The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

Nos. 13-226 & 13-228

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the West Genesee Central School District

Appearances:
Getnick Livingston Atkinson & Priore, LLP, attorneys for petitioner, Patrick G. Radel, Esq., of counsel

Ferrara, Fiorenza, Larrison, Barrett & Reitz, PC, attorneys for respondent, Susan T. Johns, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from so much of a decision of an impartial hearing officer (IHO) as determined that respondent (the district) was not required to provide his son with a general education setting with special education supports and services for the 2013-14 school year, found that the district had not violated Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act, and failed to specify the amount of compensatory education awarded. The district cross-appeals from those portions of the IHO's decision which found that the district's Committee on Special Education (CSE) did not provide the student with an appropriate program for the 2012-13 school year and ordered the district to place the student in a less restrictive setting for the 2013-14 school year than that recommended by the CSE, provide the student with compensatory education, and retain a behavioral consultant. The appeal must be sustained in part. The cross-appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local CSE that includes, but is not limited to, the 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 the 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 the 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 diagnoses including Down syndrome and an attention deficit hyperactivity disorder (ADHD) and has attended a public school 12:1+4 special class in a board of cooperative educational services (BOCES) program since September 2008 (Tr. p. 37-38; Dist. Exs. 21 at p. 1; 54 at p. 1). The student has a history of noncompliant and aggressive behavior (Dist. Ex. 4 at p. 1). A psychological evaluation completed in April 2013 indicated that the student had an IQ score of 70, in the borderline to low range of cognitive functioning (Dist. Ex. 40 at p. 4). Academic testing conducted at the time indicated that the student was functioning in a kindergarten to first grade range, scores which had not changed in two years (id. at pp. 4-5).

Because this matter concerns the implementation of the student's program in a public school during the 2012-13 school year, as well as the development and substance of the student's recommended program for the 2013-14 school year, additional facts and procedural history relevant to this decision will be further discussed below. Briefly, however, the CSE convened on April 27, 2012 for an annual review and to develop the student's IEP for the 2012-13 school year (Dist. Ex. 29 at p. 1). The CSE found the student continued to be eligible for special education programs and related services as a student with an intellectual disability and recommended placement in a 12:1+4 special class in a BOCES program (the TEAM program) with related services of occupational therapy (OT), physical therapy (PT) and speech/language therapy (id.).[1] In addition, the April 2012 IEP stated that the student would participate in general education classes for physical education, art, library, chorus, lunch, recess and other areas as appropriate (Dist. Ex. 29 at p. 13). At some point thereafter, the parent requested certain amendments to the student's IEP and, on October 30, 2012, the student's IEP was amended in accordance with the parent's request (Dist. Ex. 30 at pp. 1, 4-7).

A "planning" meeting was held on February 27, 2013 to discuss the student's placement for the 2013-14 school year (Tr. pp. 55-56, 221-23; Dist. Ex. 32). At the February 2013 meeting, a discussion occurred regarding placing the student in a different 12:1+4 BOCES special class (the Stellata program) (Dist. Ex. 32 at p. 2-4). The CSE reconvened twice in May 2013 to conduct the student's annual review (Tr. p. 251, Dist. Ex. 49). The CSE recommended that the student remain in his current 12:1+4 placement in the TEAM program for the remainder of the 2012-13 school year and spend part of the day in a general education classroom with modified curriculum and support (Dist. Ex. 49 at p. 1). All members of the CSE agreed that the TEAM program was not appropriate for the student but a compromise was reached based on the parent's preference that the student be mainstreamed to the maximum extent possible (id.). The IEP also indicated that the CSE would reconvene in June to review the student's success in the general education environment and determine his placement for the 2013-14 school year (id.). On June 20, 2013, the CSE reconvened to complete development of the student's IEP for the 2013-14 school year (Dist. Ex. 54 at pp. 1, 19-25). The June 2013 CSE recommended a 12-month program in a 12:1+4 special class placement in the BOCES Stellata program with related services consisting of two 30-minute sessions per week of group adapted physical education, two 30-minute sessions per week of individual OT, one 30-minute session per week of speech-language therapy in a group of five,

[1] The student's eligibility for special education programs and services as a student with an intellectual disability is not in dispute (see 8 NYCRR 200.1[zz][7]; see also 34 CFR § 300.8[c][6]).

three 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of individual PT, and summer services including two 30-minute sessions per week of individual speech-language therapy and one 30-minute session per week of individual OT (id. at pp. 1, 14-16). The June 2013 CSE also recommended a functional behavioral assessment (FBA), a behavioral intervention plan (BIP), supplementary aids and services including a 1:1 teaching assistant, supports for school personnel, and special transportation (id. at pp. 1, 11, 15-18).

A. Due Process Complaint Notice

By due process complaint notice dated July 10, 2013, the parent alleged that the district failed to provide the student a free appropriate public education (FAPE) for the 2012-13 and 2013-14 school years, and engaged in disability discrimination in violation of Section 504 of the Rehabilitation Act of 1973 (Section 504) (29 U.S.C. §§ 701-796) and the Americans with Disabilities Act (ADA) (42 U.S.C. § 12101 et seq.) (Dist. Ex. 1). Specifically, the parents alleged that the district failed to conduct an FBA or properly develop, review and update a BIP for the student; improperly used seclusion and restraints to address the student's behavioral needs during the 2012-13 school year; and failed to properly implement the student's IEPs during the 2012-13 school year (id. at pp. 5-9). The parent also alleged that the district predetermined the student's placement recommendation for the 2013-14 school year and that the recommended 12:1+4 placement was inappropriate for the student (id. at pp. 10-12). The parent requested, among other things, an order directing the district to convene a CSE and develop an IEP that (1) recommended placement in a general education class with supplementary aids and services or, in the alternative, placement in a district setting that was less restrictive than the recommended placement; (2) provided for training and support for district staff regarding methods "for supporting students with challenging behaviors in general education settings"; and (3) included a "behavior management protocol" requiring regular review of the student's BIP and consultation with a behavioral specialist; the parent also requested compensatory services to remediate the district's failure to offer the student a FAPE for the 2012-13 school year (id. at pp. 12-13).

B. Impartial Hearing Officer Decision

An impartial hearing convened on September 10, 2013 and concluded on September 12, 2013, after three consecutive days of proceedings (Tr. pp. 1-690).[2] By decision dated October 29, 2013, the IHO found that the district failed to provide the student a FAPE for the 2012-13 school year, failed to offer the student a FAPE for the 2013-14 school year, and did not engage in disability discrimination in violation of Section 504 and the ADA (IHO Decision at pp. 2, 18-35). More specifically, the IHO found that: (1) the district failed to properly develop, review, and update the student's BIP during the 2012-13 school year; (2) the district improperly used restraints and seclusion to address the student's behaviors during the 2012-13 school year; (3) the district failed to implement the inclusion opportunities provided for in the student's 2012-13 IEPs; and (4) the district predetermined the placement recommended for the 2013-14 school year (id. at pp. 2, 18-27). The IHO also found that the student's recommended program for the 2013-14 school year was not in the least restrictive environment (LRE) because: (1) the district did not make reasonable efforts to accommodate the student in a general education setting; (2) the district failed to consider

[2] The IHO decision indicates that a prehearing conference was conducted on September 4, 2013 (IHO Decision at p. 1).

the benefits of inclusion, and; (3) the district did not show that the recommended program included the student with nondisabled students to the maximum extent appropriate (id. at pp. 27-33). However, in determining whether the student's behaviors and/or the accommodations needed to address those behaviors would be significantly disruptive to other students in a general education classroom, the IHO found that the district "was justified in refusing a full-time general education placement" for the 2013-14 school year (id. at pp. 31-33).

