The University of the State of New York

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

No. 16-028

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

Appearances:
Friedman & Moses, LLP, attorneys for petitioners, Elisa Hyman, Esq., of counsel

Charity Guerra, Acting Special Assistant Corporation Counsel, attorneys for respondent, Cynthia Sheps, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from 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 for her son for the 2013-14 and 2014-15 school years was appropriate and which denied the parent's request for an award of compensatory educational services and independent educational evaluations (IEEs). The appeal must be sustained to the extent indicated.

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

This appeal arises from a decision of an IHO that was issued after remand (see Application of the Dep't of Educ., Appeal No. 15-091). Therefore, the parties' familiarity with the factual and procedural history of the case, including the IHO's decision before remand and the issues presented for review on appeal before remand, is presumed and they will not be repeated in detail (see id.). Briefly, the student has attended a State-approved nonpublic school (NPS), since the 2011-12 school year (kindergarten) and was recommended to receive speech-language therapy and occupational therapy (OT) services (see Parent Ex. C at pp. 2-3; see generally Parent Exs. G at pp.

1, 12-13; H at pp. 1, 8; I at pp. 1, 8; U-V).[1] On April 25, 2013, the CSE convened to conduct the student's annual review and to develop an IEP for the 2013-14 school year (Parent Ex. J at pp. 1, 12). Finding that the student remained eligible for special education and related services as a student with autism, the April 2013 CSE recommended a 12-month school year program in a 6:1+3 special class placement at a State-approved nonpublic school, with five 30-minute sessions per week of individual speech-language therapy (id. at pp. 1, 9). The April 2013 CSE also determined that the student required strategies—including "positive behavioral interventions, supports and other strategies"—to address behaviors that "impede[d] the student's learning or that of others," and included a behavioral intervention plan (BIP) with the April 2013 IEP (Parent Ex. J at p. 2; see Dist. Exs. 3-4). In addition, the April 2013 CSE created annual goals with corresponding short-term objectives and recommended supports for management needs (e.g., highly structured environment, frequent redirection and reinforcement, and small staff to student ratio), special transportation services, and that the student participate in alternate assessments (Parent Ex. J at pp. 2-8, 11-12).

On April 7, 2014, the CSE convened to conduct the student's annual review and to develop an IEP for the 2014-15 school year (see Parent Ex. K at pp. 1, 9). The April 2014 CSE also recommended a 12-month school year program in a 6:1+3 special class placement at a State-approved nonpublic school with five 30-minute sessions per week of individual speech-language therapy (compare id. at p. 1, 6-7; with Parent Ex. J at p. 9).[2] In addition, the April 2014 CSE created annual goals with corresponding short-term objectives, included a BIP, and recommended special transportation services and that the student participate in alternate assessments (Parent Ex. K at pp. 2-6, 8-9; see Parent Exs. FF; JJ).

In November 2014, during the 2014-15 school year, a Board Certified Behavior Analyst (BCBA) observed the student in his home environment (see Parent Ex. D at pp. 1-2, 5; see also Tr. I pp. 224-26).[3] The same BCBA attended a February 10, 2015 CSE meeting, which convened to conduct the student's annual review and to develop an IEP for the 2015-16 school year (see Dist. Ex. 18 at pp. 1, 14; Parent Ex. D at p. 5; L at pp. 1, 8, 11). At the February 2015 CSE meeting, the parent requested that the district provide the student with 10 hours per week of home-based applied behavior analysis (ABA) special education teacher support services (SETSS), and in response, the CSE indicated the need to further evaluate the student (see Parent Exs. C at p. 8; D at pp. 5-6; see also Parent Ex. P at p. 1). In March 2015, the district school psychologist who attended the student's April 2013, April 2014, and February 2015 CSE meetings conducted a classroom observation of the student, and completed a psychoeducational evaluation of the student (see Parent Exs. P, W; see also Dist. Exs. 2, 8, and 18). On April 9 and April 20, 2015, the BCBA

[1] The hearing record contains multiple duplicative exhibits (compare Dist. Exs. 1, 5-7, 10-12, 14, 17, and 20-23, with Parent Exs. J-M, P-Q, V at pp. 8-10, W at pp. 11-12, X at pp. 5-6, CC-DD, FF, and JJ). For purposes of this decision, only parent exhibits were cited in instances where both a parent and district exhibit were identical. The IHO is reminded that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

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

[3] References to the transcript from the original hearing will be cited as "Tr. I" and the remanded hearing as Tr. II."

formally assessed the student (see Parent Ex. D at pp. 6-11). On April 21, 2015, the CSE reconvened to review the student's updated psychoeducational evaluation and classroom observation reports, and, at that time, the CSE declined the parent's request for home-based ABA SETSS (see Parent Exs C at p. 9.; M at pp. 1, 11).[4] In an e-mail, dated April 22, 2015, the parent requested that the district conduct a speech-language therapy evaluation and an OT evaluation of the student (see Parent Ex. S).

A. Due Process Complaint Notice

By due process complaint notice dated April 24, 2015, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2013-14 and 2014-15 school years (Parent Ex. A at pp. 1-2, 5-6). In particular, the parent asserted that the April 2013 IEP and the April 2014 IEP failed to include "1:1 instruction," instruction using ABA, "home-based instruction," "parent training at home," "toilet-training," "feeding therapy," "home[-based] or center-based OT" services, assistive technology, and "peer-reviewed, research-based methods" (id. at pp. 4-6). Next, the parent alleged that the April 2013 CSE and the April 2014 CSE failed to provide the parent with "legally sufficient notice" of CSE meetings and that neither the April 2013 CSE nor the April 2014 CSE was properly composed (id. at pp. 4, 6). The parent further alleged that the April 2013 CSE and the April 2014 CSE impermissibly predetermined the student's "program and placement recommendation[s]" and applied "illegal blanket policies" regarding the "availability" of home-based or center-based related services for students who attended State-approved nonpublic schools (id.). In addition, the parent asserted that the April 2013 CSE and the April 2014 CSE deprived her of the opportunity to participate in the IEP development process (id. at pp. 5-6).

Next, the parent contended that both the April 2013 CSE and the April 2014 CSE failed to rely upon "legally sufficient" evaluations to develop the IEPs, and neither CSE reevaluated the student prior to "terminating his OT" (Parent Ex. A at pp. 4-6). With regard to the present levels of performance, the parent asserted that both the April 2013 IEP and the April 2014 IEP included "vague" descriptions, and thus, failed to adequately describe the student's "strengths, weaknesses, and the ways in which his disabilities impact[ed] his ability to make progress in cognitive, developmental, academic and other functional areas" (id. at pp. 5-6). The parent also asserted that the annual goals in the April 2013 IEP and the April 2014 IEP were "vague, not measurable, and not individually tailored" to meet the student's needs (id.). More specifically, the parent alleged that the annual goals in both IEPs failed to "sufficiently address" all of the student's needs, including but not limited to toilet training, activities of daily living (ADL) skills, and behavior (id.). Additionally, the parent contended that the April 2013 IEP and the April 2014 IEP failed to include sufficient related services recommendations to meet the student's needs (id.). Finally, with regard to both school years, the parent alleged that the "evaluation, IEP development, and placement processes" did not comply with standards for providing students with autism a FAPE pursuant to State regulation (id.).

Pertaining solely to the 2013-14 school year, the parent asserted that the CSE did not provide her with a "draft IEP before or during the meeting," and she only received a copy of the

[4] The BCBA did not attend the April 21, 2015 CSE meeting, and, based upon the evidence in the hearing record, the parent did not advise the April 2015 CSE about the BCBA's April 2015 assessment of the student during April 2015 (see Dist. Ex. 15; Parent Ex. D at p. 6; see also Tr. I pp. 215-18, 236-38).

April 2013 IEP through the mail "after the meeting" (Parent Ex. A at p. 4). With respect to the 2014-15 school year, the parent also alleged that the CSE failed to provide timely notice of the April 2014 CSE meeting (id. at p. 5). More generally, the parent asserted violations of Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794 [1998]) (section 504), that the district applied "blanket policies" regarding the student's "IEP and placement," the district "substantially changed" the student's placement without reevaluation, the district committed "systemic violations" of the IDEA and section 504, and the district deprived the student of access to "[S]tate-created educational rights and opportunities based upon his disability" (id. at pp. 6-7).

As relief, the parent indicated that while the student had not been "appropriately and thoroughly evaluated" and had not "received appropriate special education services," compensatory educational services or additional services to remedy the alleged violations should include, "at a minimum," the following: a bank of "1:1 after-school ABA services," a bank of "private 1:1 OT" services at an "enhanced rate" and by a provider of the parent's choosing, and "[a]ssistive [t]echnology" (Parent Ex. A at p. 7). In addition, the parent requested an "interim order" directing the district to fund "comprehensive independent evaluations" of the student (i.e., speech-language, OT, and an evaluation by a "BCBA" or "PhD") because the parent was "entitled to them" in light of the "deficiencies" in the district's evaluations and pursuant to the IHO's authority to order the same to "inform the hearing process" (id. at pp. 7-8). Next, the parent requested a final order directing the district to provide the following: a "minimum" of 35 hours per week of "1:1 ABA services," home-based speech-language therapy consistent with the results of the "independent" speech-language evaluation, home-based "1:1 OT" services consistent with the results of the "independent" OT evaluation, assistive technology, a 12-month school year program, special education transportation with "limited travel time/short bus run," and a "legally valid IEP that incorporate[d] the services above" (id. at p. 7). The parent also requested "[c]ompensatory education, additional and/or make-up ABA, and related services" for the district's failure to implement the student's pendency (stay-put) services and for the failure to offer the student a FAPE for the 2013-14 and 2014-15 school years (id.).

The parent submitted an amended due process complaint notice, which, in addition to reasserting, verbatim, all of the allegations as set forth in the April 2015 due process complaint notice, added the following new information and allegations: the BCBA who observed the student recommended 35 hours per week of "after-school ABA" for the student, as well as "parent training;" the BCBA recommended a "formal" functional behavioral assessment (FBA) and a "formal" BIP to be implemented across settings including—including "school, home and community"—as part of a home-based ABA program; the student's behavior "regressed" during the 2014-15 school year, and he became "more aggressive at home and at school;" the parent requested home-based ABA services at a CSE meeting; the CSE denied the parent's request for home-based ABA services; the district failed to evaluate the student since 2011; and the district's updated psychoeducational evaluation and classroom observation of the student were "cursory, not in-depth, and failed to provide an accurate profile" of the student (compare Parent Ex. A at pp. 3-6, with Parent Ex. B at pp. 3-7). For relief, the parent reiterated her requests as set forth in the April 2015 due process complaint notice, and she added a request for the completion of an FBA and a BIP by a "PhD or a BCBA" (compare Parent Ex. A at pp. 7-8, with Parent Ex. B at pp. 8-9).

B. Prior Proceedings and Facts Post-Dating the Due Process Complaint Notice

On May 6, 2015, the parties proceeded to an impartial hearing, which concluded on June 29, 2015, after two days of prehearing conferences and one day of testimony (Tr. I pp. 1-353). In

a decision, dated July 29, 2015, the IHO found both the April 2014 IEP and the February 2015 IEPs "invalid" because the student's then-current special education teacher at the NPS—who attended the April 2014 CSE meeting and the February 2015 CSE meeting—did not, according to the IHO, "participat[e]" at these particular CSE meetings as contemplated by State regulation (IHO Decision I at pp. 6-8).[5] The IHO ordered the "neighboring school district" to convene a CSE meeting prior to August 30, 2015 to create the student's IEP for the 2015-16 school year (id. at p. 8). The IHO also ordered the district to provide the student with two hours per day of "after school . . . ABA services," as well as a "total of 12 hours" of parent counseling and training to the parent prior to December 2015 "in addition" to the parent counseling and training services the parent "should receive" for the 2015-16 school year (id. at p. 9). The IHO further ordered the district to complete an OT and an assistive technology evaluation of the student no later than August 15, 2015 (id. at p. 10). The IHO denied all other requests for relief.

The parent appealed and the district cross-appealed the IHO's decision. On December 8, 2015, an SRO issued a decision, finding that the IHO improperly made sua sponte determinations regarding the participation of the special education teacher in the development of the April 2014 and February 2015 IEPs as the sole basis to conclude that both IEPs were "invalid" (Application of the Dep't of Educ., Appeal No. 15-091). Further, the SRO found that the IHO failed to consider numerous issues raised in the parent's due process complaint notices, including all of the parent's claims relating to the 2013-14 school year (id.). The SRO remanded the matter for a determination of the issues raised in the April 2015 due process complaint notice and the May 2015 amended due process complaint notice that the IHO did not address (id. at p. 13).

The SRO strongly suggested that, upon remand, the parties submit any newly acquired evaluative information into the hearing record, such as the OT and assistive technology evaluations that the IHO ordered the district to complete by August 15, 2015 (Application of the Dep't of Educ., Appeal No. 15-091). According to the evidence in the hearing record, the district conducted an OT evaluation of the student on March 12, 2015 (prior to the parent's due process complaint notice) and an assistive technology evaluation on August 12, 2015 (Dist. Ex. 27; Parent Ex. CCC).

C. Impartial Hearing Officer Decision II

On March 15, 2016, the parties returned to the impartial hearing to address the remanded issues, at which time, additional documentary was entered into evidence (Tr. II at pp. 1-171; Dist. Ex. 27; Parent Exs. BBB; CCC; EEE; IHO Exs. I-III). By decision, dated April 5, 2016, the IHO found that the district offered the student a FAPE for the 2013-14 and 2014-15 school years (IHO Decision II at p. 28). Specifically, the IHO found that the parent received notice of both the April 2013 and April 2014 CSE meetings and that both CSEs were properly composed (id. at p. 16). The IHO also found that the April 2013 and April 2014 CSEs did not predetermine the student's placement and the IEPs represented the CSEs recommendations (id. at p. 17). The IHO found that there was no evidence to support the claim that the parent did not have input in the development of the student's IEPs (id. at pp. 20, 21). The IHO found that the evaluative information for both

[5] References to the IHO's finding of fact and decision from the original hearing, attached to the petition in this appeal as Exhibit A, will be cited as "IHO Decision I" and the IHO's findings of fact and decision from the remanded hearing will be cited as "IHO Decision II"."

school years was sufficient and the required reevaluations were conducted "within the statutory period" (id. at pp. 27-28).

