The University of the State of New York

The State Education Department
State Review Officer
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No. 15-117

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Jamesville-DeWitt Central School District

Appearances:
Young, Sommer, Ward, Ritzenberg, Baker & Moore, LLC, attorneys for petitioners, Kenneth S. Ritzenberg, Esq., of counsel

Bond, Schoeneck & King, PLLC, attorneys for respondent, Jonathan B. Fellows, Esq., and Kate I. Reid, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which determined that the educational program and services respondent's (the district's) Committee on Special Education (CSE) had recommended and/or provided for their son for the 2013-14 and 2014-15 school years was appropriate and which denied their request for compensatory educational services. The appeal must be sustained in part.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The student has a history of developmental delays and maladaptive behaviors (Dist. Exs. 1 at p. 2; 2 at p. 3; 4; 5 at p. 5; 6 at pp. 2-11). At age three, he underwent a neurodevelopmental evaluation that yielded diagnoses of autism spectrum disorder and verbal apraxia (Dist. Ex. 9 at pp. 1-2). The student received services through the Early Intervention Program and later through the Committee on Preschool Special Education (Dist. Exs. 5; 8). For preschool, the student attended an 8:1+1, and then an 8:1+3, special class in an integrated setting (Dist. Exs. 8 at p. 1; 15 at p. 1; 17 at p. 1; 18 at p. 1; 20 at pp. 1, 8; 23 at pp. 1, 8; 24 at pp. 1, 9; 25 at pp. 1, 8). A functional

behavioral assessment (FBA) and a behavioral intervention plan (BIP) were conducted in May 2010 (Dist. Exs. 14; 15). Subsequently, the student's aggressive behaviors increased and, in February 2012, a new FBA and BIP were developed (Dist. Exs. 26; 27). Based on the results of the FBA, the BIP targeted the student's ability to sit quietly during circle time and decrease aggressions during gym and music (Dist. Ex. 27). The student's preschool special education teacher recommended that the student be provided with a 1:1 teaching assistant for the following school year (Dist. Ex. 30).

For kindergarten (2012-13 school year) the student attended a general education class setting, as well as a 15:1 special class for English language arts and mathematics, pursuant to an IEP dated May 14, 2012 (see Dist. Exs. 31 at pp. 1, 8; 43 at pp. 1, 10). The May 2012 IEP also recommended direct and indirect teacher consultant services, 1:1 aide services "to assist [the] student with attention and focus," the related services of speech-language therapy and occupational therapy (OT), and access to an augmentative communication device (Dist. Exs. 31 at pp. at pp. 8-9; 43 at pp. 10-11). Between September and December 2012 the student directed numerous aggressive acts toward peers and staff (Dist. Exs. 33; 35). As a result, in December 2012 the district conducted a FBA and developed a BIP that outlined specific procedures for addressing the student's aggressive behavior; the BIP was modified in March 2013 (Dist. Exs. 38; 45).

On March 22, 2013, the CSE reconvened and recommended placement in a 12:1+3 special class within the BOCES "SKATE" program, as well as the related services of speech-language therapy and OT (Dist. Ex. 48 at pp. 1, 12, 14; see also Dist. Exs. 46 at p. 6; 47 at p.1).[1] The parents disagreed with the CSE's placement recommendations and filed a due process complaint notice on April 5, 2013, which was amended on June 21, 2013 (see Parent Exs. 2; 3). The parents invoked the student's right to remain in his pendency ("stay-put") placement during the administrative proceedings, identifying the placement and services included in the May 2012 IEP as the student's then-current educational placement (Parent Exs. 2 at pp. 7, 8; 3 at pp. 4, 8, 10). The hearing record reflects that, during summer 2013, the student attended a 12:1+4 special class within the BOCES SKATE program (Tr. p. 195). The parties subsequently executed a memorandum of agreement, on July 30, 2013, which resolved the issues presented in the parents' due process complaint notice (Parent Ex. 4 at pp. 2-3). Pursuant to this agreement, the parties agreed to place the student in a classroom with "no more than 12 students" within the district's public school with the services of a "1:1 aide" in the classroom (id. at p. 2). The parties also agreed that, in the event of a future dispute, this placement would constitute the student's pendency placement (id.). The parties further agreed that the district would conduct an FBA; that the district, parents, and an "[i]ndependent [b]ehaviorist" would develop a new BIP for the student; and that the district would "convene to prepare an IEP for the 2013-14 school year in accordance with th[e] agreement" (id.).

The district engaged the services of a behavioral consultant, who observed the student multiple times during spring 2013 and developed an educational consultation report in June 2013 (Tr. pp. 277, 342, 733-34; Dist. Exs. 57; 112). On August 23, 2013, the CSE convened to conduct the student's annual review and to develop an IEP for the 2013-14 school year (Dist. Ex. 58 at p.

[1] "BOCES" is defined by State law as "Board of Cooperative Educational Services" (Tr. p. 54; see Educ. Law § 1950). The CSE chairperson services testified that the SKATE program "is designed specifically for students with autism" and offers a "very controlled environment" with transition supports and access to social workers (see Tr. p. 90).

1). Finding the student eligible for special education as a student with autism, the August 2013 CSE recommended a 12-month school year program in a 12:1+1 special class within the student's "home public school district" (id. at pp. 1, 12, 15).[2] In addition, the August 2013 CSE recommended the related services of speech-language therapy, OT, and parent counseling and training (id. at p. 12). The August 2013 CSE also recommended adapted physical education and the provision of a 1:1 aide to "support [and] assist [the] student with behavior, attention[,] and focus" (id. at pp. 1, 12-13). Additionally, the August 2013 IEP indicated that the student's FBA and BIP would be "updated" in consultation with a behavioral consultant (id. at p. 1). The student began first grade in the 12:1+1 special class placement in the district public school as recommended by the August 2013 CSE (Tr. p. 99). The hearing record further reflects that, at the parents' initiation, the student attended the behavior clinic—with which the behavioral consultant engaged by the district was associated—for approximately two hours per day for most of the 2013-14 school year (see Tr. pp. 879-81).

On October 24, 2013, the behavioral consultant engaged by the district conducted an FBA of the student (Dist Ex. 61; see Tr. p. 94). Subsequently, on December 10, 2013, the behavioral consultant developed a BIP for the student (Dist. Ex. 66 at pp. 1-5). The district added a time out protocol to the December 2013 BIP which contemplated use of a time out room under specified conditions (id. at p. 6).

On May 21, 2014, the CSE convened to conduct the student's annual review and to develop an IEP for the 2014-15 school year (Dist. Ex. 77 at p. 1). The May 2014 CSE largely retained the recommendations of the August 2013 IEP (id. at pp. 1, 11, 13-14, 16). The May 2014 IEP referenced an "emergency crisis plan" which included use of a time out room (id. at p. 11). The May 2014 IEP also recommended the BOCES SKATE program for July and August 2014, and the hearing record reflects that the student attended this placement (Tr. p. 917; Dist. Ex. 77 at pp. 1, 14).

On June 4, 2014, the behavioral consultant developed an addendum to the December 2013 BIP which constituted a protocol to address the student's elopement (Dist. Ex. 79).

On December 18, 2014, the CSE reconvened to review the student's IEP (Dist. Ex. 91 at p. 1). The December 2014 CSE recommended a 12-month school year program in a 12:1+1 special class in the BOCES Stellata program (id. at pp. 1, 14). In addition, the December 2014 CSE recommended the related services of speech-language therapy, OT, and parent counseling and training (id. at pp. 1, 15). The December 2014 CSE also recommended 1:1 teaching assistant services, behavioral consultation services, and adapted physical education (id. at pp. 1, 15-16).

A. First Due Process Complaint Notice

In a due process complaint notice dated December 31, 2014, the parents alleged that the district failed to offer the student a FAPE for the 2012-13, 2013-14 and 2014-15 school years (IHO

[2] The student's eligibility for special education programs and related services as a student with autism is not in dispute for the 2013-14 and 2014-15 school years (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

Ex. 1).[3] The parents invoked the student's right to his pendency (stay-put) placement based on the educational placement identified in the May 2014 IEP, which consisted of a 12:1+1 special class placement within the district's public school (id. at p. 8).

The district filed an expedited due process complaint notice on February 12, 2015 requesting an "expedited impartial hearing" to change the student's placement to an interim alternative educational setting to be determined by the district's CSE for up to forty-five school days (IHO Ex. 5 at pp. 1, 6).

An expedited impartial hearing convened on February 25, 2015 and concluded on February 26, 2015 after two days of proceedings (Tr. pp. 1-248). During the second day of the expedited impartial hearing, the parties reached a resolution and agreed to place the student in the 12:1+4 BOCES Stellata program, as recommended in the December 2014 IEP, from March 16, 2015 through the end of the 2014-15 school year (Tr. pp. 245-46). The parents stated that they did not waive any claims related to the appropriateness of the December 2014 IEP (Tr. p. 246).

B. Parents' Second Due Process Complaint Notice

In a second due process complaint notice dated June 15, 2015, the parents alleged that the district failed to offer the student a FAPE for the 2012-13, 2013-14 and 2014-15 school years (see IHO Ex. 3).[4] With respect to the 2013-14 school year, the parents contended that the district failed to adequately implement the student's December 2013 BIP (id. at p. 4). The parents further argued that the district improperly utilized a time out room for the student, and that the student's August 2013 IEP and December 2013 BIP did not mention a time out room (id. at p. 3). Finally, the parents argued that the district required the student to receive special transportation despite the parents' request that the student travel to school via a "regular bus" (id. at pp. 4-5).

Regarding the 2014-15 school year, the parents argued that the district discriminated against the student, abused and neglected the student, and took retaliatory measures against the parents for exercising their "due process rights" (IHO Ex. 3 at pp. 6, 9). The parents also contended that the district impermissibly deviated from the December 2013 BIP and the student's IEP (id. at p. 6). The district, argued the parents, inappropriately "isolated" the student in an "enclosed cubby hole to which he had access solely by crawling on the floor" (id.). The parents further contended that the district failed to conduct an updated FBA and BIP for the student (id.). Next, the parents argued that the time out room was not utilized in compliance with "district policy" and that the

[3] As further discussed below, the parents also filed a second due process complaint notice on June 15, 2015 which was later consolidated with the first due process complaint notice (Tr. pp. 254-57; IHO Decision at p. 7).

[4] The parents filed the first due process complaint notice on December 31, 2014, in which the parents alleged that the district failed to offer the student a FAPE for the 2013-14 and 2014-15 school years (IHO Ex. 1). The parents filed an amended due process complaint notice on June 15, 2015 in which the parents repeated the same allegations as those contained in the first due process complaint notice with additional/amended assertions related to retaliation by the district, child abuse and neglect, transportation, the student's December 2013 BIP, and utilization of the time out room and sensory room (compare IHO Ex. 1, with IHO Ex. 3). During the impartial hearing on June 16, 2015, the IHO, with the agreement of the parties, converted the parents' amended due process complaint notice to a "second due process complaint notice" and consolidated the first and second due process complaint notices (Tr. pp. 254-57; IHO Decision at p. 7).

December 2014 IEP failed to indicate a maximum time limit with respect to use of the time out room (id. at pp. 5, 9).[5] The parents also argued that the district did not meet the student's sensory needs and that the district did not allow the student to utilize the sensory room (id. at p. 6). In addition, the parents alleged that the student did not receive his mandated speech-language therapy "[o]n numerous occasions" (id. at p. 5).