The IHO ordered the district to obtain a behavioral consultant acceptable to the parent with experience in "humanistic and positive behavior supports" and "supporting students with challenging behavior in general education settings, curriculum modifications, and developing social skills," to retain the consultant for two years, and to have the consultant provide training to district school staff on positive behavior intervention strategies and emergency interventions (IHO Decision at p. 35). The IHO further ordered the district to provide the behavioral consultant with sufficient resources to conduct an FBA, develop a BIP, and to develop, implement, and coordinate a plan for provision of supplementary supports and services to the student in general education settings (id.). The IHO also ordered the district to provide unspecified compensatory education to remedy the student's limited academic progress during the 2012-13 school year (id.).

IV. Appeal for State-Level Review

The parent appeals and contends that although many of the IHO's findings were correct, the IHO erred in concluding that the district had not violated Section 504 and the ADA, erred in finding that the district was justified in recommending a placement that was not a general education placement with supports and services for the 2013-14 school year, and erred in failing to provide specific guidance as to the nature, extent, and duration of the compensatory education award. More specifically, the parent contends that the IHO should have ordered the district to develop an IEP placing the student in a general education setting with supports sufficient to enable the student to receive an educational benefit. The parent further contends that the IHO erred in relying on the lack of information about the traumatic effects of the use of restraints and seclusion on the student to find that the district was justified in recommending a placement that was not in a general education setting. For relief, the parent requests that the district develop an IEP placing the student in a general education classroom and compensatory education services in the form of "tutoring or other direct support from a special education teacher not less than 2 hours per week for 1 year, along with attendance at an inclusive summer camp and/or after-school program" (Pet. at p. 12).

In an answer and cross appeal, the district contends that the IHO erred in finding that the district failed to provide a FAPE for the 2012-13 and 2013-14 school years, in ordering the district to retain a behavioral consultant, and in finding that compensatory education was warranted based on the student's lack of progress during the 2012-13 school year. The district identifies a number of the IHO's conclusions with which it disagrees, and asserts that the hearing record shows that: (1) the April 2012 IEP adequately addressed the student's behaviors despite the lack of an updated BIP; (2) the restraints and seclusions employed by the district to address the student's behaviors were permissible because they were only used in emergency situations when the student was a threat to himself or others; (3) the district made sufficient, although unsuccessful, attempts to include the student in general education settings during the 2012-13 school year; (4) the program recommended by the CSE for the 2013-14 school year was not predetermined; (5) the June 2013 IEP recommendation that the student be placed in the Stellata 12:1+4 special class addressed the

student's behavior needs even without an updated BIP and was the LRE; (6) a general education setting was not appropriate for the student in light of his existing levels of educational performance and special education needs; (7) the IHO exceeded her authority in ordering the district to retain a behavioral consultant and specifying the terms of the consultation; and (8) there was no basis in the hearing record for an award of compensatory education. The district requests that the parent's petition be dismissed, that its cross-appeal be sustained, and that the IHO's ordered relief be annulled.

In an answer to the district's cross-appeal, the parent refutes each of the grounds on which the district contends the IHO erred, asserting that: (1) the failure to update the student's FBA and BIP during the 2012-13 school year deprived the student of a FAPE; (2) the district's use of restraint and seclusion during the 2012-13 school year was unlawful; (3) the district predetermined the student's 2013-14 program; (4) the district failed to give meaningful consideration to the benefits of inclusion and the student's behavioral needs could be adequately supported in a general education setting; (5) the IHO's order concerning the behavioral consultant was appropriate in light of the district's failure to follow State regulations concerning behavior interventions, the predetermination of the student's 2013-14 program recommendation, and disregard for the parent's role in the CSE process; and (6) the IHO's finding that the compensatory education was warranted was appropriate in light of the district's disregard for State regulations regarding behavior interventions, for its failure to implement inclusion opportunities during the 2012-13 school year, and the student's resultant lack of progress.[3]

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. 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; 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.

[3] Although the parent alleges that the district violated section 504 and the ADA, the New York State Education Law does not appear to provide for state-level administrative review by an SRO of IHO decisions with regard to section 504 or ADA disability discrimination claims (Educ. Law § 4404[2] [providing that SROs "shall review and may modify, in such cases and to the extent that the review officer deems necessary, in order to properly effectuate the purposes of this article, any determination of the impartial hearing officer 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 and require such board to comply with the provisions of such modification" (emphasis added)]). As the parent provides no authority for the proposition that SROs have jurisdiction over section 504 or ADA claims, and did not respond to the district's affirmative assertion that they do not, I decline to address them in this instance (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 n.17 [E.D.N.Y. 2012]).

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. Florida 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]). 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., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). 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; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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 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]; Perricelli, 2007 WL 465211, at *15). 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 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; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), 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]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. 2012-13 School Year

1. Events Prior to the 2012-13 School Year

On June 24, 2009, an FBA was conducted of the student which utilized school records, psychological and adaptive behavior evaluations, and reports from his teacher, therapists and grandmother as the source for the data (Dist. Ex. 13 at p. 1). The FBA assessed several of the student's inappropriate behaviors including noncompliance and task refusal, throwing of objects and "inappropriate touch" (hitting, pinching) (id.). The FBA surmised that multiple variables were responsible for precipitating and maintaining these behaviors, and that a sequential pattern did not exist (id. at p. 3). In addition, the FBA stated that the student's cognitive delays and symptoms of ADHD contributed to the student's inappropriate behaviors (id.). The FBA indicated that precipitating events for the student's inappropriate behaviors included requests from adults, redirection for inappropriate behavior, challenging academic activities, and transitions (id.). Consequences and responses such as ignoring, earning privileges, verbal correction, removal from classroom, being sent to the principal, and time outs were noted to have little impact on reducing the inappropriate behaviors, while providing a cooling off period, private adult attention, tangible rewards, and a home-school reward system gave better results in reducing the inappropriate behaviors and increasing compliant behaviors (id.). The FBA suggested that the inappropriate behaviors served to provide the student with control over a situation, escape from activities and attention from others (id.). The FBA further indicated that the student was less likely to engage in the inappropriate behaviors if tasks were developmentally appropriate, did not require lengthy visual processing and did not require the student to sustain attention for long periods of time (id.). Finally, the FBA postulated that the student was less likely to engage in inappropriate behaviors if

he was aware of the number of tasks he needed to complete, there were motivating incentives; and he was given breaks, corrective feedback, and guidelines (id.).

A BIP dated July 2, 2009 was created based on the June 2009 FBA (Dist. Ex. 13 at pp. 4-6). The goal of the BIP was to increase the student's compliance with adult directives (id. at p. 4). The draft BIP did not contain any baseline data, but did contain a list of 18 strategies to prevent the student's inappropriate behaviors, five strategies to teach alternate behaviors, and consequences for the behaviors (id. at pp. 4-6). Some of the strategies included providing developmentally appropriate and brief tasks, 1:1 instruction, motor activity breaks, providing clear incentives, using a script for redirecting the student when he showed signs of resisting a directive, avoiding physical intervention or redirection as an initial response, redirecting rather than confronting the student, offering choices, and providing reinforcement (id. at p. 4-5). The draft BIP also included a provision for a "daily report card" consisting of a listing of daily activities with a notation on compliance (id. at p. 6). The BIP was amended in July, August, and October 2009 (Dist. Exs. 15 at p. 1; 18 at p. 1). According to the amended BIPs, the student's median compliance percentages were 54% in August and 70-90% in October (id.). While the July/August 2009 BIP recommended avoiding physical intervention because it would escalate noncompliance, the October 2009 BIP stated that if the student became physically aggressive he should be placed in a "calming hold" (see Dist. Exs. 13 at p. 5; 15 at p. 3, 18 at p. 3).