Turning to the April 2013 and April 2014 IEPs, the IHO noted that, because the NPS drafted the IEPs and that the parent wanted the student to attend the NPS, her claims regarding the adequacy of the IEPs were "contradictory and disingenuous" (IHO Decision II at p. 28). The IHO found that the IEPs reported "all of the student's strengths [and] weaknesses and [the] parent's concerns" (id. at pp. 20-21). Next, the IHO found that the annual goals and BIPs addressed the student's needs (id.). The IHO found no support in the hearing record that the student required a recommendation for assistive technology in his April 2013 IEP in order to make progress and found no indication that any CSE member requested an assistive technology assessment during the April 2014 CSE meeting (id. at pp. 25-26). The IHO found that the parent's frustration with the student's inability to progress may be a result of the student's "limitations," and that "he should not be expected to achieve standards beyond his scope" (id. at pp. 18, 23). As to the issue of student's educational program for both school years, the IHO found that the student did not need 1:1 instruction and that there was "no basis" for a determination that the student was "not receiving ABA instruction in school," citing evidence that the NPS provided ABA instruction and noting that the parent and the student's teacher agreed that the NPS was appropriate for the student (id. at pp. 18, 19). With respect to home-based services, the IHO found that the evidence in support of such services post-dated the disputed CSE meetings and, therefore, could not be considered in evaluating the CSEs' recommendations (id. at p. 22). The IHO noted the discrepancy in reports of the student's needs in the home versus in the school environment and concluded that, while the parent may require "assistance in the care of the student in the home," the student did not require home-based services in order to make educational progress (id. at pp. 22-23). In this regard, the IHO observed that the "parent would greatly benefit from parent training" (id. at p. 23). Further, the IHO found that the CSE was not required to set forth "peer-reviewed, research based methods" on the IEP (id. at p. 29). Next, the IHO found "no basis" for a recommendation of feeding therapy for the student and that the student received "the best possible bathroom training . . . within the scope of his abilities" at the NPS and continued to make progress in his ADL skills (id. at pp. 18, 19). With respect to OT services, the IHO found that the parent knew that the NPS did not provide OT services, but, instead, addressed the student's OT needs "programmatically," and that the parent never requested "additional" OT (id. at pp. 19, 28). The IHO noted that the district completed the previously ordered OT evaluation, that recommended two 30-minutes sessions weekly in a small group (2:1), which the student subsequently received (id. at pp. 20, 28). The IHO found that the NPS offered parent training during the 2013-14 school, which did parent did not attend, but did not offer it during the 2014-15 school year (id. at p. 24). The IHO noted that, in her July 2015 decision, she ordered the district to provide 12 hours of parent counseling and training in addition to those sessions to which the parent would be otherwise entitled to receive during the 2015-16 school year (id. at p. 25).

The IHO also found "no testimony or evidence" to support the parent's claim that the district failed to implement the student's pendency placement (IHO Decision II at p. 29). As to the parent's requests for IEEs, the IHO found no evidence that the parent had disagreed with any district evaluation—a prerequisite for an IEE (id.). Finally, the IHO denied the parent's claims under section 504 and found that the claims under 42 USC § 1983 were outside of her jurisdiction (id. at pp. 27-28). Based on all of the foregoing, the IHO denied the parent's requests for relief in the form of compensatory additional services and IEEs (id. at p. 29).

IV. Appeal for State-Level Review

The parent appeals both of the IHO's decision and initially asserts that one or both of the IHO's decisions improperly shifted the burden of proof, were "poorly reasoned, incorrect as a matter of law, not based on the [hearing] record, [and] internally contrary and illogical" (Pet. ¶ 7).[6] In addition, the parent contends that the IHO improperly excluded evidence that was "relevant, probative and not duplicative" (id.).

The parent appeals the IHO's determination that the CSEs were properly composed, asserting that the IHO's finding in her first decision supported a CSE composition claim because the special education teacher did not have the knowledge or independence to be a valid member of the CSE due to her fear of retaliation. Next, the parent asserts that the IHO erred in finding that she had meaningful input into the development of the IEPs. The parent further argues that the district's position that it never placed ABA methodology on an IEP was evidence of predetermination and that the CSEs made additional choices about the student's educational program based on policies rather than the student's needs, such as the lack of a recommendation for OT and the CSEs' stated refusal to discuss annual goals with the NPS. The parent appeals the IHO's failure to find that the district denied the student a FAPE by failing to evaluate him. The parent argues that the district failed to establish that its reevaluations of the student met any substantive or procedural requirements.[7] The parent also alleges that the district denied the student a FAPE and violated his rights under Section 504 by terminating his OT services without an evaluation. The parent further claims that the district's reevaluation of the student was incomplete without assessments of the student's OT, speech-language, or assistive technology needs.

Turning to the April 2013 and April 2014 IEPs, the parent asserts that the IHO erred in finding that the parent's desire that the student continue to attend the NPS made her claims against the IEPs that recommended the NPS contradictory or disingenuous. The parent also appeals the IHO's ruling that the annual goals set forth in the April 2013 and April 2014 IEPs were sufficient, measurable, or aligned to the student's needs, and argues that the district did not discuss or independently analyze the NPS's proposed goals. Further, the parent claims that the IEPs did not contain appropriate goals to address the student's delays and behaviors or address his ADL skills or post-secondary transition needs. The parent appeals that IHO's failure to rule that the inappropriate FBA/BIPs denied the student a FAPE, arguing that the student exhibited severe behaviors and the IEPs lacked positive supports. The parent appeals the IHO's determination that the CSEs' failure to include assistive technology on the April 2013 or April 2014 IEPs did not deny the student a FAPE. The parent contends that the IHO made an improper sua sponte finding that the student's lack of progress was exclusively due to his cognitive functioning that, in any event was not supported by the evidence in the hearing record. The parent appeals from the IHO's finding that there was no evidence of the student's need for 1:1 instruction, noting that the only functional

[6] In the decision after remand, the IHO did frame the inquiry as "whether [the] parent has met her burden of persuasion" that the IEPs in dispute were not reasonably calculated to enable the student to receive educational benefit (IHO Decision II at p. 23). The IHO is reminded that, except in circumstances not applicable to the present case, New York State law places the burden of proof on the school district at an impartial hearing (Educ. Law § 4404[1][c]).

[7] The parent also asserts that the March 2015 psychoeducational evaluation and classroom observation of the student were insufficient. Further, the parent sets forth factual allegations regarding the circumstances of the district's completion of and transparency regarding a May 2015 OT evaluation.

skills the student exhibited occurred when he received 1:1 instruction. Further, the parent contends that the district violated the IDEA in failing to meaningfully consider her requests for ABA services and after-school instruction or include either in the student's IEPs. The parent appeals that the IHO's refusal to give credit to the recommendations of the BCBA. The parent further argues that a peer reviewed research based method should have been placed on the IEPs. Turning to the related services recommended in the April 2013 and April 2014 IEPs, the parent asserts that the IHO erred by failing to find that the CSEs' termination of the student's OT services relative to years prior denied the student a FAPE. Further, the parent argues that the IHO's finding that the NPS offered OT services programmatically was not supported by the evidence in the hearing record. The parent also contends that the IHO erred in finding that the recommended speech-language therapy was appropriate and that the district's failure to offer parent training despite a legal obligation to do so did not contribute to a denial of a FAPE.

The parent also asserts that the district failed to implement OT pursuant to pendency until March 3, 2016. Moreover, the parent asserts that the IHO erred in refusing to determine the student's stay-put placement or award compensatory services for the district's failure to implement pendency. As to IEEs, the parent claims that, contrary to the IHO's determination, she disagreed with the district's assessments of the student completed as part of the reevaluation, the district failed to defend those assessments, and the district failed to respond to her requests for evaluations. Finally, the parent appeals the IHO's denial of relief in the form of compensatory 1:1 ABA home-based services, OT, assistive technology, and parent counseling and training.[8]

The district answers the parent's petition, admitting and denying the allegations, and arguing that the IHO properly determined that the district offered a FAPE to the student for the 2013-14 and 2014-15 school years. The district objects to the additional evidence submitted with the parent's petition. The district also asserts that the district is "currently processing payment" for the student's pendency program (Answer ¶ 45) and that, therefore, the parent's claim for compensatory services to remedy the district's alleged failure to implement pendency is moot.

In a reply dated May 25, 2016, the parent replies to the district's answer, seeks findings regarding the student's pendency placement, and argues that the parent's claim for compensatory education is not moot even considering the services the district has voluntarily provided to the student.

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

[8] The parent also appeals the IHO's determination or lack thereof regarding the parent's claim under section 504. State law does not make provision for review of section 504 claims through the appeal process authorized by the IDEA and the Education Law (see Educ. Law § 4404[2]; 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"]). Therefore, I shall not review the IHO's determination under section 504.

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]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at

192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion[9]

A. Preliminary Matters—Additional Evidence

The parent proposes additional exhibits for consideration on appeal (Pet. Exs. A-N).[10] Petition exhibits A through E have been considered: (a) as automatically part of the hearing record

[9] While, for purposes of a tuition reimbursement claim, each school year must be treated separately (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 67 [2d Cir. 2000] [examining the prongs of the Burlington/Carter test separately for each school year at issue]; Omidian v. Bd. of Educ., 2009 WL 904077, at *21-*26 [N.D.N.Y. Mar. 31 2009] [analyzing each year of a multi-year tuition reimbursement claim separately]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008]), under the particular circumstances of this case (including the order in which the IHO and the parties discuss the claims at issue), this decision shall address the parent's claims with each disputed school year examined under each topic.

[10] Although, many of these exhibits were offered at the impartial hearing and marked for identification, the parent has submitted the exhibits to the Office of State Review with different exhibit designations.

pursuant to State regulation (Pet. Exs. A-C; see 8 NYCRR 200.5[j][5][vi][b]);[11] (b) as a document actually entered into evidence at the impartial hearing (Pet. Ex. D; see Tr. II p. 57); and (c) as a State Education Department guidance document published and publicly available (Pet. Ex. E). Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (8 NYCRR 279.10[b]; see, e.g., Application of a Student with a Disability, Appeal No. 15-033; see also L.K. v. Northeast Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013]). The remainder of the proffered exhibits were available at the impartial hearing and are not necessary in order to render a decision (see Pet. Exs. F-N). Further, the IHO explicitly excluded exhibits F through L them from evidence during proceedings both before and after remand (see Tr. I pp. 315-32; Tr. II pp. 65-102; Pet. Exs. F-L).[12] State regulation provides that the IHO "shall exclude any evidence that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]). Review of the transcript does not reveal that the IHO's evidentiary rulings constituted an abuse of her discretion. Furthermore, these exhibits are not necessary in order to render a decision in this matter since the evidence in the hearing record supports the parent's claims without the additional evidence (including her claim of predetermination) and, further, the documents do not directly concern the student (Pet. Exs. F-L).[13]

B. Scope of Review

Before addressing the merits of this appeal, it is necessary to determine which claims may be properly considered. 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

[11] Under State regulation, "all briefs, arguments or written requests for an order filed by the parties for consideration by the impartial hearing officer" are part of the record of an impartial hearing (8 NYCRR 200.5[j][5][vi][b]).

[12] Additionally, during the impartial hearing after remand, the parent withdrew the document now attached to the petition as exhibit M (Tr. II p. 106).

[13] Upon offering the exhibits into evidence during the impartial hearing after remand, the parent's attorney explained that the exhibits supported the parent's claim under section 1983 and conceded that there may be a question of the IHO's jurisdiction to resolve such a claim but stated that the parent needed to exhaust the claim (Tr. II pp. 67-70; see Parent Ex. A at p. 2). The parent's attorney also indicated that certain "systemic issues" were evidenced by the proposed exhibits (Tr. II p. 81). An impartial hearing under the IDEA is limited to issues "relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child" (34 CFR 300.507[a][1]; see 20 U.S.C. § 1415[b][6]). Generally, "systemic violations [are] to be addressed by the federal courts," as opposed to "technical questions of how to define and treat individual students' learning disabilities, which are best addressed by administrators" (Levine v. Greece Cent. School Dist., 2009 WL 261470, at *9 [W.D.N.Y. 2009], aff'd, 353 Fed. App'x 461, 2009 WL 3765813 [2d Cir. Nov. 12, 2009]). Likewise, as compensatory damages are not available in the administrative forum under the IDEA, neither the IHO nor I have jurisdiction to award any remedy for a claim under section 1983 (see Taylor v. Vt. Dep't. of Educ., 313 F.3d 768, 786 n.14 [2d Cir. 2002]; Polera v. Board of Educ. of Newburgh Enlarged City School Dist., 288 F.3d 478, 483 [2d Cir. 2002]; see R.B. v. Bd. of Educ., 99 F. Supp. 2d 411, 418 [S.D.N.Y. 2000]). Finally, the parent's attorney stated that the documents supported a claim of predetermination (Tr. II at pp. 70-71) but, as noted herein, the parent has successfully established that claim without the additional evidence.

Dep't of Educ., 634 Fed. App'x 845, 849, 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]). However, 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]).

Here, the parent's amended due process complaint notice sets forth facts relating to the February and April 2015 CSEs and the resultant IEPs (Parent Ex. A at pp. 1-2, 5-6). However, the parent only alleges a denial of a FAPE for the 2013-14 and 2014-15 school years (id.). Review of the February and April 2015 IEPs reveals that the CSEs were conducted as annual reviews to develop the student's program for the 2015-16 school year (Parent Exs. L at p. 8; M at pp. 1, 8). Further, during the impartial hearing, counsel for the parent expressly limited the parent's challenge to the 2013-14 and 2014-15 school years, noting specifically that "there are IEPs in evidence that reference the next school year, and it wouldn't be to challenge this school year but to go to the parent's request for remedy" (Tr. I pp. 5-6). Therefore, to the extent the parent sought to challenge the adequacy of these CSE meetings or the resultant IEPs, they were outside the scope of the impartial hearing and will not be further addressed. To the extent that parent cites the events that transpired as evidence to support her claims relating to the April 2013 and April 2014 CSE meetings, such evidence would constitute retrospective evidence that cannot be used to assess the CSEs' recommendations (see C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [finding that "a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events . . . that seek to alter the information available to the CSE"]).

