¶ 42; VVV ¶ 14). The teaching assistant assigned to the student's classroom at Block during the 2018-19 school year testified that she "acted as lead teacher off and on" for approximately two to three months when the special education teacher left the classroom (Parent Ex. VVV ¶¶ 11, 14). The teaching assistant at Block indicated that she had a "certificate in primary education" from a university outside of the United States, which was the equivalent of an associate degree in the United States (Parent Ex. VVV ¶ 1at

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<sup>19</sup> The parents offer their own calculations of the number of services missed based on the premise that the student was entitled to three sessions per week over 46 weeks, totaling 138 sessions for each service (Req. for Rev. ¶ 17). The parents indicate they "corrected" the totals set forth in the document generated by Block (Req. for Rev. ¶ 30 n.1; see Parent Ex. HH); however, the parents do not take into account days that school may have been closed or student absences. There is no evidence in the hearing record to rebut the number of missed sessions identified on the document generated by Block, which the parents offered into evidence (Parent Ex. HH). In addition, there is a discrepancy in the hearing record with respect to the number of sessions of missed speech-language therapy services for the 2018-19 school year (compare Parent Ex. HH, with Parent Ex. III ¶ 82[a]). Specifically, the chart developed by the Block director indicates that the student missed 34 sessions of speech-language therapy, whereas, her affidavit indicates the student missed 24 sessions (compare Parent Ex. HH, with Parent Ex. III ¶ 82[a]). As there is no explanation in the hearing record for the discrepancy in the parents' calculations or the difference in the number of missed speech-language therapy sessions stated on parent exhibit HH and the Block director's affidavit, I will rely on the larger number of missed sessions specified in parent exhibit HH.

p. 1); however, according to the hearing record, the teaching assistant was not a certified special education teacher (Parent Ex. III ¶ 46).

State regulation provides that "special education instruction shall be provided by individuals appropriately certified or licensed" (8 NYCRR 200.6[b][4]). It also defines a special education teacher as one "certified or licensed to teach students with disabilities" (8 NYCRR 200.1). Supplementary school personnel "means a teacher aide or a teaching assistant" (8 NYCRR 200.1[hh]; "'Supplementary School Personnel' Replaces the Term 'Paraprofessional' in Part 200 of the Regulations of the Commissioner of Education," VESID [Aug. 2004], [available at http://www.p12.nysed.gov/specialed/publications/policy/suppschpersonnel.pdf](http://www.p12.nysed.gov/specialed/publications/policy/suppschpersonnel.pdf)). While a teacher aide may assist teachers in nonteaching duties such as "attending to the physical needs" of students or "supervising students," teaching assistants may provide "direct instructional services to students" only while under the supervision of a certified teacher (see 8 NYCRR 80-5.6[b], [c]; see also 34 CFR 200.58[a][2][i] [defining paraprofessional as "an individual who provides instructional support"]).

Nevertheless, the credentials of the teaching assistant who led the student's class for a portion of the school year does not necessarily result in a denial of a FAPE. A State has broad discretion in establishing and enforcing the training and certification standards under which students with disabilities are to be provided with a FAPE; however, courts have also recognized that the proper inquiry when challenging the district's provision of special education services by properly trained staff is "whether the staff is able to implement the IEP" (S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at \*12 [S.D.N.Y. Dec. 8, 2011]; see L.K. v. Dep't of Educ. of the City of New York, 2011 WL 127063, at \*11 [E.D.N.Y. Jan. 13, 2011]), and that the purposes of the IDEA may nevertheless be achieved for a particular student and his or her needs met even when the provision of specially designed instruction is provided by personnel who are not certified (see Weaver v. Millbrook Cent. Sch. Dist., 2011 WL 3962512, at \*6 [S.D.N.Y. Sept. 6, 2011]; see also Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] [noting that in a tuition reimbursement case, the lack of services by state-certified teachers at the parents' unilateral placement did not compel a finding that the services were inappropriate]). Thus, the provision of services by personnel who lack the required certifications does not constitute an automatic denial of a FAPE, but rather the issue is a fact-specific inquiry. I also note, however, that the precise extent to which each distinct state requirement is adopted for purposes of offering the student a FAPE under the IDEA is not always entirely clear (see, e.g., Poway Unified Sch. Dist. v. Cheng, 2011 WL 4479033, at \*4 n.3 [S.D. Cal. Sept. 26, 2011] [collecting cases and citing Bay Shore Union Free Sch. Dist. v. Kain, 485 F.3d 730 [2d Cir. 2007]]). Notwithstanding this point, the district and the State-approved preschool in this case are subject to State standards and they should ensure that the student's services are provided in conformity with State regulations regarding provider qualifications.

Based on the above, the failure to have a special education teacher deliver the services in the June 2018 IEP was a violation of State certification requirements. However, this violation, on its own, does not warrant a finding that there was a material deviation from the terms of the IEP so as to result in a denial of FAPE to the student. Pertinently, it is not alleged that the student missed instruction or received subpar instruction at any point during the 2018-19 school year as a result of the teaching assistant's role in the classroom. Indeed, as discussed further below, the evidence in the hearing record demonstrates that the student made progress at Block during the

2018-19 school year (see Dist. Ex. 4). However, as noted above, the lapse in the delivery of related services was more than de minimus, and results in a finding that the district denied the student a FAPE, and the student is entitled to make-up services in the form of compensatory education for that denial.

## **C. 2019-20 School Year**

### **1. Parent Participation**

As with the 2018-19 school year, the parents similarly allege that the April 2019 CPSE meeting was conducted in a manner that deprived them of a meaningful opportunity to participate in educational planning for the student for the 2019-20 school year.<sup>20</sup>

A CPSE convened on April 18, 2019 for the student's annual review (see Parent Ex. B). According to the attendance page, attendees at the meeting included the CPSE administrator, the parent, and a special education teacher (*id.* at p. 2). The student's mother testified that, on that date, she received a call regarding the student's IEP and was told that the student's program and placement would remain the same for the 2019-20 school year (Tr. p. 667; Parent Ex. JJJ ¶¶ 53-54). The parent described the meeting as "very short," during which the teacher shared information about the student; she did not remember expressing any concerns during this meeting (Tr. p. 667; Parent Ex. JJJ ¶ 54). When asked how she involved the parents in the CPSE meeting, the CPSE administrator testified that she "called them" (Tr. p. 340).