According to one of the student's special education teachers, restraints were used with the student during the 2010-11 and 2011-12 school years during which the student attended the BOCES TEAM program (Tr. pp. 103-05, 108-09, 130, 133-34; Dist. Ex. 21 at p. 7).[4] The teacher noted that restraints were used when the student was aggressive toward others or tried to do harm to himself (Tr. pp. 134-35). According to the teacher, during the 2010-11 school year the student exhibited an increase in compliant behavior and a "very drastic decrease in aggressive behavior" and that addressing the student's behaviors by modifying his environment, among other methods, was consistently effective, but that the need for restraint had not been extinguished (Tr. pp. 136-37, 202). The teacher noted that "BOCES was getting away from using restraints. So we were moving away from that," and that towards the end of the 2011-12 school year a BOCES behavior specialist was employed to oversee development of "the new behavior plan" (Tr. p. 133).

A "behavior summary" dated June 15, 2011, was developed by the student's special education teacher, in consultation with the program behavior specialist, to target the student's noncompliance and aggression (Tr. pp. 133, 139-140; see Dist. Ex. 26). The special education teacher explained that she kept data regarding noncompliant and aggressive behavior to prepare the summary; however, this baseline data is not described in the summary (Tr. p. 141; see Dist. Ex. 26). The behavior summary does attempt to hypothesize the student's motivation for displaying noncompliant behaviors; however this hypothesis was not based on multiple sources of data (see Dist. Ex. 26 at p. 2). The special education teacher stated that she knew the student very well and that there was no question in her mind as to what triggered the student's behaviors (Tr. p. 201-02). The behavior summary does not define the student's behaviors in concrete terms or provide a baseline of the problem behaviors with regard to frequency, duration, intensity or latency

[4] The actual ratio of students, teachers and teacher assistants in the program varied from year to year. The BOCES special education teacher testified that during the 2010-11 school year there were approximately 10 students and "six or seven" teacher assistants in the class (Tr. p. 106-07).

across settings, people and times of day; and therefore does not meet State regulatory criteria for an FBA (see Dist. Ex. 26; see also 8 NYCRR 200.22[a][3]).

A November 14, 2011 "behavior support plan" was developed by the student's special education teacher (Tr. p. 188, see Dist. Ex. 28). The student's special education teacher stated during testimony that this served as a BIP for the student and was based on observation, rather than an FBA (Tr. p. 188). However, the special education teacher's testimony also revealed that the behavior summary and the behavior support plan were "tied together," but that she had "never written one of these" so she was "kind of flying by the seat of my pants" (Tr. p. 201). The November 2011 BIP does not identify the baseline measure of the problem behavior or a schedule to measure the effectiveness of the plan, as required by regulation; nor does it include the use of restraints or seclusion as intervention strategies (Tr. p. 193, see Dist. Ex. 28; see also 8 NYCRR 200.22[b][4]).

The November 2011 behavior support plan included methods to be used to prevent inappropriate behaviors such as providing choices, providing a visual schedule, breaking tasks into smaller units, and increasing non-contingent reinforcement (Dist. Ex. 28 at p. 1). The plan also included methods to teach appropriate behavior, such as use of a "break card" to request a break, the attention of a preferred adult, and providing positive reinforcement (id. at pp. 1-2). The special education teacher stated that 2011-12 was a good year for the student, that he displayed more compliance and less aggression, and that the staff working with him was increasingly able to structure the environment so the student would be more successful (Tr. pp. 130, 137-138).

2. Planning for the 2012-13 School Year

As mentioned above, the CSE met on April 27, 2012 for an annual review to develop the student's IEP for the 2012-13 school year, and recommended placement in a 12:1+4 class with related services of OT, PT, and speech/language therapy (Dist. Ex. 29 at p. 1). The April 2012 IEP described the student as mostly independent with regard to daily living skills, except that he needed adult support to stay on task and manage behaviors (id.). The April 2012 IEP further stated that the student made gains behaviorally during the school year; however, he continued to require one-on-one adult assistance and attention throughout the school day (id. at pp. 6-7). He was able to work in a small group setting during academic instruction and transition from activities most of the time, although unstructured times of day such as lunch and recess caused aggressive behavior (id. at p. 6). When the student was not receiving adult attention, he became noncompliant, argumentative and disruptive (id.). In addition, the April 2012 IEP indicated that the student would participate in general education classes for physical education, art, library, chorus, lunch, recess, and other areas "as appropriate" (Dist. Ex. 29 at p. 13).

3. Events During the 2012-13 School Year

According to testimony provided by the student's special education teacher, the student began the 2012-13 school year exhibiting "lots of" noncompliance, aggression, and arguing, and the reinforcers that had previously worked for the student were no longer effective (Tr. pp. 148, 150-152). Initially, the goal for the school year was to increase the student's independence because he had shown improvement related to his compliant behavior during the previous year, however, the student's problematic behaviors returned and he regressed "back to where they were in [2009],"

such that working on improving the student's independence was not feasible (Tr. pp. 152-53). In order to prevent escalation of the student's behaviors, he was provided with a choice to not participate in general education opportunities for classes like art and gym, and the student was provided with one-on-one academic instruction (Tr. pp. 153-55). Redirecting the student was sometimes effective, but ignoring noncompliant behavior caused the behaviors to escalate and the student to become aggressive (Tr. pp. 156-57). If the student became aggressive, restraints were used (Tr. p. 153). According to the teacher, due to curriculum changes, she had to spend more of her time providing group instruction, which lead to the student becoming increasingly noncompliant (Tr. pp. 159-60). The student was restrained "ten or twelve" times from September 2012 to January 2013 to prevent him from, or as a result of, causing harm to himself or others (Tr. pp. 160-61). Between October 2012 and March 2013, six incident reports were filed by district staff working with the student because the student was restrained for physical aggression (Parent Exs. H, I, J, K, L, N). In addition, the student tried to bite teachers, and ran away when he was not receiving one-on-one attention (Tr. pp. 162-63). The teacher also stated that the student hit other students on three occasions and opined that it seemed to be for no reason other than to gain adult attention (Tr. pp. 164-67). However, according to the parent and grandparent, aggressive behaviors did not occur in the home (Tr. p. 86; Dist. Exs. 33 at p. 1, 34 at p. 2).

The special education teacher stated that she attempted the interventions recommended on the November 2011 behavior support plan/BIP during the 2012-13 school year, and that they were "sometimes" effective (Tr. p. 189-90). The special education teacher explained that she believed the student needed a new BIP in October 2012 because "things weren't working" and that she did not know what was causing the student's behaviors (Tr. p. 190-91). The special education teacher stated that in October 2012, the student's behaviors were "puzzling" to her, that reinforcers that had previously worked did not any longer, and that although the student had previously taken direction from her, he was no longer doing so (Tr. p. 148). The teacher also testified that it would have been "unfair" to the student to conduct an FBA in October 2012 because the student's medication was being changed, and that his behaviors could be a result of side effects caused by the medication (Tr. pp. 149, 191).[5] There was no written schedule for follow up or monitoring in the student's BIP, and the special education teacher stated that the BIP was reviewed "as needed" (Tr. p. 193). The special education teacher stated that she consulted with the program's behavior specialist, and that they decided to limit the teacher's attention to the student to only when he was behaving appropriately, and that she would not be involved in restraining the student, but that others might if it was required (Tr. p. 195). When asked whether it was accurate to state that the student had been restrained as a result of noncompliance, the teacher stated that previously when the student was noncompliant, she had used a "hug type thing" to give him a "deep pressure feeling" in order to compel him to comply with directions (Tr. p. 196-97). She added that this strategy was no longer being used (id.). The special education teacher stated that since the November 2011 BIP was no longer being followed, the three different aides who worked with the student were to follow her verbal directions regarding how to respond to the student's behaviors (Tr. p. 193-94).

[5] According to the student's educational history contained in the record, aggressive behaviors had been evident since before April 2006 (Dist. Ex. 3 at p. 3).