Turning to the CSE process and resultant IEP, the parents argued that the December 2014 CSE predetermined its program recommendation and ignored the parents' concerns expressed during the December 2014 CSE meeting (IHO Ex. 3 at pp. 5-7). Further, the parents stated that the district denied their requests for access to the student's classroom (id. at p. 5). Next, the parents alleged that the December 2014 CSE failed to properly evaluate the student in all areas of suspected disability and collect "requisite data" regarding the student's present levels of performance (id. at p. 7). The parents asserted that the CSE "incorrectly asserted that [the student] ha[d] displayed aggressive behavior toward peers and staff" (id. at p. 5). The parents further asserted that the December 2014 IEP's annual goals were not measurable (id. at p. 7). The parents further alleged that the December 2014 CSE's recommended program and services were inconsistent with available data and evaluations (id.). Additionally, the parents asserted that the December 2014 CSE's recommended program and services were "substantively inappropriate [and] inadequate" (id.). The parents argued that the district neglected to provide the student with ABA instruction using discrete trial techniques "on an extended basis," such as after school and on the weekends and failed to appropriately teach the student generalizations of behavior (id. at pp. 6-7). Next, the parents asserted that the December 2014 CSE's recommended placement did not constitute the least restrictive environment (LRE) for the student because the student was "unnecessarily segregated" from his peers and not allowed on the playground with any other students (id. at pp. 5-6).

As relief, the parents requested compensatory education services in the form of ABA instruction using discrete trial techniques to be delivered to the student in school, after school, and on weekends (IHO Ex. 3 at p. 9). The parents also requested an award of monetary damages as a result of the district's "discrimination" against the student and any other relief deemed appropriate by the IHO (id. at p. 10).

C. Impartial Hearing Officer Decision

On June 30, 2015, the district filed a motion to dismiss the parents' second due process complaint notice on the grounds that the implementation claims related to the student's 2012-13, 2013-14, and 2014-15 school years were moot and no longer a "live controversy" (IHO Ex. 8 at p. 1). The district also asserted that the parents' claims related to the 2012-13 school year should be dismissed because they were resolved between the parties in a memorandum of agreement dated July 30, 2013 (id.). By interim order, dated August 17, 2015, the IHO granted the district's motion to dismiss the parents' claims related to the 2012-13 school year (IHO Interim Order at p. 3). With respect to the parents' implementation claims related to the student's 2013-14 and 2014-15 school years, the IHO denied the district's motion to dismiss on the grounds that the parents' request for

[5] The parents also argued that, subsequent to their first due process complaint notice and before the student left the district public school, the district continued to use the time out room in abrogation of district policy and State law and allowed the student to choke on objects (IHO Ex. 3 at p. 9).

ABA services using discrete trial techniques "could theoretically be awarded as compensatory services," thus rejecting the district's mootness argument (id.).

The impartial hearing continued on June 16, 2015 and concluded on August 26, 2015 after five days of proceedings (see Tr. pp. 249-1045).[6] In a decision dated November 12, 2015, the IHO found that the district offered the student a FAPE in the LRE for the 2013-14 and 2014-15 school years (IHO Decision at p. 40).

Initially the IHO found no merit to the parents' claims arising under Section 504 of the Rehabilitation Act (section 504) (IHO Decision at pp. 40-42). With respect to the parents' allegations that the district abused and neglected the student and engaged in retaliatory and discriminatory conduct against them, the IHO found that there was no evidence in the hearing record to support a finding that the district took "adverse actions" against the parents or student (id. at pp. 42-43).

Next, the IHO found that, given references to provision of a "quiet place" for the student in the December 2013 BIP and attachment of a time out protocol thereto, the district's utilization of the time out room for the student "complied with [State] [r]egulations and was not inappropriate" (IHO Decision at p. 34). The IHO further found that the use of the time out room to address the student's unanticipated behaviors was appropriate (id. at pp. 34-35). Next, the IHO found no merit to the parents' claims that the time out room was not utilized solely for emergency interventions (id. at p. 35). The IHO also found that the time out room was used in conjunction with the student's BIP (id.). Additionally, the IHO found that the December 2013 BIP was "current and valid" as of the December 2014 CSE meeting and that the CSE did not err by failing to update it (id. at pp. 32-33).

The IHO additionally found that the student's placement in a 12:1+1 special class in the district school constituted the LRE for the 2013-14 and 2014-15 school years (IHO Decision at pp. 35-39). More specifically, the IHO noted that, during the first grade, the student integrated with nondisabled peers during lunch and nondisabled third graders during recess (id. at p. 38). The IHO further found that, as the student's behaviors became "problematic," the district appropriately determined that the student could not be integrated with nondisabled peers during lunch and recess (id.).[7] Thus, the IHO concluded that the student's 12:1+1 special class without mainstreaming constituted the LRE (id. at pp. 38-39).

Next, the IHO found that the December 2014 CSE did not predetermine its recommendation for the student and that the parents had an opportunity to participate during the CSE meeting (IHO Decision at pp. 27-28). Specifically, the IHO found that, during the December 2014 CSE meeting, the parents voiced their concerns and the district considered these concerns prior to making its recommendation (id. at p. 28). The IHO further found that the December 2014 CSE considered several placement options before recommending placement in a 12:1+4 special

[6] The parties agreed that any testimony and exhibits introduced during the two days of proceedings relating to the expedited impartial hearing would be part of the record to the extent that they were relevant (Tr. pp. 24-25).

[7] The IHO also observed that the student's desk needed to be reconfigured to prevent injury to other students (id. at pp. 38-39).

class within the BOCES Stellata program (id.). In addition, the IHO noted that, although a representative from BOCES attended the December 2014 CSE meeting, this did not evince predetermination because the student attended a BOCES program during the 2013 and 2014 summer sessions (id.). The IHO further noted that, even if the parents were denied the opportunity to observe the student in class during the school year, there was no evidence to suggest that the parents did not have an opportunity to participate during the CSE meeting (id.).

The IHO further found that the December 2014 CSE had sufficient and appropriate evaluative information to develop the student's December 2014 IEP (IHO Decision at p. 30). The IHO further found that the annual goals in the December 2014 IEP were appropriate, notwithstanding that they were identical to those included on the May 2014 IEP, given the student's lack of progress at that point in the 2014-15 school year and the additional support that would be available in the recommended 12:1+4 special class to help the student achieve the goals (id. at pp. 31-32). With respect to the December 2014 IEP's failure to identify a maximum time limitation for use of the time out room, the IHO found that this procedural violation did not rise to the level of a denial of a FAPE (id. at p. 35). Next, the IHO indicated that the December 2014 CSE's recommendation of the 12:1+1 special class in the BOCES Stellata program was appropriate (id. at pp. 31-32). The IHO also found that the composition of the 12:1+4 special class program did not exceed the age range set forth in State regulations (id. at p. 39).

With respect to the district's failure to make-up speech-language therapy sessions, which the student missed when his speech-language therapist took a leave of absence, the IHO found that such failure was "de minimis" and did not rise to a level of a denial of a FAPE (IHO Decision at pp. 30-31). Nevertheless, the IHO ordered the district to provide the student with 11 additional speech-language therapy sessions during the 2015-16 school year (id. at p. 31). The IHO otherwise denied the parents' request for compensatory educational services (id. at p. 40).

IV. Appeal for State-Level Review

The parents appeal and assert that the IHO erred in finding that the district offered the student a FAPE in the LRE for the 2013-14 and 2014-15 school years. Initially, the parents contend that the IHO erred in finding that the district did not retaliate against the parents or discriminate against the student. The parents further maintain that the district engaged in child abuse and neglect.

Next, the parents argue that, during the 2013-14 school year, the district utilized a time out room for the student, despite there being no mention of a time out room in the student's August 2013 IEP and prior to it being referenced in the student's BIP. The parents assert that the behavioral consultant did not reference a time out room in the December 2013 BIP she developed but rather the district subsequently appended a time out room protocol to the BIP. Further, the parents assert that none of the student's IEPs stated a maximum amount of time that the student would spend in the time out room. The parents also assert that, during the 2013-14 school year, the district modified the time out room by moving the door handle so that the student could not reach it to let himself out. Further, the parents allege that, during the 2013-14 school year, the district reconfigured the student's desk "creating a solid wall forcing [the student] to crawl in and out of his desk" (Pet. ¶ 24). The parents also argue that a new BIP was not developed subsequent to the

student's December 2013 BIP, despite the student's deteriorating behaviors and the belief of the student's teacher that the strategies in the BIP were not working for the student.

With respect to the 2014-15 school year, the parents contend that the IHO erred in finding that the district's use of the time out room and BIP was appropriate. The parents particularly note that the district used the time out room with an increased frequency and for progressively longer durations during the 2014-15 school year. In addition, the parents assert that, when the student was in the time out room, there was not always a staff member observing the student and the student was not provided his communication cards. The parents also express significant concern about the district's manner of handling the student's behavior—that emerged during the latter part of the student's attendance at the district school—of defecating and urinating in the time out room. The parents also contend that the district did not allow the student to utilize the sensory room.

With respect to implementation of the mainstreaming mandates in the student's IEPs, the parents assert that, during both the 2013-14 and 2014-15 school years, the district failed to ensure the student's access to nondisabled peers, thereby depriving him of an education in the LRE.

Next, the parents contend that, despite their expressed concerns, the December 2014 CSE recommended the 12:1+4 special class in the BOCES Stellata program. The parents further contend that the IHO erred in finding that the student was appropriately evaluated and that the December 2014 CSE had sufficient evaluative information to develop the student's IEP. In particular, the parents assert that the district school psychologist did not test the student during his time in the district school based on her belief that the student could not comply with the directions of a standardized intellectual assessment. With respect to the December 2014 CSE's recommendation, the parents assert that the IHO erred in finding that the BOCES Stellata program was appropriate. Moreover, the parents assert that the December 2014 failed to offer the student a placement in the LRE. The parents additionally assert that the recommended 12:1+4 special class was inappropriate because some instruction was provided by teaching assistants, discrete trial techniques were not used, and the ages of the other students enrolled the recommended 12:1+4 special class exceed the 36 month age rage prescribed by State regulations. The parents also assert that the district failed to provide the student with home-based ABA services using discrete trial techniques. Lastly, the parents argue that the IHO erred in denying the student compensatory educational services.

In an answer, the district generally responds to the parents' allegations with admissions and denials.

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. 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]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR

300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).

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

VI. Discussion

A. Scope of the Impartial Hearing and Scope of Review

Before addressing the merits of this appeal, it is necessary to determine which claims may be properly considered. First, the parents' argument that the 12:1+4 special class in the BOCES Stellata program exceeded the age range set forth in State regulations was not identified in the parents' due process complaint notices (see IHO Exs. 1; 3). A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]; B.P. v. New York City Dep't of Educ., 2015 WL 9487873, at *3 [2d Cir. Dec. 30, 2015]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]). Further, although the Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 59 [2d Cir. June 18, 2014]; M.H., 685 F.3d at 250-51; see J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *9 [S.D.N.Y. Aug. 5, 2013]), in this instance, the grouping of the students in the 12:1+4 special class in the BOCES Stellata program was first raised during the impartial hearing by the parents' counsel on cross-examination of a district witness, not by the district "in support of an affirmative, substantive argument" (Tr. pp. 233-34; B.M., 569 Fed App'x at 59). Therefore, the district did not "open the door" to these issues and the IHO's determination on this point must be reversed.

Also, the parents present claims outside the scope of the IDEA and the Education Law. Specifically, the parents allege violations of section 504 and claims of retaliation, discrimination, child abuse, and neglect. State law does not make provision for review of such claims through the SRO appeal process authorized by the IDEA and the Education Law (see Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Therefore, an SRO has no jurisdiction to review any portion of the parents' claims or the IHO's findings regarding section 504, discrimination, retaliation, abuse or neglect (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 n.17 [E.D.N.Y. 2012] ["Under New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"]; see also D.C. v. New York City Dep't of

Educ., 950 F. Supp. 2d 494, 507 [S.D.N.Y. 2013]). Therefore, the parents' claims related to section 504, retaliation, discrimination or child abuse, and neglect shall not be reviewed on appeal.