As with the June 2018 CPSE meeting, the extent to which the district provided the parents with proper notice of the meeting is unclear. However, the parent attended the meeting and there is no evidence in the hearing record that the parents attempted to raise or discuss specific concerns related to the student's annual goals during the CPSE meeting and were rebuffed by other members of the CSE. Further, as with the June 2018 CPSE meeting, the April 2019 CPSE recommended a substantively appropriate IEP as discussed below. Accordingly, even if the district committed a procedural violation of the IDEA, in this instance, it would not support a finding that the district denied the student a FAPE in a way that an award of equitable relief in the form of compensatory education would be appropriate.

### **2. Student's Needs**

Beyond the parents' allegations directed at the sufficiency of the evaluative information discussed above, the parents do not allege a separate claim relating to the evaluations before the April 2019 CPSE; however, to frame the remainder of the discussion, the student's needs as of the April 2019 CPSE meeting will be summarized.

The April 2019 CPSE had before it the student's progress reports from Block, which described in detail the student's present levels of performance and showed that the student had

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<sup>20</sup> The parents' allegations that the district predetermined the student's programming for the 2019-20 school year are identical to the parents' allegations regarding predetermination addressed above regarding the 2018-19 school year; they are without merit for the same reasons as discussed above and will not be further discussed.

made progress toward many skills but still exhibited severe delays in all areas (Tr. p. 338; see Parent Ex. B; Dist. Ex. 4).

The March 2019 Block education annual report indicated that, according to results from administration of the Developmental Assessment of Young Children-Second Edition (DAYC-2) and teacher observations, the student presented with a severe delay in his cognitive, speech-language, social/emotional, motor, and self-help skills (Dist. Ex. 4 at pp. 2-4). Specifically, the student needed verbal and minimal physical prompts to follow classroom routines (id.). With regard to the student's cognitive development, the annual report indicated that the student was able to follow the classroom routine with only verbal and minimal physical prompts (id. at p. 2). In addition, he was able to remain on task during large group activities for at least 10 minutes and was able to remain on task during discrete trial training with a tangible or edible reinforcer (id.). According to the annual report, the student was sometimes able to greet others independently or when verbally prompted and transition between activities with only verbal prompts (id.). The annual report noted that the student no longer engaged in tantrums as he was now able to be redirected when he was upset (id.).

The annual report indicated that the student's receptive language was severely delayed (Dist. Ex. 4 at p. 2). The student was able to respond to his name when called and follow two step directions (id.). He also was able to receptively identify objects such as a car, ball, and baby (id.). He was able to receptively identify the alphabet, numbers, days of the week, months of the year, and shapes with physical prompts (id.). The student's expressive language skills were emerging as he was able to say "hi," when prompted by a staff member and also able to say "mama," "bye see you later," and rote count to five (id.). The annual report indicated that the student was able to use his picture exchange communication system (PECS) book to communicate his needs and give his "snack icon" to staff during "manding sessions" (id. at pp. 2-3).

Additionally, with regard to social/emotional development, the student was able to engage in parallel play but was working on initiating play with peers, turn taking, and sharing (Dist. Ex. 4 at p. 3). The student was able to sustain eye contact with a partial physical prompt, but his eye contact was still fleeting when he was not engaged in an activity of his choice (id.). In the area of gross motor skills, the student was able to participate in dance and movement activities with some physical assistance (id.). When provided with a full prompt he was able to imitate some gross motor movements (id.). The annual report stated that the student had poor body awareness and could lose his balance when unfocused (id.). He was able to independently use low playground equipment, kick a ball, and jump up and down on a trampoline (id.). The student's tricycle riding skills were emerging (id.). In terms of fine motor skills, the student required hand over hand assistance to trace letters and numbers, and scribble with a crayon but was unable to independently snip paper with scissors (id. at pp. 3-4). He was able to turn pages in a book and was working on using a tripod grasp to hold a crayon (id. at p. 3). The student was able to spread glue on paper, crumple tissue paper, string one-inch beads, and complete simple puzzles given full physical prompts (id. at p. 4).

In the area of self-help skills, the annual report noted that the student was working on toilet training, but still did not indicate when he was wet or soiled (Dist. Ex. 4 at p. 4). The student was "on a schedule" whereby a staff person would take him to the bathroom every half hour to an hour (id.). The student was reportedly afraid of the bathroom stalls and hesitant to sit on the toilet,

although he remained dry most of the time while at school (id.). The student mostly ate finger foods sent in from home (id.).

According to the March 2019 Block speech-language therapy annual report, at that time, the student exhibited a severe delay in receptive, expressive, and social/pragmatic language skills (Dist. Ex. 4 at pp. 5-6). In addition, the student demonstrated very short joint attention and eye contact during verbal activities (id.). The student inconsistently followed simple routines and initiated play with others (id.). The speech-language annual report noted that the student was unable to communicate his needs using vocalizations but had been introduced to PECS and was able to differentiate two pictures given physical prompts (id. at p. 6). The April 2019 IEP indicated that the student engaged in parallel play but not cooperative play (Parent Ex. B at p. 5). He enjoyed interacting and playing with familiar adults but was resistant to playing with his peers (id.).