On October 30, 2012, the student's IEP was amended based on correspondence between the parent and the district's assistant director of special education wherein the parent requested that the student's primary goal be changed to reflect that the student was, at the time of the writing, able to comply with directives, and suggested that in light of his improved behavior, a new BIP should be done (Dist. Ex. 30 at pp. 1, 4-7). The district agreed to change the student's goal accordingly, and in their correspondence enclosed a copy of the student's latest behavior plan, dated November 14, 2011 (Dist. Ex. 30 at pp. 6-7).

On January 3, 2013, the student's grandmother met with the student's teacher to discuss his behaviors (Tr. p. 44-45). According to the grandparent, the teacher said that she was "handling" the behavioral issues and that things were "going okay" at that point (Tr. p. 45). This characterization of the circumstances by the special education teacher appears incompatible with the teacher's observation that the student was restrained "ten or twelve" times between September 2012 and January 2013 for aggressive behavior (Tr. p. 160-61). By letter dated January 10, 2013, the grandparent requested a meeting to be held after February 11, 2013, to discuss the student's transition to middle school for the 2013-14 school year (Dist. Ex. 31).

Beginning in January 2013, the student was frequently absent from his program for a variety of reasons (Tr. p. 45). The student's grandmother testified that the student was away on a family vacation for a "couple of weeks," that there was a "school break week," and that one of the student's doctor's recommended the student remain at home while his medication was evaluated and modified, which occurred from late February 2013 until late March 2013 (Tr. pp. 45-46). The student's grandmother also testified that further absences occurred because she kept the student at home whenever the special education teacher would be out of the classroom for any period of time because without the teacher in the classroom, it was "explosive with the aides," whose method of confronting the student's behaviors was "basically to restrain him" (Tr. pp. 46-47). According to the student's grandmother, the student was absent from his program because the teacher was "out of the classroom throughout that school year about five weeks" for personal and professional purposes (Tr. p. 47).

Between February and April 2013, a school psychologist from the student's program observed the student in his 12:1+4 special class on three separate occasions (Tr. p. 343). The school psychologist observed the student engaging in "silly" and "low level" attention-seeking behaviors (Tr. p. 344-46). The school psychologist stated that she took data on the student's aggression, attention seeking, and noncompliance (Tr. p. 355). The school psychologist stated that because the TEAM program did not offer the same behavior management options as the alternative 12:1+4 class in the Stellata program which was being considered by the school district, the behavior plan would be written differently depending on where the student was going (Tr. p. 356-57). From the observations, the school psychologist developed "the start of an FBA which would then lead to the behavior plan" (Tr. p. 358; Dist. Ex. 56). Further, the school psychologist indicated that the "procedures" were not included in the FBA because she did not know where the student would be going, and the "steps" depended on the placement (Tr. p. 363). She also stated that she did not review the student's prior FBA and BIP, and she was not aware that these existed (Tr. p. 388-89).

A "planning" meeting was held on February 27, 2013 to discuss the student's placement for the next school year (Tr. pp. 55-56, 221-23; Dist. Ex. 32). According to the February 27, 2013

meeting minutes, as well as testimony by the student's grandmother and the district's assistant director of special education, the student was not exhibiting aggressive behaviors in the home, when the student exhibited aggression in the classroom he would be sent home, and the student would stay at home if the teacher was going to be absent (Tr. p. 43, 46, Dist. Ex. 32 at pp. 1-3). In addition, the record indicates that at the February 27, 2013 meeting, a discussion occurred regarding placing the student in the Stellata program and that the student's grandmother brought up an FBA and a BIP "a number of times" (Tr. pp. 56, 231-32, Dist. Ex. 32 at p. 2-4).

In a February 27, 2013 letter to follow up on the planning meeting, the parent requested short term home tutoring and a new BIP (Tr. p. 54, Dist. Ex. 33). The letter stated that the student did not exhibit aggressive behaviors at home, that during the meeting there was a lengthy discussion regarding the "numerous" attempts over the last nine months to get his behavior under control, and that in the last three weeks, the behaviors had escalated (Dist. Ex. 33 at p. 1).

On February 28, 2013, the student was evaluated to assess his neurodevelopmental status (Dist. Ex. 34 at p. 1). The evaluator opined that the student's aggressive behaviors at school were due to impulsivity, obsessiveness, anger, difficulty with transition, and testing limits; and that his behavior was "very different at home" (id. at p. 1-2). The evaluator made recommendations regarding medications for the student, as well as home tutoring as a short-term plan for school, until an appropriate classroom environment was identified (id. at p. 2).

On March 4, 2013, in response to the parent's February 27, 2013 letter, the district special education director sent an email to the grandparent indicating that a new FBA and BIP had been created and rejecting the request for home tutoring (Tr. pp. 54-55; Dist. Ex. 36). Testimony by the assistant director of special education indicated that the request was denied because district policy required a medical excuse to provide home tutoring to a student, and that in fact, the FBA and BIP had not yet been completed (Tr. pp. 233, 292-93).[6] Prior written notice and a request for consent to conduct an FBA, dated March 25, 2013, were thereafter sent to the parent (Dist. Ex. 39).

As stated previously, the student was absent from school due to a family vacation and based upon a doctor's recommendation, from February 28, 2013 to March 25, 2013 (Tr. p. 46). Upon returning to his program on March 26, 2013, the student was suspended for hitting another student (Dist. Ex. 42 at p. 15). According to testimony by the assistant director of special education, the district held a meeting without the parent on March 27, 2013, where it was decided that the student needed a change of placement "now" and that a 12:1+1 special class would not be appropriate for the student (Tr. pp. 295-97; Dist. Ex. 41). The assistant director confirmed in testimony that this meeting occurred before the anticipated FBA was conducted, before a BIP was developed, before an anticipated psychological evaluation report was received, and before the student's "triennial" evaluation was completed (Tr. pp. 296-98; see Dist. Exs 40, 45). In addition, the plan to send the student home when he became aggressive was reiterated (Dist. Ex. 41 at p. 2).

On April 9, 2013 a manifestation meeting was held, and it was determined that the behavior which resulted in the March 26, 2013 suspension was related to the student's disability, and that

[6] The witness referred to "district policy"; State regulations do not prevent a CSE from recommending home instruction as a student's special education program in the absence of a medical excuse; rather, home instruction may be recommended for a student "in consideration of the student's unique needs" (see 8 NYCRR 200.6[i]).

the student required a new FBA and BIP (Tr. p. 168; Dist. Ex. 42 at pp. 2, 15). According to the April 2013 meeting minutes, the student had been in school only 5 or 6 days since January 17, 2013 (Dist. Ex. 42 at pp. 15, 17). In addition, the meeting minutes noted that the student preferred not to attend settings with nondisabled peers, did not do well in unstructured activities, and that as classes became more academic, his noncompliant behaviors such as throwing objects and destroying materials had increased (id. at p. 17). Testimony by the district assistant director of special education indicated that at the April 2013 meeting, referral of the student to a State-approved nonpublic school program was discussed, but that the district needed to exhaust local options before they could recommend such a program (Tr. p. 243; Dist. Ex. 44 at p. 3). The parent signed an "agreement to change in placement" dated April 9, 2013, indicating that the parent agreed to the student's placement in a half day program beginning April 10, 2013, until a new teacher assistant was "put in place" (Dist. Ex. 43).

The hearing record contains an undated psychological evaluation that reports that the student was administered an independent psychological evaluation in March and April 2013 at the request of the school district, to provide additional information for the student's triennial review (Dist. Ex. 40). In the report, the evaluator stated that a recent FBA had been conducted by the school psychologist (id. at p. 3; see Dist. Ex. 56). In May 2013, the district conducted assessments of the student's needs in the areas of speech-language, physical therapy, occupational therapy, and special education (Dist. Ex. 45). According to the evaluation reports, the student had made limited or no progress due to noncompliant and aggressive behaviors, and the related services providers recommended discontinuing the student's services until his behaviors were better controlled (id. at pp. 2, 3, 4).