C. CSE Process

1. CSE Composition

The parent alleges that the CSEs were not properly composed because the individuals present at the meeting did not possess the required knowledge, training, or independence to properly formulate a program due to the special education teacher's fear of retaliation and the fact that CSE members were constrained by policy.

The IDEA requires a CSE to include the following members: the parents; one regular education teacher of the student (if the student was, or may be, participating in the regular education environment); one special education teacher of the student or, where appropriate, not less than one special education provider of the student; a district representative; an individual capable of interpreting instructional implications of evaluation results; at the discretion of the parent or district, other persons having knowledge or special expertise regarding the student; and if appropriate, the student (see 20 U.S.C. § 1414[d][1][B]; see 34 CFR 300.321[a]; 8 NYCRR 200.3[a][1]). Here, the parent does not dispute that the required members were in attendance at the April 2013 and April 2014 CSE meetings or that those attending held the appropriate certifications or licenses. Nor does the parent detail any arguments regarding the CSE members'

knowledge or training.[14] With respect to the parent's allegations that a member of the CSE remained silent out of fear of retaliation, the SRO, in Application of a Student with a Disability, Appeal. No. 15-091, rejected this claim as outside the scope of the parent's amended due process complaint notice, and the parent may not revive it by reframing the allegation as one relating to CSE composition (see Pape v. Bd. of Educ. of Wappingers Cent. Sch. Dist., 2013 WL 3929630, at *8 [S.D.N.Y. July 30, 2013] ["The law of the case doctrine '. . . holds that when a court has ruled on an issue, that decision should generally be adhered to by that court in subsequent stages in the same case, unless cogent and compelling reasons militate otherwise.'"], quoting United States v Quintieri, 306 F.3dF3d 1217, 1226 [2d Cir. 2002]). The parent's allegations with respect to the members' independence as a consequence of particular State or district policies is more appropriately addressed in the context of the parent's claims of parent participation and predetermination and will be discussed below.

To the extent that any claim relating to the composition of the April 2013 or April 2014 CSEs remains, a review of the hearing record reveals that both CSEs included the statutorily required members and members knowledgeable about the student's particular needs. The April 2013 CSE team consisted of a district special education teacher (who also served as the district representative), a district school psychologist, and, by telephone, the student's then-current special education teacher, the student's then-current speech-language therapist,[15] a clinical coordinator for the NPS, and the parent (Tr. I p. 262; Dist. Exs. 24 at pp. 2-3; 25 at pp. 2-3; Parent Exs. C at p. 3; J at p. 13).[16] The hearing record indicates that the individuals at the April 2013 CSE possessed knowledge of the student's strengths, weakness, and needs, as the student's special education teacher who prepared report that CSE used to develop the April 2013 IEP, and the student's speech-language pathologist, who provided services to the student, attended the meeting and provided verbal input (Dist. Exs. 5; 24 at p. 3; 25 at p. 3; Parent Ex. J at pp. 1-2).

The April 2014 CSE also consisted of a district special education teacher (who served as the district representative), a district school psychologist, the student's then-current special education teacher, the student's then-current speech-language provider, and, by telephone, the parent (Dist. Exs. 8; 24 at pp. 5-6; 25 at pp. 5-6).[17] The student's teacher and speech-language pathologist prepared written reports for the CSE and provided verbal input (Tr. I pp. 102, 107;

[14] In her post-hearing brief to the IHO before the remand, the parent argued that the CSE was not properly constituted because the district representative "was insufficiently trained and unsure of her statutory duties" (Parent Post-Hearing Brief at p. 13). The IDEA and federal and State regulations require that a CSE include "a representative of the school district who is qualified to provide or supervise special education and who is knowledgeable about the general education curriculum and the availability of resources of the school district" (8 NYCRR 200.3[a][1][v]; see 20 U.S.C. § 1414[d][1][B][iv]; 34 CFR 300.321[a][4]). While it appears that the parent has abandoned this particular argument, in any event, the evidence in the hearing record shows that the district special education teacher, who served as the district representative, was qualified to fulfill the role required by State regulations (see Dist. Ex. 25 at pp. 1-2)

[15] According to the hearing record, the student's current speech-language therapist did not conduct the speech-language evaluation (compare Parent Ex. J at p. 13, with Parent Ex. CC at p. 3).

[16] While the attendance page for the April 2013 CSE meeting has "NA" next to the parent's name (Parent Ex. J at p. 13), the parent testified that she attended this meeting (Tr. I p. 262)

[17] The parent indicated that, while she did not know that the meeting was taking place until the special education teacher called her and, therefore, did not attend in person, she did ultimately participate in a portion of the April 2014 meeting by telephone (Tr. I pp. 261, 263; Parent Ex. C at p. 3).

Dist. Exs. 9 at pp. 1-2; 10 at pp. 1-2; 24 at p. 6; 25 at p. 6; Parent Ex. K at pp. 1-2). Accordingly, the hearing record indicates that the April 2014 CSE was comprised of all of the mandated members, including those who had particular knowledge of the student's needs. Thus, a review of the evidence in the hearing record shows that both the April 2013 and April 2014 CSEs were properly composed.

2. Parent Participation/Predetermination

The parent alleges that she was deprived an opportunity to participate in the development of the student's April 2013 and April 2014 IEPs because she was not provided notice of the April 2014 meeting and the CSEs' refused to discuss the student's annual goals with the NPS. The parent further asserts that the CSE advised her that the student would lose his place at the NPS if she requested OT services, as the State Education Department would not allow a student to remain at the NPS if it could not provide all of a student's required related services. The parent further contends that the district predetermined the student's educational program, as demonstrated by the testimony of district employees that they would never specify ABA methodology on an IEP (Dist. Ex. 24 at p. 8; 25 at p. 8).

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see T.F. v. New York City Dep't of Educ., 2015 WL 5610769, at *5 [S.D.N.Y. Sept. 23, 2015]; A.P. v. New York City Dep't of Educ., 2015 WL 4597545, at *8, *10 [S.D.N.Y. July 30, 2015]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *17 [E.D.N.Y. Aug. 19, 2013] [stating that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["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).

With respect to the parent's claims that she was not given notice of the April 2014 CSE meeting, the parent set forth in her affidavit that she only learned of the CSE meeting on the actual day of the meeting when she received a call from the student's teacher and was asked to participate by phone (Parent Ex. C at p. 3).[18] State regulation provides that, whenever a CSE seeks to convene a meeting concerning the development of a student's IEP or the provision of FAPE, it must provide the parent with written notification "at least five days prior to the meeting" (8 NYCRR 200.5[c]).

[18] The parent's affidavit actually sets forth these facts with respect to the April 2013 CSE meeting but it was clarified during the impartial hearing that this was a mistake and the alleged lack of notice related to the April 2014 CSE meeting (Tr. I. pp. 262-63).

The district special education teacher set forth in her affidavit that notice of the CSE meeting was sent both in writing, and orally in a phone call to the parent (Dist. Ex. 25 at p. 9). The parent stated that she had moved and despite giving the district "notice of her new address," the notice of the meeting was apparently sent to her old address (Parent Ex. C at p. 3). Even if the parent did not learn of the CSE meeting until the actual meeting date, the parent was able to, and did, participate by telephone in the April 2014 CSE meeting and, therefore, even assuming improper notice of the CSE meeting occurred, it did not rise to the level of a denying the parent participation in the IEP development process in this instance (see Tr. I p. 263).

As to the CSEs' alleged refusal to discuss the annual goals with the NPS, this also does not establish a violation related to parent participation. According to the hearing record, the annual goals included in the student's IEPs were developed by the NPS staff on a draft IEP (Tr. I p. 48; Dist. Exs. 24 at pp. 2, 3; 25 at pp. 2, 3). The IDEA does not require that goals be drafted in final form during the CSE meeting (see E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *8 [S.D.N.Y. Sept. 29, 2012]; S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *10-*11 [S.D.N.Y. Nov. 9, 2011]; J.G. v. Briarcliff Manor Union Free Sch. Dist., 682 F. Supp. 2d 387, 394 [S.D.N.Y. 2010]; E.G., 606 F. 2d at 388-89). Further, districts are permitted to reply upon draft IEPs developed prior to a CSE meeting "'[s]o long as they do not deprive parents of the opportunity to meaningfully participate in the IEP development process'" (Dirocco v. Bd. of Educ., 2013 WL 25959, at *18 [S.D.N.Y. Jan. 2, 2013], quoting M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 506 [S.D.N.Y. 2008]). Absent any evidence of a specific concern voiced and ignored about the annual goals developed by the NPS and adopted by the CSEs, the CSEs' reliance on goals developed by the student's actual teacher(s) and/or provider(s) from the school he attended did not deprive the parent an opportunity to participate in the development of the IEPs in this instance.

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

With respect to the 2013-14 and 2014-15 school years, the parent stated in her affidavit that the district members of the April 2013 and April 2014 CSEs advised her at the meetings that, if she wanted the student to remain at the NPS, the CSEs would not recommend OT as a related service on the student's IEPs because the NPS did not provide that service (Parent Ex. C pp. 3-4). Further, the parent stated that, during the April 2013 CSE meeting, the CSE only discussed that the NPS did not provide OT and did not discuss whether the student required OT (id. at p. 3). According to the parent, during the April 2014 CSE meeting, although she believed the student

needed the service due to sensory issues, she did not ask the CSE to recommend OT on the IEP, because she feared that, if she did, the CSE would recommend a different school program (id. at p. 4). The district special education teacher testified that the April 2013 CSE discussed whether OT as a related service was required to meet the student's needs and that there was no indication the student required OT services beyond the OT provided by the NPS programmatically (Tr. I pp. 84-85; Dist. Ex. 24 at pp. 4-5).

The State guidance over which this controversy arose directs State-approved nonpublic schools to arrange to provide related services or to accept only those students for whom they can provide the special education program and services recommended in students' IEPs ("Provision of Related Services to Students with Disabilities Placed in Approved Private Schools in New York City," Office Special Educ., Special Educ. Field Advisory, [Sept. 2012], available at http://www.p12.nysed.gov/specialed/dueprocess/NYC-IHO-RSA-912.pdf). The guidance also directs the district to ensure that it refers students to schools that are approved to meet the needs of the student, without having to receive related services beyond the school day through related services authorizations (RSAs) (id.).

Consistent with the parent's testimony, the student's IEPs that pre-dated this State guidance included recommendations for OT (see Parent Exs. C at pp. 2-3; G at pp. 1, 12-13; H at pp. 1, 8; I at pp. 1, 8) and, as discussed below, the hearing record does not include any evaluative information that would support the April 2013 and April 2014 CSE's subsequent determinations not to recommend OT for the student (Dist. Ex. 9; Parent Exs. V at pp. 8-10; W at pp. 11-12; CC). It is concerning that any member of a CSE would advise a parent to forego a potentially required service for a student with a disability in order to maintain such student's placement at a specific school and avoid a directive from the State Education Department. While the district may have acceded to the parent's preference that the student continue at the NPS (Tr. I p. 275; Parent Ex. C. at p. 4), this would not relieve the district of its obligation to ensure that the student's entire special education program and related services aligned with the student's needs. Therefore, the hearing record supports a finding that the district predetermined the OT services for both the 2013-14 and 2014-15 school years. This is a procedural violation and the extent to which it contributed to a denial of a FAPE in this instance is addressed below (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

Finally, with respect to the parent's allegation that the district refused to recommend ABA methodology on the IEPs, the district special education teacher explained that placing a certain methodology on the IEP would limit the providers who implemented the IEP to one particular methodology (Dist. Ex. 25 at p. 8). Even if the statements of the district special education teacher established or contributed to a finding of predetermination, it would not contribute to a finding of a denial of a FAPE in this instance because, as discussed in further detail below, the CSEs recommended an "ABA school" for the student for both school years (id.).

3. Sufficiency of Evaluative Information and Present Levels of Performance

The parent next argues that the district did not possess sufficient evaluative material such that it could not make appropriate recommendations for the student. The parent further argues that the IHO erred in finding that the April 2013 and April 2014 IEPs accurately described the student's needs.

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]).

The hearing record reflects the April 2013 CSE considered a March 2013 educational progress report and an April 2013 speech-language report prepared by the student's the NPS classroom teacher and a NPS speech-language therapist, respectively (Tr. I. p. 138; Parent Exs. V at pp. 8-10; CC; Dist. Exs. 24 at p. 3; 25 at pp. 2-3). The NPS also provided the CSE with a draft version of the 2013-14 IEP, in addition to an FBA and BIP dated April 23, 2013, both of which the NPS created to address the student's problematic behaviors (Tr. I. pp. 22, 24, 69-72; Dist. Exs. 3; 4; 24 at pp. 2-3; 25 at pp. 2-3).[19] According to the district special education teacher, she and the school psychologist had also "referenced" the student's IEP from the 2012-13 school year in preparation for the April 2013 CSE meeting (Tr. p. 19; Dist. Ex. 25 at p. 2; Parent Ex. H).

At the time the March 2013 educational progress report was prepared, the student was purportedly making "inconsistent to gradual progress" academically (Parent Ex. V at pp. 8, 10).[20] The educational progress report outlines the focus of the student's instruction and his progress as related to "non-verbal imitations," following single-concept commands, maintaining eye contact, receptively identifying body parts and colors, and block building (Parent Exs. J at p. 1; V at pp. 8-9). Under the heading of social studies, the student's introduction to a group about calendars and associated concepts such as dates and months were incorporated into to the April 2013 IEP (Parent Exs. J at p. 1; V at p. 10). In addition, the report indicated that when the student was working on "independent" tasks, such as completing an activity book page or a jigsaw puzzle, he required "prompting and reinforcement to remain on task with appropriate behavior" (Parent Ex. V at pp. 9-10). Within the domain of ADL skills, the student was able use a fork instead of his hand with "occasional prompting," and he was working on "chaining the steps to hand washing and tooth

[19] The draft April 23, 2013 IEP was not included in the hearing record.

[20] The April 2013 IEP describes the student's rate of progress as "gradual across most academic areas," without mention of the inconsistent nature of that progress as described in the educational report (Parent Exs. J at p. 1; V at p. 8).

brushing," with a focus on "retrieving" soap for handwashing, and turning on the water for tooth brushing (id. at p. 10). The report also notes that with prompting, the student used PECS to request wants and express needs, information that is echoed in the April 2013 IEP (Parent Exs. J at p. 1; V at pp. 8, 10).

While details regarding the student's level of mastery in each of these skill areas are limited, the student's behavioral challenges, including his need for "constant redirection" and "frequent prompting," are clearly depicted throughout the educational progress report and the student's April 2013 IEP (Parent Exs. J at pp. 1-2; V at pp. 8-10). The educational report also points out the program's use of a BIP "with parental approval" to address the student's stereotypic behaviors, "such as waving objects or his fingers in front of his face and putting his fingers in his ears and humming" (Parent Exs. J at p. 1; V at p. 8). Information regarding the student's overall management needs as described in the educational progress report is consistent with those described in the student's April 2013 IEP, specifically with regard to his need for a highly structured environment with frequent redirection and reinforcement (Parent Exs. J at p. 2; V at p. 10).

As mentioned above, the hearing record indicates the CSE also considered an April 2013 speech-language report (Parent Ex. CC; Dist. Exs. 24 at p. 3; 25 at p. 3). According to the report, the student presented with "the many speech and language deficits associated with autism" (Parent Ex. CC at p. 2). As indicated in the speech-language report, the student had receptively "mastered matching identical object to object, picture to picture, colors, shapes, object to picture, and picture to object" as well as "matching non-identical objects and pictures," information that is reflected in the April 2013 IEP (Parent Exs. J at p. 1; CC at p. 1). Additionally, the speech-language report indicated the student exhibited "emerging skills" for matching associated items, such as toothpaste and toothbrush, and required prompting to identify functional objects such as a plate, cup, and body parts such as head, and nose (Parent Ex. CC at p. 1). The speech-language therapist also observed that the student had difficultly following nonverbal imitations, fine motor imitations, and two-step imitations and demonstrated "inconsistency" when following one-concept commands and two-step receptive commands (id.). The student's preference for edibles such as "Mike and Ike's," was repeated in both the speech-language report and the April 2013 IEP (Parent Exs. J at p. 1; CC at p. 2).

Expressively, the speech-language report and the April 2013 IEP indicated the student was "non-verbal," and that he communicated using PECS, which he supplemented with pointing and gesturing in order to convey his wants and needs (Parent Exs. J at p. 1; CC at p. 2). According to the speech-language report, the student was working on the articulation of vowel sounds and "consonant vowel clusters" including "ma," "mo," and "mi" (Parent Ex. CC at p. 2). The speech-language report also noted that the student's ability to respond "yes/no" with a head gesture was emerging, and while he was able to wave "hi," he required prompts to greet his peers verbally (id.). Additionally, the speech-language therapist indicated the student was working on "oral motor movements," which was "crucial" to enabling "the production of various sounds and words" (id.). In general, April 2013 IEP is consistent with the speech-language progress report, as both illustrate the student's "significant communicative deficits" (Parent Exs. J at p. 1; CC at pp. 1-2).

The student's speech-language therapist recommended the student "continue to receive services that embody an ABA teaching philosophy while utilizing discrete trial instruction and data-based decision making" (Parent Ex. CC at p. 2). The speech-language report also offered future goals for the student's language that included, among other things, increasing his "functional

communication skills using PECS, articulation, matching skills, and verbal imitation skills," many of which are reviewed below in relation to the April 2013IEP annual goals (Parent Exs. J at pp. 6-7; CC at pp. 2-3).

Turning to the 2014-15 school year, the hearing record shows the NPS provided the April 2014 CSE with a March 2014 speech-language report and an April 2014 educational report (Tr. pp. 138; Dist. Exs. 9; 24 at p. 6; 25 at p. 6; Parent Ex. W).[21] The NPS staff also provided an FBA and a BIP, both dated March 31, 2014 (Parent Exs. EE; FF; Dist. Exs. 24 at p. 6; 25 at p. 6).[22] According to the district school psychologist and district special education teacher, the NPS staff familiar with the student also provided verbal input during the meeting (Dist. Exs. 24 at p. 6; 25 at p. 6). A careful review of the April 2014 IEP reflects a general alignment with the NPS reports, although the individual documents contain a higher degree of detail across most areas of functioning.

The April 2014 educational progress report detailed the student's need for "a highly structured environment to maximize his attending skills and ability to focus on program materials," relating the student's engagement in "several maladaptive behaviors" as interfering with his academic progress, observations reflected in the April 2014 IEP (Parent Exs. K at p. 2; W at p. 11). The educational progress report depicted specific maladaptive behaviors that served as the focus of the student's 2014 FBA and BIP, which will be discussed below (Parent Exs. J; W at p. 11; FF at p. 1; JJ at p. 1).

The educational report and the April 2014 IEP stated the student communicated his basic wants and needs using an iPad with the Talkboard application, which served as an augmentative device (Parent Exs. K at p. 1; W at p. 11).[23] The educational progress report indicated the student used "gestures such as pointing and head nods" to gain the attention of adults, and was working on "waving 'Hi' to his peers," which is echoed in the student's IEP (id.). Academically, the student's classroom teacher indicated the student was able to receptively identify two uppercase letters, as well as "match letters, numbers, shapes, and colors," receptively identify two numerals in isolation, and receptively identify four body parts, information generally reflected on the April 2014 IEP (Parent Exs. K at p. 1; W at pp. 11-12).[24]

---

[21] Although not included in the hearing record, the hearing record indicates that the student's the NPS classroom teacher provided the CSE with a "draft" of the IEP based upon her own "very detailed" assessments, that she used in order to "determine the needs of the child in the upcoming year" (Tr. I pp. 105, 107-08, 137-38; Dist. Exs. 24 at p. 6; 25 at p. 6; Parent Ex. F at p. 1).

[22] The hearing record also contains a BIP dated March 1, 2014 (Parent Ex. EE). Nothing in the hearing record explains the origin of this document. While not entirely clear, the evidence shows that the March 31, 2014 BIP was the version considered at the April 2013 CSE meeting (see Tr. pp. 184-85; see also Dist. Ex. 12 [identical copy of Parent Ex. FF]).

[23] The hearing record shows that, during the 2013-14 school year, the student's parent purchased an iPad and Talkboard application, which was used at school and "replaced his PECS book" (Parent Exs. C at p. 5; W at p. 7). While the change in the student's communication system may not have been shared immediately with the district, the CSE was made aware of the student's iPad at the April 2014 CSE, as its use and motivational value was documented in the NPS materials (Parent Exs. K at p. 1; W at p. 11; JJ at p. 5).

[24] The educational progress report stated the student had mastered receptive identification of four body parts; the IEP reflected that he had mastered five (Parent Exs. K at p. 1; W at 12).

Within the ADL domain, the April 2014 educational report noted multiple areas in which the student required prompts in order to successfully complete a task, including unpacking his school bag, removing his jacket and putting it away, and brushing his teeth (Parent Exs. K at p. 1; W at p. 12). The educational report also cited handwashing as a focus, that the student had "made inconsistent progress," and that he was currently working on lathering his hands (id.). The teacher noted that in the future, the student would work on "engaging/disengaging various closures such as zippers, snap buttons, and Velcro" (Parent Ex. W at p. 12).

Under the heading of "independent task completion," the educational progress report indicated the student was able to "complete 12-24 piece non-interlocking puzzles, sort various objects by shape and color, and complete up to 7 pages in his activity book" (Parent Ex. W at p. 12). The educational progress report summary stated the student was making "inconsistent to consistent progress across his academic and ADL programs," and asserted the student required a "highly-structured classroom environment with a high staff to student ratio" (id.). The report also emphasized the need for such a program to employ "systematic and differential reinforcement and discrete trial teaching" (id.).

The April 2014 CSE also considered a March 2014 speech-language report; in contrast to descriptions of the student's behavior included in the 2013 educational and speech-language reports and the April 2014 educational report, the speech-language pathologist portrayed the student as having "good attending skills" and being responsive to direction "by making eye contact for up to five seconds" (Dist. Ex. 9 at p. 1). Specifically, the speech-language pathologist explained that, with "minimal support, [the student] makes eye contact when being spoken to and attends to materials presented" (id.).

When describing the student's receptive language, the speech-language report indicated that, while the student performed multiple "nonverbal imitations . . . (e.g., "Do this")," his ability to perform fine motor and multi-step nonverbal imitations was emerging, as was his ability to identify body parts and objects by function (Dist. Ex. 9 at p. 1). The report also stated the student was making progress identifying "functional objects (e.g., cup, toothbrush) in a field of three," but experienced difficulty identifying objects in pictures and following commands that included prepositions (id.).

The speech-language report described the student's verbal speech as "limited" and detailed that the student's then-current program targeted the articulation of phonemes "typically acquired first," such as a, u, m, and b (Dist. Ex. 9 at p. 2). The report also noted the student "respond[ed] to greetings by looking and waving," but his ability to respond to yes/no questions was inconsistent (id.). Although the student required "moderate support" to transport his iPad to and from speech, the March 2014 speech-language report indicated the student "communicate[d] primarily using the TalkBoard application on his personal iPad," adding that his PECS program had been modified for use on the iPad (id.). The report noted the student was "independently and spontaneously requesting items appropriately using his iPad" (id.). Future goals, as proposed by the speech-language pathologist, included increasing functional language skills, such as "knowledge and use of functional vocabulary," matching skills, and articulation (id.).

Review of this summarized evaluative information, which was available to the April 2013 and April 2014 CSEs, reveals that it was sufficient to describe the student's needs in the areas of academics, ADL, behavior, speech-language, and communication. However, the hearing record demonstrates that neither the April 2013 nor the April 2014 CSEs possessed sufficient evaluative

material concerning the student's fine motor or sensory skills related to OT. During the 2011-12 and 2012-13 school years, the student received three weekly 30-minute individual sessions of OT (Parent Exs. G at p. 13; H at p. 8). The student's 2012-13 IEP included short-term objectives to improve the student's ability to grasp a pencil correctly, imitate block patterns, assemble jigsaw puzzles, use a pegboard and shape sorter, color shapes within the lines, uses scissors independently, and follow various hand movements to songs (Parent Ex. H at pp. 4-6). However, the hearing record does not reflect that the district had available or reviewed adequate evaluative information about the student's progress toward meeting these objectives, or generally what the student's fine motor needs and skills were at the time of both the April 2013 and April 2014 CSE meetings. The March 2013 educational progress report provided one detail about the student's fine motor needs, indicating that the student was working on the fine motor skill "thumbs together in discrimination," and the April 2013 IEP present levels of performance completely lack any information about the student's fine motor skills (Parent Exs. J at pp. 1-2; V at p. 9). The April 2014 educational progress report and the April 2014 IEP indicated without elaboration that the student was "working on increasing his fine motor skills through object manipulation" (Parent Exs. K at p. 1; W at p. 11). Therefore, both the April 2013 and April 2014 CSEs lacked sufficiently comprehensive evaluative information to identify all of the student's special education and related services needs (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]). This omission constitutes a procedural violation and, therefore, may only support a finding of a denial of a FAPE if it (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]). For the reasons set forth below with respect to OT services, and in combination with the predetermination of the OT recommendation, the lack of evaluative information contributes to the determination in this case that the district failed to offer the student a FAPE for the 2013-14 and 2014-15 school years as a consequence of the CSEs' failure to include OT as a related service on the student's April 2013 and April 2014 IEPs.

D. Challenged IEPs

1. Annual Goals

The parent claims that the April 2013 and April 2014 IEPs fail to appropriately address all of the student's needs and fail to include appropriate annual goals. An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

With respect to the annual goals developed for the 2013-14 school year**,** the district special education teacher testified that the NPS prepared a draft of the 2013-14 IEP, including the annual goals, and submitted it to her prior to the April 2013 CSE meeting (Tr. I pp. 28-29). The district special education teacher testified that, while she did not specifically recall whether the CSE discussed the 2013-14 annual goals during the April 2013 CSE meeting, she "knew" the NPS had

reviewed them with the parent prior to the meeting, based upon "working with [the NPS] for 15 years" (Tr. I pp. 29-30).

The April 2013 IEP contained approximately eighteen annual goals and approximately 62 short-term objectives; each goal included criteria by which to determine successful achievement of the goal (Parent Ex. J at pp. 3-8).[25] In addition, the April 2013 IEP annual goals denote a variety of methods by which progress would be measured, including trial by trial, performance assessment task, and teacher assessment (id.). The IEP also indicated progress would be monitored one time per quarter (id.). The annual goals are identified by targeted skill area, including reading, math, social studies, science, independent task completion, play/socialization, art/music skills, gross motor skills, and appropriate behavior (id.).

A review of the March 2013 educational progress report and the April 2013 IEP academic, socialization, and independent task goals shows correlation between the skills the student was working on at the NPS and the annual goals (compare Parent Ex. J at pp. 3-5, with Parent Ex. V at pp. 8-9). With regard to the annual goal intended to "improve [the student's] ADL skills," five short-term objectives address handwashing, tooth brushing, donning shirts and pants with minimal prompting, preparing food, including the use of a microwave, and "holding his utensils (fork, knife, and spoon) and use [of a] napkin appropriately" (Parent Ex. J at p. 5). With the exception of using a microwave, the educational progress report indicates the student was already working on achieving these ADL skills with prompting (Parent Exs. J at p. 5; V at p. 10).

Annual goals addressing the student's speech-language and assistive technology needs are generally consistent with needs and recommendations identified in the April 2013 speech-language progress report (Parent Exs. J at pp. 6-7; CC at pp. 2-3). Specifically, the April 2013 IEP includes a goal to "increase [the student's] functional communication skills using an [augmentative communication] system," and improve his "knowledge and use of functional vocabulary" (id.). The IEP also includes goals addressing speech intelligibility, "oral motor strength, range of motion, and precision," and matching skills, all of which are included in the April 2013 speech-language report (id.).

Regarding the parent's claim that the April 2013 IEP failed to provide annual goals addressing the student's behavior, review of the evidence in the hearing record shows that the student's need for redirection to stay focused on an activity and his stereotypic behaviors were detailed in the 2013 educational progress report and the April 2013 IEP present levels of performance (Dist. Exs. 3 at p. 1; 4; Parent Exs. J at pp. 1-2, 8; W at pp. 8-10). The IEP included one annual goal to address these needs, which indicated the student "will improve appropriate behavior" (Parent Ex. J at p. 8). Of the four short-term objectives associated with this goal, two address the student's behavior, in general terms; one states the student "will generalize learned behaviors across people and settings," and the other states, the student "will decrease targeted maladaptive behaviors such as motor stereotypies with a lessening of prompts" (id.).[26] While the annual goals and short-term objectives related to the student's behavior could have been more

[25] The district special education teacher and the district school psychologist reported that the CSE created 19 separate goals for the student, but the April 2013 IEP included only 18 annual goals (compare Dist. Exs. 24 at p. 4 and 25 at p. 4, with Parent Ex. J at pp. 3-8).

[26] The remaining short-term objectives state the student "will participate in monthly parent observations" and "participate in at least one home visit per school year" (Parent Ex. J at p. 8).

specific, a review of all of the April 2013 IEP's annual goals shows that, as a whole, they addressed the student's areas of need and do not contribute to a denial of FAPE for the 2013-14 school year (Tarlowe, 2008 WL 2736027, at *9 [internal quotations omitted]; see also P.K. v. New York City Dep't of Educ., 819 F. Supp. 2d 90, 109 [E.D.N.Y. 2011], aff'd 526 Fed. App'x 135 [2d Cir. May 21, 2013] [noting reluctance to find a denial of a FAPE based on failures in IEPs to identify goals or methods of measuring progress]).

Turning to the 2014-15 school year, the April 2014 IEP included approximately 10 annual goals and approximately 41 short-term objectives (Parent Ex. K at pp. 3-6). Each annual goal denotes the criteria by which to determine successful achievement of the goal, as well as the method by which progress would be measured, including discrete trial instruction and performance assessment task (Parent Ex. K at pp. 3-6). In addition, the April 2014 IEP indicated that the student's progress with each of these goals would be measured one time per quarter (id.). The annual goals included in the April 2014 IEP target the student's needs across multiple domains, including learning readiness, reading, math, science, social studies, ADL skills, independent task completion, play and socialization, as well as art and "gym" skills, and correlate to those need areas described in the April 2014 educational progress report (compare Parent Ex. K at pp. 3-6, with Parent Ex. W at pp. 11-12).

The April 2014 IEP includes one annual goal, with five short-term objectives, that addresses the student's ADL skills (Parent Ex. K at pp. 4-5). The short-term objectives are largely consistent with the April 2014 educational progress report and target handwashing, retrieving and preparing "his lunch with a minimal number of prompts," dressing himself independently, and "engag[ing] and disengag[ing] various closures such as zippers, buttons, and snap boards" (Parent Exs. K at p. 5; W at p. 12). In addition, the annual goal includes a short-term objective that the student would "independently request the bathroom by using a bathroom pass" (Parent Ex. K at p. 5).

With specific regard to the student's behavioral difficulties, the 2014 CSE did not include an annual goal or short-term objectives addressing this aspect of the student's functioning, although the committee did adopt an FBA and BIP prepared by staff at the NPS (discussed below) (Dist. Exs. 24 at p. 7; 25 at p. 6; Parent Exs. J; FF).

A comparison of the 2014 educational and speech-language progress reports and present levels of performance on the April 2014 IEP reflects that, although some needs identified in the evaluative information available to the CSE had related annual goals, a significant area of need—communication—lacks any annual goals (Dist. Ex. 9 at pp. 1-2; Parent Ex. K at pp. 3-6; W at pp. 11-12). For example, the learning readiness goal includes short-term objectives, such as following one-concept commands in two steps and following one-concept commands with objects, which are discussed in the April 2014 speech-language and educational progress reports (Dist. Ex. 9 at p. 1; Parent Exs. K at p. 3; W at p. 1). However, although the student's "verbal speech" is described as "limited," and his ability to communicate appears to be dependent upon an augmentative communication device, the 2014-15 IEP does not include an annual goal intended to specifically address the student's speech-language or assistive technology needs (Dist. Ex. 9; see Parent Ex. K at pp. 3-6). The 2014 speech-language report suggested multiple annual goals addressing speech-language difficulties, including "but not limited to" increasing functional communication skills, increasing knowledge and use of functional vocabulary, and increasing speech production and improve articulation, it is unclear why these were not incorporated into the 2014-15 IEP (Dist. Ex. 9 at p. 2; see generally Parent Ex. K at pp. 3-6).

While every deficit area of the student's functioning need not have had a corresponding goal in the IEP (see, e.g., J.L. v. City Sch. Dist., 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013] [failure to address all areas of need though goals not a denial of FAPE]), in this instance, the evidence in the hearing record support a finding that the lack of speech-language goals addressing the student's functional communication skills, in conjunction with the failure to adequately address the student's assistive technology needs in the area of communication, discussed immediately below, constitute procedural violations that contribute cumulatively with the other violations to a finding that the district failed to offer the student a FAPE for the 2014-15 school year, as discussed further below (Dist. Ex. 9 at p. 2; see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

2. Special Factors

a. Assistive Technology

The parents allege that the district denied the student a FAPE because it did not adequately address the student's need for augmentative communication and assistive technology.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. One of the special factors that a CSE must consider is whether the student "requires assistive technology devices and services, including whether the use of school-purchased assistive technology devices is required to be used in the student's home or in other settings in order for the student to receive a [FAPE]" (8 NYCRR 200.4[d][3][v]; see 20 U.S.C. § 1414[d][3][B][v]; 34 CFR 300.324[a][2][v]; see also Educ. Law § 4401[2][a]).

Here, as noted above, the April 2013 IEP considered a March 2013 progress report which indicated that, with prompting, the student used PECS to request wants and express needs (Parent Ex. V at pp. 8, 10). The April 2013 IEP similarly indicated that the student communicated using PECS, which he supplemented with pointing and gesturing in order to convey his wants and needs (Parent Exs. J at p. 1; CC at p. 2). Sometime during the 2013-14 school year, as recognized in a December 2013 progress report from the NPS, the student's PECS book had been replaced by the student's personal iPad, which allowed him to independently request the bathroom and, with moderate support, express "I want" (Tr. I. p. 138; Parent Ex. W at p. 7). However, this occurred after the April 2013 IEP was developed, and there is no information in the hearing record that the student required a specific assistive technology device or service at the time of the April 2013 CSE meeting (see C.L.K., 2013 WL 6818376, at *13).

Turning to the 2014-15 school year, it does not appear that the December 2013 progress report was considered by the April 2014 CSE. Nonetheless, the student's use of and preference for the iPad was discussed in the educational and speech-language reports and the March 2014 FBA and incorporated into the April 2014 IEP in both the present levels of performance and in an annual goal (Dist. Ex. 9 at p. 2; Parent Exs. K at pp. 1, 5; W at p. 12; JJ at p. 5). Across these various documents, the student's use of his personal iPad was identified as a motivating device that supported his communication skills as well as his engagement in socialization and learning activities (Parent Exs. K at pp. 1, 5; W at p. 12; JJ at p. 5). While the district special education teacher acknowledged the CSE's responsibility to evaluate a student's need for assistive technology and provide such a device if the evaluation determined it to be necessary, the CSE did not order an assistive technology evaluation, nor does the IEP indicate the student required a "device or service to address his communication needs" (Parent Ex. K at p. 2). Under the circumstances of

this case, the district should have conducted an assistive technology evaluation in connection with the April 2014 CSE meeting in order to assess the need for assistive technology given the student's communication deficits. The April 2014 CSE was aware that the iPad was a valuable tool for the student, yet it failed to assess how the iPad could be incorporated into the student's educational program. Moreover, it appears that the district made no efforts to secure an iPad for the student and, instead, allowed the student to use an iPad purchased and supplied by the parent.

Based on the above and in conjunction with the other violations identified herein—in particular the lack of speech-language goals in the April 2014 IEP—the evidence in the hearing record supports a finding that the failure to appropriately assess the student's assistive technology needs or recommended assistive technology in the April 2014 IEP contributed to the denial of a FAPE for the 2014-15 school year. A district may not rely on a parent to fund or provide assistive technology that it is the district's responsibility to provide to a student as a component of a FAPE; therefore, the district shall, if it has not done so already, reimburse the parents for the iPad utilized by the student or provide the student with an iPad purchased by the district (see Application of a Student with a Disability, Appeal No. 12-238; see also Letter to Anonymous, 24 IDELR 388 [OSEP 1996]; Letter to Bachus, 22 IDELR 629 [OSEP 1995]; Letter to Galloway, 22 IDELR 373 [OSEP 1994]).

b. Interfering Behaviors

The parent argues that the district denied the student a FAPE because the FBAs and BIPs were inadequate and the district failed to demonstrate how it complied with State regulations in preparing those documents. The parent further contends that the IEPs do not reference the student's severe behaviors.

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). 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 includes, but is not limited to,

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

(8 NYCRR 200.1[r]). According to State regulation, an FBA shall be based on multiple sources of data 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 provide in relevant part that the CSE 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]).[27]

With respect to the 2013-14 school year, the hearing record shows the April 2013 CSE reviewed an April 23, 2013 FBA and BIP developed by NPS staff (Dist. Exs. 3; 4; 24 at p. 3; 25 at p. 3). The April 2013 FBA indicated that observational data was collected at five minute intervals, which identified "motor stereotypies" as the problem behaviors—defined in the April 2013 IEP as waving objects or his fingers in front of his face and putting his fingers to his ears and humming (Dist. Ex. 3 at p. 1; Parent Ex. J at p. 1). The FBA indicated that contextual factors contributing to the behaviors included the student's was nonengagement in a task or activity and the presence of manipulatives within view of the student (Dist. Ex. 3 at p. 1). According to the FBA, staff at the NPS presumed that the stereotypic behaviors served a self-stimulatory function for the student and that he received automatic reinforcement from engaging in those behaviors, which served to maintain them (id. at p. 2). While the FBA did not include specific baseline data with regard to frequency, duration, and intensity of the behaviors, it indicated that the student engaged in the behaviors across environmental conditions such as group instruction, gym, lunch,

[27] The Official Analysis of Comments to the federal regulations explains that the decision regarding whether a student requires interventions such as a BIP rests with the CSE and is made on an individual basis (Consideration of Special Factors, 71 Fed. Reg. 46683 [August 14, 2006]). However, neither the IDEA nor its implementing regulations require that the elements of a student's BIP be set forth in the student's IEP ("Student Needs Related to Special Factors," Office of Special Educ. [April 2011], available at http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf). However, once a student's BIP is developed and implemented, "such plan shall be reviewed at least annually by the CSE or CPSE" (8 NYCRR 200.22[b][2]). 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]).

1:1 instruction, and breaks (id. at p. 1). A review of the April 2013 FBA shows that it included the required information, and any deficiency with respect to the specificity of the baseline data did not contribute to a denial of a FAPE in this instance (see Application of a Student with a Disability, Appeal No. 16-002).

The April 2013 BIP identified motor stereotypy as the problem behavior and indicated that classroom staff and the student's speech-language providers were the responsible parties for implementing the behavior plan "throughout the school day" (Dist. Ex. 4). Expected behavior change was to reduce stereotypic behaviors to "10% of baseline," to be assessed via "interval recording" (id.). A review of the BIP shows that it failed to include required information, such as: the baseline measure of the problem behavior (including frequency, duration, and intensity of the target behavior); and the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior and teach alternative and adaptive behaviors to the student (id.; see 8 NYCRR 200.22[b][4]).

However, the April 2013 FBA did provide some of the information required in a BIP, including that previous consequences/interventions attempted with the student to address inappropriate behavior were redirection and differential reinforcement of appropriate behaviors and that the student "responded well to the [then-]current intervention which [wa]s a response interruption with verbal reprimand for his motor stereotypies" (Dist. Ex. 3 at p. 2). The April 2013 FBA also identified the schedule to measure the effectiveness of the interventions as "[d]aily data collection using a 5-minute partial interval recording method" (id.). Similarly, the April 2013 FBA indicated that the student received attention from staff and edibles as positive reinforcement (consequences for alternative acceptable behavior), and the IEP indicated that the student was reinforced by a token system consisting of 10 tokens: five given for correct responses, and five given for appropriate behavior (id. at p. 3). As previously discussed, the April 2013 IEP includes a goal that the student "will improve appropriate behavior" with two short-term objectives related to behavior: "will generalize appropriate learned behaviors across people and settings," and, "will decrease targeted maladaptive behaviors such as motor stereotypies with lessening of prompts" (Parent Ex. J at p. 8). Therefore, notwithstanding the deficiencies in the April 2013 BIP, cumulatively, the FBA, BIP, and IEP included sufficient information to support a finding that the omissions in the BIP did not impede the student's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or cause 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]).

Turning to the 2014-15 school year, the April 2014 CSE considered a March 2014 FBA and BIP drafted by the NPS staff (Tr. I pp. 158-59; Dist. Exs. 24 at p. 6; 25 at p. 6; Parent Exs. FF; JJ). In contrast to the FBA and BIP from the preceding school year, the 2014 FBA and BIP identified an increased number of problem behaviors (Parent Exs. FF at p. 1; JJ at p. 1). That is, the FBA listed four "categories" of behaviors, with more specific descriptions within each category (id.). Within the category of "stereotypy," the FBA and BIP listed the student's engagement in finger play and/or "covering his ears while humming" (id.). The category of "disruptive behaviors" listed yelling, screaming, crying, and "swiping objects from surfaces" (id.). "Out of seat" behaviors described instances when the student left his seat without permission (id.). The final category, oral play, included instances when the student "spit[] and smear[ed] his saliva, bit[] or place[d] non-edible items in his mouth, bit[] or suck[ed] his skin on the wrist area and lick[ed] surfaces" (id.).

The March 2014 FBA indicated that the student's teacher and the NPS's clinical director used "ABC data collection" and interviews to determine the function(s) of each of the targeted behaviors (Parent Ex. JJ at p. 1). The FBA listed data sources identified as surveys or questionnaires specific to behavior(s), student record review, parent and staff interviews, and "ABC charts" (id. at pp. 1-2). The student's severe communication impairments and other areas of functioning associated with his diagnosis of autism were identified as influencing factors that increased the likely occurrence of the targeted behaviors (id. at p. 2). With regard to antecedents or triggers for oral play and stereotypy, the FBA indicated that, according to baseline data, these behaviors "seem[ed] to occur across environments," and that "all behaviors occur[red] throughout the school day" (id. at pp. 2, 4). The FBA indicated that "demands and non-preferred activities" preceded inappropriate behaviors (id. at pp. 3-4). The FBA noted the function of the targeted behaviors provided the student with sensory stimulation, other sensory stimulation provided by the stereotypy, and "tangible/preferred activity intermittently receive[d] items/activities" (id.). The FBA also stated that the interfering behaviors allowed the student to avoid difficult tasks and non-preferred activities or tasks (id.). Finally, the FBA identified possible reinforcers for the student's engagement in appropriate behavior as using his iPad and providing edibles and breaks (id. at p. 5). Replacement behaviors included teaching the student to request a break or ask for help and preferred objects or activities (id. at p. 5).

While the March 2014 BIP carried over the list of targeted behaviors included in the FBA, the baseline information was presented as aggregated data regarding each category of behavior, rather than identifying each separate problematic behavior (Parent Ex. FF at p. 1). Specifically, while the BIP indicated the percentage of problem behaviors in categories designated as stereotypy (51.2), disruptive behaviors (25), out of seat (12.4), and oral play (32.6), the BIP did not identify the frequency, duration, intensity, and/or latency of the component behaviors for each category (id.). In addition, the functional hypothesis regarding the problematic behaviors was further condensed to global statements, such as "student is most likely to engage in these behaviors when he feels over or under stimulated," and the antecedents "can be demands placed on student and sometimes it can be because he wants access to a tangible" (id.). The BIP identified the consequence of engaging in the targeted behaviors as "teacher redirects student," and described the function of the target behaviors as "sensory, escape, and access to tangible" (id.). The BIP noted that, when the student did not have access to preferred activities for "a long period of time," he was more likely to engage in the problem behaviors (id. at p. 2).

Intervention strategies included providing reinforcement more frequently when presented with difficult to non-preferred activities and "reinforcement for not engaging in target behaviors" (Parent Ex. FF at p. 2). In addition, the BIP recommended "communication strategies" as "replacement behaviors," including fostering the student's ability to request help when "presented with a difficult task and or request for a break" (id.). According to the BIP, the schedule to measure the effectiveness of the interventions would be "as needed," with the start and end date for monitoring from March 31, 2014 to March 31, 2015 (id. at p. 3). The BIP indicated the student's use of replacement behavior—"appropriate communication"—would be measured for effectiveness on a daily basis using individualized data sheets for the full calendar year of March 2014 through March 2015 (id. at p. 3). The "data on problem behavior(s) after implementation of BIP for specified interval" stated "[r]educe all behaviors to 25% of baseline levels or less" and "increase communication behaviors to appropriate levels" (id. at pp. 2-3). The student's classroom teacher and support staff were identified as the "person responsible" for measuring the effectiveness of the intervention (id. at p. 3).

As described above, a review of the March 2014 FBA shows that accurately identified the student's interfering behaviors, and the resultant March 2014 BIP adequately provided a description of the interfering behaviors and their antecedents, and set forth intervention strategies and supports to address the behaviors (see 8 NYCRR 200.1[mm]).

3. 1:1 Instruction, ABA Methodology, and Home-Based Instruction

The parent appeals the IHO's determinations that the student did not require recommendations for 1:1 instruction, support for toileting needs, ABA methodology, or home-based services on his April 2013 or April 2014 IEPs to receive a FAPE.

First, while the hearing record supports a finding that the student needed a high degree of support, it does not reflect a need for 1:1 instruction, as the parent argues.[28] The parent specifically argues that the record demonstrates that the student only exhibited functional skills was when he received 1:1 instruction. As stated in the April 2013 IEP, the student required constant redirection to stay on task, "frequent prompting to sit appropriately," "prompting to request for wants and needs via PECS," and "prompting to carry [his augmentative communication device] across various settings, follow directions, imitate oral motor movements, and produce various phonemes" (Parent Ex. J at p. 1). The April 2013 IEP also noted that the student required "frequent redirection and reinforcement to attend to the therapists and program details" (id. at p. 2). Overall, the level of adult support, including redirection and prompting, described in the April 2013 IEP is consistent with observations noted in the 2013 educational progress report (Parent Exs. J at p. 1; V at pp. 8-9). The 2013 speech-language report recommended that the student continue to receive daily 30-minute individual speech-language therapy sessions (Parent Ex. CC at p. 2).

While the April 2014 IEP included fewer references to the student's need for frequent redirection, it indicated he still needed prompting to "request the bathroom" (Parent Ex. K at p. 1). The April 2014 educational progress report indicated that the student required redirection when he exhibited maladaptive behaviors, prompts to unpack his school bag, complete some ADLs, and to socialize with peers (Parent Ex. W at pp. 11-12). The 2014 speech-language report recommended that the student continue to receive five 30-minute individual sessions of speech-language therapy per week (id. at p. 2).

The March 2013 and the April 2014 educational progress reports indicated that the student required a highly structured environment, and the April 2014 educational progress report further recommended a "high staff to student ratio, which utilize[d] systematic and differential reinforcement and discrete trial teaching" (Parent Exs. V at p. 10; W at p. 12). The NPS special education teacher testified that the "highly structured classroom environment" was delivered by the NPS, and also that at times the student worked individually with staff (Tr. I pp. 119, 152-53; see Parent Ex. JJ at p. 4; Dist. Ex. 3 at p. 1). While neither the April 2013 nor April 2014 IEPs recommended 1:1 support, the IEPs recommended a very small student-to-teacher ratio (i.e., a

[28] A review of the exhibits the parent cites to for support that the student required 1:1 instruction shows that many were prepared subsequent to the development of the IEPs in dispute (see Parent Exs. F; P; Q; Dist. Ex. 27), and the affidavit prepared by the private BCBA indicated he did not meet the student until November 2014 (Parent Ex. D at p. 5). A review of the one document cited that predates the CSE meetings, the June 2011 psychoeducational evaluation report, shows that it did not indicate that the student required 1:1 instruction to receive educational benefits (see Parent Ex. O).

6:1+3 special class) and individual speech-language therapy sessions (Parent Exs. J at pp. 1, 9; K at pp. 1, 9). Additionally, in describing their knowledge of the NPS program, both the district school psychologist and the district special education teacher who participated in these CSE meetings testified that the 6:1+3 student to adult ratio would provide the student with opportunities for 1:1 support (Dist. Exs. 24 at p. 8; 25 at p. 8).[29] Based upon these recommendations, the evidence in hearing record support's the IHO's ultimate conclusion that the lack of a recommendation specifically for 1:1 instruction in April 2013 and April 2014 IEPs did not result in a denial of a FAPE to the student in this instance.

The parent also alleges that the April 2013 and April 2014 IEPs did not address the student's toileting needs. The March 2013 educational progress report considered by the April 2013 CSE indicated that the student was "currently toilet trained" and that he independently requested to use the bathroom through "PECS" (Parent Ex. V at p. 10). The April 2013 IEP indicated that the student would "improve his ADL [s]kills" (Parent Ex. J at p. 5). The April 2014 IEP indicated that the student was "currently on a bathroom schedule" where he was taken to the bathroom three times per day (Parent Ex. K at p. 1). The April 2014 IEP included an annual goal indicating that the student would improve his ADL skills (id. at pp. 4-5). One of the short-term objectives specifically stated that the student would independently request to use the bathroom by using a pass (id. at p. 5). Both the district representative and special education teacher who participated in the April 2013 and April 2014 CSE meetings testified that it was their understanding that toilet training services were offered "programmatically" at the NPS (Dist. Exs. 24 at p. 9; 25 at p. 9). Under these circumstances, the April 2013 and April 2014 IEPs' recommendations with respect to the student's activities of daily living did not result in a denial of FAPE notwithstanding the April 2013 CSE's failure to develop an annual goal in toileting in the April 2013 IEP (L.O. v. New York City Dep't of Educ., 2016 WL 2942301 at *8 [2d Cir. May 20, 2016] [finding that "although the IEP failed to provide goals and objectives specifically related to [the student's] toileting needs, it nonetheless designed goals that would enable [the student] to make progress in this area."]).[30]

Second, with respect to ABA methodology, the precise teaching methodology to be used by a teacher is usually a matter to be left to the teacher's discretion, absent evidence that a specific methodology is necessary for a student to receive a FAPE (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] [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 also S.B. v. New York City Dep't of Educ., 2016 WL 1271690, at *5 [S.D.N.Y. Mar. 30, 2016] ["as a matter of law, an IEP is not required to specify a particular

[29] It is permissible to consider this testimony as an explanation or justification for the services included on the IEP and not as an attempt to rehabilitate an inadequate IEP (R.E., 694 F3d at 186-87). In other words, the district staff did not testify that the student would receive a service or support not included on the IEP, such as a 1:1 paraprofessional, but instead described the recommended special class (Dist. Exs. 24 at p. 8; 25 at p. 8).

[30] The hearing record also includes information on the student's toileting needs from the student's special education teacher at the NPS for most of the 2013-14 and 2014-15 school years (Parent Ex. F at pp. 1-2). This information, however, is not confined to a specific time period. Given the importance of assessing an IEP prospectively and disregarding extrinsic evidence which post-dated the relevant CSE meeting, or was otherwise unavailable to it, I have not considered this evidence for purposes of this claim (see L.O., 2016 WL 2942301, at *15; R.E., 694 F.3d at 188; C.L.K., 2013 WL 6818376, at *13).

methodology"]; 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"]).

The evidence in the hearing record does not demonstrate that the student required instruction using ABA methods to receive a FAPE, or explain why other methodologies would be inappropriate for the student. The genesis of the parent's argument regarding ABA appears to derive from an unsigned and unsworn report from the student's special education teacher dated May 15, 2015 and a report from a private evaluator dated May 8, 2015 (Tr. I p. 138-39; Parent Ex. F at p. 2; Pet. Ex. D at 6). Both of these documents postdate the challenged CSE meetings and, thus, cannot be used to assess their recommendations (see C.L.K., 2013 WL 6818376, at *13).[31] Thus, the CSE did not err by failing to prescribe ABA methodology on the student's IEPs.

But even assuming that the student required instruction using ABA in order to receive a FAPE, there would be no harm in this instance because ample evidence in the hearing record shows that the student received instruction using the ABA methodology at the NPS. The district special education teacher and school psychologist set forth in their affidavits that the student received ABA all day while at the NPS (Dist. Exs. 24 at p. 8; 25 at p. 8). Similarly, the student's special education teacher from the NPS testified that all of the teachers at the NPS employed the ABA methodology (Tr. I p. 103). Since the student actually received ABA during the 2013-14 and 2014-15 school years, any failure of the April 2013 or April 2014 CSE to place it on the IEPs did not contribute to a denial of a FAPE.

Finally, with respect to home-based or extended day services, a CSE may be required to recommend such services on an IEP if they are necessary for the student to make progress in the classroom and that, without such services, the student would regress or make only trivial progress (see P.S. v. New York City Dep't of Educ., 2014 WL 3673603, at *13-*14 [S.D.N.Y. Jul. 24, 2014]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *11; [S.D.N.Y. Mar. 31, 2014]; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *7, *14 [S.D.N.Y. Aug. 23, 2012], aff'd, 530 Fed. App'x 81 [2d Cir. 2013]; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *15 [S.D.N.Y. Sept. 27, 2013], aff'd, 589 Fed. App'x 572 [2d Cir. Oct. 29, 2014] [fact that student may have benefited from home-based services does not mean that such services are necessary to receive a FAPE]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *17-*19 [E.D.N.Y. Oct. 30, 2008]). An IEP does not need to include extended school day services or home based services after school if such services would only address the student's behaviors at home or assist the student in generalizing skills or knowledge (L.K. v. New York City Dep't of Educ., 2016 WL 899321, at *8-*10 [S.D.N.Y. Mar. 1, 2016]; see also Student X., 2008 WL 4890440 at *17-*18; (P.S., 2014 WL 3673603, at *13-*14; K.L., 2012 WL 4017822, at *7, *14; C.G. v. New York City Dep't of Educ., 752 F. Supp. 2d 355, 360 [S.D.N.Y. 2010]).

Here, the information in the hearing record does not show that the April 2013 and April 2014 CSEs were presented with any information indicating that the student required home-based services in order to receive a FAPE (see Dist. Ex 25 at pp. 8-9). Indeed, all of the evidence cited by the parent on appeal in support of this claim postdates the April 2013 and 2014 CSE meetings.

[31] The student's special education teacher set forth in her statement that student requires home-based ABA services in order to generalize, maintain mastered skills and increase his ability to acquire new skills (Tr. I p. 138-39; Parent Ex. F at p. 2). The private evaluator concluded in his report that the student should receive intensive SETSS-ABA services (Pet. Ex. D at p. 22).

As noted above, it would be unfair to impute knowledge of this evidence to the April 2013 and 2014 CSEs when it had not yet come into existence (C.L.K., 2013 WL 6818376, at *13). To be sure, the student is now receiving ABA instruction delivered at home pursuant to an agreement with the district which, in turn, is based on the IHO's decision in the original proceeding. Thus, the CSE is now well poised to assess whether these services are beneficial for the student, and whether they are necessary in order to receive a FAPE or merely promote the generalization of skills or knowledge (L.K., 2016 WL 899321, at *8-*10).[32]

Accordingly, the evidence in the hearing record supports a finding that the April 2013 and April 2014 CSE's failure to recommend 1:1 instruction for the student, instruction utilizing ABA, or home-based services did not result in a denial of a FAPE for the student for either the 2013-14 or the 2014-15 school years.

4. Related Services

a. Occupational Therapy

An IEP must include a statement of the related services recommended for a student based on such student's specific needs (8 NYCRR 200.6[e]; see 20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]). Thus, each student's need for related services must be determined on an individual basis as part of the CSE process and must be based on an assessment of the student's individual needs (Letter to Ackerhalt, 60 IDELR 21 [OSEP 2012]; Letter to Rainforth, 17 IDELR 222 [OSEP 1990]).

As noted above, the student's OT needs in this case were not based on an independent basis (as a consequence of the CSEs predetermination of the student's educational program) and were not based on an assessment of the student's individual needs (as a consequence of the CSEs failure to complete assessments that evaluated the student's fine motor skills). In light of the student's past receipt of OT services and short-term objectives to improve fine motor skills, a review of the documentation considered by both the April 2013 and 2014 CSEs shows that it was inadequate to determine what, if any, fine motor needs the student exhibited and whether OT services would be appropriate to meet those needs (Parent Ex. V at p. 9; W at p. 11). The district special education teacher testified that, at the time of both the April 2013 and 2014 CSE meetings, the student was not receiving OT and the CSEs did not have information indicating the student needed OT to make academic progress (Dist. Ex. 25 at pp. 4, 7-8). However, at the April 2013 CSE meeting, the CSE had available the student's 2012-13 IEP recommending OT services and fine motor short-term objectives, some of which were included in the April 2013 and April 2014 IEPs (Tr. I p. 19; Parent Ex. H at pp. 4-6, 8; J at pp. 3-6; K at p. 3-5). The district special education teacher further stated that the NPS representatives indicated that "if [the student] had any occupational therapy needs they were addressed programmatically at [the NPS]," further evidence that the CSEs lacked sufficient evaluative information in this area (Dist. Ex. 25 at pp. 4, 7). Accordingly, the district has failed to establish that the student did not require OT for the 2013-14 or 2014-15 school years in order to receive educational benefits.

[32] As noted above, a CSE that convened on April 21, 2015 declined the parent's request for home-based ABA services (see Dist. Ex. 14 at pp. 1, 13; Parent Ex. C at p. 9). Should the parent disagree with this determination, it must be resolved in a separate due process proceeding.

b. Parent Counseling and Training

Next, the parent asserts that the April 2013 and April 2014 CSEs failed to recommend parent counseling and training. State regulations require that an IEP indicate the extent to which parent counseling and training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). State regulations further provide for the provision of parent counseling and training for the purpose of enabling parents of students with autism to perform appropriate follow-up intervention activities at home (8 NYCRR 200.13[d]). Parent counseling and training is defined as "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's [IEP]"(8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]). However, some courts have held that a failure to include parent counseling and training on an IEP does not constitute a denial of a FAPE where a district provided a comprehensive parent training component that satisfied the requirements of the State regulation (see M.W. v. New York City Dep't of Educ., 725 F.3d 131, 141-42 [2d Cir. 2013]; R.E., 694 F.3d at 191; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *10 [S.D.N.Y. Oct. 28, 2011]; M.N. v. New York City Dep't of Educ., 700 F. Supp. 2d 356, 368 [S.D.N.Y. 2010]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 509 [S.D.N.Y. 2008]). The Second Circuit has explained that "because school districts are required by [State regulation] to provide parent counseling, they remain accountable for their failure to do so no matter the contents of the IEP. Parents can file a complaint at any time if they feel they are not receiving this service" (R.E., 694 F.3d at 191; see 8 NYCRR 200.13[d]; M.W., 725 F.3d at 142). The Second Circuit further explained that "[t]hough the failure to include parent counseling in the IEP may, in some cases (particularly when aggregated with other violations), result in a denial of a FAPE, in the ordinary case that failure, standing alone, is not sufficient to warrant reimbursement" (R.E., 694 F.3d at 191; see K.L. v. New York City Dep't of Educ., 2013 WL 3814669 [2d Cir. Jul. 24, 2013]; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *10 [S.D.N.Y. Oct. 16, 2012] aff'd, 553 Fed. App'x 2 [2d Cir8, 2014]).

In this case, a recommendation for parent counseling and training is not reflected in either the April 2013 or April 2014 IEPs (Parent Exs. J at pp. 9; K at p. 6-7). The special education teacher testified that parent training was offered to parents in the 2013-14 school year (Tr. I p. 170). The parent testified that she did not attend parent training in the 2013-14 school and that she had heard about it but did not remember it being offered to her (Tr. I at p. 291). With respect to the 2014-15 school year, the special education teacher testified that a portion of the NPS was rented to another agency and there no parent training was offered to the parents that year (Tr. I at pp. 170-71).

Although the April 2014 CSEs failure to recommend parent counseling and training in the student's IEP constituted a violation of State regulation, such a violation, is not sufficient in this case—either alone or cumulatively—to support a finding that the district failed to offer the student a FAPE (see M.W., 725 F.3d at 142; R.E., 694 F.3d at 191; F.L., 2012 WL 4891748, at *9-*10; C.F., 2011 WL 5130101, at *10; M.N., 700 F. Supp. 2d at 368; M.M., 583 F. Supp. 2d at 509).

E. 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 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). Those violations include: for the 2013-14 school year, the predetermination of the student's OT services, the inadequacy of the evaluative information before the April 2013 CSE regarding the student's OT needs, and the failure to recommend OT for the student in the April 2013 IEP; and for the 2014-15 school year, the predetermination of the student's OT services, the inadequacy of the evaluative information before the April 2013 CSE regarding the student's OT needs, and the failure to recommend OT for the student in the April 2013 IEP, as well as the lack of speech-language goals addressing the student's functional communication skills, in conjunction with the failure to adequately address the student's assistive technology needs in the area of communication. 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. 2d 570, 586 [S.D.N.Y. 2013]), here the violations identified above, when considered cumulatively, impeded the student's right to a FAPE for the 2013-14 and 2014-15 school years. In light of this determination, the relief requested by the parent shall be considered.

F. Prospective Relief

The parent requests that the district provide an IEP that includes the following educational placement and services: a 6:1+3 program which uses ABA methodology at the NPS; 35 hours weekly of 1:1 ABA services to used be in school, home, or in the community; one hour weekly of parent training; assistive technology consisting of an iPad with "Proloquo2Go" and any other appropriate software/applications for cognitive and academic support for use at home and school; two hours of daily assistive technology training until the student becomes proficient in the use of the device; assistive technology training for the parent and teachers; two weekly 45-minute sessions of OT after school; four weekly 30-minute speech-language therapy sessions; a 12-month school year program, and transportation. In this case, prospective relief would be inappropriate under the circumstances. In addition to the April 2013 and April 2014 IEPs challenged in this proceeding, the hearing record contains an April 2015 IEP and, in accordance with its obligation to review a student's IEP at least annually, the CSE should have already developed a new IEP for the student for the 2016-17 school year (Parent Ex. M at pp. 1, 10; see 20 U.S.C. § 1414[d][4][A]; Educ. Law § 4402[2]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]). A CSE is tasked with assessing a student's needs from year to year, and it would be inappropriate to unnecessarily interfere with this process by ordering amendment of the student's IEP without any knowledge or evidence regarding the annual review of the student's current needs or services conducted subsequent to the matters under review in this proceeding (see Student X, 2008 WL 4890440, at *16 [noting that "services found to be appropriate for a student during one school year are not necessarily

appropriate for the student during a subsequent school year"]). The appropriate course is to require the parties to come into compliance with the statutory process envisioned under the IDEA and to effectuate equitable relief to remediate past harms that have been explored through the development of an appropriate evidentiary record. Therefore, the parent's request to direct the contents of new IEPs going forward is denied.

G. Pendency

Before considering the parent's specific requests for compensatory education, it must be clarified to what placement and/or related services the student has received and/or is entitled to as a consequence of the unusual procedural posture of this case.[33]

The IDEA and the State Education Law require that a student remain in his or her then-current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. §1415[j]; Educ. Law §§4404[4], 4410[7][c]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see T.M., 752 F.3d at 170-71; Student X, 2008 WL 4890440, at *20; Bd. of Educ. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. Jan. 18, 2005]). Under the IDEA, the pendency inquiry focuses on identifying the student's then current educational placement (Mackey v. Bd. of Educ., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d. Cir 1982]). Although not defined by statute, the phrase "then current placement" has been found to mean the last agreed upon placement at the moment when the due process proceeding is commenced (Murphy v. Bd. of Educ., 86 F. Supp. 2d 354, 359 [S.D.N.Y. 2000] aff'd, 297 F.3d 195 [2002]). The U.S. Department of Education has opined that a student's then current placement would "generally be taken to mean current special education and related services provided in accordance with a child's most recent [IEP]" (Letter to Baugh, 211 IDELR 481 [OSEP 1987]; see Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]). However, if there is an agreement between the parties on placement during the proceedings, it need not be reduced to a new IEP, and it can supersede the prior unchallenged IEP as the then current placement (Evans v. Bd. of Educ., 921 F. Supp. 1184, 1189 n.3 [S.D.N.Y. 1996]; see Bd. of Educ. v. Schutz, 137 F. Supp. 2d 83 [N.D.N.Y. 2001], aff'd, 290 F.3d 476, 484 [2d Cir. 2002]; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]).

In this case, the parent commenced the impartial hearing process by due process complaint notice dated April 24, 2015, which was amended on May 19, 2015 (see generally Parent Exs. 1, 2). It appears from the hearing record that the student's pendency placement derived from a June 21, 2012 IEP providing for placement in a 6:1+3 special class in a State-approved nonpublic school, four weekly 30-minute sessions of individual speech-language therapy, and three weekly 30-minute sessions of individual OT (Parent Ex. H at pp. 7-8; see Tr. II pp. 73, 141).[34]

[33] The parent also correctly asserts that the IHO erred in refusing to issue a determination on pendency on the basis that the parent did not include such a request in her due process complaint notice (Tr. II p. 145). A student's right to pendency automatically arises as of the filing of the due process complaint notice, and therefore, is one particular issue that generally is not contained in a due process complaint (Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; see Mackey v. Bd. of Educ., 386 F.3d 158, 160-61 [2d Cir. 2004]).

[34] While the June 2012 IEP recommended three 30-minute sessions of OT per week, the parties subsequently agreed to alter the student's pendency placement to two weekly individual 45-minute sessions (Parent H at pp. 7-8; see Tr. II pp. 141-42).

Subsequently, after the original impartial hearing, the IHO ordered the district to provide the student with two hours per day of "after school . . . ABA services," to provide the parent with 12 hours of parent counseling and training prior to December 2015, and to conduct an OT evaluation and an assistive technology evaluation of the student prior to August 15, 2015 (Petition Ex. A at p. 11). Upon remand, the efficacy of the IHO's ordered relief remained unclear (see Application of the Dep't of Educ., Appeal No. 15-091). Although the district cross-appealed the IHO's order in the appeal before remand, in the instant appeal, the district represents that it voluntarily agreed to implement the IHO's award for home-based ABA services and parent training (Answer ¶45 n. 8). The district further "represent[ed]" in its answer that it would continue to fund the ten hours weekly of home-based ABA services and one hour per week of parent counseling and training "pursuant to [the student's] pendency entitlement," along with placement in the 6:1+3 special class at the NPS, four 30-minute sessions of speech-language therapy per week, two 45-minute sessions of individual OT per week, and special education transportation services (id. at ¶ 45 & n.8).

As noted above, once a proceeding commences, a student's pendency placement can be changed in one of two ways pursuant to the IDEA: 1) by agreement between the parties themselves or 2) by a state-level administrative (i.e. SRO) decision that agrees with the child's parents that a change in placement is appropriate (34 CFR 300.518[a], [d]; 8 NYCRR 200.5[m][1], [2]; see Schutz, 290 F.3d at 484-85; A.W. v Bd. of Educ., 2015 WL 3397936, at *6 [N.D.N.Y. May 26, 2015]; New York City Dep't of Educ. v. S.S., 2010 WL 983719, at *1 [S.D.N.Y. Mar. 17, 2010]; Murphy, 86 F. Supp. 2d at 366). Absent one of the foregoing events, once a pendency placement has been established, it "shall not change during those due process proceedings" (S.S., 2010 WL 983719, at *1 [emphasis in the original]). And upon a pendency changing event, such changes apply "only on a going-forward basis" (S.S., 2010 WL 983719, at *1). This serves the core purpose of pendency, which is "to provide stability and consistency in the education of a student with a disability," and it would belie this provision to require a district to change a student's educational services in the middle of an impartial hearing (Arlington Cent. Sch. Dist. v. L.P., 421 F. Supp. 2d 692, 696 [S.D.N.Y. 2006]; see Evans, 921 F. Supp. at 1187, quoting Bd. of Educ. v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]; see also Doe v. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015], cert. denied 2016 WL 1059911 [2016] [noting that the goal of pendency is "to maintain the educational status quo while the parties' dispute is being resolved"]).

Applying these principals to the present case, the district's representations reflect an agreement to modify the student's pendency placement on a going-forward basis. Accordingly, the parties' agreement as to the student's placement and services now form the basis of the student's pendency placement from the time of the agreement until the proceedings and any appeals are concluded or another subsequent agreement to modify the student's pendency placement takes place between the parties.

H. Compensatory Education

The parent asserts that the student is entitled to compensatory home-based ABA services, OT, assistive technology and training, and parent counseling and training to remedy the alleged denial of a FAPE during the 2013-14 and 2014-15 school years.

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.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). 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"]; 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"]).