The March 2019 Block OT annual report stated that the student presented with delays in fine/gross motor skills, graphomotor skills, self-care/ADL skills, motor planning, bilateral eye-hand coordination, visual-motor perceptual skills, body and safety awareness, sustained attention and focus to task, and he had decreased regulation and modulation of arousal state (Dist. Ex. 4 at p. 7). The annual report described the student as sensory seeking (id.) Weakness and low tone affected the student's participation in fine motor table-top activities (id.). According to the annual report the student was able to "follow verbal requests/instructions 50% of the time with increased difficulty completing upon request, due to decreased ability to remain focused and attentive" (id. at p. 8). The student demonstrated the ability to maintain eye-contact for 2-3 seconds at a time and demonstrated good transitioning skills between the classroom and therapy spaces (id.). In terms of fine motor skills and graphomotor tasks, the student's ability to stack a six-block high tower was emerging and he demonstrated the ability to thread large animal beads (id.). The student continued to work on establishing hand dominance during pre-writing and coloring activities and he demonstrated the ability to grossly scribble across the picture outline he was coloring, with difficulty attending to task (id. at pp. 9-10). The student demonstrated the ability to imitate vertical and horizontal lines and circles with 50 percent accuracy after being provided hand-over-hand demonstrations (id. at p. 9). Turning to visual perceptual/motor skills, the OT annual report indicated that the student could complete two-piece non-interlocking puzzles with minimal assistance but required maximum assistance for four-piece puzzles, could stack rings on a peg but not in the correct size order and required maximum assistance to properly position his fingers onto self-opening scissors (id.). The annual report indicated that with regard to self-care skills and ADLs the student required moderate hand-over-hand assistance to open/close snaps, buttons and a zipper on practice boards (id. at p. 10). The student demonstrated the ability to self-feed with minimal assistance (id.).

The March 2019 Block PT annual report noted that the student had made steady progress but continued to present with delays in gross motor development (Dist. Ex. 4 at pp. 11-12). According to the PT annual report, the student displayed poor balance and decreased strength which contributed to his difficulty acquiring basic coordination skills (id. at p. 11). The student exhibited poor body and safety awareness, and he tended to trip when inattentive (id.). The annual report noted that the student required cueing and encouragement to participate in gross motor activities due to low endurance and arousal level (id.). The student exhibited decreased muscle tone in his core and lower extremities which caused difficulty completing age-appropriate running, jumping, and ball skills (id.). The student was able to ambulate independently over level surfaces

but required supervision in crowded areas due to distractibility and poor spatial awareness (*id.*). The student was able to ascend stairs alternating feet and using a handrail but needed support to descend stairs (*id.*). The annual report indicated that the student presented with poor coordination, especially for activities that required reciprocal movements during ball playing (*id.*).

### 3. Annual Goals

The parents allege that, like the annual goals included in the June 2018 IEP, those set forth in the April 2019 IEP were too difficult and required prerequisite skills, were impermissibly vague, and unmeasurable, and failed to address major areas of delay, including toileting and communication (Req. for Rev. ¶ 22).

The April 2019 IEP included approximately 17 annual goals and 62 short-term objectives to address the student's needs in the areas of gross motor, fine motor, cognition, self-help, social/emotional, and speech-language (Parent Ex. B at pp. 7-16). The student's goals and objectives included increasing muscle strength and stair climbing abilities, improving coordination, and ball throwing (*id.* at p. 7). Additional goals and objectives targeted sensory processing, fine motor, graphomotor, and visual-perceptual/motor skills (*id.* at pp. 9-10). The student's goals and objectives further included improving self-help skills such as dressing, eating, and toileting (*id.* at p. 11). Goals and objectives were included for the student to work on social/emotional skills such as playing and sharing with peers, and cognitive skills such as identifying shapes, colors, and numbers, as well as matching and classifying objects (*id.* at pp. 11, 13, 14). Finally, the student's goals and objectives in speech-language included improving pragmatic language skills such as eye-contact and requesting, receptive skills such as following directions and answering questions, and expressive skills such as increasing vocabulary and expressing needs (*id.* at pp. 14-16). Contrary to the parents' allegations, the goals and objectives were aligned with the student's needs and were appropriately ambitious. The parents' allegation that the April 2019 IEP did not include goals to address toileting or communication skills is belied by the IEP, which specifically included a goal targeting self-help skills with a short-term objective that the student would indicate when he needed to use the bathroom two out of three times with 75 percent accuracy, as well as a goal targeting expressive language skills, including verbal and nonverbal communication (*id.* at pp. 11, 16).

Regarding the measurability of the annual goals, review of the April 2019 IEP shows that each annual goal included evaluative criteria (e.g., 80 percent success on trials over four sessions; 75 or 80 percent accuracy), evaluation procedures (e.g., assessment, class report, staff observations, data collection), and the schedule to be used to measure progress (e.g., quarterly) (Parent Ex. B at pp. 7-17). The parents take particular issue with language in the annual goals which provided that the student would "increase" or "improve" a skill. While some of the annual goals are stated broadly, as with the June 2018 IEP, the inclusion of short-term objectives in this case cured any lack of specificity in the annual goals (*id.*; see *E.F.*, 2013 WL 4495676, at \*18-\*19). For example, one annual goal broadly states that the student will develop cognitive skills to appropriate age level; however, the accompanying short-term objectives specified that the student would work on matching and sorting objects and pictures, identifying weather concepts, and classifying objects and pictures (Parent Ex. B at p. 13).

#### **4. Special Factors—Interfering Behaviors**

As with the 2018-19 school year, the parents allege that the district failed to address the student's "significant behavioral needs" by failing to offer behavioral interventions including an FBA and BIP (Req. for Rev. ¶ 28).

The parent testified that, during his first months at Block, the student exhibited "severe behavior issues" but that, by the spring, the student's behavior was improving in school and he was able to communicate more but he was continuing to have tantrums at home and in the community (Parent Ex. JJJ ¶¶ 50-52). The student's 2018-19 classroom teaching assistant stated that, when he began attending Block, he exhibited behaviors such as tantrums, unwillingness to eat, noncompliance, and "serious meltdowns," which was the "main thing" needing to be addressed in order for the student to participate fully in class (Tr. p. 608). The teaching assistant testified that, by the end of December 2018, the student's tantrums had decreased, and staff did not need to intervene to prevent him from hurting himself (Tr. p. 609). Still, it was very difficult to get the student to comply and participate in classroom activities (*id.*). By the end of the 2018-19 school year, the student's language was reportedly emerging, his tantrums were "almost completely gone," and he was making progress without a BIP (Tr. pp. 609-10). As noted above, the March 2019 Block education annual report noted that, at that time, the student no longer engaged in tantrums, and he was able to be redirected when he was upset (Dist. Ex. 4 at p. 2).