The CSE convened on May 3, 2013 and May 10, 2013, to conduct the student's annual review (Tr. p. 251, Dist. Ex. 49). The CSE recommended that the student remain in his current 12:1+4 placement in the BOCES TEAM program for the remainder of the 2012-13 school year and spend part of the day in the 5th grade classroom with modified curriculum and support (Dist. Ex. 49 at p. 1). All members of the CSE agreed that the BOCES TEAM program was not appropriate for the student and district staff opined that the Stellata program was more appropriate for him, but that a compromise was agreed upon due to the parent's preference (Dist. Ex. 49 at p. 1). The IEP also stated that the CSE would reconvene in June to review the student's success in the general education environment and determine his placement for next year (id.). The CSE agreed to consider a proposal by a private behavior consultant hired by the parent to provide training to the staff working with the student, in order to ensure a smooth transition into the general education class (Tr. p. 73-76, see Dist. Ex. 48). However, this proposal was rejected, as district determined that its staff did not require the consultant's assistance to implement classroom modifications and accommodations, as the staff "was well versed in that" (Tr. p. 76, 257-58).

The parent signed a May 3, 2013 agreement for the district to provide the student with home instruction for one week, in order to "facilitate a cooperative plan for [the student's] program" (Dist. Ex. 47). The agreement was amended on May 10, 2013, to extend the duration of the home instruction to May 17, 2013 (Dist. Ex. 50).

On May 16, 2013, an email was sent by the district's assistant director of special education to the grandparent (Dist. Ex. 51). The email stated that the district had decided not to have the

student return to his previous classroom (id. at p. 1).[7] A "continuum of response" and a "plan" for the student for the remainder of the 2012-13 school year were attached to the email (id. at pp. 2-3). The plan was for the student to spend the majority of his day in a general education class (Dist. Ex. 51 at p. 1, 3). The special education teacher testified that she spent a "couple of hours" discussing the student's needs with the other special education teacher who was to work with the student, but did not meet with the general education teacher (Tr. p. 199-200).

The student attended school on May 21, 2013 and spent 10-15 minutes in the general education fifth grade class (Dist. Ex. 52 at p. 1). On May 22, 2013, the student was suspended for pushing a teacher assistant and hitting two other students (Tr. p. 271-72, Dist. Ex. 53). The student did not attend school for the rest of the school year; instead the student's grandparent hired private tutors to work with him (Tr. p. 84).

4. Implementation of the 2012-13 IEPs

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 the district deviates from substantial or significant provisions of the student's IEP in a material way and thereby precludes the student from the opportunity to receive educational benefits (T.L. v. New York City Dep't of Educ., 2012 WL 1107652, *14 [E.D.N.Y. Mar. 30, 2012]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 503 [S.D.N.Y. 2011]; see A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205, 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 821-22 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]). In order to show a denial of a FAPE based on a failure to implement an IEP, a party must establish more than a de minimus failure to implement all elements of the IEP, and instead must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP (Houston Indep. Sch. Dist., 200 F.3d at 349; see also Fisher v. Stafford Township Bd. of Educ., 289 Fed. App'x 520, 524-25, 2008 WL 3523992 [3d Cir. Aug. 14, 2008]; Couture v. Bd. of Educ., 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 in other words, "material" (A.P., 370 Fed. App'x at 205; see Van Duyn, 502 F.3d at 822 [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 [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]).

[7] No amendment to the IEP was included in the record to document this change, nor was the parent included in this decision (Tr. p. 77).

In the present matter, the parent asserts that the district's failure to conduct an FBA or develop an updated BIP during the 2012-13 school year in response to the student's escalating behavior needs resulted in a failure to offer the student a FAPE. Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H., 361 Fed. App'x at 161; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at *8; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]). To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]; Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669, 673 [S.D.N.Y. 2011]; Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *30 [N.D.N.Y. Sept. 29, 2009] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 380 [2008]).

In New York State, policy guidance explains that "the IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address," among other things, a student's interfering behaviors, "in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," Office of Special Educ. [Dec. 2010], at p. 22, available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP," and if necessary, the "student's need for a [BIP] must be documented in the IEP" (id.). 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 having an FBA conducted and a BIP developed for a student (8 NYCRR 200.4[d][3][i], 200.22[a], [b]). An FBA is defined in State regulations as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and "include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it" (8 NYCRR 200.1[r]). State regulations require that an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]).

The hearing record amply supports the IHO's determination that the district's failure to develop, review, and update the student's BIP during the 2012-13 school year denied the student a

FAPE, and I decline to depart from her finding or her reasoning (IHO Decision at pp. 18-20). As early as August 4, 2012 the parent indicated an interest in updating the student's BIP, albeit because the student's behavior had improved during the 2011-12 school year (Dist. Ex. 30 at pp. 4-5). Shortly after the start of the 2012-13 school year, however, the district's effectiveness in addressing the student's behavioral needs declined. The student's special education teacher stated that she attempted the interventions recommended on the November 2011 BIP during the 2012-13 school year and that they were "sometimes" effective (Tr. p. 189-90). She came to the conclusion that the student's BIP needed to be updated in October 2012 because "things weren't working" and stated she did not know what was causing the student's behaviors, although she had previously been able to identify the behavioral triggers (Tr. pp. 190-91, 201-02). The special education teacher stated that in October 2012, the student's behaviors were "puzzling" to her, that reinforcers that had previously worked did not any longer, and that although the student had previously taken direction from her, he was no longer doing so (Tr. p. 148).

Beginning in October 2012, the district's methods of addressing the student's behavior departed from those listed in the most recent (November 2011) BIP (Dist. Ex. 28). Instead, as described above, a "verbal" behavior plan was employed in the student's program that included seclusion of the student, physical restraint, securing the student's absence from the program on days the primary teacher would not be in the classroom, and having the student's grandmother take the student home if his behaviors became unmanageable. None of these interventions were set forth on the November 2011 behavior plan or authorized by the IEP in place for the bulk of the 2012-13 school year (see Dist. Exs. 28; 29).

As the school year progressed, these interventions also became ineffective. This might have been anticipated as at one time the student's BIP recommended avoiding physical intervention because it would escalate noncompliance (see Dist. Exs. 13 at p. 5; 15 at p. 3, 18 at p. 3). Both the student's grandmother and his special education teacher indicated that the student became more aggressive when restrained (Tr. pp. 102, 120-22). Additionally, the independent behavior consultant obtained by the family for the student opined that restraining a student "usually" causes aggression (Tr. p. 561).

On February 28, 2013, the student's parent specifically requested in writing for the district to update the student's BIP, once the student's medications were "under control" and he could begin attending the program again (Dist. Ex. 33 at p. 2). The district requested permission to conduct an FBA approximately one month later, but the FBA had yet to be completed by the time the CSE convened in June 2013 to develop a program for the student's 2013-14 school year (Tr. pp. 389-90, 399; Dist. Exs. 39, 54, 56).[8]

In addition to the district's general obligation to review the IEP of a student with a disability at least annually, federal and State regulations require the CSE to revise a student's IEP as

[8] The hearing record does not contain any evidence that the parent ever provided written consent; the grandparent testified that verbal consent was given during the manifestation meeting (Tr. pp. 60-61, 234). However, the record is unclear whether the district informed the parent that written consent was required and the district did, in fact, conduct an FBA of the student at some point prior to May 2013 (Tr. pp. 244-45; Dist. Ex. 56). However, it appears that the FBA was not officially completed at that time (Tr. p. 390; see Parent Exs. V at pp. 9-13; W at pp. 9-10; X at p. 76).

necessary to address "[i]nformation about the child provided to, or by, the parents" during the course of a reevaluation of the student (34 CFR 300.324[b][1][ii][C]; 8 NYCRR 200.4[f][2][ii]), and State regulations provide that if parents believe that their child's placement is no longer appropriate, they "may refer the student to the [CSE] for review" (8 NYCRR 200.4[e][4]). Furthermore, in a recent guidance letter the United States Department of Education indicated that parents may request a CSE meeting at any time and that if the district determines not to grant the request, it must provide the parents with written notice of its refusal, "including an explanation of why the [district] has determined that conducting the meeting is not necessary to ensure the provision of FAPE to the student" (Letter to Anonymous, 112 LRP 52263 [OSEP Mar. 7, 2012]; see 34 CFR 300.503; 8 NYCRR 200.5[a]). State regulations further provide that, if appropriate, an IEP must be revised to address "any lack of expected progress toward the annual goals and in the general education curriculum," "the results of any reevaluation conducted . . . and any information about the student provided to, or by, the parents," or "the student's anticipated needs" (8 NYCRR 200.4[f][2][i-iii]).