1. Home-Based ABA Services

The parent seeks 3,220 hours of home-based ABA services to be provided by a qualified ABA professional of the parent's choice, to include toilet-training services of at least three hours per day, seven days per week until the student demonstrates independent toileting skills across home, school, and community settings. The bases for the finding that the district denied the student a FAPE for the 2013-14 and 2014-15 school years (violations related to OT, speech-language, and assistive technology) do not align with an award of home-based ABA services. That is, additional home-based ABA services would not provide the student with educational benefits that likely would have accrued from the special education services the school district should have supplied in the first place (see Reid, 401 F.3d at 524). Furthermore, the evidence in the hearing record shows that additional ABA services are unnecessary to supplement the amount of ABA instruction the student received by virtue of the district's implementation of the IHO's original decision and the parties' subsequent agreement with respect to the student's pendency entitlement. Additionally, the student is currently placed in a 12-month program in a nonpublic school that utilizes ABA methodology (Tr. I at pp 87, 103, 238; Dist. Ex. 25 at p. 8; Parent M at pp. 1-12). The evidence in the hearing record does not establish how suffusing the student's time at home with additional ABA services would be beneficial or feasible.

2. Occupational Therapy

The parent seeks 138 compensatory OT hours to be provided by a licensed occupational therapist of the parent's choosing as well as 63 OT hours to compensate for the failure to implement pendency. In light of the district's failure to address the student's fine motor needs as set forth above, the evidence in the hearing record supports a finding that the student is entitled to compensatory education in the form of additional OT services.

In this case, the hearing record demonstrates that during the 2012-13 and 2013-14 school years the student had not been adequately evaluated to determine if, and to what degree, he exhibited deficits in fine motor skills and/or sensory processing. However, there is evidence in

the hearing record to indicate that, during that time, the student had been experiencing difficulties with his graphomotor skills and sensory processing (see Parent Exs. J at pp. 3-5; K at pp. 1, 3, 5-6; V at p. 9; W at p. 11). The district evaluated the student pursuant to the IHO's original order and prepared a report, dated May 12, 2015 (see Dist. Ex. 27 at pp. 1-6; see IHO Decision I at p. 10).[35] The evaluator noted that the primary areas of concern were sensory processing and fine motor skills (Dist. Ex. 27 at p. 2). The evaluator noted that the student appeared to have low muscle tone and needed constant redirection and tactile cues to complete physical tasks such as waking around cones, walking 2 minutes on the treadmill, and climbing obstacles (id. at p. 3). With respect to ADLs, the student was able to work on the dressing boards, snap and unsnap, but could not zipper or button (id.). The student was working on pre-writing skills such as drawing vertical lines, but was unable to write his name (id. at p. 4, 5). The evaluator noted that the student demonstrated sensory sensitivity when another student in the class yelled, and the student appeared to require sensory input when he got out of his seat and pushed his body against a mat in the classroom (id. at p. 4-5). The evaluator noted that the student required sensory input activities in order to regulate his ability to process textures, sounds, smells, tastes, brightness, and movement (id. at p. 5). The evaluator recommended two 30-minute sessions of OT per week in a small group (2:1) along with suggested accommodations and adaptations to promote school functioning (id. at p. 6).

The district should have evaluated the student and recommended OT services in the April 2013 and April 2014 IEPs. Therefore, in order to address the student's deficits demonstrated in the hearing record and to compensate the student for the district's failure to recommend OT services, the district shall provide the student with compensatory OT services for the 2013-14 and 2014-15 school years.[36] The June 2012 IEP recommended three weekly, 30-minute sessions of individual OT for the student (Parent Ex. H at p. 8). It appears that the student's needs with respect to OT have remained relatively constant such that this recommendation continued to be appropriate for the 2013-14 and 2014-15 school years. Therefore, multiplying three weekly sessions by the number of weeks in a 12-month school year (approximately 42 weeks), I find that the student is entitled to 126 30-minute sessions per year, for, a total of 252 30-minute sessions of individual OT.[37]

Moreover, separate from the compensatory relief ordered above, the parent correctly argues that the district did not abide by its pendency obligations, and that the student is entitled to compensatory services stemming from this violation. The Second Circuit has held that where a district fails to implement a student's pendency placement, students should receive the pendency services to which they were entitled as a compensatory remedy (E. Lyme, 790 F.3d at 456 [full reimbursement for unimplemented pendency services awarded because less than complete reimbursement for missed pendency services "would undermine the stay-put provision by giving the agency an incentive to ignore the stay-put obligation"]; see Student X, 2008 WL 4890440, at

[35] The evaluation report is being considered solely within the context of fashioning equitable relief and not to assess the recommendations made by the April 2013 and April 2014 CSEs.

[36] In New York, the school year begins on July 1 (Educ. Law § 2[15]).

[37] The April 2013 and April 2014 CSEs found the student eligible for services on a twelve-month basis; the parties do not indicate, and the record does not show, that this was inappropriate (Parent Exs. J at p. 9; K at p. 7). Additionally, although this award has used a 30-minute paradigm to calculate the total amount of compensatory relief, the parties may agree to deliver the services in a different duration if it better meets the student's needs.

*25, *26 [services that the district failed to implement under pendency awarded as compensatory services where district "disregarded the 'automatic injunction' and 'absolute rule in favor of the status quo' mandated by the [IDEA] and wrongfully terminated [the student's] at-home services"] [internal citations omitted]). It is difficult to determine from this hearing record when the district commenced implementation of pendency OT services. Thus, irrespective of any compensatory award of additional services, the district should have implemented three 30-minute sessions of individual OT per week upon the filing of the parent's due process complaint notice on April 24, 2015. The district represented at the second impartial hearing that it issued an RSA as of March 15, 2016 to provide OT to the student, but it is unclear whether services began immediately pursuant to this authorization (Tr. II p. 74). Therefore, in addition to the above award, the district is hereby ordered to provide the student with the OT services to which he should have received pursuant to pendency, less any services actually delivered.[38]

3. Assistive Technology

The parent also seeks assistive technology in the form of an iPad equipped with Proloquo2Go and any other appropriate software and applications for use at home and at school, along with at least two hours per day of assistive technology training until the student becomes proficient in the use of the communication software. Given the district's failure to explain how it assessed or met the student's assistive technology needs during the 2014-15 school year, it is next necessary to determine whether an award of compensatory additional services is warranted to "make up" for the district's denial of FAPE (Newington, 546 F.3d at 123).

The district conducted an assistive technology evaluation and prepared a report dated August 12, 2015 (Parent Ex. CCC pp. 1-6).[39] The evaluator reported that the student presented with moderate to severe deficits in receptive and expressive language abilities (id. at p. 1). The evaluator noted that according to teacher and therapist reports, the student was nonverbal and primarily conveyed his wants and needs through hand gestures, PECS symbols, and the use of symbols on an iPad application, TouchTalk (id.). Occasionally, the student used verbal approximations to communicate, and verbal or gestural prompts were often required (id.). According to the assistive technology evaluation report, although the personal family iPad and PECS were provided, the student's communication needs were not being satisfied (id. at p. 2). The evaluator reported that the PECS was not functional because the student was dependent on staff to locate and select the appropriate symbols from an array of three or four items to engage in activities (id.). The evaluator also indicated that the family's iPad was also not a functional form of communication for the student because once the device was sent home, it was used for purposes other than communication and once the device returned to school, the settings used for communication were manipulated or missing, causing the teacher or therapist to reprogram the device and reteach the symbols and locations of the information (id.). The evaluator reported that she observed the student using his family's iPad, he matched his picture to his name, and followed simple one-step directions when prompted with a model and the phrase "do this" with gestural prompts (id. at 3). The evaluator also assessed the student's ability to use a dynamic display touch screen augmentative alternative communication application on a tablet (id.). The evaluator noted

[38] Additionally, this entitlement shall extend throughout the duration of this proceeding (see M.R. v. Ridley Sch. Dist., 744 F.3d 112 [3d Cir. 2014]] cert. denied, 135 S. Ct. 2309 [2015]).

[39] The evaluation report is being considered solely within the context of fashioning equitable relief and not to assess the recommendation made by the April 2014 CSE.

that during the assessment the student's response accuracy varied based on the placement of the picture/symbol, ability to process what was asked of him and wait to make a selection, and perseverative behaviors; however, the student was able to comprehend that the evaluator's tablet was a functional modality of communication (id.). The evaluator concluded that a dynamic speech generating application would be beneficial to promote functional communication and to increase expressive and receptive language to access the current curriculum (id. at pp. 3-4).

The evaluator recommended a locked tablet with the dynamic speech generating application Proloquo2go, to be used daily for the length of related services and classroom activities, and also identified three goals and related short-term objectives (id. at pp. 4-6).

Given the above, I will order the district to implement the recommendations set forth in the August 2015 assistive technology evaluation report and provide the student with a locked tablet with the Proloquo2go application for the student to use at school. In light of the fact that the student receives home-based ABA services, the provision of a second tablet, as described in the August 2015 evaluation report, could appropriately remedy the April 2014 CSE's failure to address the student's assistive technology needs. Therefore, the district shall be ordered to provide the student with the additional locked tablet equipped with the Proloquo2go application as identified in the August 2015 assistive technology evaluation report (see Parent Ex. CCC at p. 4).

With respect to assistive technology training for the student and the parent, I order the CSE to reconvene for the purposes of making a recommendation to provide the student and the parent with assistive technology service training as defined by 8 NYCRR 200.1[f][5].

4. Parent Counseling and Training

The parent seeks 148 compensatory hours of parent training. Here, it is undisputed that the April 2013 and April 2014 CSEs did not recommend parent counseling and training as required by State regulation (see Parent Exs. J; K). The student's special education teacher further testified that parent training was not available at the NPS during the 2014-15 school year (Tr. I p. 170-71). However, the district represented that it has funded one hour weekly of parent training pursuant to implementation of the IHO's original order and will continue to do so pursuant to the student's pendency placement (Answer at p. 19 n 8; IHO Decision I at p 11).[40] The parent also receives ten one-hour sessions of parent counseling and training per month pursuant to the April 2015 IEP (Dist. Ex. 17 at p 9). Given that the parent is receiving parent training through the district's voluntary implementation of the IHO's original order and through the April 2015 IEP, it is not necessary to award additional compensatory parent counseling and training. However, the district is reminded, when next it convenes a CSE to develop an IEP for the student, to provide parent counseling and training in accordance with State regulations and the student's needs (8 NYCRR 200.4[d][2][v][b][5]; 200.13[d]).

I. Independent Educational Evaluations

Finally, the parent seeks an independent FBA conducted by a BCBA, an independent OT evaluation, an independent speech-language evaluation, and an independent assistive technology

[40] With respect to parent training, the IHO ordered that the district provide 12 hours of parent training prior to December 2015 in addition to the parent training she should receive for the 2015-16 school year (IHO Decision I at p. 11).

evaluation. The IHO found that there was no evidence that the parent disagreed with any evaluation conducted by the district and denied the parent's request for IEEs.

The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, ensure that either an IEE is provided at public expense or initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). However, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]).

The hearing record contains an e-mail from the parent dated April 22, 2015 requesting an OT evaluation and a speech language evaluation (Parent Ex. S). The parent sent this e-mail to the individual who served as the special education teacher at an April 2015 CSE meeting (compare Parent Ex. S, with Parent Ex. M at p. 12). The evidence in the hearing record shows that the district subsequently conducted an OT evaluation on May 12, 2015(Dist. Ex. 27 at pp. 1, 6). However, there is no evidence that the district conducted a speech-language evaluation or otherwise responded to the parent's request, and the hearing record does not contain a speech-language evaluation of the student.[41] Although the parent requested independent evaluations in the due process complaint notice only on "an interim basis to inform the record" (Parent Ex. B at p. 9), under the circumstances of this case I will order the district to fund an IEE of the student in the area of speech-language (see Letter to Baus, 65 IDELR 81 [OSEP 2015] [indicating that if a parent disagrees with an evaluation because a child was not assessed in a particular area, the parent has the right to request an IEE to assess the child in that area]).

As to the remainder of the IEEs requested, if the parent disagrees with any of the most recent district evaluations, including the most recent FBA, the March 2015 OT evaluation, or the August 2015 assistive technology evaluation of the student (Dist. Ex. 27; Parent Ex. CCC), the parent may request an IEE from the district based on such disagreement, at which point the district must, without unnecessary delay, ensure that either an IEE is provided at public expense or initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained

[41] The hearing record does contain, however, speech language progress reports from the NPS which are anecdotal and descriptive in nature (see Parent Exs. BB-DD).

by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv).

VII. Conclusion

Based on a review of the hearing record and for the reasons set forth above, I find that the district denied the student a FAPE for the 2013-14 and 2014-15 school years. I further find that an award of compensatory services, as described above, is appropriate to remediate the district's denials of a FAPE.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

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

IT IS FURTHER ORDERED that the district shall provide the student with 312 individual 30-minute sessions of OT. The parties may agree to alter the time increments by which these services are delivered based upon the student's needs. These services shall be implemented by no later than June 30, 2018; and

IT IS FURTHER ORDERED that the district provide the student with the OT services to which he was entitled to under pendency, calculated from April 24, 2015 through the duration of this proceeding, less any services already delivered to the student; and

IT IS FURTHER ORDERED that the district is to implement the recommendations set forth in the August 2015 assistive technology evaluation report and provide the student with a locked tablet with "a dynamic speech generating application: Proloquo2go" for the student to use at school, and provide the student with an additional locked tablet also equipped with Proloquo2go for use at home in order to access his home-based services; and

IT IS FURTHER ORDERED that the CSE reconvene and assess the student's and parent's need for assistive technology training services; and

IT IS FURTHER ORDERED that the district shall provide the parent with a list of independent evaluators from which a parent can obtain an IEE for the student at district expense. If the parties cannot mutually agree on an independent evaluator to conduct the IEE, the district shall provide the parents with information about where IEEs may be obtained, as well as the criteria applicable to IEEs should the parent wish to privately obtain additional evaluations at her own expense by an individual who is not on the district's list of independent evaluators.

Dated: **Albany, New York**
June 13, 2016

SARAH L. HARRINGTON
STATE REVIEW OFFICER