The CPSE administrator testified that "typically" the school would request a BIP for a student if a student needed one, but that here Block did not make such a request for the student (Tr. p. 848). However, the CPSE administrator's view that the district may exclusively rely on the preschool to request a BIP for the student is not consistent with the requirements outlined above, which puts the onus on the CPSE to determine whether the student's behaviors impede his learning or that of others and whether the student would benefit from positive behavioral interventions and supports, and other strategies to address the behaviors or from a BIP (8 NYCRR 200.4[d][3][i]; 200.22[a]-[b]). Nevertheless, given evidence that, at the time of the April 2019 CPSE meeting, the information available to the committee demonstrated that the student's behaviors were being addressed and had improved in the preschool program, the CPSE's failure to conduct an FBA or develop a BIP for the student for the 2019-20 school year does not rise to the level of a denial of a FAPE.

#### **5. 8:1+3 Special Class with Related Services**

The parents allege that, in developing its recommendations, the April 2019 CPSE failed to consider the student's progress, or lack thereof, towards achieving his annual goals for the 2018-19 school year. In addition, the parents allege that the April 2019 IEP was substantively inappropriate because it did not recommend 1:1 instruction, ABA therapy, assistive technology, instruction to address the student's activities of daily living (ADL) skills (including toileting and feeding), or parent counseling and training.

A student's progress under a prior IEP is a relevant area of inquiry for purposes of determining whether an IEP has been appropriately developed, particularly if the parents express concern with respect to the student's rate of progress (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66-67 [2d Cir. June 24, 2013]; Adrienne D. v. Lakeland Cent. Sch.

Dist., 686 F. Supp. 2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, \*14-\*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," at p. 18, Office of Special Educ. Mem. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). The fact that a student has not made progress under a particular IEP does not automatically render that IEP inappropriate, nor does the fact that an IEP offered in a subsequent school year which is the same or similar to a prior IEP render it inappropriate, provided it is based upon consideration of the student's current needs at the time the IEP is formulated (see Thompson R2–J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153-54 [10th Cir.2008]; Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 530 [3d Cir. 1995]; S.H., 2011 WL 6108523, at \*10; D.D-S., 2011 WL 3919040, at \*12; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 650 [S.D.N.Y. 2011]). Conversely, "if a student had failed to make any progress under an IEP in one year," at least one court has been "hard pressed" to understand how the subsequent year's IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch. Dist., 62 F.3d at 534 [noting, however, that the two IEPs at issue in the case were not identical]).

As with the June 2018 IEP, the April 2019 CPSE recommended that the student continue to attend an 8:1+3 special class at Block and continue to receive related services consisting of three 30-minute sessions per week in each of individual speech-language therapy, OT, and PT (Tr. p. 338; compare Parent Ex. B at pp. 1, 18, with Dist. Ex. 2 at pp. 1, 20). The CPSE administrator testified that the recommendations were continued "based on the progress of the child" (Tr. p. 338). She explained that, by the April 2019 CPSE meeting, the staff at Block had "been working with [the student] for a year" and that she spoke "with the clinicians or the teacher" and reviewed their reports, and the staff at Block felt the program continued to be appropriate for the student (Tr. p. 832).

The Block director testified that the student made some progress during the 2018-19 school year, and that his biggest gain during the year was in his social/emotional development (Tr. pp. 627-28; Parent Ex. III ¶ 35). Specifically, the student had improved his ability to wave "hi," make eye contact, follow directions, and attend to tasks for longer periods of time (Tr. p. 628; Parent Ex. III ¶ 36). The director also testified that the student continued to exhibit delays in all areas (Parent Ex. III ¶¶ 37-41).

In addition, a comparison of the student's needs as presented by the evaluative information in front of the June 2018 CPSE, with his needs as presented by the evaluative information in front of the April 2019 CPSE showed that the student was making progress in a number of areas, including responding to his name (compare Dist. Ex. 3 at p. 19, with Dist. Ex. 4 at p. 2), following directions (compare Dist. Ex. 3 at p. 13, with Dist. Ex. 4 at p. 2), imitating lines and snipping with scissors (compare Dist. Ex. 3 at pp. 11, 32, with Dist. Ex. 4 at p. 9), and ascending stairs (compare Dist. Ex. 3 at p. 35, with Dist. Ex. 4 at p. 11). Block staff also reported that the student no longer engaged in tantrums or threw himself on the floor (Dist. Ex. 4 at p. 2).

Accordingly, based on the above, the evidence in the hearing record supports finding that the student made progress at Block during the 2018-19 school year.

Turning to the parents' claims that the April 2019 IEP was inappropriate because it did not recommend 1:1 instruction, ABA therapy, toileting or feeding services, or assistive technology; those claims are without merit for the reasons discussed above relative to the June 2018 IEP. With respect to the whether the student's needs warranted a recommendation on the IEP for ABA services, the hearing record reflects that the student received some instruction using ABA methodology at Block in leading up to the April 2019 CPSE meeting. In describing the program the student attended, the Block director testified that Block was an ABA-based school and the student "received a lot of ABA services throughout his five and a half hours of the school day" together with the assistance of "behavior coaches" (Tr. p. 630). The Block director testified that the school incorporated ABA into the curriculum, but they did not offer one to one ABA "as a matter of course" (Parent Ex. III ¶ 28). Further, she indicated that the school used discrete trial training as part of the curriculum but that the student only received it 10-15 minutes per day (*id.* ¶ 30). Given the student's progress at Block with the ABA provided, the student's needs did not dictate that the IEP mandate ABA therapy.

As for self-help skills, the April 2019 IEP noted that the student had at times been resistant to using the toilet and preferred to eat with his fingers and included a specific goal to address the student's self-help needs with short-term objectives specifically addressing his feeding and toileting skills (Parent Ex. B at pp. 4-5, 11). There is no basis for a finding that the student required a separate service in the IEP to address his self-help skills or that the annual goal could not be addressed with existing classroom staff or during related services. As for assistive technology, the CPSE administrator stated that she had never received a referral from Block for an assistive technology evaluation, and therefore the CPSE did not have the student evaluated (Tr. pp. 792-93, 795-96). However, again, the CPSE recommended speech-language therapy and goals to address the student's communication needs and the student had been working with a PECS book to aid him in this area (*see* Parent Ex. B at pp. 14-16, 18; Dist. Ex. 4 at p. 6). Overall, the evidence in the hearing record supports a finding that the April 2019 IEP was appropriately designed to enable the student to make progress in light of his circumstances even without the additional supports and services from which the parents believed the student would benefit.