Here, the district was aware of the student's noncompliant and aggressive behaviors as early as October 2012, but failed to address the behavior by conducting an FBA and developing or revising a BIP until spring 2013. During this time, the student was restrained, secluded, and sent home as routine responses to his inappropriate behavior, suspended, and ultimately the student ceased attending the program altogether.

I find that the failure of the CSE to review the interventions actually used with the student or to develop a revised BIP that was designed to measure and monitor the student's aggressive behaviors, as well as the student's response to strategies implemented by the district, or otherwise note appropriate supplementary aids and services, in the IEP resulted in the denial of a FAPE (see R.K. v. New York City Dep't of Educ., 2011 WL 1131492, at *18-19 [E.D.N.Y. Jan. 21, 2011]; cf. A.C., 553 F.3d at 172; E.M. v. New York City Dep't of Educ., 2011 WL 1044905, *9 [S.D.N.Y. Mar. 14, 2011]; Oberti v. Bd. of Educ., 995 F.2d 1204, 1217, 1220-21 [3d Cir. 1993]). Accordingly, I find that the district's failure to comply with State regulations resulted in a substantive deficiency in this instance and deprived the student of educational benefits by failing to sufficiently address the student's behaviors which impeded his learning. In light of the above, I find that the district failed to implement the 2012-13 IEPs and, in this instance, it was a material deviation from the student's IEPs that deprived the student of a FAPE for the 2012-13 school year (A.P., 370 Fed. App'x at 205; see Van Duyn, 502 F.3d at 822).

5. Improper Use of Aversives

The IHO set forth a thorough and cogent description of State regulations concerning the use of emergency interventions (the use of reasonable physical force) and "time out rooms" (an area for a student to safely deescalate, regain control, and prepare to meet expectations to return to his or her education program) in her decision (IHO Decision at pp. 21-22; see 8 NYCRR 200.22[c], [d][1]). Briefly, and most relevantly, State regulations require that "[e]mergency interventions shall not be used . . . as a substitute for systematic behavioral interventions that are designed to change, replace, modify or eliminate a targeted behavior" (8 NYCRR 200.22[d][2][ii]). Further, the regulations require that "[e]xcept for unanticipated situations that pose an immediate concern for the physical safety of a student or others, the use of a time out room shall be used only in conjunction with a behavioral intervention plan that is designed to teach and reinforce alternative

appropriate behaviors" (8 NYCRR 200.22[c][3]). Additionally, there are specific requirements regarding the use of time out as an intervention in that the room employed must be "unlocked and the door must be able to be opened from the inside" and that "[s]taff shall continuously monitor the student in a time out room. The staff must be able to see and hear the student at all times" (8 NYCRR 200.22[c][6], [7]). Lastly, State regulations require staff training on the use of emergency interventions and time-out rooms and impose certain monitoring requirements to "document the use of the time out room, including information to monitor the effectiveness of the use of the time out room to decrease specified behaviors," among other purposes (8 NYCRR 200.22[b][5]; [c][1], [8]; [d][3], [4]; [f][4]).

Briefly, and in light of facts set forth above, the hearing record shows that emergency interventions in the form of restraints were used in the student's program in lieu of "systemic behavioral interventions" as called for in the regulations. The district appears to have failed to comply with the specifics of State regulations, in that testimony from district witnesses established that the student was secluded alone in a room with the door held shut (Tr. pp. 175, 644). Most importantly, these interventions were not employed in conjunction with a behavioral intervention plan, and continued to be employed long after the student's conduct could be reasonably described as "unanticipated." Rather, each of the many, repeated incidents of aggressive and unregulated behavior by the student were responded to as if they were unanticipated emergency situations. For much the same reasoning as set forth in her decision, I concur with the IHO that the district's use of restraints and seclusion with this student during the 2012-13 school year was in violation of State regulations and contributed to the district's failure to provide the student a FAPE during that school year.

B. June 2013 CSE Meeting and IEP

On June 20, 2013, the CSE reconvened to conduct the student's annual review and to continue development of his IEP for the 2013-14 school year (Dist. Ex. 54 at pp. 1, 19-25). The June 2013 CSE recommended an extended school year program in a 12:1+4 special class placement in the BOCES Stellata program with related services consisting of two 30-minute sessions per week of group adaptive physical education, two 30-minute sessions per week of individual OT, one 30-minute session per week of speech-language therapy in a group of five, three 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of individual PT, and summer services including two 30-minute sessions per week of individual speech-language therapy, and one 30-minute session per week of individual OT (Dist. Ex. 54 at pp. 1, 14-16). The June 2013 CSE also recommended a BIP, supplementary aids and services including a 1:1 teaching assistant, supports for school personnel, and special transportation (id. at pp. 1, 11, 15-18).

1. Predetermination/Parent Participation

The IHO found that the district impermissibly predetermined the student's recommended program for the 2013-14 school year in that district staff determined before the meeting that the student's behaviors could not be managed in any district placement and that the district refused to consider additional information at the June 2013 CSE meeting, thereby depriving the parent of a meaningful opportunity to participate in the development of the IEP (IHO Decision at pp. 26-27). Although I concur with the IHO's finding that the district failed to offer the student a FAPE for the

2013-14 school year, my determination rests on slightly different grounds. 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 P.K., 569 F. Supp. 2d at 383 ["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] ["Meaningful participation does not require deferral to parent choice"]; Paolella v. District of Columbia, 210 Fed. App'x 1, 3, 2006 WL 3697318 [D.C. Cir. Dec. 6, 2006]).

Moreover, 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 (see T.P., 554 F.3d at 253; Nack v. Orange City Sch. Dist., 454 F.3d 604, 610 [6th Cir. 2006] ["predetermination is not synonymous with preparation"]; Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 857-60 [6th Cir. 2004]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 333-34 [E.D.N.Y. 2012]; D.D-S, 2011 WL 3919040, at *10-11; B.O. v. Cold Spring Harbor Cent. Sch. Dist., 807 F. Supp. 2d 130, 136 [E.D.N.Y. 2011]; A.G. v. Frieden, 2009 WL 806832, at *7 [S.D.N.Y. Mar. 26, 2009]; P.K., 569 F. Supp. 2d at 382-83; Danielle G. v. New York City Dep't of Educ., 2008 WL 3286579, at *6-*7 [E.D.N.Y. Aug. 7, 2008]; M.M., 583 F. Supp. 2d at 507; W.S., 454 F. Supp. 2d at 147-48; see also 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). A 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 [S.D.N.Y. 2009], aff'd, 366 Fed. App'x 239, 2010 WL 565659 [2d Cir. Feb. 18, 2010]).