Finally, the parties have not appealed the IHO's finding that the December 2014 IEP's annual goals were appropriate or his order directing the district to provide the student with 11 additional speech-language therapy sessions during the 2015-16 school year. Accordingly, these issues are final and binding on the parties and will not be reviewed on appeal (8 NYCRR 200.5[k], 279.4[a]; see also 34 CFR 300.514[b]).

B. Behavioral Intervention Plan and Behavioral Interventions

The parents interpose various challenges to the district's implementation of the December 2013 BIP, failure to revise the BIP, and use of the time out room and other behavioral interventions during the 2013-14 and 2014-15 school year.

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 (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010]; 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], aff'd, 506 Fed. App'x 80 [2d Cir. Dec. 26, 2012]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 503 [S.D.N.Y. 2011]; see 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]).

While the IEPs, FBA, and BIP themselves are not at issue, the federal and State laws and regulations relating to a CSE's consideration of a student's interfering behaviors informs the issue to be determined; to wit, whether or not the district properly implemented the BIP and other behavioral interventions.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ., 361 Fed. App'x 156, 160-61 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172). To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]; Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669, 673 [S.D.N.Y. 2011]; Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *30 [N.D.N.Y. Sept. 29, 2009] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 380 [S.D.N.Y. 2008]). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may 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]).

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," at p. 22, Office of Special Educ. [Dec. 2010], 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, a "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]). State regulation defines an FBA as the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and:

> include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it.

(8 NYCRR 200.1[r]). According to State regulations, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]).

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

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

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

If the CSE determines that a BIP is necessary for a student the BIP shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . . ; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR 200.22[b][4]). Once a student's BIP is developed and implemented, "such plan shall be reviewed at least annually by the CSE or CPSE" (8 NYCRR 200.22[b][2]). Furthermore, "[t]he implementation of a student's [BIP] shall include regular progress monitoring of the frequency, duration and intensity of the behavioral interventions at scheduled intervals, as specified in the [BIP] and on the student's IEP. The results of the progress monitoring shall be documented and reported to the student's parents and to the CSE or CPSE and shall be considered in any determination to revise a student's [BIP] or IEP" (8 NYCRR 200.22[b][5]).

State 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 [BIP] 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 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[c][1], [8]).

1. Behavioral Needs

While the student's behavioral needs and the August 2013 and May 2014 IEPs, October 2013 FBA, and December 2013 BIP are largely uncontested—but for the implementation of the same and the alleged failure to revise the BIP—prior to examining the merit of the parents' various claims, it is necessary to review the student's behavioral needs and the district's approaches to addressing those needs.

The hearing record indicates that the student engaged in maladaptive behaviors such as hitting, kicking, head butting, scratching, biting, eloping, aggressing towards peers, self-aggressive behaviors, choking himself, obsessive compulsive and repetitive behaviors, and defecating and urinating outside of a bathroom (Dist. Exs. 60-62; 64-69; 71-76; 78-85; 92-95; 97-99; 102; 104-106).

The district engaged the services of a behavioral consultant, who observed the student multiple times during spring 2013 and developed an educational consultation report in June 2013, which contained recommendations for preventative strategies, antecedent interventions, replacement behaviors, and reactive strategies (Tr. pp. 277, 342, 733-34; Dist. Ex. 57; 112). Of note, with respect to reactive strategies, the consultant questioned the effectiveness of the "fix your feet" protocol that had been used with the student during the 2012-13 school year and

acknowledged "multiple medication changes" that year, which had not been tracked with the behavioral data (Dist. Ex. 57 at p. 4). The consultant also noted that the district's then-current "data collection system" was "cumbersome" and consisted of "copious amounts of information" but did not yield "a great deal of useful information" (id.). The student's teacher testified that this report was shared with her and the parents and that the consultant began the process of conducting an FBA in fall 2013 (Tr. pp. 342-44, 489-92). She further testified that behavioral data was collected beginning in September 2013 "to help support [the student] and manage through behaviors," as well as to see what other interventions could be utilized (Tr. pp. 348-49). The behavioral consultant testified that she conferred with the district on ways to structure the new classroom and how to use support staff to ensure success with classroom management, made initial recommendations, and observed the student approximately 16 times during the 2013-14 school year (Tr. pp. 736-37, 741-42, 747).

Consistent with the memorandum of agreement, discussed above, for the 2013-14 school year a new 12:1+1 special class was created in the district public school, housed in a classroom with an adjoining sensory room and an adjoining time out room (Tr. pp. 99, 342-44).

The August 2013 IEP noted that, in consultations with the behavioral consultant, an FBA and a BIP would be updated (Dist. Ex. 58 at p. 1). The IEP also indicated that, "[i]n the interim, emergency interventions w[ould] be implemented if necessary," including use of a "safe place" for the student to deescalate (id.). In order to address the student's maladaptive behaviors, the August 2013 IEP contained information regarding the student's management needs and recommendations for addressing the student's behaviors such as: increasing the student's communication skills; direct staff support, especially during transitions; improving self-regulation; encouraging meaningful engagement; improving the student's self-help skills; providing sensory input; utilizing a visual schedule; using tangible reinforcers; providing positive reinforcement; and preteaching and using visual information for each task presented (id. at pp. 2-9). Additionally, the August 2013 IEP contained behavioral strategies, including a specific teacher response protocol with preventative strategies and interventions and provision of sensory input and social stories, and behavior plans for the playground and bus (id. at p. 9).

The evidence in the hearing record indicates that in September 2013 the district adopted a policy, which authorized the use of time out rooms: (1) in a potentially dangerous or unanticipated situation; and (2) as a behavior management strategy set forth in a student's BIP (Dist. Ex. 40).

The behavioral consultant developed an FBA, dated October 24, 2013 (Dist. Ex 61). The FBA identified the following sources of assessment: a functional assessment interview, a motivation assessment scale, "ABC" (antecedent, behavior, consequence) data collection, a review of records, and direct observation (id. at p. 1). The FBA identified the following target behaviors: "aggressive episodes" (including hitting, slapping, pinching, kicking, pulling hair, head butting, or throwing an object at another person); elopement; throwing an object (not at another person); wetting (urinating outside of the bathroom); and slamming doors (id.) In addition to summarizing the student's then-current medications, health and diet, and sleep habits, the consultant indicated that, in the 12:1+1 special class in the district public school, the student received 1:1 support in a "quiet and calming" classroom environment, as well as "visual supports and a timer for each activity," and "a visual schedule to show the sequence of the day" (id. at p. 2). The consultant noted that "problematic behaviors" were more likely to occur in the afternoon and that events that

could trigger behaviors included the bus being late, music in the car, transitions, doors not being fully closed, things not matching or being symmetrical, being told "no," novel demands without the usual structure, a lack of visual support, difficult tasks, or interruption of a desired activity (id.). The consultant identified the following established functional alternatives to the problematic behaviors (some of which required various levels of prompting): asking for help, making verbal requests, and accessing preferred activities (id.). The consultant noted that, with prompting or help, the student used minimal vocal speech and used an augmentative communication device for structured activities but less regularly for functional communication (id.).

Based on results of the motivation assessment scale, the consultant concluded that the student's aggressions and elopement from the instructional area may have been maintained by a "desire to escape from demands and/or access to a preferred item or activity" and that the student's door slamming behavior may have been "internally motivating, such as [by] a sensory need, perseveration, or compulsion" (Dist. Ex. 61 at p. 2). Based on the behavior data collected by classroom staff for approximately a two week period in September 2013, the consultant concluded that: 68 percent of aggressions were preceded by a demand and 25 percent by a transition; 40 percent of throwing instances were triggered by a demand, 40 percent by a transition, and 20 percent by the desire for access to a preferred item; almost all instances of elopement were preceded by a demand; and almost all instances of wetting were preceded by the student's elopement to the matted area adjacent to the classroom (id.). The FBA also included detailed summaries of three of the consultant's observations of the student in the classroom (id. at pp. 3-7). Based on these sources of information, the consultant concluded that the student was "more likely to display challenging behavior when presented with non-preferred task demands, when transitioning from a preferred to a non-preferred activity, when denied access to a preferred item or activity, or when engaged in instruction that [wa]s repeated or non-preferred" (id. at p. 7). The consultant further observed that the student's behaviors functioned to allow him to escape or avoid demands, gain a significant amount of attention from adults, or access otherwise disallowed preferred items (id.). The consultant recommended that a BIP be developed for the student and that the student's behaviors be assessed frequently (id. at p. 8).

The December 2013 BIP included many of the same recommendations as set forth in the June 2013 educational consultation report (compare Dist. Ex. 57, with Dist. Ex. 66).[8] Specifically, the December 2013 BIP contained recommendations for preventative strategies for setting event interventions and antecedent interventions, strategies to teach replacement behaviors, and reactive strategies to deal with escalation of the student's behaviors if the preceding strategies were not effective (Dist. Ex. 66). With respect to setting event interventions, the BIP recommended: "robust amounts of individual attention," particularly before transition and work demands; minimized distractions in the instructional environment; avoidance of excessively long breaks after instruction (particularly in a different room) and use of a timer during breaks; increased focus on the student's functional communication; and use of a vertical picture schedule with Velcro cards (id. at pp. 1-2). As for antecedent interventions, the BIP recommended: making task demands interesting by using the student's preferences; using discrete trial teaching; transitioning from non-preferred to

[8] The student's teacher indicated that a lot of the support strategies ultimately included in the December 2013 BIP were already in place by that point because the consultant had made similar recommendations during fall 2013 (Tr. pp. 352-53).

medium preferred to preferred activities; providing choices in tasks and materials; providing notice of time left in non-preferred activities; providing non-contingent breaks in work based on time or task completion, not behavior; presenting demands at a medium to fast pace; and presenting demands in the form of a statement, not a question (id. at p. 2). Identified strategies to teach replacement behaviors included: providing the same level of attention for replacement behaviors or compliance as provided for challenging behaviors; introducing interdependent work using the "TEACCH" (Treatment and Education of Autistic and Related Communication Handicapped Children) methodology; increasing social skill instruction; introducing a token reinforcement system; and using primary reinforcers for the student's response to the "come here" command (id. at pp. 3-4). Finally, reactive strategies included: moving out of the student's space, as well as "wait[ing] out" and refusing to acknowledge the behavior; if the student was unable to maintain safety in the instruction area, guiding the student to "a quiet space" to "calm down" and avoid providing sensory or other calming strategies that could reinforce the behavior; once the student was calm, engaging him in compliance trials and presenting him with a modified version of the demand that occurred before the behavior (so as not to reinforce the student's avoidance of the demand); and continuing to track behavior using an ABC sheet (id. at p. 4).

Additionally, the December 2013 BIP contained an emergency intervention protocol which outlined the procedure for using the time out room (Tr. p. 510; Dist. Ex. 66 at p. 6). In particular, the BIP provided that "[i]f the previously stated strategies [we]re not effective and [the student's] aggressions continue[d] to escalate (putting himself and others in danger) the time out room . . . w[ould] be utilized" (Dist. Ex. 66 at p. 6). The BIP stated that the time out room would be used no more than 30 minutes before the parents were notified (id.). In addition, the BIP specified the following procedures for getting the student in the time out room: the student would be removed to the time out area after following the continuum of strategies set forth in the BIP; if necessary, a physical escort would move the student to the time out room; if necessary, mats would be used to create a barrier to help facilitate the transition of the student into the time out rom; and physical restraint would be avoided and used only in emergency situations (id.). Once in the time out room, the BIP provided that staff should use verbal prompts familiar to the student to represent the end of the behavior and then close the door and monitor the student at all times (id.). The BIP further provided that a timer should be set for two minutes, after which staff would ask the student if he was ready, and, if the student was not ready, the process would be repeated (id.). Finally, the BIP provided that a time out log would be sent home to the parents (id.).

The May 2014 IEP contained behavioral strategies similar to those set forth in the August 2013 IEP, including a specific teacher response protocol with preventative strategies and interventions (Dist. Ex. at 77 p. 9). The May 2014 IEP referenced an "emergency crisis plan" which included use of a time out room (id. at p. 11).

A BIP addendum to address the student's elopement was developed by the behavioral consultant in June 2014 (Tr. pp. 301, 367-68, 518-19, 831-32; Dist. Ex. 79). The addendum set forth proactive and reactive interventions to address the student's elopement, as well as a "reinforcement plan" (Dist. Ex. 79). With respect to proactive interventions, the BIP addendum recommended: continuing to use the BIP already in place; providing 1:1 support for the student at all times, including in the hallways, during transitions, and on the playground; watching for warning signs for elopement (identified as changes in schedule or routine, previous attempts at elopement during the same day, and recent changes in medication); prior to leaving the classroom

or the school building, showing the student a visual card and verbally telling him to "Stay with teacher"; and, when warning signs were present, ensuring the student was within arms' length (id. at p. 1). As for reactive strategies to implement once the student eloped, the BIP addendum included a series of recommended responses that varied based on the level of elopement, ranging from escorting the student back to the classroom to notifying the police (id. at pp. 1-2). For the reinforcement plan, the BIP addendum indicated that the student should not receive additional time out of school as a consequence of elopement behavior, as that could inadvertently reinforce the behavior (id. at p. 2). In addition, the BIP addendum stated that data should be taken regarding the elopement behavior and that the elopement protocol "should be reviewed at least monthly by school staff involved with [the student] and at least yearly to update the protocol" (id.).

2. Implementation of the Behavioral Intervention Plan and Time Out Room

On appeal, the parents argue that the student was placed in the time out room on several occasions during the 2013-14 school year, despite that the August 2013 IEP did not reference a time out room. In addition, the parents assert that no BIP was in effect for the student that referenced the use of a time out room until the district added a time out room protocol to the December 2013 BIP developed by the behavioral consultant. The parents also argue that the time out room was not used or maintained in compliance with State regulations or district policy. Finally, the parents also argue that the district failed to adequately implement the December 2013 BIP.

The hearing record indicates that the time out room was constructed during summer 2013 (see Tr. pp. 98-99, 342-44). The time out room is described in the hearing record as a room with mats on all of the walls and the floor (Tr. p. 381; Dist. Ex. 116). Largely, the hearing record supports a finding that the time out room was constructed in a manner consistent with State regulations (8 NYCRR 200.22[c][5]-[7]). However, the parents testified that district personnel "moved the door handle from the normal level . . . so [the student] couldn't let himself out of the time out room" (Tr. pp. 888-89). The parents' testimony in this respect is unrebutted.[9, 10] State regulations require that the time out room must be "unlocked and the door must be able to be opened from the inside" (8 NYCRR 200.22[c][6]). The movement of the handle in the time out room, therefore, constructively allowed the student to be locked in the room and created the result that the door could not be opened from the inside by the student. Thus, the parents' unrebutted testimony regarding the movement of the handle in the time out room contributes to a denial of FAPE in this instance.

As to the use of the time out room in relation to the August 2013 IEP and December 2013 BIP, at the beginning of the 2013-14 school year, the parents are correct that the August 2013 IEP

[9] The hearing record contains district work orders which were completed with respect to the time out room throughout the 2013-14 and 2014-15 school years; however, none specifically reference the door handle being raised to a different level (Dist. Exs. 100, 117). This, however, is not dispositive of the issue as the district had an opportunity to cross-examine the parents as to this statement or introduce rebuttal evidence, which it elected not to do.

[10] Moreover, in the IHO's findings of fact, he affirmatively states that "the door handle on the inside [of the time out room] was raised, which meant it could not be reached by the Student" (IHO Decision at p. 14 n.3). While the IHO did not further examine the implications of this finding, the district failed to dispute the finding on appeal.

did not include reference to a time out room and the December 2013 BIP with the time out room protocol had not yet been developed (Dist. Exs. 58; 66). However, the August 2013 IEP did indicate that "emergency interventions would be implemented if necessary, which [could] include a safe place to deescalate" (Dist. Ex. 58 at p. 1). In addition, the CSE chairperson testified that the time out room was not referenced on the August 2013 IEP because it had not been "officially formulated" yet, and that, early in the 2013-14 school year, every time the student went into the time out room, it was considered an emergency due to the intensity of his behaviors and the "risk of escalating even higher" (Tr. pp. 286, 291). Moreover the parents testified that they were aware the school district was constructing a time out room and had an opportunity to view the room (Tr. pp. 887-88).

The evidence in the hearing record shows that the student was placed in the time out room, at a minimum, 30 times between September 4, 2013 and December 4, 2013 for a duration ranging from one minute to ten minutes, with the majority being under five minutes (Dist. Ex. 67 at pp. 1-28).[11] The student's teacher testified that, during fall 2013, the time out room was used only if the strategies in the BIP were not effective and the student injured himself or another person and not every time the student acted aggressively (Tr. pp. 350-51). Further, according to the parents, the student did not spend a lot of time in the time out room during the entire 2013-14 school year (Tr. p. 888). Specifically, the parents testified that, during the 2013-14 school year, they received two or three reports per week that the student had been in the time out room for "a few minutes" (id.).

While the district used the time out room for the student notwithstanding that the IEP did not expressly provide for such use and prior to the development of the BIP, given the timeline of the development of the instructional space including the time out room, the parents' knowledge thereof, and reference in the student's IEP to use of a safe place to deescalate, the district's use of the time out room at this point did not constitute a deviation from substantial or significant provisions of the student's IEP in a material way (see A.P., 370 Fed. App'x at 205).[12]

Subsequently, the December 2013 BIP indicated that the student should be moved to a "quiet space" to "calm down" if he could not maintain safely where instruction occurred (Tr. p. 548; Dist. Ex. 66 at p. 4). Although a time out room was not originally mentioned in the December 2013 BIP developed by the behavioral consultant, the district added an emergency intervention protocol to the December 2013 BIP, which outlined the procedure for using the time out room (Tr. pp. 296, 807; Dist. Ex. 66 at p. 6). The fact that the district added the time out protocol to the December 2013 BIP developed by the behavioral consultant was not legally impermissible (8 NYCRR 200.22[b]).

[11] The exhibit that includes time out room reports for the 2013-14 school year did not include any such reports for November 2013 (see Dist. Ex. 67). There is no indication in the hearing record as to whether this is an accurate reflection of the use (or lack thereof) of the time out room during that month or whether reports exist for November 2013 but were not included in the exhibit.

[12] As the August 2013 and May 2014 IEPs are not in dispute, the failure to identify the maximum amount of time that the student would spend in the time out room in the IEPs does not contribute to the determination that the district failed to offer the student a FAPE; however, as discussed below, this omission in the December 2014 IEP does contribute to such a finding.

Turning to implementation of the BIP, a review of the hearing record reveals that the classroom staff appropriately implemented the strategies and supports set forth in the document (see Dist. Ex. 66). Specifically, the behavioral consultant testified that she observed the teachers using preventative strategies, visual support, and classroom structure to prevent behaviors from occurring (Tr. p. 748).[13] The behavioral consultant further testified that the student's teacher followed her suggestions "more thoroughly, more completely, and more quickly than any teacher [she has] ever worked with" (Tr. p. 750). When behaviors did occur, the behavioral consultant testified that the classroom staff would use verbal prompts to provide vocabulary for the student if behaviors were triggered by his low level of communication, and they were providing replacement behaviors to de-escalate and to increase the student's level of communication (Tr. p. 749). Furthermore, the behavioral consultant described that the staff was using visual supports and a picture exchange communication system (PECS) to teach replacement behaviors for communication needs (id.). Additionally, the student's teacher testified that all of the strategies outlined in the June 2013 educational consultation report and from direct consultation with the behavioral consultant, were utilized in her classroom (Tr. p. 496).

The hearing record also indicates that the December 2013 BIP was implemented by use of antecedent interventions, classroom structure to minimize distractions and allow for "robust amounts of individualized attention," discrete trial teaching, increased functional communication, replacement behaviors, a token reinforcement system, primary reinforcers, social skills instruction, and opportunities for sensory input (Tr. pp. 342-45, 351-61, 364-65, 734-51; Dist. Exs. 51; 57; 61; 66 71; 74; 117). With respect to the parents' argument that the student was unable to utilize the sensory room, there is nothing in the hearing record that indicates that the student's required "sensory opportunities" be provided in a separate sensory room (Dist. Ex. 91). Moreover, the hearing record indicates that the student was exhibiting unsafe behaviors in the sensory room, so the staff moved sensory equipment out of the sensory room to be used in "other safe areas" (Tr. pp. 308, 409). Furthermore, the student's teacher testified that the student enjoyed using the sensory equipment in the matted room and that he always had access to sensory equipment in the classroom (Tr. p. 409). Accordingly, the hearing record supports a finding that the district adequately implemented the December 2013 BIP.

With respect to the use of the time out room in relationship to the December 2013 BIP, the student's teacher testified that the time out room was utilized in the emergency crisis plan, and that it was "solely for emergencies," which she defined as the student "being unsafe, imposing a danger to himself or to others in our classroom, a peer or staff member" (Tr. pp. 505, 520-21). The student's teacher further testified that, prior to moving the student to the time out room, the classroom staff would utilize the December 2013 BIP which, as described above, provided a continuum of support strategies and preventative techniques, and that after the staff had "worked through the sequence of interventions," and the student was still "imposing harm to either himself or to another individual" he would be removed to the time out room (Tr. pp. 369-70). Similarly, the CSE chairperson testified that, in January 2015, she observed the teacher "go through the de-escalation behavior" and that she tried to use tasks that were calming to the student, but when he did not respond to those strategies, he was placed in the time out room due to the intensity of his

[13] As discussed above, the behavioral consultant observed the student approximately 16 times during the 2013-14 school year (Tr. pp. 736-37, 741-42; 747).

behaviors (Tr. p. 298). The behavioral consultant also testified that the December 2013 BIP was being implemented properly and that a time out room was "purely for time and space to deescalate," and that crisis intervention was not intended to decrease or change behaviors, but was intended to keep the student and others around him safe (Tr. pp. 761, 794, 820-21).

Additionally, classroom behavior data included in the hearing record indicated that the student engaged in behaviors (self-aggressive and aggressive) at rates much higher than the amount of times he was in the time out room during the 2014-15 school year, indicating that the student was not moved to the time out room every time he engaged in maladaptive behaviors (compare Dist. Exs. 95, 97, 98 with Dist. Ex. 99). For example, a sample of the behavioral data indicates that on September 3, 2014 the student aggressed approximately 17 times during the school day, and was in the time out room approximately 3 times; on November 5, 2014 the student aggressed approximately 24 times and was in the time out room approximately 8 times and on January 5, 2015, the student aggressed approximately 11 times and was in the time out room approximately one time (Dist. Exs. 93 at pp. 1-2, 95 at p. 1, 3, 45; 98 at p. 1; 99 at pp. 1-2).

While the parents testified that "there were times" that the parents came to the classroom and "there weren't eyes on" the student in the time out room (Tr. pp. 936, 937-38), the hearing record reflects that, consistent with State regulation, a window was installed in the time out room door and that the student was always "under visual observation" (Tr. pp. 314, 436, 937). Additionally, with respect to the student's access to communication cards, the hearing record is not entirely clear as to the manner in which they were used or accessible while the student was in the time out room (Tr. pp. 442-45). While there is nothing in the IEPs or the BIP that requires the student to have access to the communication cards in the time out room (see Dist. Ex. 58; 66; 77)—and, therefore, any failure to ensure such access was not a failure in implementation of a provision of the student's IEP or BIP—if the district continues use of a time out room for the student in the future, it is encouraged to review whether or not the student should be given access to the communication cards at such times.

Notably, the hearing record indicates that, during the 2014-15 school year, the student's behaviors escalated in both intensity and frequency (see Tr. p. 368). The student was placed in the time out room on almost a daily basis and for an increasing number of times per day (see Tr. pp. 574, 915, 929; Dist. Ex. 93). The use of the time out room became particularly frequent after the winter break (at which point the parents had already filed the first due process complaint notice and the 12:1+1 special class constituted the student's pendency placement) (see Dist. Ex. 99; IHO Ex. I). On a few occasions between January and March 2015, the student remained in the time out room for particularly lengthy periods of time, due to the student's urinating and defecating behaviors and because the staff would not or could not enter the room as a consequence of health and safety concerns and/or the student's aggressive behaviors (see Tr. pp. 136-37, 315-19, 398-406, 428-29, 434-39, 457-59, 592-98, 761-64; Dist. Exs. 99; 106; 126; 131). The parents were called to the classroom on a few of occasions to aid staff in getting the student dressed and/or cleaned up after he disrobed or urinated or defecated in the time out room (see Tr. pp. 137, 404-05, 596-98, 916-17, 929-30, 935, 938-39; Dist. Exs. 106; 126; 131). Notwithstanding the severity of these incidents and the fact that the CSE had already determined that the district public school was not equipped to properly manage the student's behaviors, the hearing record supports a finding that the district staff attempted to follow the strategies in the BIP and ensure the student's safety and the safety of others (see Tr. pp. 406, 584-85; Dist. Exs. 91; 106).

Based on the above, the hearing record shows that the time out room was utilized as an area for the student to deescalate, and that it was used in conjunction with the student's December 2013 BIP.

3. Failure to Revise the Behavioral Intervention Plan

The parents contend that the district failed to revise or redraft the BIP despite the student's "significantly deteriorat[ing]" behaviors during the student's 2013-14 and 2014-15 school years and that the IHO erred in finding that the district was not obligated to update the December 2013 BIP. Notwithstanding the above evidence that the district implemented the strategies identified in the student's IEPs and the December 2013 BIP, a review of the hearing record supports the parents' contention that the district should have revised or redrafted the student's BIP and/or reviewed the student's IEP as it related to behavioral interventions.

As noted above, State regulation requires that, "[i]f a particular device or service, including an intervention, accommodation or other program modification is needed to address the student's behavior that impedes his or her learning or that of others, the IEP shall so indicate" (8 NYCRR 200.22[b][2]). If the CSE determines that a BIP is necessary for a student, the BIP is required to identify: the baseline measure of the problem behavior; the intervention strategies to be used to prevent the occurrence of the behavior and provide consequences for the targeted behavior; and a schedule to measure the effectiveness of the interventions (8 NYCRR 200.22[b][4]). Once a student's BIP is developed and implemented, "such plan shall be reviewed at least annually by the CSE" (8 NYCRR 200.22[b][2]). Furthermore, implementation of a BIP requires regular progress monitoring which must be documented and reported to the student's parents and to the CSE for consideration in any determination to modify a student's BIP or IEP (8 NYCRR 200.22[b][5]).

The hearing record shows that the student continued to engage in high levels of aggressive and self-injurious behaviors that, despite implementation of the December 2013 BIP, were not decreasing in frequency (Tr. pp. 349, 355-59, 362, 368, 370, 372-73, 380-81, 386-87, 572; Dist. Exs. 60-62; 64-69; 71-85; 92-95; 97-99; 101; 104-106; 112-14; 119; 121-22; 124; 126; 128-29; 131).[14] In addition, the time out room was used with increased frequency during the latter part of the 2013-14 school year and the beginning of the 2014-15 school year (see Dist. Ex. 67; 93). The student's teacher testified that the student's behaviors became no longer "manageable within [the district's school's] framework" and that the strategies in the BIP were not working (Tr. p. 517).

According to the behavioral consultant, the December 2013 BIP was not revised because she felt the BIP was still valid and she would not have changed any of her original recommendations (Tr. pp. 759-60). She further testified that she reviewed behavioral data every time she observed the student and that there was "never a time when [she] felt that the data indicated that the [FBA] was invalid" (Tr. p. 828). However, a review of the ABC recording sheets developed by the behavioral consultant and completed by district staff shows that the sheets did not include specific details about the antecedent (e.g., where the student was, what the student was doing, what staff were doing, tasks, activities, interactions, and social events immediately prior to

[14] There is some indication in the hearing record that changes in the student's medications could have contributed to his increased behaviors (see Dist. Ex. 71); however, absent further assessment of the same, such a cause/effect relationship cannot be stated with certainty.

the target behavior) or specific consequences (e.g., what happened immediately after the target behavior including sources of reinforcement such as escape from a demand, increased attention, or access to preferred stimuli) (Dist. Exs. 60; 62; 64; 68; 72; 73). Rather, the ABC recording sheets provided a brief description of the antecedent such as "seat" or "transition" without detailing what the student or staff were doing, tasks in which the student was engaged, or interactions that took place immediately prior to the target behaviors (see Dist. Exs. 60; 62; 64; 68; 72; 73). Similarly, the ABC recording sheets described staff response to the target behaviors (e.g., giving verbal or visual prompts, saying "fix" or utilization of the time out room) but did not detail the reinforcement the student received from engaging in the maladaptive behaviors (id.). Thus, the ABC recording sheets did not provide the level of detail necessary to determine how the antecedents and consequences in the student's environment may have impacted his maladaptive behaviors.

However, as the student's behaviors progressively intensified during academic tasks, the district reacted by modifying his environment. Specifically, according to the CSE chairperson, the classroom staff made "environmental modifications to make the classroom safe for [the student] and other students" (Tr. p. 309). Further review of the hearing record shows that these modifications included several changes to the students work area which subsequently led to restricting the student's ability to move within the classroom, essentially becoming a behavioral intervention which should have been considered in any determination of whether or not to revise the BIP or the IEP (Tr. pp. 309-11, 363-66, 905-06, 953; Dist. Exs. 114; 115; 117 at pp. 2-3).

Specifically, during the 2013-14 school year, the district modified the student's desk several times in an attempt to control the student's kicking, head butting, and hitting, subsequently creating a boxed in space which the student would access by crawling on the floor (Tr. pp. 309-11, 363-66, 905-06, 953; Dist. Exs. 114; 115). The CSE chairperson, the district special education teacher, and the student's mother testified about the evolution of the student's workspace (Tr. pp. 308-11, 363-66, 905-07, 995-99; Dist. Ex. 114). Originally, the students in the 12:1+1 special class occupied desks in a "study carrel" configuration, whereby all of the desks faced the wall and had sides separating each workspace to "try to minimize distractions" (Tr. pp. 363-64; Dist. Ex. 114 at p. 1; see Dist. Ex. 117 at pp. 2, 3). The student "used a weighed based chair with arms to provide a boundary" (Dist. Ex. 114 at p. 1). Next, according to the evidence in the hearing record, on or around April 14, 2014, the decision was made in consultation with the behavioral consultant to face the student's desk away from the wall, such that the table portion of the student's workspace separated him from the staff member working with him and reduced his ability to aggress towards others (Tr. pp. 309, 364-65, 995-96; Dist. Ex. 114 at pp. 1-2). Subsequently, however, the student would elope from his seat or aggress towards the staff members sitting across from him, so a boundary was added to the front of the desk and a "half-wall divider" (approximately four feet high) was constructed on the sides of the desk and attached to the wall, in which there was a hole on one side for entry (Tr. pp. 308-09, 364-65, 366; Dist. Ex. 114 at p. 1). A tunnel was added for the student to access the desk, which was also intended to provide sensory input (Tr. p. 310, 906; Dist. Ex. 114 at p. 1). The tunnel was ultimately abandoned because the student preferred crawling on the floor through the entrance (Tr. p. 310; Dist. Ex. 114 at p. 1).

As for the 2014-15 school year, the evidence in the hearing record indicates that, in September, the student's workspace was modified by increasing the space between the wall and the desk to accommodate his size (Dist. Exs. 114 at p. 2; 117 at p. 13). The district special education teacher testified that, during the 2014-15 school year, the same configuration was used;

however, the student repeatedly kicked the wall by "laying on his back on his desk," so reinforcement and carpeting were added to avoid damage to the workspace (Tr. pp. 365-66; see Tr. pp. 310; Dist. Ex. 114 at p. 2). According to the special education teacher, at that point, the student was kicking above the divider, so taller dividers, as high as the door frame, were added to the workspace (Tr. p. 366). Ultimately, in or around November 2014, the structure was "rebuilt as a single solid unit . . . reinforced with wooden slats" with the wall itself reinforced with plywood covered in carpet (Dist. Ex. 114 at p. 2; see Dist. Ex. 117 at p. 10).

The student's mother testified that she was not comfortable with the configuration of the student's workspace and suggested that the teacher employ other strategies, such as use of sensory equipment, to address the student's behaviors (Tr. pp. 905-06; see Tr. pp. 953-54, 997-99). According to notes about the environmental modifications, the student's mother expressed her discomfort to the district special education teacher on January 23, 2015, at which point, it was determined that the entry to the student's workspace would be enlarged so the student could walk in and out of it (Dist. Ex. 114 at p. 2; 117 at p. 9).

In light of facts set forth above, the reconfiguration of the student's work area to the extent it restricted the student's movement within the classroom essentially acting as a behavioral intervention, which was not described in the student's IEP or BIP, should have triggered the application of the above mentioned State regulations. Moreover, notwithstanding testimony summarized above indicating that the desk was constructed, in part, to address the student's elopement behavior, the June 2014 addendum to the BIP, which contained a protocol to address the student's elopement, did not mention the desk configuration (Dist. Ex. 79). Given that the student's behaviors were escalating over the course of the school years, such that the district believed they were significant enough to warrant the modified work area, the increased use of the time out room, and ultimately requiring the parents to retrieve the student from school, the CSE should have convened to review the BIP. Under the unique circumstances of this case, the failure to review and update the interventions actually used with the student or to develop a revised BIP or otherwise note appropriate supplementary aids and services in the IEP contributed to deny the student a FAPE.

C. Implementation—Least Restrictive Environment

The parents further argue that the IHO erred in finding that the district provided the student with a FAPE in the LRE during the student's 2013-14 and 2014-15 school years.

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 422, 428 [W.D.N.Y. 2008]). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; M.W. v. New York City Dep't of Educ., 725 F.3d 131, 144 [2d Cir. 2013]; Newington, 546 F.3d at 112,

120-21; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. N. Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobol, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 CFR 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 CFR 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 CFR 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; 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 M.W., 725 F.3d at 143-44; J.S., 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]). If, after examining the factors under the first prong, it is determined that the district was justified in removing the student from the general education classroom and placing the student in a special class, the second prong requires consideration of whether the district has included the student in school programs with nondisabled students to the maximum extent appropriate (Newington, 546 F.3d at 120).

In fashioning a test to assess a student's placement in the LRE, the Court acknowledged that the IDEA's "'strong preference'" for educating students with disabilities alongside their nondisabled peers "'must be weighed against the importance of providing an appropriate education'" to students with disabilities (Newington, 546 F.3d at 119, citing Walczak, 142 F.3d at 122, and Briggs v. Bd. of Educ. of Conn., 882 F.2d 688, 692 [2d Cir. 1989]; see Lachman v. Ill. State Bd. of Educ., 852 F.2d 290, 295 [7th Cir. 1988]). In recognizing the tension created between the IDEA's goal of "providing an education suited to a student's particular needs and its goal of educating that student with his non-disabled peers as much as circumstances allow," the Court explained that the inquiry must be fact specific, individualized, and on a case-by-case analysis regarding whether both goals have been "optimally accommodated under particular circumstances" (Newington, 546 F.3d at 119-20, citing Daniel R.R., 874 F.2d at 1044).

The above standard provides the context for the LRE requirements; however, the parents' claims with respect to the 2013-14 and 2014-15 school years allege that the district failed to implement mainstreaming efforts and ensure the student's access to nondisabled peers, thereby depriving him of an education in the LRE. Therefore, the issue to be resolved is whether or not the district deviated from the student's IEPs in a substantial or material manner with respect to the student's level of access to nondisabled peers (see A.P., 370 Fed. App'x at 205).

As noted above, during the 2012-13 school year, the student attended a program that combined inclusion opportunities in a general education setting with instruction in a special class (see Dist. Exs. 31; 32; 43). However, according to the August 2013 IEP, the student's special education teacher informed the June 2013 CSE that, at the time, the student's "ability to participate in the general education classroom [wa]s limited due to significant behavioral concerns" (Dist. Ex. 58 at p. 7). In the space designated for stating the extent to which the student would participate in the general education environment with student's without disabilities, the August 2013 IEP indicated that the student's primary instruction would occur in the special class setting (id. at p. 14). In addition, the August 2013 IEP provided for the student's participation in adapted physical education (id. at p. 12). The IEP did not indicate that the student would participate in extracurricular or other nonacademic activities with regular education students (id. at p. 14). Therefore, as the student's August 2013 IEP (which is not at issue) does not require that the student participate in the general education environment in any respect, the district's purported failure to implement mainstreaming opportunities must fail. In any event, the hearing record indicates that the district nonetheless made efforts to offer the student access to nondisabled peers in accordance with the parents' requests for the same.

The parents testified that, during the 2013-14 school year, they requested "multiple times" that the district provide the student access to nondisabled peers and inquired as to his participation in parties, art, or library in the general education setting (Tr. pp. 908-09). According to the parents, the student's teacher informed them that attempts had been made to allow the student to participate in some of the settings identified by the parents but that the attempts "were pretty unsuccessful" and "overwhelming" for the student (Tr. p. 908). The student's teacher testified that, during the first grade, the student had lunch with his peers and recess with third-grade students (Tr. pp. 354-55; see Tr. p. 908). The student's teacher further testified that recess with third-grade students "actually worked out better because . . . the size of the peers . . . was a better fit" (Tr. p. 355). The student's teacher also testified that the student participated in a "fund-raising event," a "Special Olympics" event, and a "Halloween parade," which integrated all of the students (id.). Moreover, the parents testified that the student participated in the "end of year first grade performance" (Tr. 904). Additionally, the student participated in a snack group which consisted of a "game-based activity" with the student and "grade-level peers" twice a week; however, due to the student's increasing aggressions towards his peers, the student's teacher decided that the student's participation in the snack group was no longer appropriate (Tr. pp. 355-56).

The parents testified that, as the 2014-15 school year approached, they continued to request socialization opportunities for the student (Tr. pp. 911-12). The unchallenged May 2014 IEP maintained the recommendations that the student receive instruction in a special class and participate in adapted physical education and did not otherwise recommend that the student participate in other nonacademic or extracurricular with nondisabled peers (Dist. Ex. 77 at pp. 13, 15). Therefore, as with the August 2013 IEP, a claim that LRE mandates in the May 2014 IEP were not implemented must fail. Nevertheless, as with the 2013-14 school year, the district continued attempts to provide the student with access to nondisabled peers but with decreasing success (see Tr. p. 919).

As the student began second grade during the 2014-15 school year, the student's teacher testified that his "behaviors were very intense" (Tr. p. 368). The student's teacher further testified that the student participated during recess with other students but, after "significant aggressions

and incident reports," the student was not safe with peers or staff outside (Tr. pp. 512-13). The student's teacher testified that she worked with the behavioral consultant and "put together a plan to reintegrate" the student during snack or recess (Tr. p. 371; see Tr. p. 834). However, because of the student's frequent and intense behaviors, the student's teacher testified that he "wasn't at a spot behaviorally to be able to make that integration step at that point" (Tr. p. 373). The student's teacher further testified that, after consulting with the behavioral consultant, "[she] felt the same way[;] that it would not be an appropriate time to reintegrate at that point" (id.).

Therefore, the parents' claim that the district failed to implement the LRE mandates in the student's IEPs during the 2013-14 and 2014-15 school years must fail.

D. December 2014 CSE

1. Parental Participation/Predetermination

The parents also allege on appeal that the district denied them the opportunity to participate in the development of the student's December 2014 IEP because the CSE ignored their concerns. As set forth below, a review of the hearing record supports the IHO's determination that the parents' ability to participate during the CSE meeting was not significantly impeded.

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see T.F. v. New York City Dep't of Educ., 2015 WL 5610769, at *5 [S.D.N.Y. Sept. 23, 2015]; A.P. v. New York City Dep't of Educ., 2015 WL 4597545, at *8, *10 [S.D.N.Y. Jul. 30, 2015]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *17 [E.D.N.Y. Aug. 19, 2013] [stating that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; P.K., 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"]). When determining whether a district complied with the IDEA's procedural requirements, the inquiry focuses on whether the parents "had an adequate opportunity to participate in the development" of their child's IEP (Cerra, 427 F.3d at 192).

In the present case, the evidence in the hearing record demonstrates that the parents were afforded an opportunity to participate at the December 2014 CSE meeting and in the development of the student's December 2014 IEP. Both of the student's parents attended the December 2014 CSE meeting (Dist. Exs. 89 at p. 8; 91 at p. 1). The student's mother testified that, during the CSE meeting, she was "opposed" to the CSE's recommendation and wanted the student at the district school "with the friends he knew and grew up with" (Tr. p. 932). The student's mother further testified that, although she did not make any alternative placement suggestions during the CSE

meeting, she "recommend[ed] a lot of suggestions and ideas of . . . how [the district] could structure [the student's] school day to maybe minimize some of the behavior problems [the student] was having" (id.). While the parents noted that the CSE ultimately recommended a change of placement for the student despite their suggestions, they recognized that their "oppos[ition] to the new placement was duly noted" (Tr. p. 983). The parents further testified that, during the CSE meeting, they were able to voice their opinions and speak their minds (Tr. p. 983). Accordingly, the hearing record shows that the parents participated, in part, by virtue of expressing their disagreement, and the fact that the CSE did not adopt their preferred recommendations does not amount to a denial of meaningful participation (P.K., 569 F. Supp. 2d at 383; Sch. for Language & Commc'n Dev., 2006 WL 2792754, at *7).

Lastly, while the parents allege that they were unable to observe the student in his classroom during the school year, they do not advance any arguments regarding how this constituted a procedural inadequacy that would result in finding that the district failed to offer the student a FAPE for the 2014-15 school year, as the parents do not allege that the failure to visit the student in his classroom impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or 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]; see also Letter to Mamas, 42 IDELR 10 [OSEP 2004] [IDEA does not provide a general entitlement to parents of students with disabilities to observe their children in any current classroom or proposed educational placement]). Moreover, a review of the hearing record reveals that the parents observed the student in the classroom via a baby monitor on January 29, 2015 (Tr. p. 584; Dist. Ex. 104). Therefore, the parents' argument is without merit.

2. Sufficiency of Evaluative Information

The parents allege that the district failed to properly evaluate the student's needs in all areas of suspected disability and that the IHO erred in finding that the student was appropriately evaluated. Upon review, the evidence in the hearing record does not support the parents' allegations.

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

including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

Here, the December 2014 CSE had sufficient evaluative information available to develop the student's IEP. Evaluative information available to and considered by the CSE included classroom progress reports and behavioral data, a January 2012 FBA with updated information through March 2014, a March 2012 OT evaluation, a March 2012 speech-language evaluation, a January 2013 psychological evaluation, and a December 2014 psychological summary report (Tr. pp. 128-29, 133; Dist. Exs. 26; 37; 38; 86; 87; 89; 91 at p. 1). In addition, the evidence in the hearing record, including the minutes of the December 2014 CSE meeting, reflects that the CSE considered input from: the CSE chairperson, a behavioral consultant, the student's special education teacher, the BOCES psychologist, a district school psychologist, the principal, and the student's parents (Tr. pp. 128-36, 231-32, 387-89; Dist. Ex. 89).

With respect to the parents' argument that the district failed to conduct a "standardized intellectual assessment" for the student's triennial evaluation, the hearing record indicates that a psychological assessment was conducted in December 2014, during which the Wechsler Intelligence Scale for Children–Fourth Edition and the Vineland Adaptive Behavior Scales–Second Edition (Vineland-II), Teacher Rating Form and the Parent/Caregiver Rating Report Form, were administered (Dist. Ex. 87 at p. 1). The district school psychologist who administered the assessments testified that an intellectual assessment was unsuccessful because the student did not respond to the testing materials (Tr. p. 679). The district school psychologist further testified that the evaluative information contained in the December 2014 psychological summary report was based on rating forms completed by the student's then-current teacher and his parents, and that the Vineland–II was used to "provide an estimate of adaptive behaviors in terms of communication and daily living skills and social skills based on parent report and teacher report" (Tr. pp. 680-82). In addition, the district school psychologist testified that it was not uncommon to be unable to administer a cognitive instrument to a "nonverbal severely autistic student" because the student has to be able to engage in the task, respond verbally, and understand verbal directions (Tr. pp. 696-97). Similarly, the behavioral consultant testified that it was not uncommon to be unable "to get a valid test measure on a child particularly who has very low verbal skills" (Tr. p. 846). Moreover, the BOCES psychologist testified that formative assessments were often used because cognitive testing could be difficult for students on the autism spectrum (Tr. p. 715).

Based on the above, the hearing record supports the IHO's conclusion that the December 2014 CSE had sufficient evaluative information available to it in order to develop the student's December 2014 IEP. Further, there is no indication in the hearing record that it was necessary for the district to conduct any further evaluations of the student prior to the December 2014 CSE meeting or that its failure to do so impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process, or deprived the student of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513; 8 NYCRR 200.5[j][4]).

E. December 2014 IEP

1. Behavioral Interventions

The parents' arguments relating to behavioral interventions implemented by the district during the 2013-14 and 2014-15 school years are set forth above in much greater detail. However, the parents also assert that the December 2014 IEP failed to set forth the maximum amount of time during which the student would be placed in the time out room.

As noted above, State regulation requires that a student's IEP "specify when a [BIP] includes the use of a time out room for a student with a disability, including the maximum amount of time a student will need to be in a time out room as a behavioral consequence as determined on an individual basis in consideration of the student's age and individual needs" (8 NYCRR 200.22[c][2]). Further, before implementing a BIP "that will incorporate the use of a time out room," districts must afford parents "the opportunity to see the physical space that will be used as a time out room" (8 NYCRR 200.22[c][2][4]).

Here, the December 2014 IEP stated that the student had an emergency crisis plan on his BIP continuum, which utilized the district time out room policy (Dist. Ex. 91 at p. 13). The IEP did not state the maximum amount of time the student would need to be in a time out room (id.). The December 2014 CSE recommended a new placement for the student in the BOCES Stellata program (Dist. Ex. 91 at pp. 1, 15). As opposed to the parents' involvement with the district public school's development of the time out room for the 2013-14, there is no indication in the hearing record that the parents had the opportunity to see the physical space to be used as a time out room at the BOCES Stellata program. Nor did the parents have independent knowledge about the use of the time out room in the BOCES Stellata program, as they did with the district public school by virtue of the school's use thereof and provision of "Parent Notifications" describing the student's behaviors and the durations of time the student spent in the time out room each time it was utilized (Dist. Ex. 93; 99).[15] In addition, given the increased durations of time the student spent in the time out room in at the district public school during the latter months of his attendance (see Dist. Ex. 67; 93), identification of the maximum amount of time the student would need to be in the time out room at the BOCES Stellata program was particularly important. Notwithstanding that the December 2013 BIP remained in effect at the time of the December 2014 CSE meeting, along with the district time out room protocol (Dist. Ex. 66), the hearing record offers no information as to whether the district's time out room protocol would have been utilized by the BOCES Stellata program. Therefore, the fact that the time out room protocol stated that the time out room would "be utilized no more than 30 minutes before the parents are notified" (Dist. Ex. 66 at p. 6), does nothing to mitigate this procedural deficiency in this instance. Accordingly, under the particular facts of this case, the December 2014 CSE's failure to identify the maximum amount of time the student would need to be in the time out room as a behavioral consequence is a procedural violation that contributes to the ultimate determination in this matter that the district failed to offer the student a FAPE.

[15] As it turns out, the BOCES Stellata program did not have a time out room but rather utilized "break rooms" (Tr. p. 712); however, there is no indication in the hearing record that this distinction was discussed at the December 2014 CSE meeting and, therefore, this retrospective testimony may not be relied up to "rehabilitate a deficient IEP after the fact" (see R.E., 694 F.3d at 186).

2. Home-Based ABA Services

Although not address by the IHO, the parents assert on appeal that the district failed to provide the student with home-based ABA services using discrete trial techniques. In support of this contention, the parents point to the statement in the student's May 2014 IEP that the student learned best when taught using "a discrete trials program" (Dist. Ex. 77 at p. 7).[16] In addition, the parents point to the testimony of the behavioral consultant that the student would benefit from home-based ABA services (Tr. pp. 784-85). This evidence does not reflect that the student required such instruction outside of the school environment in order to receive a FAPE. Moreover, there is nothing in the hearing record to indicate any of the evaluative information available to the December 2014 CSE recommended home-based services for the student or that the behavioral consultant relayed her opinion that home-based services would be beneficial for the student to the CSE (see Dist. Exs. 26; 37; 38; 86; 87; 89).

Although the parents believe the student required home-based ABA services to derive educational benefit, the hearing record indicates that their primary reason for wanting these services was to enable the student to generalize skills (see Tr. p. 913). Several courts have held that the IDEA does not require school districts as a matter of course to design educational programs to address a student's difficulties in generalizing skills to other environments outside of the school environment, particularly in cases in which it is determined that the student is otherwise likely to make progress in the classroom (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1152-53 [10th Cir. 2008]; Gonzalez v. Puerto Rico Dep't of Educ., 254 F.3d 350, 353 [1st Cir. 2001]; Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1293 [11th Cir. 2001]; JSK v. Hendry County Sch. Bd., 941 F.2d 1563, 1573 [11th Cir 1991]). As discussed herein, except for the failure to identify the maximum amount of time the student would spend in the time out room, the December 2014 CSE designed a program that was reasonably calculated to provide the student with educational benefit and, therefore, the December 2014 IEP is not deficient due to the CSE's failure to recommend home-based ABA services.

3. 12:1+4 Special Class in BOCES Stellata Program

Turning to the appropriateness of the BOCES Stellata program, a review of the hearing record supports the IHO's determination that the December 2014 CSE's recommendation of the 12:1+4 BOCES Stellata program was appropriate.

According to the evidence in the hearing record, the December 2014 CSE discussed and considered other placement options before reaching its decision to recommend the placement at the BOCES Stellata program. For example, consistent with December 2014 CSE meeting minutes, a December 2014 prior written notice reflected that, in addition to discussing the BOCES Stellata program, the CSE considered continued placement of the student in the district school and placement of the student at the BOCES SKATE program (Dist. Exs. 89 at pp. 4-7; 90 at p. 1). The prior written notice further reflects that the CSE declined to recommend placement at the current district program because "despite a significant amount of behavioral interventions and environmental supports in his current school based program," the student's behaviors continued to be at a "high level" (Dist. Ex. 90 at p. 1). Consistent with the December 2014 CSE meeting

[16] This statement also appears in the December 2014 IEP (Dist. Ex. 91 at p. 8).

minutes, the December 2014 prior written notice further reflected that the CSE rejected the BOCES SKATE program because it "mirror[ed]" the student's current program and the "BOCES representative felt they could not meet his needs any better in [the BOCES] SKATE program" (Dist. Exs. 89 at p. 4; 90 at p. 1). Additionally, the district principal testified that the CSE was in agreement that the student should be placed in the BOCES Stellata program because it was "the next class on the continuum" and the program "was directed more specifically to students with behavior concerns" (Tr. p. 63). The district principal further testified that "all of [the BOCES Stellata] staff, including the administration, w[ere] much more highly trained than [the district staff]" (id.).

While the parents would have preferred that the student remain in the district school, the CSE chairperson testified that the district school was not "meeting [the student's] needs educationally or behaviorally" and they were not "impacting change" at the student's current setting (Tr. p. 128). As discussed above, the student exhibited deficits in cognitive, academic, language, pragmatic, social/emotional, behavioral, sensory, and fine and gross motor skills (Dist. Exs. 58 at pp. 1-9; 71; 77 at pp. 1-9; 81; 86; 87; 89; 91 at pp. 1-12; 120). As described in the hearing record, the 12:1+4 special class in the BOCES Stellata program is intended for students with autism and provides behavioral interventions, psychiatric services, a psychologist on staff at all times, a snoezelen room,[17] the support of a social worker, social skills training, instruction utilizing the TEACCH methodology, and the service of staff who have received training in therapeutic crisis intervention (Tr. pp. 144, 188-90; Dist. Ex. 89 at pp. 4-7).[18]

The parents argue that the recommended placement was not appropriate for the student because it did not utilize discrete trial techniques. Generally, the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher's discretion—absent evidence that a specific methodology is necessary for the student to receive educational benefit (Rowley, 458 U.S. at 204; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 575-76 [2d Cir. Oct. 29, 2014]; A.S. v. New York City Dep't of Educ., 573 Fed. App'x 63, 66 [2d Cir. July 29, 2014], aff'd 2011 WL 12882793, at *16 [E.D.N.Y. May 26, 2011] [noting the "broad methodological latitude" conferred by the IDEA]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 86 [2d Cir. July 24, 2013]; R.E., 694 F.3d at 192-94; M.H., 685 F.3d at 257 [the district is imbued with "broad discretion to adopt programs that, in its educational judgment, are most pedagogically effective"]; see M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *12 [S.D.N.Y. Mar. 31, 2014] [finding in favor of a district where the hearing record did not "demonstrate[] that [the student] would not be responsive to a different methodology"]).

Here, the December 2014 IEP acknowledged that the student "learn[ed] best when new skills [we]re taught through a discrete trials based program" but did not specify that this was the only methodology with which the student could receive educational benefit (Dist. Ex. 91 at p. 8). Further, there is no evidence in the hearing record that the student could not benefit from the TEACCH methodology. On the contrary, the behavioral consultant recommended the "TEACCH

[17] The hearing record indicates that the snoezelen room is a room specifically for students with significant sensory needs (Tr. p. 189).

[18] Therapeutic crisis intervention is described in the hearing record as a proactive prevention program use to support students with behavioral difficulties (Tr. p. 189).

style" of "independent work" for the student (Dist. Ex. 57 at p. 3; see Tr. pp. 96, 734-35). In addition, the student's teacher in the district school for the 2013-14 and 2014-15 school years characterized her classroom as using "a structured TEACCH system" and indicated that the behavioral consultant instructed her on the TEACCH methodology, as well as discrete trial techniques (Tr. pp. 322, 341, 738-42). Finally, the hearing record indicates that, while largely using the "TEACCH philosophy," the BOCES Stellata program also used "pieces" of ABA or discrete trial techniques, including "one-on-one instruction where there's a lot of repetition of material" (Tr. pp. 238-39, 716). In light of the above, the hearing record does not support the parents' contention that the 12:1+4 special class in the BOCES Stellata program was not appropriate for the student based on its methodological approach.

Finally, the parents also assert that the 12:1+4 BOCES special class was inappropriate because teaching assistants in the recommended class delivered instruction to the students. There is no merit to the parents' argument in this regard because, even if there is factual support in the hearing record for the allegation (Tr. pp. 237-38), State regulation explicitly permits teaching assistants to provide "direct instructional service" to students (see 8 NYCRR 80-5.6[c][1]).

Therefore, in light of the student's needs, the December 2014 CSE's recommendation of the 12:1+4 BOCES Stellata program was appropriate.

4. Least Restrictive Environment

In addition to challenging the district's implementation of mainstreaming opportunities in the district public school, discussed above, the parents also assert that the December 2014 CSE's recommendation for the 12:1+4 special class in the BOCES Stellata program was not the student's LRE. Again, 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). With respect to the first prong of the Newington analysis, the hearing record does not support the conclusion that the student would have been educated satisfactorily in a general education environment for academic subjects, nor does either party suggest that such a placement would be appropriate. As to the second prong, for all of the reasons set forth above regarding the implementation of the LRE mandates during the 2013-14 and 2014-15 school years, including the district's good faith but ultimately unsuccessful efforts to provide opportunities for the student to interact with nondisabled peers, the hearing record supports a determination that the 12:1+4 special class in the BOCES Stellata program offered the student an education suited to meet the student's particular needs and that the student's needs could not be met in a less restrictive environment.

Further, to the extent that the parents disagreed with the December 2014 CSE recommendation of the BOCES Stellata program because it was not the student's "neighborhood school," this also implicates LRE considerations and, particularly, the language of 34 CFR 300.116(c). This regulation provides that a district must "ensure" that a student attend his or her neighborhood school "[u]nless the IEP . . . requires some other arrangement" (34 CFR 300.116[c]; see 8 NYCRR 200.4[d][4][ii][b]). Numerous courts have held that this provision does not confer an absolute right or impose a "presumption" that a student's IEP will necessarily be implemented

in his or her neighborhood school (see White v. Ascension Parish Sch. Bd., 343 F.3d 373, 380-82 [5th Cir. 2003]; Lebron v. N. Penn Sch. Dist., 769 F. Supp. 2d 788, 801 [E.D. Pa. 2011] [finding that "though educational agencies should consider implementing a child's IEP at his or her neighborhood school when possible, [the] IDEA does not create a right for a child to be educated there"]; Letter to Trigg, 50 IDELR 48 [OSEP 2007]; see also R.L. v. Miami-Dade Cnty. Sch. Bd., 757 F.3d 1173, 1191 n.10 [11th Cir. 2014]; AW v Fairfax Cnty. Sch. Bd., 372 F.3d 674, 682 [4th Cir 2004]; McLaughlin v. Holt Pub. Sch. Bd. of Educ., 320 F.3d 663, 672 [6th Cir. 2003]; Kevin G. v. Cranston Sch. Comm., 130 F.3d 481, 482 [1st Cir. 1997]; Flour Bluff Ind. Sch. Dist. v. Katherine M., 91 F.3d 689, 693-94 [5th Cir 1996]; Urban v. Jefferson Cnty. Sch. Dist. R–1, 89 F.3d 720, 727 [10th Cir. 1996]; Murray v. Montrose Cnty. Sch. Dist. RE-1J, 51 F.3d 921, 929 [10th Cir 1995]; Schuldt v. Mankato Indep. Sch. Dist. No. 77, 937 F.2d 1357, 1361–63 [8th Cir. 1991]; Barnett v. Fairfax Cnty. Sch. Bd., 927 F.2d 146, 151 [4th Cir. 1991]; H.D. v. Cent. Bucks Sch. Dist., 902 F. Supp. 2d 614, 626 [E.D. Pa. 2012]). However, a district remains obligated to consider whether a student's IEP may be implemented at his or her neighborhood school (34 CFR 300.116[c]; 8 NYCRR 200.4[d][4][ii][b]; see Lebron, 769 F. Supp. 2d at 801).

In the instant case, and as discussed above, the December 2014 CSE considered placement within the student's neighborhood school but rejected this placement as it did not possess the necessary resources to address the student's behavioral needs (Dist. Exs. 89 at pp. 4-7; 90 at p. 1). The CSE chairperson further explained that the December 2014 CSE did not recommend the student's neighborhood school because due to the "behavioral incidents" that were happening, the student was not getting "the amount of educational growth we wanted for him" (Tr. p. 131). The CSE chairperson testified that the student's needs at the district school were not being met "educationally or behaviorally" (Tr. p. 128). The district principal testified that the BOCES Stellata program was "more specific[] to students with behavior concerns" (Tr. p. 63). Thus, the December 2014 IEP required the "other arrangement" of the BOCES Stellata program, which justified placement in an "out of district school" other than the student's neighborhood school (R.L., 757 F.3d at 1191 n.10; White, 343 F.3d at 380 [finding that "it was not possible for [the student] to be placed in his neighborhood school because the services he required are provided only at the centralized location, and his IEP thus requires another arrangement"]); Lebron, 769 F. Supp. 2d at 801; see, e.g., Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006] [noting that districts need not place students in the closest public school to the student's home if "the services identified in the child's IEP require a different location"]; Letter to Trigg, 50 IDELR 48).

While the parents' interest in providing opportunities for the student to interact with neighborhood peers is a legitimate one, consideration must also be given to the practical recognition that public school districts often cannot offer every kind of class and service at each neighborhood school within their systems (see White, 343 F.3d at 379 ["It is also undisputed that the parents' request that [the student] attend his neighborhood school was primarily social . . . [but] this concern is beyond the scope of the 'educational benefit' inquiry courts make under the IDEA."]). This is especially true in the instant case, where the purpose of a BOCES program is to provide resources which an individual district may be unable to provide on its own (see Educ. Law § 1950[1]). Accordingly, the parents' argument is without merit.

F. Cumulative Impact

To the extent the district's violations described above constitute procedural violations, a finding that the district denied the student a FAPE is appropriate 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]). Under the circumstances of this case, I find it appropriate to consider the cumulative impact of the identified deficiencies in order to determine whether or not the district offered the student a FAPE (T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170 [2d Cir. 2014]; R.E., 694 F.3d at 191 [noting that "even minor violations may cumulatively result in a denial of a FAPE"]; see also M.L., 2014 WL 1301957, at *10; R.B. v. New York City Dep't of Educ., 15 F. Supp. 3d 421, 434 [S.D.N.Y. 2014]).

While the violations described above, standing alone or when considered individually, might not result in the denial of a FAPE, the aggregate effect of the violations in this case—including the parents' unrebutted testimony that the door handle was moved out of the student's reach in the time out room; the district's failure to revise the December 2013 BIP despite the increasing frequency and intensity of the student's behaviors and the increasing use of the time out room and environmental modifications such as the configuration of the student's workspace; and the CSE's failure to identify in the December 2014 IEP the maximum amount of time that the student would spend in a time out room—requires reversal of the IHO's finding that the district offered the student a FAPE for the 2013-14 and 2014-15 school years (see R.E., 694 F.3d at 191; R.B., 15 F. Supp. 3d at 434). While multiple procedural violations may not result in the denial of a FAPE when the "'deficiencies . . . are more formal than substantive'" (R.B., 15 F. Supp. 3d at 434 [ellipses in original], quoting F.B., 923 F. Supp. 2d at 586), here the violations identified above impeded the student's right to a FAPE. Accordingly, the violations identified above, when considered cumulatively, resulted in the denial of a FAPE for the 2013-14 and 2014-15 school years.

G. Relief

A review of the hearing record supports the parents' assertions that the district denied the student a FAPE for the 2013-14 and 2014-15 school years. As a remedy, the parents seek compensatory services in the form of ABA services using discrete trial techniques to be delivered to the student after school or on weekends.

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015]; Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education relief may be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). Within the Second Circuit, compensatory education 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 WL 9731053, at *12-*13 [S.D.N.Y. March 6, 2008], adopted, 2008 WL 9731174 [S.D.N.Y. July 7, 2008]).[19] 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]).

The purpose of an award of compensatory educational services or additional services is to provide an appropriate remedy for a denial of a FAPE (see E. Lyme Bd. of Educ., 790 F.3d at 456; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994] [holding that "[a]ppropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA"]; Application of the Dep't of Educ., Appeal No. 11-075). Accordingly, an award of additional services should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; S.A. v. New York City Dep't of Educ., 2014 WL 1311761, at *7 [E.D.N.Y. Mar. 30, 2014] [noting that compensatory education "serves to compensate a student who was actually educated under an inadequate IEP and to catch-up the student to where he [or she] should have been absent the denial of a FAPE"] [internal quotations and citation omitted]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]; Puyallup, 31 F.3d at 1497 [finding "[t]here is no obligation to provide a day-for-day compensation for time missed"]).

[19] In addition, in the Second Circuit, compensatory education may be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction under the IDEA if there has been a gross violation of the IDEA resulting in the denial of, or exclusion from, educational services for a substantial period of time (see E. Lyme Bd. of Educ., 790 F.3d at 456 n.15; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2, 113 n.6 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69, 75 [2d Cir. 1990]; M.W. v New York City Dept. of Educ., 2015 WL 5025368, at *3 [S.D.N.Y. Aug. 25, 2015]).

Here, there is a lack of guidance in the parents' pleadings, as well as in the hearing record, as to how the requested ABA instruction is reasonably calculated to provide the educational benefits that likely would have accrued but for the district's violations described above, all of which related to addressing the student's interfering behaviors. In terms of connecting the requested relief to the alleged grounds for the denial of a FAPE, the parents assert that the student "cannot make up for time lost in the time out room in which his educational needs were otherwise ignored but he can be awarded compensatory educational services" (Parent Mem. of Law at p. 18). The parents do not specify the amount of additional services requested.

Notwithstanding the deficiencies in the district's planning and delivery of the behavioral interventions for the student, the student's needs were significant and the district made many reasonable efforts to address those needs, even if not all such efforts were successful or entirely appropriate. The district made these efforts, at times, in a manner that, while in the spirit of cooperation and in accordance with the parents' preference that the student remain in the district school, may not have aligned with the district's ability to provide the student a FAPE. While there is evidence in the hearing record that eventually the student's behaviors interfered with his ability to receive educational benefit (see Dist. Ex. 91 at p. 10), the student made some progress toward achieving his IEP annual goals (see Parent Ex. 12), which must be taken into account in considering an award of compensatory educational services. Further, the student received instruction during the 2013-14 and 2014-15 school years using the discrete trial techniques that the parents request as compensatory educational services (Tr. pp. 345, 739, 741).

Rather than the home-based ABA instruction requested by the parents, relief more closely aligned with the denial of FAPE described above may have taken the form of requiring the district to retain the services of an independent behavioral consultant agreed upon by the parties; however, the district already engaged the services of a behavioral consultant agreed upon by the parents (see Tr. p. 635) and, notwithstanding the deficiencies that arose in part therefrom, it does not appear that the district could have anticipated the same and it would not necessarily be an equitable result to require the district to repeat these efforts absent some evidence in the hearing record regarding a different consultant and the different approaches to address the student's behavioral needs he or she might offer. Another potential form of relief would be to order the district to develop a revised FBA and BIP; however, the evidence in the hearing record reveals that the district has already developed a new FBA and BIP for the student (IHO Ex. 8 at p. 16). More importantly, the evidence in the hearing record shows that a change in the student's placement has occurred, the student is receiving educational benefit in the BOCES Stellata program, and that the program is meeting his needs in an environment more prepared to respond to his behaviors through staff appropriately trained and methods aligned with the student's needs.

Consistent with the December 2014 IEP and pursuant to the February 2015 expedited due process complaint notice filed by the district and the subsequent agreement between the parties, the student attended the BOCES Stellata program for the latter part of the 2014-15 school year beginning on March 16, 2015 (Tr. p. 245; Dist. Ex. 109). As described above, according to the hearing record, the BOCES Stellata program provides behavioral interventions, psychiatric services, a psychologist on staff at all times, a snoezelen room, social worker support, social skills training, and staff who receive training in therapeutic crisis intervention (Tr. pp. 144, 188-90; Dist. Ex. 89 at pp. 4-7). According to the BOCES psychologist, at the time of the impartial hearing, the student was doing well at the Stellata program, actively engaging in a small reading group and a

social skills group, correctly answering questions relating to reading, raising his hand to ask a question, independently going up to the SMART board, and learning to take turns (Tr. p. 717). She indicated that the student continued to engage in aggressive behaviors such as hitting, head butting, and kicking, but that, based on a three level aggression scale, the student had not engaged in "too many Level 3's" and that they were "early on" and "sporadic" (Tr. pp. 727-28). She further indicated that, based on the data collected, the student's "significant high level aggressive behaviors . . . seem[ed] to be lessening" (Tr. p. 729). Further, the BOCES psychologist testified that, since enrolling at Stellata, the student had not engaged in the same urinating and defecating behaviors he exhibited in the time out room toward the end of his enrollment in the district school (Tr. pp. 720-21). According to the district's memorandum of law, the student has continued attending the Stellata program for the 2015-16 school year pursuant to an IEP developed on May 11, 2015 (Dist. Mem. of Law at p. 2; see IHO Ex. 8 at pp. 6-18).

Because a compensatory award should attempt to place a student in the position he or she would have occupied if not for the violations of the IDEA, relief in the form of after school and weekend ABA instruction would be inappropriate at this juncture (Newington, 546 F.3d at 123; S.A., 2014 WL 1311761, at *7; see L.M., 478 F.3d at 316; Reid, 401 F.3d at 518; Puyallup, 31 F.3d at 1497). It is difficult to imagine what further equitable remedy would be fair to impose upon the district but still benefit the student at this time. As is the case here, a request for compensatory education "should be denied when the deficiencies suffered have already been mitigated" (N. Kingston Sch. Comm. v. Justine R., 2014 WL 8108411, at *9 [D.R.I. Jun. 27, 2014], report and recommendation adopted, 2015 WL 1137588 [D.R.I. Mar. 12, 2015]). Accordingly, the parents' request for additional compensatory services is denied.

However, as it appears that the goal of the student's education is and should be to ultimately return to the district public school (see Tr. pp. 206-07), if the CSE recommends that the student attend the district school and also determines that the time out room should be used for the student, the district is hereby ordered to comply with State regulations regarding the use of time out rooms, including by identifying the maximum amount of time for the use of the time out room in the student's IEP and remedying the position of the handle in the time out room.

VII. Conclusion

In summary, the evidence in the hearing record establishes that the district failed to offer the student a FAPE for the 2013-14 and 2014-15 school year but that the student is not entitled to relief requested by the parents in the form of compensatory home-based ABA services using discrete trial techniques.

I have considered the parties' remaining contentions and find them without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated November 12, 2015, is modified by reversing those portions of the decision which found that the district offered the student a FAPE for the 2013-14 and 2014-15 school years; and

IT IS FURTHER ORDERED that, if and when a CSE recommends that the student reenroll in the district public school, prior to the student's enrollment, the district is directed to

comply with State regulations regarding the use of the time out room, including by identifying the maximum amount of time for the use of the time out room in the student's IEP and remedying the position of the handle in the time out room.

Dated: **Albany, New York**
January 19, 2016

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SARAH L. HARRINGTON
STATE REVIEW OFFICER