Turning to the parents' assertion that the April 2019 IEP did not include parent training, State regulations require that an IEP indicate the extent to which parent counseling and training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). State regulations further provide for the provision of parent counseling and training for the purpose of enabling parents of students with autism to perform appropriate follow-up intervention activities at home (8 NYCRR 200.13[d]). Parent counseling and training is defined as "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's [IEP]" (8 NYCRR 200.1[kk]; *see* 34 CFR 300.34[c][8]). In this instance, the April 2019 IEP did not include a recommendation for parent counseling and training (*see* Parent Ex. B); however, the Block director reported that the school offered two "official" parent/teacher conferences per year and provided parent training every other Friday (Parent Ex. III at ¶18). She explained that parent training consisted of workshops on various topics designed to assist parents in understanding their child's needs, the educational program designed for their child, and the educational process (*id.*). Considering that parent counseling and training was available to the parents at Block, and that the Second Circuit has consistently held that the failure to include parent counseling and training on an IEP does not usually constitute a denial of a FAPE (*see L.O.*,

822 F.3d at 122-23; M.W., 725 F.3d 131, 141-42; R.E., 694 F.3d at 191; *see also* A.M., 845 F.3d at 538; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 32 [2d Cir. Mar. 16, 2016]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 39 [2d Cir. Mar. 19, 2015]; *but see* C.F., 746 F.3d at 80-82), there is insufficient basis to find that a lack of a recommendation for parent counseling and training may have contributed to a denial of FAPE.

Based on the above, including the student's progress in essentially the same program during the prior school year, the overall recommendation for placement in an 8:1+3 special class, along with related services was appropriate to meet the student's special education needs.

## 6. Implementation

For the 2019-20 school year, the parents claim that the district "materially failed" to implement the April 2019 IEP as the district failed to ensure that the student was receiving special education instruction by a certified teacher, failed to ensure the student was receiving his related services, and failed to provide "sufficient services" as part of the remote delivery of instruction during the COVID-19 pandemic (Req. for Rev. at ¶ 27).

Regarding implementation of related services, the April 2019 IEP mandated that the student receive three 30-minute sessions each of individual speech-language therapy, OT, and PT (Parent Ex. B at p. 18). According to the document generated by Block, for the 2019-20 school year, the student missed 27 sessions of speech-language therapy, 12 sessions of OT, and 11 sessions of PT (Parent Ex. HH).<sup>21</sup> According to the Block director, the student missed the related services "because therapists weren't available" (Parent Ex. III ¶ 82). The related services missed represents more than a handful and amounts to a material deviation from the mandates of the student's April 2019 IEP.

In addition, according to the evidence in the hearing record, the student's 8:1+3 special classroom was staffed by a teaching assistant rather than a certified special education teacher for most of the 2019-20 school year (Tr. p. 631; Parent Exs. III ¶ 45; VVV ¶ 30). The teaching assistant indicated that she was the "lead classroom teacher beginning [in] or about December 2019" when the special education teacher left (Parent Ex. VVV ¶ 30). She noted that another teaching assistant was assigned to the classroom to replace her but the special education teacher was not replaced (*id.* ¶ 31).

As with the 2018-19 school year, the certification of the teacher is not a per se denial of a FAPE and the parents do not allege that the student missed instruction or received inadequate instruction due to the qualifications of the teaching assistant. The evidence in the hearing record also shows that the staff at Block worked on the student's annual goals and the student made progress at Block during the 2019-20 school year (*see* Dist. Ex. 6). At the February 2020 CSE meeting, the parents expressed the fact that the student had made "amazing progress" over the past

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<sup>21</sup> Again, the parents offer an estimate of the number of services missed based on the premise that the student was entitled to three sessions per week over 46 weeks, totaling 138 sessions for each service (Req. for Rev. ¶ 26); however, as with the 2018-19 school year, there is no evidence in the hearing record to rebut the number of missed sessions identified on the document generated by Block, which the parents offered into evidence (Parent Ex. HH), and, therefore, parent exhibit HH will be relied on to determine the number of services missed.

few months (Parent Ex. F at p. 3). Accordingly, the lack of certification of the teaching assistant who led the student's classroom for much of the 2019-20 school year, on its own, is not a material deviation from the April 2019 IEP.

Finally, the parents allege that the district did not provide the student sufficient services during the closure of school buildings due to the COVID-19 pandemic and assert that the student regressed. The Block director testified that the student was offered specialized instruction and related services "to the maximum extent possible" during remote instruction, but indicated that, "[w]hether he was receptive to it" was another matter (Tr. pp. 631-32). She indicated that the student's remote program from March through June 2020 consisted of three to five 30-minute sessions per day of instruction, as well as related services (Parent Ex. III ¶ 49). In addition, she indicated that Block provided resources for parents to help them work with their children independently, as well as "the ability to connect 1:1 with the teachers, intervention specialists, and the behavior coaches assigned to the classroom" (*id.* ¶ 49). The student's teaching assistant testified that the student "really struggled" with remote instruction (Parent Ex. VVV ¶ 55). She indicated that, although the parents tried to engage the student in remote learning, he refused, and that, even when he tried, he was unable "to focus and engage" in the class or related services (*id.* ¶ 56). She opined that, during remote instruction, the student "significantly regressed" and was unable to adjust to the remote learning (*id.* ¶¶ 59-60). The parent confirmed in her direct affidavit testimony that the student had difficulty engaging in remote learning (Parent Ex. JJJ ¶¶ 81-89).

Both the USDOE and SED's Office of Special Education have issued guidance acknowledging that the global pandemic and the resulting closure of schools resulted in "an inevitable delay" in districts providing services to students with disabilities or engaging in the decision-making process regarding such services ("Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities," 76 IDELR 104 [OCR & OSERS 2020]; "Compensatory Services for Students with Disabilities as a Result of the COVID-19 Pandemic," at p. 1, Office of Special Educ. Mem. [June 2021], available at <http://www.p12.nysed.gov/specialed/publications/2020-memos/documents/compensatory-services-for-students-with-disabilities-result-covid-19-pandemic.pdf>). In addition, the USDOE has noted reports from some local educational agencies that they were "having difficulty consistently providing the services determined necessary to meet [each] child's needs" and that, as a result, "some children may not have received appropriate services to allow them to make progress anticipated in their IEP goals" ("Return To School Roadmap: Development and Implementation of Individualized Education Programs in the Least Restrictive Environment under the Individuals with Disabilities Education Act," 79 IDELR 232 [OSERS 2021]).

To address these delays and other delivery-related issues that occurred as a result of the pandemic, OSEP and NYSED's Office of Special Education have indicated that, when school resumes, a CSE should convene and "make individualized decisions about each child's present levels of academic achievement and functional performance and determine whether, and to what extent, compensatory services may be necessary to mitigate the impact of the COVID-19 pandemic on the child's receipt of appropriate services" ("Return To School Roadmap," 79 IDELR 232; "Compensatory Services for Students with Disabilities as a Result of the COVID-19 Pandemic," at pp. 1, 3; see also "Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities," 76 IDELR 104; "Questions and Answers on Providing Services to Children with Disabilities During the

Coronavirus Disease 2019 Outbreak," 76 IDELR 77 [OCR & OSERS 2020]; "Supplement #2 - Provision of Services to Students with Disabilities during Statewide School Closures Due to Novel Coronavirus (Covid-19) Outbreak in New York State," at pp. 2-5, Office of Special Educ. Mem. [June 2020], available at <http://www.p12.nysed.gov/specialed/publications/2020-memos/special-education-supplement-2-covid-qa-memo-6-20-2020.pdf>). The CSE's review might include a discussion of whether the student has new or different needs compared to before the pandemic, whether the student experienced a loss of skill or a lack of expected progress towards annual goals and in the general education curriculum, whether evaluations of the student or implementation of an IEP was delayed, and whether some of the student's IEP services could not be implemented due to the available methods of service delivery or whether such methods of service delivery were not appropriate to meet the student's needs ("Return To School Roadmap," 79 IDELR 232; "Compensatory Services for Students with Disabilities as a Result of the COVID-19 Pandemic," at pp. 3-4; see "Supplement #2 - Provision of Services to Students with Disabilities during Statewide School Closures Due to Novel Coronavirus (Covid-19) Outbreak in New York State," at p. 1).

If the parent disagrees with a CSE's determination regarding the student's entitlement to compensatory services, State guidance notes that:

Parents of students with disabilities may resolve disputes with school districts regarding the provision of FAPE by pursuing one of the dispute resolution options provided for in the IDEA. A parent may file a State complaint directly with NYSED in accordance with Commissioner's Regulation section 200.5(*l*), request mediation in accordance with Commissioner's Regulation section 200.5(*h*), or file a due process complaint and proceed to hearing in accordance with Commissioner's Regulation section 200.5(*j*).

("Compensatory Services for Students with Disabilities as a Result of the COVID-19 Pandemic," at p. 5; "Supplement #2 - Provision of Services to Students with Disabilities during Statewide School Closures Due to Novel Coronavirus (Covid-19) Outbreak in New York State," at p. 6).

In sum, the USDOE and NYSED's Office of Special Education have indicated that, under these unique circumstances, a CSE should have the first opportunity to consider the student's needs and whether any additional services may be warranted as a result of the pandemic. There is no indication that this has yet occurred for this student. Therefore, to the extent it has not already done so, the CSE should convene to determine if compensatory services are warranted to remedy a loss of skill resulting from the remote delivery of instruction and services to the student during the COVID-19 pandemic. The compensatory award discussed below may overlap with any compensatory education that a CSE may contemplate; however, the CSE can and should still consider whether further services are warranted specifically to make up for loss of skill relating to the delivery of remote instruction over and above the amount awarded herein.

#### **D. Relief**

At the outset—and as noted above—in its answer, the district has agreed to fund the IEEs requested by the parents (Answer at ¶ 3). Specifically, the parents requested the following IEEs:

a comprehensive neuropsychological evaluation, a speech-language therapy evaluation, an OT evaluation, a PT evaluation, an assistive technology evaluation, and an auditory processing evaluation, as well as a behavioral observation by a BCBA (Parent Mem. of Law at p. 9). In light of the district's agreement, I will order the district to fund each of the requested IEEs. I turn now to the remaining relief sought by the parents.

### **1. Compensatory Education**

The parents seek compensatory education for alleged violations of pendency as well as for denials of a FAPE for the 2018-19, 2019-20, and 2020-21 school years.

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case where a denial of FAPE has occurred (see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015]; L.O., 822 F.3d at 125 [remanding to district court to determine what, if any, relief was warranted for denial of FAPE]; Wenger v. Canastota Cent. Sch. Dist., 979 F. Supp. 147 [N.D.N.Y. 1997]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 & n.12 [2d Cir. 2014]; Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also E. Lyme, 790 F.3d at 456; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address [] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

#### **a. 2018-19 and 2019-20 School Years**

Initially, as discussed above, for the 2018-19 and 2019-20 school years, the district materially failed to implement the student's related service mandates as set forth in his June 2018 and April 2019 IEPs (compare Parent Ex. B at p. 18, and Dist. Ex. 20, with Parent Ex. HH, and Parent Ex. III ¶ 82).<sup>22</sup> In its answer, the district "concedes that some . . . services were missed

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<sup>22</sup> The parents request compensatory services for the 2018-19 and 2019-20 school years as part of their request for compensatory education to make-up for the district's failure to implement the student's pendency services

due to student absence and/or the [district's] failure to provide services" (Answer ¶ 18). The district offered no evidence during the impartial hearing regarding student absences or other justifications for the missed services identified by Block (Parent Ex. HH). Accordingly, the student will be awarded compensatory related services to make up for the services identified by Block as being missed. For the 2018-19 school year, as specifically detailed in the hearing record, the student shall be awarded as follows: 34 sessions of speech-language therapy, 38 sessions of OT, and 10 sessions of PT (Parent Exs. HH; III ¶ 82). For the 2019-20 school year, the student shall be awarded: 27 sessions of speech-language therapy, 12 sessions of OT, and 11 sessions of PT (*id.*). As the sessions were designated as 30-minute sessions, the student is awarded a total of 30.5 hours of speech-language therapy services, 25 hours of OT, and 10.5 hours of PT to make up for the district's failure to implement those related services during the 2018-19 and 2019-20 school years.

### **b. 2020-21 School Year**

The district did not appeal the IHO's determination that it failed to offer the student a FAPE for the 2020-21 school year; however, on appeal, the parents argue that the IHO erred in denying their request for compensatory education.

Indeed, the IHO did not articulate the basis for his finding that compensatory education was not an appropriate form of relief to remedy the district's failure to offer the student a FAPE for the 2020-21 school year (*see* IHO Decision at p. 10). It may be that the IHO found the parents' request to be excessive, as an award blindly ordering any and all relief requested may be akin to a default judgment, which is generally a disfavored outcome (*see Branham v. Gov't of the Dist. of Columbia*, 427 F.3d 7, 11-12 [D.C. Cir. 2005]). However, "[o]nce a plaintiff has established that she is entitled to an award, simply refusing to grant one clashes with *Reid*, which sought to eliminate 'cookie-cutter' awards in favor of a 'qualitative focus on individual needs' of disabled students" (*Stanton v. Dist. of Columbia*, 680 F. Supp 2d 201, 207 [D.D.C. 2010], quoting *Reid*, 401 F.3d at 524, 527; *see Lee v. Dist. of Columbia*, 2017 WL 44288, at \*1 [D.D.C. Jan. 3, 2017]).

For the 2020-21 school year, the parents seek compensatory education in the form of 1,840 hours of 1:1 ABA instruction, 24 hours of ABA supervision, and 24 hours of parent counseling and training (Req. for Rev. at ¶ 31). As pointed out by the district, in general, the 1:1 ABA instruction of 1,840 hours equals "40 hours per week for the extended 12[-]month school [year] (46 weeks)" (*see* Req. for Rev. ¶ 31; Answer ¶ 16). Relatedly, the parents also request compensatory education to remedy pendency violations for periods of time that overlap with the request for compensatory education for the 2020-21 school year (*see* Req. for Rev. ¶ 30).<sup>23</sup>

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(Req. for Rev. ¶ 30). However, the 2018-19 and 2019-20 school years predated the parents' due process complaint notice in this matter, which is dated October 9, 2020 (Parent Ex. A). Therefore, for those school years, the student was not entitled to services pursuant to pendency (*see E. Lyme*, 790 F.3d at 452 [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]).

<sup>23</sup> The Second Circuit has held that where a district fails to implement a student's pendency placement, students should receive the pendency services to which they were entitled as a compensatory remedy (*E. Lyme*, 790 F.3d at 456 [full reimbursement for unimplemented pendency services awarded because less than complete reimbursement for missed pendency services "would undermine the stay-put provision by giving the agency an incentive to ignore the stay-put obligation"]; *see Student X v. New York City Dep't of Educ.*, 2008 WL 4890440,

The district concedes that the student is entitled to compensatory education for the deprivation of a FAPE for the 2020-21 school year, but at an amount less than requested by the parents (Answer ¶¶ 3, 15). The district proposes a reduced amount of compensatory education to remedy its failure to offer the student a FAPE for the 2020-21 school year. The district's proposal is "10 hours a week of 1:1 ABA instruction for the 12 month 46 week 2020-2021 time period, which would amount to 460 hours of compensatory 1:1 ABA instruction" (*id.* ¶ 17). Further, the district agrees to fund 24 hours of ABA supervision and 24 hours of parent counseling and training as requested by the parents (*id.*).

In a private ABA assessment, dated November 4, 2020, a BCBA recommended that, on a going-forward basis, the student receive 40 hours per week of 1:1 ABA instruction split between the school (30 hours per week) and home/community (10 hours per week) (Parent Exs. C at p. 8; D ¶ 50; GG ¶ 80).

According to the student's mother, leading up to the 2020-21 school year, she left a voicemail for the individual identified for that purpose on the school location letter that she was "not accepting" the placement of the student at the proposed public school site but that she never heard back from the district (Parent Ex. JJJ ¶¶ 94). She further indicated that, as a result, the student did not attend any school placement beginning in September 2020 (*id.* ¶ 97). The parents filed their due process complaint notice on October 9, 2020, thereby triggering the student's right to pendency, which IHO I determined would be implemented at Block in an 8:1+2 special class (see Parent Exs. A; E). The student began attending Block pursuant to pendency in mid-November 2020 (Parent Ex. JJJ ¶ 106). The student began attending on a remote basis in November 2020 but transitioned to a hybrid model in February 2021 (Parent Ex. III ¶ 70). Both the director and the teaching assistant from Block testified that, based on information from other staff, the student had "regressed" and lost many of the skills he had previously developed, including communication and toileting skills (Parent Exs. III ¶ 73; VVV ¶¶ 64-65). The Block director opined that, for the 2020-21 school year, the student's needs warranted 1:1 full-time instruction using ABA in school and at home (Parent Ex. III ¶ 74).

For a period of approximately two months (September through November 2020), the student received no educational programming, and the parents' request for 40 hours per week of 1:1 ABA instruction is not an unreasonable request. However, after November 2020, the parents' requested compensatory education completely fails to take into account any benefit the student received while attending Block (see Somberg v Utica Community Schs., 2017 WL 242840, at \*4 [E.D. Mich Jan. 20, 2017] [declining to award full-time tutoring for years during which student

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at \*25, \*26 [E.D.N.Y. Oct. 30, 2008] [services that the district failed to implement under pendency awarded as compensatory education services where district "disregarded the 'automatic injunction' and 'absolute rule in favor of the status quo' mandated by the [IDEA] and wrongfully terminated [the student's] at-home services"] [internal citations omitted]). To the extent the parents seek compensatory education to remedy lapses in the student's pendency placement or services during the 2021-22 school year, there is no record basis before me to direct a specific award. However, the district continues to be responsible for the provision of the student's pendency services through the end of this proceeding (see M.R. v. Ridley Sch. Dist., 744 F.3d 112, 125 [3d Cir. 2014] [school districts must continue funding a student's pendency placement until final resolution of all IDEA proceedings, including appeals]).

was denied a FAPE, since the student "did make some advancement over the course of his time in high school, even though he was not presented with what he was due under IDEA"], aff'd, 908 F.3d 162 [6th Cir. 2018]). As noted above, Block provided ABA, albeit not on a full-time 1:1 basis. Without a clearer articulation of why the student would need 40 hours per week of 1:1 ABA in addition to his attendance at a small special class placement that provided ABA instruction, the district's proposal of 10 hours per week of 1:1 ABA is more reasonable for the period of the 2020-21 school year after November 2020.

Accordingly, the student is entitled to an award of 600 hours of compensatory 1:1 ABA instruction (representing 320 hours for the period of September to November 2020 and 380 hours for the period of November 2020 through June 2021),<sup>24</sup> 24 hours of ABA supervision, and 24 hours of parent counseling and training. In addition, to remedy the lack of related services delivered during the approximately two month period from the start of school in September 2020 to November 2020, the student is entitled to 24 sessions each of speech-language therapy, OT, and PT, in addition to those missed services already discussed above related to the 2018-19 and 2019-20 school years.

Additionally, after the student began attending Block in November 2020, the student missed approximately 12 speech-language therapy sessions according to the document generated by Block in May 2021 (Parent Ex. HH; see Parent Ex. III ¶ 82). As the student was entitled to the speech-language therapy pursuant to pendency and the district has not offered any evidence as to the reasons for the missed services, they will be included in the compensatory award. There is insufficient basis in the hearing record for any further award of pendency-related compensatory education.

With respect to related services, the total awards (including sessions calculated to remedy violations for the 2018-19, 2019-20, and 2020-21 school years) are as follows: 97 sessions of speech-language therapy (or 48.5 hours), 74 sessions of OT (or 37 hours), and 45 sessions of PT (or 22.5 hours).

## **2. Prospective Relief**

The parents assert that the IHO went outside the scope of the hearing in awarding relief that was not requested by the parent. As relief, the IHO awarded a detailed list of specific items that the district was required to include on the student's IEP going forward (IHO Decision at pp. 10-11).

An award of prospective relief in the form of IEP amendments and the prospective placement of a student in a particular type of program and placement, under certain circumstances, has the effect of circumventing the statutory process, pursuant to which the CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing the student's needs (see Adams v. Dist. of Columbia, 285 F. Supp. 3d 381, 393, 396-97 [D.D.C. 2018] [noting with approval the hearing officer's finding "that the directives

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<sup>24</sup> As both the parents and the district base their calculations for compensatory ABA on a 46 week school year, I will also use this timeframe to measure an appropriate award.

of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective placement in a private school"]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, at \*16 [E.D.N.Y. Oct. 30, 2008] [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]).

While prospective placement might be appropriate in rare cases (see Connors v. Mills, 34 F.Supp.2d 795, 799, 804-06 [N.D.N.Y. Sept. 24, 1998] [noting a prospective placement would be appropriate where "both the school and the parent agree[d] that the child's unique needs require[d] placement in a private non-approved school and that there [we]re no approved schools that would be appropriate"]), the pitfalls of awarding a prospective placement have been noted in multiple State-level administrative review decisions, including that where a prospective placement is sought by the parents, such relief could be treated as an election of remedies by the parents, where the parents assume the risk that future unforeseen events could cause the relief to be undesirable (see, e.g., Application of a Student with a Disability, Appeal No. 20-123; Application of a Student with a Disability, Appeal No. 19-018).

Here, the parents indicate that they would not elect such a remedy, and, therefore, an award of prospective placement of the student as ordered by the IHO is not an appropriate award at this juncture. The more appropriate course is to limit review in this matter to remediation of past harms that have been explored as part of the underlying proceeding and a resulting award of compensatory education, as has been set forth above. Accordingly, the IHO's award of a prospective services was not an appropriate remedy under the circumstances presented in this matter.

Additionally, at this point, the school years at issue—2018-19, 2019-20, and 2020-21—are over and, in accordance with its obligation to review a student's IEP at least annually, the CSE should have already convened to produce an IEP for the 2021-22 school year (see Eley v. Dist. of Columbia, 2012 WL 3656471, at \*11 [D.D.C. Aug. 24, 2012] [noting that prospective placement is not an appropriate remedy until the IEP for the current school year has been completed and the parent challenges the IEP for the current school year]). As such, if the parents remain displeased with the CSE's recommendation for the student's program for the 2021-22 school year, they may obtain appropriate relief in a proceeding challenging that program.

## **VII. Conclusion**

Except for the material deviation in the implementation of the student's related services during the 2018-19 and 2019-20 school years, the evidence in the hearing record otherwise supports the IHO's finding that the district offered the student a FAPE for the 2018-19 and 2019-20 school years. As the district did not appeal the IHO's determination that it denied the student a FAPE for the 2020-21 school year, that determination is final and binding, and as set forth above, the parents are entitled to compensatory education for that denial of FAPE. However, the hearing record does not support the IHO's award of prospective relief. Additionally, the student is entitled to IEEs as agreed to by the district.

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that the IHO's decision dated September 3, 2021 is modified by reversing that portion which found that the district did not materially deviate from the implementation of related services during the 2018-19 and 2019-20 school years thereby denying the student a FAPE and also reversing that portion which denied the parents request for compensatory education and IEEs;

**IT IS FURTHER ORDERED** that the district shall fund the following IEEs: a neuropsychological evaluation, a speech-language therapy evaluation, an OT evaluation, a PT evaluation, an assistive technology evaluation, and an auditory processing evaluation, as well as a behavioral observation by a BCBA; and

**IT IS FURTHER ORDERED** that the district shall fund compensatory related services in the form of 48.5 hours of speech-language therapy, 37 hours of OT, and 22.5 hours of PT; and

**IT IS FURTHER ORDERED** that the district shall fund 600 hours of 1:1 ABA instruction, 24 hours of ABA supervision, and 24 hours of parent counseling and training.

**Dated:** Albany, New York  
February 4, 2022

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**STEVEN KROLAK**  
**STATE REVIEW OFFICER**