At the CSE meetings held on May 3 and May 10, 2013, the CSE, which included the parent, discussed both a general education setting—which the parent preferred—and the BOCES Stellata special class the district intended to recommend (Tr. pp. 67-72; Dist. Ex. 49 at pp. 14-15, 21-22).[9] During the May 10, 2013 CSE meeting the student's family members and the private behavior consultant argued that the student could be educated in a general education setting if his behavioral needs were adequately supported (Tr. pp. 71-74). Ultimately, the CSE did not finalize a 2013-14 school year recommendation during the meetings and instead reached an agreement to pursue a "trial attempt in general education" for the remainder of the 2012-13 school year (id.). After the attempt in general education concluded the CSE met again on June 20, 2013 (Tr. p. 272; Dist. Ex. 54 at p. 1). At that meeting the district again recommended Stellata, and the parent again disagreed, the resultant IEP recommended the student attend the Stallata program (Tr. p. 272; Dist. Ex. 54 at p. 1).

[9] According to the student's grandmother, each of these CSE meetings was roughly two and one-half hours long (Tr. pp. 68-69, 71).

The IHO correctly pointed out the testimony of the district's assistant director of special education as strong evidence of predetermination, in that she stated that at a March 27, 2013 meeting conducted without the student's parent, the staff concluded that a 12:1+1 in-district special class placement was not appropriate (Tr. p. 237; Dist. Ex. 41 at p. 2). However, the discussions at the May CSE meetings and the district's agreement to attempt to place the student in a general education setting for the end of the 2012-13 school year evinces an open mind on the part of the CSE to consider a placement other than Stellata.

In this instance, the hearing record indicates that while the district members of the CSE maintained a firm position as to the program they believed was appropriate, significant discussions took place during the CSE meetings regarding the student and the student's needs, and changes were in fact made to the student's current IEP at the parent's request, thus affording the parent the opportunity to participate in the development of the student's program (see E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *17-*18 [E.D.N.Y. Aug. 19, 2013] [explaining that a CSE does not have to follow parents' suggestions as long as it listens to them]). 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 P.K., 569 F. Supp. 2d at 383 [noting that a disagreement between the parents and the district does not mean that the parents were denied the opportunity to participate or that the outcome of the CSE meeting was predetermined]; Sch. for Language & Communication Dev., 2006 WL 2792754, at *7 [finding that "[m]eaningful participation does not require deferral to parent choice"]; Paolella, 210 Fed. App'x at 1).[10]

2. Adequacy of Evaluative Information

An evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things, the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1]; 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]), and the 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]; see Application of the Dep't of Educ., Appeal No. 07-018). A CSE may direct that additional

[10] The IDEA, rather than requiring parental consent to an IEP, "'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], 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]).

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]). No single measure or assessment should be used as the sole criterion for determining an appropriate educational program for a student (8 NYCRR 200.4[b][6][v]).

Among the elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental, and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). On the basis of its review, a CSE must "identify what additional data, if any, are needed to determine," among other things, "the present levels of academic achievement" of a student (20 U.S.C. § 1414[c][1][B]). Any additional assessments need only be conducted if found necessary to fill in gaps in the initial review of existing evaluation data (20 U.S.C. § 1414[c][2]; see also D.B. v. New York City Dep't of Educ., 2013 WL 4437247, at *9 [S.D.N.Y. Aug. 19, 2013]).

The hearing record establishes that the student's behavioral needs were of primary importance in developing an appropriate education program for the 2013-14 school year. Behavioral concerns so dominated the student's educational experience during the 2012-13 school year, that his occupational therapist, speech-language therapist, and physical therapist all recommended suspending these related services for the 2013-14 school year until the student's behavior issues could be appropriately addressed (see Dist. Ex. 45 at pp. 2, 3, 4). The hearing record also established that at the time the district began planning for the student's 2013-14 school year in March 2013, a planning meeting without the parent occurred before an anticipated FBA was conducted, before a BIP was developed, before an anticipated psychological evaluation report was received, and before the student's "triennial" evaluation was completed (Tr. pp. 296-98; see Dist. Exs 40, 45). Most significantly, at the time of the June 2013 CSE meeting, the evaluation of paramount importance to appropriately addressing this student's needs, the FBA, remained in draft form. Transcripts of the May 3, May 10, and June 20, 2013 CSE meetings indicate that the meeting participants discussed an FBA; however the FBA in question was not yet completed (see, e.g., Parent Exs. V at pp. 9-13; W at pp. 9-10; X at p. 76). According to the evaluator who was charged with developing the FBA, at the time the student's IEP was being developed during spring 2013, the "functional assessment/behavior intervention worksheet" she prepared was a draft document that should not be considered by the CSE as an FBA or a BIP (Tr. pp. 388-90, 399; Dist. Ex. 56). The evaluator stated that the worksheet was "the start" of an FBA and that its purpose was to record the collection of data that she had conducted in observing the student in his program (id.).[11] "The failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F.3d at 190). "The entire purpose of an

[11] The evaluator confirmed that at the time of her testimony in September 2013, the FBA had still not been completed (Tr. p. 390).

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" (id.).

With regard to this student, whose behavioral needs were central to his education, an adequate FBA was required in order for the CSE as a whole, including the parent, to meaningfully consider an appropriate program for the student. I find, in accord with the IHO's determination, that the CSE's failure to obtain and review a completed FBA prior to completing the student's IEP for the 2013-14 school year constituted a serious procedural violation that in this instance contributed to the denial of a FAPE to the student (see IHO Decision at p. 27).

3. 12:1+4 Placement and Least Restrictive Environment Considerations

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

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

supplemental aids and services) is made through an examination of a non-exhaustive list of factors, including, but not limited to "(1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class" (Newington, 546 F.3d at 120; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50). The Court recognized the tension that occurs at times between the objective of having a district provide an education suited to a student's particular needs and the objective of educating that student with nondisabled peers as much as circumstances allow (Newington, 546 F.3d at 119, citing Daniel R.R., 874 F.2d at 1044). The Court explained that the inquiry is individualized and fact specific, taking into account the nature of the student's condition and the school's particular efforts to accommodate it (Newington, 546 F.3d at 120).[12]

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

The record demonstrates that conflicting opinions existed regarding whether the student would benefit from interacting with nondisabled peers. While testimony by the student's special education teacher, the school psychologist, and the assistant director of special education indicated that the student would not benefit from being in a general education setting because he did not model appropriate behaviors of nondisabled peers, independent consultants working with the student's family opined that he would learn appropriate behaviors by interacting with nondisabled peers (compare Tr. pp. 177, 184, 273-74, 379-80, with Tr. pp. 451-53, 465). In addition, the educational consultant for the family stated that she believed the plan which was developed by the district to support the student in the fifth grade general education setting was inadequate, due to the lack of input solicited from the family by the district, as well as a lack of systematic implementation (Tr. pp. 571-573). She further opined that the failure of the inclusion attempt was due to the lack of an FBA and BIP, as well as a failure to give the plan adequate time to work (Tr. p. 575).

The CSE convened on June 20, 2013 to develop an IEP for the 2013-14 school year (Dist. Ex. 54 at p. 1). The CSE recommended placing the student in the Stellata program, a 12:1+4 special class at a separate site than the student's home school, designed for students with severe behavior disorders (Dist. Ex. 54 at p. 1; see Tr. p. 170). State regulations provide that 12:1+4 special classes are designed for students with "severe multiple disabilities, whose programs consist primarily of habilitation and treatment" (8 NYCRR 200.6[h][4][iii]). The hearing record indicates that the student's cognitive and functional levels did not necessitate a program that focused "primarily [on] habilitation and treatment," as he was independent regarding most daily living skills such as dressing, toileting and feeding; and that the student was verbal and social (Dist. Ex.

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

54 at pp. 2,3,5,8). Therefore, I agree with the IHO's determination that the 2013-14 IEP did not provide for placement of the student in the LRE. However, the IHO also reasonably determined that the student, due to his severe behavioral needs, could not profitably be placed in a general education setting on a full-time basis based on the information available at the time. Accordingly, when next the CSE convenes, it shall consider whether the student may be included in general education classes with appropriate supports and, if not, it should explain the maximum extent to which the student may be included in mainstreaming opportunities with nondisabled peers.

C. Compensatory Additional Services

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory relief may be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). Within the Second Circuit, compensatory relief in the form of supplemental special education or related services has been awarded to such students if there has been a denial of a FAPE (see Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; Student X. v. New York City Dep't of Educ., 2008 WL 4890440, at *23 [E.D.N.Y. Oct. 30, 2008] [finding that compensatory education may be awarded to students under the age of twenty-one]; see generally R.C. v. Bd of Educ., 2008 LEXIS 113149, at *38-40 [S.D.N.Y. March 6, 2008]). Likewise, SROs have awarded compensatory "additional services" to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]; Application of a Student with a Disability, Appeal No. 09-111 [adding summer reading instruction to an additional services award]; Application of the Bd. of Educ., Appeal No. 09-054 [awarding additional instructional services to remedy a deprivation of instruction]; Application of a Student with a Disability, Appeal No. 09-044 [awarding "make-up" counseling services to remedy the deprivation of such services]; Application of a Student with a Disability, Appeal No. 09-035 [awarding 1:1 reading instruction as compensation for a deprivation of a FAPE]; Application of a Student with a Disability, Appeal No. 08-072 [awarding after school and summer reading instruction as compensatory services to remedy a denial of a FAPE]; Application of the Bd. of Educ., Appeal No. 08-060 [upholding additional services awards of physical therapy and speech-language therapy]; Application of a Student with a Disability, Appeal No. 08-035 [awarding ten months of home instruction services as compensatory services]; Application of the Bd. of Educ., Appeal No. 06-074; Application of a Child with a Disability, Appeal No. 05-041; Application of a Child with a Disability, Appeal No. 04-054).

Here, although the IHO determined that additional services were warranted, she did not specify the type or amount of services the district needed to provide to remedy the denial of a FAPE to the student (see IHO Decision at p. 35). The parent contends that the IHO should have ordered the district to provide additional services to address the student's social deficits that were aggravated by the district's "unlawful and counterproductive interventions" during the 2012-13

school year in the form of "tutoring or other direct support from a special education teacher not less than 2 hours per week for 1 year, along with attendance at an inclusive summer camp and/or after-school program" (Pet. at p. 12).

There is evidence in the hearing record demonstrating that the district's failure to address the student's behavioral needs interfered with his academic, physical, and social/emotional progress during the 2012-13 school year. For example, the student's 2012-13 IEP called for the student to attend art, music, and gym classes in a general education setting (see Tr. pp. 645-48; Dist. Ex. 29 at p. 13). However, according to the June 2013 IEP, the student spent "little to no time" in general education classes during the 2012-13 school year, as his behaviors such as noncompliance, destruction of materials, arguing, and aggressiveness were disruptive to the learning environment (Dist. Ex. 54 at p. 3). Similarly, as stated previously, the student made limited or no progress in his related services due to noncompliant and aggressive behaviors, and the related services providers recommended discontinuing the student's services until behaviors were better controlled (id. at pp. 2-6). The student's special education teacher testified that the student's academic and social skills were more advanced than the other students in his class and that the student could not be appropriately grouped for academic instruction (Tr. pp. 110-11).

As described above, the student's behaviors, among other factors, resulted in the student's program being progressively curtailed and reduced as the school year progressed, and ultimately the student ceased attending the district program entirely. Although a portion of the student's absences and other removals from his program can be attributed to decisions made voluntarily by the student's caregivers, at least an equal portion of the absences and other removals from his program can be attributed to the district's failure to address the student's behavioral needs and/or decisions made by the student's parent and grandparent in response to their perception that the district was not taking adequate steps to address the student's needs. The order for the district to obtain a behavioral consultant—as set forth below—is a significant form of equitable relief to address the FAPE deprivation that occurred during the 2012-13 school year. I find that the hearing record does not indicate that an award of an inclusive summer camp and/or after-school program is either necessary or appropriate to remedy the denial of FAPE in this instance. To address the lack of academic instruction that occurred as a result of the district's failure to provide a FAPE during the 2012-13 school year, while considering the voluntary nature of a significant portion of the student's absences from the program, I will order additional services in the form of tutoring or other direct support from a special education teacher for one hour per week for one year (36 weeks).

D. Relief

The district contends that the IHO exceeded her authority and erred in ordering the district to hire a behavioral consultant, erred in ordering that the consultant needed to be acceptable to the parent and erred in specifying the terms of that consultation. The district asserts that the board of education is responsible for hiring district staff and that it may not hire an independent contractor to provide direct instruction to a student or to oversee district staff. I agree with the district to the extent that the IHO's order could be read to give the behavioral consultant undue authority over the functions of the CSE. Accordingly, the IHO's determination that the district must retain a behavioral consultant amenable to the parent is reversed. However, the IHO's remedy appropriately attempted to fashion equitable relief directly relevant to improper manner of

addressing the student's needs and is not unlike directing a district to retain an independent educational evaluation of a student by a qualified evaluator and, therefore, the district is directed to retain a behavioral consultant, inform the parent of the behavioral consultant it has chosen to retain, and invite the consultant to the next two annual reviews held to develop the student's IEPs. The behavioral consultant shall be retained to conduct an FBA and develop a BIP and provide such assessment and recommendations in writing to the CSE regarding the consideration of factors that may affect the student's inclusion in the general educational environment or maximization of the student's opportunities to mainstream with his nondisabled peers if removed from general education. The CSE, at the next annual review held to develop an IEP for the student, shall consider whether it is necessary for the consultant to provide positive behavioral intervention training to district staff as a supportive service on the student's IEP, and consistent with State regulations, shall provide prior written notice describing to the parent the CSE's decision and rationale.[13]

VII. Conclusion

I have considered the parties' remaining contentions and find that I do not need to address them in light of my determinations herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated October 29, 2013 is modified, by reversing those portions that found the district failed to properly implement inclusion opportunities specified in the student's IEPs and the May 2013 agreement, directed the CSE to reconvene and offer the student a "less restrictive" placement for the 2013-14 school year, and ordered the district to hire a behavioral consultant acceptable to the parent to the extent inconsistent with the body of this decision; and

IT IS FURTHER ORDERED that the district shall, if it has not already done so , retain a behavioral consultant in accordance with the body of this decision to conduct an FBA and develop a BIP for the student, attend the next two annual reviews held to develop IEPs for the student, advise the CSE regarding the student's behavioral functioning, and develop recommendations for including the student in general education settings and exposing the student to normally developing peers to the maximum extent appropriate; and

IT IS FURTHER ORDERED that the CSE, when it next convenes to develop an IEP for the student, shall consider the results of the FBA and BIP developed by the behavioral consultant

[13] I do not order the district to submit to training by the consultant because matters of staff qualifications are left to State standards, and to require additional training would be inappropriate at this juncture, so long as the CSE reviews and determines whether district staff are capable of implementing the revised IEP that is developed after consultation has occurred (see Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *11 [W.D.N.Y. Sept. 26, 2012], adopted at 2012 WL 5473485 [Nov. 9, 2012]). Additionally, although I concur generally with the IHO's statements regarding preferred qualifications of the consultant, I do not require the district to meet each of the stated qualifications so long as the district retains an independent consultant meeting the district's professional qualification criteria for independent evaluators and such consultant can provide the services called for by this remedial relief.

and consider whether it is necessary arrange for the consultant to provide positive training regarding behavioral interventions to district staff to facilitate proper implementation of the student's BIP; and

IT IS FURTHER ORDERED that, within 30 days of the date of this decision, the district shall provide the student with one hour per week of 1:1 tutoring or direct support from a certified special education teacher for 36 weeks.

Dated: **Albany, New York**
February 28, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER