The University of the State of New York

The State Education Department
State Review Officer
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No. 17-006

Application of the BOARD OF EDUCATION OF THE FLORIDA UNION FREE SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Shaw, Perelson, May & Lambert, LLP, attorneys for petitioner, Michael K. Lambert, Esq., of counsel

Mayerson & Associates, attorneys for respondent, Gary S. Mayerson, 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 district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered placement at the New Beginnings Annex (New Beginnings), a nonpublic school located out-of-State, and payment for the student's tuition costs at New Beginnings for the 2016-17 school year. The appeal must be sustained in part and the matter remanded to the IHO for further administrative proceedings.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The student's educational program relating to the 2015-16 school year has been the subject of two previous administrative appeals (see Application of a Student with a Disability, Appeal No. 16-041, Application of a Student with a Disability., Appeal No. 16-060). The parties' familiarity with the student's prior educational history is presumed and will not be repeated in detail; however, a brief description of the student's recent educational history is necessary to provide the context of this appeal.

The student attended a Board of Cooperative Educational Services (BOCES) 6:1+2 special class at the commencement of the 2015-16 school year (Dist. Ex. 10 at p. 1). He continued to attend the 6:1+2 BOCES special class placement until February 2016, when his placement was changed to home instruction with related services due to an increase in behavioral difficulties (Dist. Ex. 11 at pp. 1-2). The student's home instruction program consisted of one hour of home-based tutoring per day, and OT and speech-language therapy services provided at the district elementary school (see Application of a Student with a Disability, Appeal No. 16-060). Beginning April 13, 2016 through the remainder of the 2015-16 school year, the student's home instruction program was implemented at the elementary school, with the addition of a 1:1 aide (Dist. Ex. 31 at pp. 1-2; see id.).

On June 13, 2016 and again on June 23, 2016 the CSE convened to develop an IEP for the student for the 2016-17 school year (fourth grade) (Dist. Ex. 12 at pp. 1-2).[1] During the meeting, the CSE determined that the student was eligible for special education and related services as a student with autism. In previous years, the student was classified as a student with a speech or language impairment (Tr. p. 135; Dist. Ex. 12 at p. 1; see Dist. Exs. 9-11). Finding that the student remained eligible for services as a student with a disability, the June 2016 CSE recommended a 12-month school year program, which consisted of a 6:1+2 special class placement in a BOCES setting during July and August 2016, along with four 30-minute sessions of individual speech-language therapy per week, three 30-minute sessions of individual occupational therapy (OT) per week, one 30-minute session of counseling per week in a small group, as well as two 30-minute sessions of parent counseling and training per month, and the support of a full-time one-to-one aide (Dist. Ex. 12 at pp. 11-12). The IEP indicated that the behavioral intervention plan (BIP) in effect during the 2015-16 school year "will follow to summer" and that "BOCES will have to rework BIP if need be in summer" (id. at p. 3; see Parent Ex. 28). For September 2016 through June 2017, the June 2016 CSE recommended that the student attend a 6:1+2 special class placement in the district and receive the same related services as recommended for summer 2016, with the addition of one 30-minute session of individual counseling per week (id. at pp. 10-11). Also, beginning in September 2016, the June 2016 IEP included added program modifications of a sensory diet, noise cancelling headphones, and updated goals (id. at pp. 1-3, 5-10).[2] CSE meeting minutes indicated that in the fall, the team working with the student would look at the BIP and "develop what needs to be developed," and that the district was hiring a "psychologist with a (board certified behavior analyst) BCBA" to be a resource once the student was "in district" (id. at p. 3; see Tr. p. 762). To address the student's special transportation needs during the 2016-17 school year, the June 2016 CSE provided the student with a bus attendant and a "[h]arness" (id. at p. 12). According to the June 2016 CSE meeting minutes, the father stated that the parents did not accept "the fall program in district" because "it was a new program" (id. at p. 3; see Tr. pp. 952-53).

[1] There is only one June 2016 IEP in the hearing record (Dist. Ex. 12). This IEP and the minutes contained therein were developed over the course of two CSE meetings that took place on June 13, 2016 and June 23, 2016 (Tr. pp. 159, 174; see Dist. Ex. 12 at pp. 1-2). For the remainder of this decision the CSE and IEP are referred to as the June 2016 CSE and the June 2016 IEP, except, where necessary, or for purposes of clarity, the specific date of the CSE meeting is identified for when the CSE referenced or discussed certain matters.

[2] The section detailing the sensory diet notes that the OT will "develop [a sensory diet] with staff and parental input" and will "implement and modify [it] as appropriate" (Dist. Ex. 12 at p. 10).

Beginning on July 6, 2016, the student began receiving his 12-month program at the BOCES setting (Tr. p. 1024; Dist. Ex. 12 at pp. 11-12).[3] While at the BOCES summer program the student was suspended for a total of six days in relation to three incidents related to his behavior in class (see Parent Exs. 58-59; 74).

Due to the parents' disagreement with the CSE's recommended fall 2016 program and placement, the student began receiving services, pursuant to pendency, at the district elementary school on September 7, 2016 (Tr. pp. 955-57; Dist. Ex. 33 at pp. 1-2).[4] The daily services the student received included three hours of 1:1 tutoring, speech-language therapy and OT services, and two hours of BCBA support (Tr. pp. 497-98, 815; Dist. Ex. 33 at pp. 1-2).[5]

A. Due Process Complaint Notice

The parents submitted three due process complaint notices on the following dates: June 2, 2016, June 15, 2016, and July 8, 2016 (Dist. Exs. 1 at p. 4; 2 at p. 4; 3 at p. 4). To simplify matters, on the first day of the impartial hearing the IHO ordered that all three due process complaints be consolidated (Tr. pp. 3-4, 51). Additionally, due to some confusion as to the issues raised and the timing of the CSE meetings and due process complaint notices, the parties and the IHO agreed that the parents would submit an amended due process complaint notice that included all arguments the parents sought to be addressed (Tr. pp. 36-46, 48, 51-52). The parents submitted an amended due process complaint notice on August 11, 2016 (Dist. Ex. 28 at p. 6).

As an initial matter, the parents claimed that the student's pendency placement was not based upon his "education needs," they objected to the number of hours per week of academic instruction as home instruction, and "demand[ed] [the student] be provided with a full school day schedule in his homebound placement" (Dist. Ex. 28 at p. 2).

In the amended due process complaint notice, the parents challenged the appropriateness of both the 12-month BOCES placement and the 6:1+2 special class recommended in the June 2016 IEP along with the CSE process (see Dist. Ex. 28). The parents contended that there was "no time to develop an IEP with new goals for the summer program" because the CSE meeting did not take place until June 2016 (id. at pp. 3, 8). They also claimed they had "no control" of what was on the IEP, and were "ignored" at the CSE meetings (id. at pp. 9-10). The parents disagreed with the school district evaluations because they failed to identify the "behavior and education needs" of the student (id. at p. 2). The parents maintained that the district did not have a functional behavioral assessment (FBA) or BIP to address the student's "continued behaviors on the school bus" or travel goals on the IEP to address his behaviors on the bus and that neither the IEP nor the BIP addressed the student's toileting issues (id. at pp. 11-12). Additionally, the parents argued that the June 2016 IEP did not address the student's need for transportation to be less than 35 minutes in duration (id. at p. 10). The parents also claimed that the continued use of the December 2015

[3] According to the student's mother, the last day of the BOCES summer program was August 17, 2016 (Tr. p. 1034).

[4] The school psychologist testified that the first day of school was September 6, 2016 (Tr. p. 396).

[5] The services of the BCBA were provided pursuant to an award of compensatory education from a prior impartial hearing (Dist. Ex. 33 at p. 1).

BIP was not appropriate and that the BIP did not have "calming down techniques" (id. at p. 14). Related to goals, the parents maintained that they disagreed with most of the goals on the IEP and they claimed that there were no goals that addressed the student's toileting issues, there were no counseling goals, and there were no speech-language therapy goals to address "Functional Communication training" (id. at pp. 12, 14, 16). Furthermore, the parents contended that the student required behavior therapy but that "there is no behavior therapy on the IEP with goals" (id. at p. 16). The parents also contended that there was no parent counseling or training with "service providers" on the June 2016 IEP and that the IEP offered no assistive technology to the student (id. at pp. 13-14). Additionally, the parents argued that the student's sensory diet was developed by an individual unqualified to draft such a document; furthermore, the sensory diet was not appropriate and included "oral motor therapy activities that only a speech pathologist should be addressing" (id. at pp. 13-14). The parents also objected to the IEP lacking "the services an autistic child needs" (id. at p. 1).

The parents argued that the 2016 12-month services, specifically the BOCES placement, were not based on the student's needs and were largely the same as the 12-month services the student received for the 2015-16 school year (Dist. Ex. 28 at pp. 2-4). Additionally, the parents claimed that the BOCES placement was incapable of controlling the student and "could not keep him in the classroom all day" (id. at p. 10). The parents claimed that the BOCES did not have the student's IEP, BIP, or sensory diet on the first day of school, nor was the BOCES provided with the sensory diet activities and behavior interventions staff used with the student in spring 2016 (id. at pp. 12-13).[6] The parents also "disagree[d] with the refusal of…having a Behavioralist for the summer ESY program" (id. at p. 10). Further, the parents asserted that the staff at the BOCES was not certified or licensed (id. at p. 5). The parents maintained that the student was not provided with "bus transportation for the "first two weeks to school with 35 minute[s] or less travel time" and that the bus trip to school took "at least 50 minutes" (id. at p. 10). Moreover, the parents asserted that the district failed to provide a harness for the student during the student's bus transportation to the BOCES program (id. at p. 11).

Regarding the fall program for the 2016-17 school year, the parents argued that the 6:1+2 special class in the district did not exist at the time they filed the due process complaint notice and that the parents did not have a classroom profile or knowledge of the qualifications of the teacher and aides (Dist. Ex. 28 at p. 4). The parents also asserted that the district did not have certified or licensed staff to implement the BIP (id. at p. 5).

As for relief, the parents requested: compensatory education for the time that the student was at the summer 2016 BOCES program; six hours a day of "academics and therapy services" until the student is placed in a school for students with autism within 35 minutes of the parents' home; a "[b]ehavioralist" for one hour a day; mileage reimbursement for the times the parents had

[6] On the second day of the impartial hearing, the IHO refused to certify "as an issue" that BOCES was not provided with the sensory diet activities and behavior interventions as it was "not clear enough to be a claim" in the due process complaint notice (Tr. pp. 86-91). However, the plain language in the due process compliant notice indicates that the parents objected to "no BOCES staff being provided with the sensory diet activities and behavior interventions" that staff who worked with the student during his in-district home instruction used, which they testified about at the hearing on June 14, 2016 (Dist. Ex. 28 at pp. 12-13; see Dist. Ex. 31).

to transport the student to or from the BOCES program; a behavior plan "and a goal" to address the student's behaviors during travel time; "a goal and program to address [the student's] toileting issues;" a "real sensory diet" developed by an "OTR" to include parent counseling and training "in the home program;"[7] oral motor therapy conducted by a licensed speech pathologist in the home "with parent counseling and training;" no parent counseling and training with the district school psychologist; an assistive technology evaluation; a new FBA and BIP that includes "coping and calming down programs;" five sessions of OT per week; new annual goals, including speech-language therapy goals to address "[f]unctional [c]ommunication training, pragmatics," and social skill training and goals; and individual counseling with a goal to address the student's ability to self-regulate (Dist. Ex. 28 at pp. 17-18).

The parents also "question the impartiality of the hearing officer" prior to the beginning of the impartial hearing and make a number of requests regarding the procedures for the due process hearing (Dist. Ex. 28 at pp. 18-22).

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing, which concluded on October 25, 2016, after six hearing days (see Tr. pp. 1-1188). In a decision, dated December 20, 2016, the IHO concluded that the district failed to offer the student a FAPE for the 2016-17 school year (IHO Decision at pp. 8-9, 12). The IHO determined that the June 2016 IEP "offers largely the same program that I previously ruled to have denied the student a FAPE," as no new "interventions or methodologies" were included, and while noise cancelling headphones, counseling, and parent training were added to the IEP, there was nothing to suggest that the student would benefit to any great extent because of those additions (id. at p. 7). The IHO also noted that a sensory diet and a new BIP were mentioned in the IEP, but the sensory diet was not "specifically referenced" in the IEP, there was nothing in the record to establish what would be provided in the BIP, and no timelines were included to indicate when either the sensory diet or the new BIP would be completed (id.). The IHO also found that the student's progress from February through June 2016 was minimal and inconsistent, and much of that progress was attributable to the student receiving individual instruction with the support of an aide (id. at p. 8). The IHO found that the record indicated "something significant and new had to be included in the Student's earlier program to make it appropriate" (id. at p. 8). For those reasons, the IHO determined that the district "denied the [s]tudent a FAPE through its IEPs in June, 2016" (id. at p. 9).

As for relief, the IHO determined that the student should be placed at "New Beginnings immediately, at the expense of the District" (IHO Decision at p. 12).[8] The IHO noted that he was "impressed with the testimony from the school," and that given the "extreme behavioral problems" and "unusually severe needs," New Beginnings would be able to address the student's needs with

[7] Although not clearly defined in the hearing record, "OTR" is generally understood to stand for "occupational therapist, registered." Furthermore, during the direct testimony of the student's father, the parents' advocate identified an OTR as a "registered occupational therapist" (Tr. p. 561).

[8] Although the parents requested prospective placement at New Beginnings in their due process complaint notices dated June 15, 2016 and July 8, 2016, such relief was not specifically requested in their August 11, 2016 amended due process complaint notice.

a "fresh approach" (id. at p. 11).[9] The IHO also found that "[a]ppropriate transportation" to the school should be provided by the district and include a harness and a bus aide, to ensure the student's safety (id. at p. 12).

IV. Appeal for State-Level Review

The district appeals, arguing that the IHO incorrectly found that the student was denied a FAPE for the 2016-17 school year and erred in ordering the district to place the student at New Beginnings. The district claims that the IHO erroneously concluded that the June 2016 IEP offers the same program he previously determined denied the student a FAPE. The district claims the IHO ignored several differences between the June 2016 IEP and the student's program for the 2015-16 school year and "important distinctions as to how [the student] was presenting at the time" the June 2016 IEP was developed. Namely, the district asserts that the IHO had previously found that the student's 2015-16 program was appropriate from July 2015 through December 2015; the district notes that the IHO "ignored several material distinctions" between the two programs, and that the IHO incorrectly concluded that the student made minimal progress in the "tutorial" program he received at the district elementary school at the end of the 2015-16 school year. The district also argues that the IHO erroneously suggested that the student did not receive individual instruction in the program recommended by the June 2016 CSE.

Next, the district claims that the IHO's findings regarding the student's transportation arrangements while at the BOCES summer program were not supported by the hearing record. The district argues that the IHO erred in failing to make a finding about the appropriateness of the BOCES summer program. The district further maintains that the IHO's decision contains little or no citation to the hearing record, and, as a result, "is entitled to little, if any, deference."[10] The district also claims that the IHO improperly relied on evidence that was presented in a prior due process hearing involving the same student, which was not admitted during this hearing.

The district also asserts that the evidence in the hearing record fails to support a conclusion that New Beginnings is an appropriate placement for the student. Specifically, the district indicates that the testimony of the director of New Beginnings provided "no explanation as to how [the student's] needs…could have been appropriately met" in the classes provided at New Beginnings, and did not identify the student-staff ratios at the school; furthermore, the district asserts that neither the director nor the BCBA at New Beginnings (the only school staff who testified) knew any personal information about the student and did not testify to having seen any evaluative materials for the student. Finally, the district claims that transporting the student from the parents'

[9] The IHO further noted that implementation of Applied Behavioral Analysis (ABA) with "[t]rained and supervised…professionals" at New Beginnings was part of the fresh approach that he believed would address the student's needs (IHO Decision at p. 11).

[10] The IHO failed to cite to specific transcript and exhibit pages in the findings of fact and conclusions of law section of his decision (see IHO Decision at pp. 2-5, 7-8, 10-12), which makes it difficult to ascertain the basis for the IHO's conclusions. The IHO is reminded that State regulations provide that "[t]he decision of the impartial hearing officer shall . . . set forth the reasons and the factual basis for the determination" and "shall reference the hearing record to support the findings of fact" (8 NYCRR 200.5[j][5][v]).

home to New Beginnings would take at least "39-44 minutes," which is inconsistent with the parents' claim that the student required a travel time of 35 minutes or less.

In an answer, the parents respond to the district's request for review by admitting and denying the parents' assertions and requesting that the IHO's decision be upheld in its entirety.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at

203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

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

VI. Discussion

A. Preliminary Matters

1. Additional Evidence

In their answer, the parents include two State complaints as exhibits.[11] While the parents do not expressly request that the State complaints be considered as additional evidence, those documents were not entered into evidence at the impartial hearing, and the parents rely on them and request the SRO to take them into account in upholding the IHO's decision (see Answer ¶¶ 1, 1(d)(i)-(ii), 1(h), 4). For that reason, the parents' inclusion of the State complaints in their answer is treated as a request to consider them as additional evidence. 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 (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). In this case, the evidence provided is not necessary to render a decision. While findings made in a State complaint may be offered as evidence in an impartial hearing, such findings do not have preclusive effect in an impartial hearing (8 NYCRR 200.5[*l*][2][viii][3]; Letter to Lieberman, 23 IDELR 351 [OSEP 1995]; see Lucht v. Molalla River Sch. Dist., 57 F. Supp. 2d 1060, 1065 [D. Or. 1999] [holding that, based upon Letter to Lieberman, res judicata did not attach in an impartial hearing following a State complaint process concerning the same student]). Accordingly, these documents are not necessary to render a decision and the parents' request to include them as additional evidence is denied.

2. IHO's Reliance on Prior Decisions

The district claims the IHO improperly relied on evidence from a previous due process proceeding between the parties, which was not admitted during this proceeding. However, the district fails to identify what evidence the IHO improperly relied upon. And as the district already noted above, the IHO rarely cited to the hearing record, so it is unclear what evidence the district believes the IHO may have relied on. The only evidence identified by the district is the IHO's "prior findings that were based upon such evidence"; however, the IHO did not rely on prior findings so much as he identifies, accurately in this case, that the school district "did not appeal…portion[s] of the [IHO] decision" that found the "6:1+2 program at [] BOCES was inappropriate for the student" (see IHO Decision at p. 7; see Application of a Student with a Disability, Appeal No. 16-060). The IHO is not prohibited from relying on prior administrative rulings regarding the same student as prior decisions should generally be adhered to in subsequent stages of due process, unless cogent and compelling reasons dictate otherwise (see Pape v. Bd. of Educ. of Wappingers Cent. Sch. Dist., 2013 WL 3929630, at *8 [S.D.N.Y. July 30, 2013]). Therefore, I find that to the extent that IHO relied on his prior determinations and prior SRO decisions regarding this student, such reliance was not improper in rendering a decision in this matter.

[11] The district also included a copy of Application of a Student with a Disability, Appeal No. 16-060 as an exhibit.

B. 2016-17 School Year

1. June 2016 IEP

The district argues that the IHO erred in concluding that the programs offered in the 2015-16 and 2016-17 IEPs were "largely the same," therefore denying the student a FAPE.[12] Regarding the program the student received from February 2016 through June 2016, the district also argues that it was erroneous for the IHO to find that the student's progress was minimal, and that the IHO ignored the student's behavioral gains, which prompted the CSE to recommend an in-district special class placement commencing in September 2016. Finally, the district claims that the IHO failed to decide the appropriateness of the summer 2016 BOCES program. The district maintains that the program was appropriate based on the information available to the June 2016 CSE—including the student's long history of success in BOCES summer programs—and although the student's behaviors resulted in less success in 2016 than in previous summers it does not mean the program was not appropriate when recommended.[13]

As an initial matter, the IHO found that the June 2016 IEP "offers largely the same program that [he] previously ruled to have denied the student a FAPE," as it did not include new "interventions or methodologies" (IHO Decision at p. 7). A student's progress under a prior IEP may be a relevant area of inquiry for purposes of determining whether a subsequent IEP is appropriate, particularly if the parent expresses concern with respect to the student's rate of progress under the prior IEP (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66 [2d Cir. June 24, 2013]; and at least one court has been "hard pressed" to understand how the subsequent year's IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch. v. Scott P., 62 F.3d 520, 534 [3d Cir. 1995] [noting, however, that the two IEPs at issue in the case were not identical as the parents contended]). Accordingly, the June 2016 IEP is analyzed based on whether it met the student's needs as of the time of its drafting and the similarities shared between the two IEPs should not have been the sole basis upon which to determine whether the student was offered a FAPE. Rather, an appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance, 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, and provides for the use of appropriate special education services, and whether or not a current program is appropriate should be determined on these grounds and not necessarily whether it bears similarity to a previous IEP. As discussed below, a review of the hearing record supports the IHO's conclusion that the district denied the student a FAPE for the 2016-17 school year.

[12] The district asserts that the IHO had previously found that the July 2015 IEP was appropriate from July 2015 to December 2015 (see Application of a Student with a Disability, Appeal No. 16-060 at p. 5). In the prior hearing, the IHO determined that the December 2015 IEP denied the student a FAPE for the remainder of the school year (id.).

[13] The IHO did not fail to address the appropriateness of the BOCES summer program in his decision. To the extent that the student's summer 2016 and 2016-17 programs are addressed in a single IEP, the IHO's findings that the June 2016 IEP was inappropriate addressed the appropriateness of both programs.

The June 2016 CSE had before it a March 11, 2014 OT evaluation report, a December 2, 2014 FBA and BIP, a May 19, 2015 audiological report, a June 23, 2015 speech-language evaluation report, an October 30, 2015 BIP, a December 11, 2015 BIP, a June 10, 2016 progress report, a June 7, 2016 OT progress report, and a June 8, 2016 speech-language progress report (Tr. pp. 142-44, 160-72; Dist. Exs. 12 at pp. 4-6; 14; 16; 17; 18; 19; 24; 26; 27; Parent Ex. 28).[14] In addition, the June 2016 CSE also considered the student's most recent psychological and educational reports; a March 7, 2014 psychological report, and a March 4, 2014 Brigance educational assessment (Tr. pp. 140, 142-45; Dist. Exs. 13; 15). According to the June 2016 speech-language progress report, the student's performance had been inconsistent, and he had not achieved his goals in this area (Dist. Ex. 27). Specifically, the student continued to have difficulty with accurate use of pronouns, had shown inconsistent progress in answering "who" and "what" questions, and had difficulty responding to "where" questions (id.). The June 2016 OT report stated that the student had shown some improvement during the past six weeks in his ability to be compliant and attend to task with minimal outbursts (Dist. Ex. 26). The student was progressing gradually in his ability to attend to tasks for 10 minutes following sensory motor activities, and was progressing inconsistently in his visual motor skills as evidenced by printing his first and last name using correct capital and lower case letters (id.). The student also had continued difficulty during "adult directed activities" (id.).

The June 2016 IEP featured 17 measurable annual goals to address the student's needs in the areas of study skills, reading, writing, mathematics, speech-language, social/emotional/behavioral, motor, and activities of daily living (Dist. Ex. 12 at pp. 9-10). Specifically, as identified in the student's June 2015 speech-language evaluation report and December 2014 FBA/BIP, the student exhibited difficulties with turn taking, following directions and transitioning; the June 2016 IEP included goals for the student to independently come to circle time, sit and take turns, follow a one-step direction, as well as independently transition between locations within the school building (Dist. Exs. 12 at pp. 9, 10; 16 at p. 1; 18 at p. 2). Furthermore, in accordance with his reading, writing, and mathematics delays, described in the March 2014 Brigance Assessment, the March 2014 OT evaluation report, and the June 2016 OT progress report, the June 2016 IEP included goals for the student to demonstrate improved understanding of phonics, basic addition and subtraction, and improved writing skills (Dist. Exs. 12 at pp. 9, 10; 14 at pp. 1, 3, 6-7; 15 at pp. 1-2; 26). Additionally, as indicated in the June 2015 speech-language evaluation report, the student exhibited an inability to answer questions appropriately; the June 2016 IEP included goals for the student to answer simple "wh" questions and answer questions related to informational text read aloud (Dist. Exs. 12 at p. 9; 18 at pp. 2, 4-5). Further, to address the student's difficulty with functional communication skills, the June 2016 IEP featured a goal for the student to expand utterances to improve functional communication (e.g. expressing needs and wants) (Dist. Ex. 12 at p. 9; 16 at p. 7). To address the student's difficulties with attention and social/emotional development, the June 2016 IEP included goals to display cooperative play skills, utilize self-regulation skills to manage emotions, and attend to and participate appropriately in an adult directed activity (Dist. Ex. 12 at pp. 9-10; 14 at p. 1; 16 at p. 6; 18 at p. 2).

[14] The June 2016 IEP lists a February 4, 2016 BIP as a document that was available to the CSE; however, it was not included in the hearing record (Dist. Ex. 12 at p. 4). The meeting information section of the IEP only refers to the December 2015 BIP (Dist. Ex. 12 at p. 3; Parent Ex. 28).

Based upon the progress the student exhibited with the home instruction program he received at the elementary school beginning in April 2016, the June 2016 CSE determined that a BOCES 6:1+2 special class placement was appropriate for the student for summer 2016 (Dist. Ex. 12 at p. 12). State regulations provide that a 6:1+2 special class placement is designed for students "whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention" (8 NYCRR 200.6[h][4][ii][a]). In conjunction with the supports inherent in the special class, the June 2016 IEP recommended revision of the December 2015 BIP "by the team that will be working with" the student, provision of verbal and visual models of expected positive behaviors, and "sensory activities" (Dist. Ex. 12 at pp. 7-8). The CSE also recommended parent counseling and training, and that the student receive the support of a full-time 1:1 aide, counseling, OT, and speech-language therapy services (Dist. Ex. 12 at pp. 11-12). The CSE also recommended special transportation services including a bus attendant and harness (Dist. Ex. 12 at p. 13). Although the 6:1+2 special class may have been an appropriate placement for the student, other deficiencies with the student's program, described below, result in a finding that the district's 12-month program denied the student a FAPE.

While the school psychologist stated that the student's management needs "increased dramatically" during the 2015-16 school year, and he became "more aggressive" and violent, adding to the bolting, climbing, and running behaviors he previously exhibited, by the time of the June 2016 CSE meeting the student's behaviors had reportedly improved (Tr. pp. 146, 190-91, 255-56). Specifically, the district presented testimony from the previous hearing and argues on appeal that, contrary to the IHO's finding that the student exhibited minimal and inconsistent progress from February through June 2016, the student had made gains, and those gains provide additional evidence that the program recommended by the June 2016 CSE was appropriate for the student (see Dist. Ex. 31).

At the previous hearing, the student's tutor testified that when she first began working with the student in April 2016, a small class setting would not have been appropriate (Dist. Ex. 31 at p. 13). However, the student made "tremendous" improvements behaviorally between the initiation of tutoring and the end of the 2015-16 school year, and she believed that for the 2016-17 school year the district elementary school "would be perfect for him," in a "small" classroom where he "can have the attention that he needs" (id. pp. 12, 14).[15] Furthermore, she believed that he was able to "control his behaviors himself" and work on academics (id. at p. 13). The student's speech-language therapist similarly testified that the student exhibited behavioral issues when he first came to the elementary school in April 2016 (id. at p. 30). However, the speech-language therapist's June 2016 testimony indicated that "in the last few weeks it's been very good" and that the student had become much more "available to learn" (id. pp. 30, 34). Consequently, she believed that the student could benefit from a small class at the district elementary school (id. p. 34). The speech-language therapist further indicated that the student was not as aggressive as he was in February 2016, and the routine of being in a full-day classroom would be beneficial to him (id. pp. 34-35). The student's certified occupational therapy assistant (occupational therapist) also believed that the student would do well in a small classroom setting at the district elementary school because he was no longer violent, could follow directions, and could benefit from the

[15] She also testified that the student would still require a 1:1 aide throughout the day (Dist. Ex. 31 at pp. 12, 14).

"consistent routine" of such a classroom (id. pp. 15-16, 24). She also testified that he had responded well and that "consistency is good for him" (id.).[16] [17] This evidence of behavioral progress, according to the school psychologist, was also consistent with discussions held at the June 2016 CSE meeting that included the student's then-current tutor, occupational therapist, and speech-language therapist (see Tr. pp. 190-92).

The hearing record indicates that the focus on improving the student's behavior and using specific behavioral interventions and sensory strategies with the student in spring 2016 resulted in the progress described above. According to the student's tutor, in June 2016 the student's behavior was "our main priority," and staff focused on the student's behavior in attempts "to get to the point" the student could work on content area activities (Dist. Ex. 31 at pp. 4, 9-10, 12). The tutor testified that she, the occupational therapist, and the speech-language therapist worked together and had meetings about the student's behavior plan in order to consistently use the same language and techniques with the student (id. at pp. 12, 14). The student's tutor and related service providers testified about the specific behavioral interventions and sensory strategies that were used with the student during spring 2016 that resulted in his improved availability to learn. Specifically, the student's tutor testified that staff used a "reward system" with the student to work towards gaining rewards, and that modeling breathing techniques, squeezing balloons, and shaking sensory bottles were successful methods to help the student calm down and sit in his seat (id. at pp. 2-3, 10-11, 13, 24). By June 2016, the tutor testified that the student would grab a balloon or sensory bottle to improve his control over his behaviors when he became frustrated (id. at p. 13). She further testified that the student benefitted from using balloons, sensory bottles, and breathing techniques, and that the student knew when he needed to use them, and got them for himself when needed (id.).

Additionally, the student's occupational therapist stated that she successfully used sensory motor equipment with the student such as swings, therapy balls, large cushions, a "steamroller," various types of scooters, Theraputty, and a trampoline (Dist. Ex. 31 at pp. 16-17, 23). According to the occupational therapist, the student appeared to enjoy using the equipment, and she noticed improvement in his ability to attend to table-top activities when the equipment was used first (id. at p. 23). To improve the student's behavior, the occupational therapist testified that she used scooters, swings, and the opportunity to observe other children as "motivators" to redirect the student's inappropriate behaviors (id. at pp. 22-23). She further testified that she used breathing techniques and sensory bottles with the student "for calming," which had a beneficial impact on the student (id. at pp. 21, 23-24). The occupational therapist testified that a sensory diet was a "list of activities for the child to follow throughout the day that can help them through their routine," and sensory diet activities she used with the student in spring 2016 included playing with a ball, going on a swing, using a "bean bin," and "water beads" (id. at pp. 19-21).

[16] However, the speech-language therapist testified that she had never seen the student with other students in a classroom, and the occupational therapist testified that she has never seen the student in a smaller class environment (Dist. Ex. 31 pp. 24, 36).

[17] The student's tutor and occupational therapist also testified that they used the student's December 2015 BIP throughout this time; the occupational therapist also testified that the student's service providers held meetings to discuss "what was being implemented [through the December 2015 BIP and]…how [they] could address [the student's] behaviors" (see Dist. Ex. 31 at pp. 2, 12, 22).

June 13, 2016 CSE meeting information indicated that the student needed a sensory diet, and that the occupational therapist provided the parents with a sensory profile to complete in order for her to develop the sensory diet (Dist. Ex. 12 at p. 2). The June 2016 IEP indicated that a sensory profile had been completed, that the student required sensory activities to help calm and focus him, that he responded well to "proprioceptive input" to organize him for table work, that a sensory diet "will be followed," and that "movement breaks are encouraged" (Dist. Ex. 12 at p. 4, 7).

Despite district staff's knowledge about successful behavioral and sensory strategies to use with the student, the June 2016 IEP indicated that the sensory diet would be implemented with the student beginning in September 2016, and not during the summer 2016 BOCES program (Dist. Ex. 12 at pp. 11-12). A review of the June 2016 IEP does not show that BOCES staff participated in either the June 13 or the June 23, 2016 CSE meetings, where information about the student's progress and sensory interventions was discussed (Dist. Ex. 12 at pp. 1-3). Additionally, other than noting that the student responds to proprioceptive input and needs sensory activities to calm and focus, the IEP does not otherwise indicate what sensory interventions to use with the student to manage his behavior (id. at p. 7).

Turning to the student's BIP, June 2016 CSE meeting information indicated that at the time of the meeting, the student's behaviors "have been managed by the team that is working with him" that they were working "with the existing BIP as much as they can," and that the CSE determined the student needed a BIP (Dist. Ex. 12 at pp. 2, 8). 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]). However, the district's failure to develop a BIP in conformity with State regulations does not, in and of itself, automatically render the IEP deficient, as the IEP must be closely examined to determine whether it otherwise addressed the student's interfering behaviors (see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 80 [2d Cir. 2014]; F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 6-7 [2d Cir. Jan. 8, 2014]; M.W. v. New York City Dep't of Educ., 725 F.3d 131, 139-41 [2d Cir. 2013]; R.E., 694 F.3d at 190).

Despite the evidence of behavioral progress made during spring 2016, the hearing record does not show that the district attempted to update the student's BIP prior to the summer 2016 BOCES placement; rather, the IEP indicated that the December 2015 BIP would "follow" to the BOCES placement and that "BOCES will have to rework [the] BIP if need be in [the] summer" and "[n]o outside agency is going to be coming in-staff working with [the student] need to be the ones developing and changing the BIP" (Dist. Ex. 12 at p. 3).

A review of the December 2015 BIP shows that at the time of the June 2016 CSE meeting, the BIP continued to reflect that the student's behaviors required two or three staff members to safely intervene, and that the student's parents "have agreed" to pick up the student if it was determined that all interventions had been unsuccessful and that the student's behaviors continued "to be unsafe to himself and others" (Parent Ex. 28 at pp. 1-2). The December 2015 BIP also

indicated that the student exhibited behaviors including running, bolting, and climbing on furniture (id. at p. 1). The functional hypothesis was determined to be that the student engaged in these behaviors to attain adult attention, sensory input, or due to environmental factors such as noise (id.). Finally, the December 2015 BIP identified preventive strategies such as reminding the student when transitions will occur throughout the day, visual cues related to transitions, and the use of reinforcement (id.).

Despite the student's improvement from April to June 2016, the hearing record shows that that student's behavior continued to be a significant area of need and concern at the time of the June 2016 CSE meetings (Dist. Ex. 12 at pp. 2-3, 6-8). The lack of an updated BIP prior to the summer 2016 BOCES program, coupled with a lack of information about successful behavioral interventions and sensory strategies in either the IEP or a subsequent sensory diet (which as stated previously, was not recommended for summer 2016), in this instance has the effect of denying the student a FAPE (see C.F. v. New York City Dept. of Educ., 746 F.3d 68, 80–82 [2d Cir. 2014] [insufficient BIP was a procedural violation that resulted in a substantive denial of FAPE because student's behaviors required a more supportive placement]; A.W. v. Bd. of Educ. of the Wallkill Cent. Sch. Dist., 2016 WL 4742297, at *3 [N.D.N.Y. Sept. 12, 2016] [failure to address significant behaviors that affected student's ability to perform in the classroom of which district was aware resulted in a denial of FAPE]).[18] As the district's failure to recommend appropriate summer services renders the June 2016 IEP inappropriate (see T.M. ex rel. A.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 167 [2d Cir. 2014] ["[t]hat proposed ESY placement violated the LRE requirement… made the April 2010 IEP substantively inadequate"]), a further discussion of the June 2016 IEP recommendations for the 10-month school year is reserved for the below discussion of the parent's request for prospective placement and the determination of an appropriate remedy.

2. June 2016 IEP – Implementation

Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if there was more than a de minimus failure to implement all elements of the IEP and, instead, the school board or other authorities failed to implement substantial or significant provisions of the IEP (Houston Independent School District v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]; see also Fisher v. Stafford Township Bd. of Educ., 2008 WL 3523992, at *3 [3d Cir. Aug. 14, 2008]; Couture v. Bd. of Educ. of Albuquerque Pub. Schs., 535 F.3d 1243 [10th Cir. 2008]; Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 [8th Cir. 2003]). Accordingly, in reviewing failure to implement claims under the IDEA, courts have held that it must be ascertained whether the aspects of the IEP that were not followed were substantial, or in other words, "material" (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202,

[18] In a prior proceeding the IHO found that the December 2015 BIP was inappropriate and determined that the student was denied a FAPE for a portion of the 2015-16 school year (Application of a Student with a Disability, Appeal No. 16-060). Of specific concern to the IHO in the previous hearing was "the district's practice of having the parent pick up the student from school because the school could not 'maintain' him in the classroom" (id.). Although the CSE was unaware of this determination during the June 2016 CSE meeting which predates the IHO's previous decision (see Dist. Ex. 12 at p. 1; Application of a Student with a Disability, Appeal No. 16-060), as discussed above, the lack of information communicated to the BOCES summer program about the student's improved behavior and successful interventions resulted in a denial of a FAPE.

205 [2d Cir. March 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007] [holding that a material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled student and the services required by the student's IEP]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73, 75-76 (D.D.C. 2007) [where a student missed a 'handful' of speech-language therapy sessions as a result of the therapist's absence or due to the student's fatigue, nevertheless, the student received consistent speech-language therapy in accordance with his IEP, the district's failure to follow the IEP was excusable and did not amount to a failure to implement the student's program]).

Moreover, an implementation claim is a narrow inquiry into the actual delivery of the program and services recommended in the student's IEP, rather than the appropriateness of the recommended program and services or the student's progress thereunder. It has been held that an implementation claim must be closely examined to ensure that it involves nothing more than implementation of services already spelled out in an IEP (Polera v. Bd. of Educ., 288 F.3d 478, 489 [2d Cir. 2002] [reviewing the relevant claim and noting that the district's alleged failure to provide services was "inextricably tied to the content of the IEPs and therefore . . . much more than a failure of implementation"]; Donus v. Garden City Union Free Sch. Dist., 987 F. Supp. 2d 218, 231 [E.D.N.Y. 2013]; see also Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669, 682 [S.D.N.Y. 2011]).

a. Special Factors – Interfering Behaviors

Implementation of the student's June 2016 IEP is also a matter of concern, specifically as it relates to the student's behavioral issues and BIP.

Initially, the hearing record contains inconsistencies as to whether the district provided the BOCES summer program with the necessary documentation to implement the student's June 2016 IEP. A school district must have an IEP in effect for each student with a disability within its jurisdiction at the beginning of each school year (20 U.S.C. § 1414[d][2][A]; 34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]). Additionally, districts "must ensure that ... [t]he child's IEP is accessible to each regular education teacher, special education teacher, related services provider, and any other service provider who is responsible for its implementation" and that "each teacher and provider… is informed of (i) [h]is or her specific responsibilities related to implementing the child's IEP; and (ii) [t]he specific accommodations, modifications, and supports that must be provided for the child in accordance with the IEP" (34 CFR 300.323[d]; 8 NYCRR 200.4[e][3]). In this instance, the school psychologist testified that the BOCES was provided with and subsequently used the December 2015 BIP (Tr. pp. 246-49), which the June 2016 IEP identifies as the BIP to be utilized during the summer program (Dist. Exs. 12 at p. 8; see Parent Ex. 28). The student's father also testified that he believed that the BOCES used the December 2015 BIP; however, he did not believe that the BOCES had a copy of the BIP at the start of the summer program (Tr. pp. 569-71). The student's mother testified that the BOCES did not have the December 2015 BIP, sensory diet, and June 2016 IEP until she provided it to the BOCES after the student's suspension (Tr. pp. 1027-28, 1096). Additionally, the assistant principal of the BOCES testified that he was not familiar with the December 2015 BIP, and he believed that they used a

different BIP during the summer (Tr. p. 622; Parent Ex. 28).[19] The director of the BOCES summer program also testified that she was unaware whether the December 2015 BIP was utilized during the student's summer program, but that in any case, they would have used the BIP that was "the most current" (Tr. pp. 734-35). The school psychologist testified that there were discussions between the district assistant superintendent and the BOCES principal about the BOCES having the student's IEP, BIP, and sensory diet; however, there is no indication as to when those discussions took place or when the BOCES was provided with those documents (Tr. p. 258).

Additionally, as noted above, the June 2016 IEP identified that the BIP for the student "will need to be reviewed and re-worked as necessary by the team that will be working with him" (Dist. Ex. 12 at pp. 2, 8). During the June 23, 2016 CSE meeting, the student's father indicated that he was concerned about the student's "possible behaviors" while at the BOCES summer program, at which point he was informed that the December 2015 BIP "w[ould] follow [the student], [and that] the BOCES staff needs to work with him…and develop [the BIP] as necessary throughout the summer to provide him…appropriate behavior support" (Tr. pp. 189-90; see Dist. Ex. 12 at p. 3). The school psychologist also testified that once BOCES staff had the student's December 2015 BIP, it was their job from that point forward to "work that document," and since "a behavior plan is a fluid document…[the BOCES] need[ed] to continue to develop what may work" (Tr. p. 252). The director of the BOCES testified that the BOCES staff "would have written pieces of that behavior plan" or given input to another BIP developed by the district as needed (Tr. pp. 736-37). BOCES staff also appear to have utilized behavioral interventions that were not part of the December 2015 BIP as the BOCES assistant principal testified that when the student acted out, BOCES staff would place him in an "alternate classroom setting" (Tr. pp. 620-21). Furthermore, the student's father testified that the student was restrained "at least twice" at the BOCES summer program (Tr. pp. 572-73). Overall, while BOCES staff testified that the student's December 2015 BIP was revised or reworked during the summer, an updated BIP is not in the hearing record and when questioned BOCES staff were not able to identify such a document (see Tr. pp. 621-22, 736-37).

There are also indications in the hearing record that the district took steps to address the student's behavioral issues during summer 2016 by attempting to provide—although not a service on the student's IEP—the support of a BCBA; however, this was ineffective as the BOCES refused to allow the district to provide a BCBA at the BOCES summer program (Tr. p. 743). The student's father testified that he had been asking for "behavioral support" since February of 2016; he had also been asking for support during the time of the student's summer program, but never received a response from the district (Tr. pp. 532-33; 539-40; see Parent Ex. 67). The father testified that after waiting for approximately two weeks for the district to provide the student with a BCBA at the BOCES summer program, the BOCES informed the district that "they don't accept outside people" (see Tr. pp. 532-33). In support of this claim, the director of the BOCES testified that she would not allow the district to provide a BCBA at the BOCES summer program as the "person was not an employee and under the direct supervision" of the director (Tr. p. 743). Additionally, while the director testified that they do have "BCBA trained staff on site" (Tr. pp. 743-44), there

[19] However, the assistant principal also testified that he played no direct role in implementing the student's IEP during the summer (Tr. p. 629).

is no indication in the hearing record that the BOCES provided the services of a BCBA for the student.

Further, the above failures, to provide school staff with copies of necessary documentation regarding the student's behaviors and to update the student's BIP as necessary in accordance with the June 2016 IEPs directive, cannot in this instance be considered harmless errors as the student exhibited several serious behavioral incidents over the summer. In an August 4, 2016 letter—approximately two weeks before the BOCES summer program concluded—the acting principal of the BOCES identified that the student had 131 behavioral incidents, 83 of which were labeled "severe" which was defined as "climbing [on] furniture, physical aggression…flopping-crawling under furniture" and "lifting [the furniture] with [his] legs" (Parent Ex. 76 at p. 1). These incidents ranged from less than 1 minute to 45 minutes in duration (id.). Furthermore, the BOCES identified that the student had 25 "medium" incidents and 23 "mild" incidents (id.). The letter also indicates that the student had "made minimal progress towards his [BIP] goal of transitioning safely…with minimal disruption and with [a] 1:1 in close proximity" (id.). The acting principal addressed this note to the assistant superintendent of the district and copied the parents (see id.). The student was also suspended three times during the summer due to his behaviors (see Parent Exs. 58; 59; 74). On the first occasion, the student was suspended a single school day because he "attempted to stand on a chair and pushed [a] Para Educator, who fell over the chair" and later he "began to climb, push grab and kick staff members" (Parent Ex. 58). On the second occasion, the student was suspended for two days for repeatedly kicking and punching staff and standing on a chair and attempting to jump off (Parent Ex. 59).[20] On the third occasion, the student was suspended for three days for "climbing on furniture, hitting and kicking staff members," and "scratch[ing] and [breaking] the skin of several staff members" (Parent Ex. 74). The principal of the BOCES sent letters for each incident directly to the parents and copied the district assistant superintendent on each letter (see Parent Exs. 58; 59; 74). According to the student's mother, as a result of the student's suspensions and an unrelated health issue, he only attended the BOCES summer program for 16 days (Tr. pp. 1074-76).

To the extent that the district school psychologist testified that the district's plan for developing a new BIP for the 2016-17 school year was to "let [the student] get through this summer with what we know BOCES would work with and then have him start in the school year, and our team would then really work very hard to develop a new plan" (Tr. pp. 201-02), the district is responsible for providing appropriate services to support the student in his 12-month placement (see T.M., 752 F.3d at 165 [2d Cir. 2014] [the least restrictive environment requirement applies in the same way to 12-month placements as it does to school-year placements]). The school psychologist further testified that she believed the location and environment in which a BIP is conducted can influence the student and his behaviors and that the student needed to be in a program in which the district can gather data to complete a BIP (Tr. pp. 202-203, 407). While there are instances where delaying the development of a BIP until an FBA can be completed in the student's new environment may be acceptable (see M.N. v. Katonah-Lewisboro Sch. Dist., 2016 WL 4939559, at *15 n. 24 [S.D.N.Y. Sept. 14, 2016] [the value of conducting an FBA at the student's private school would have been limited to the student's functioning in that environment

[20] The BOCES director also testified that she was present during the second incident and that she personally witnessed the student engaging in behaviors such as climbing on furniture, crawling under furniture, bolting, and flopping on the floor (Tr. pp. 731-33).

as opposed to in the recommended program]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *13 [S.D.N.Y. Aug. 5, 2013] [in certain circumstances a district can wait until after a student begins to attend a district school to conduct an FBA]), in this instance, regardless of whether the district placement beginning in September 2016 would have also required the development of a new BIP, the student's behaviors necessitated a new BIP in his 12-month placement. The school psychologist also seemed to downplay the extent of the student's behaviors by opining that while there were "some [behavioral] problems" for the student at the BOCES, there "are always going to be incidences at this point until you extinguish the behaviors," and that the "frequency doesn't always equal the significance of [the behavior]" (Tr. pp. 256-57; see Parent Ex. 76 at p. 1). However, the district was aware that the student exhibited both frequent and significant behavioral issues, and the district's failure to take responsibility for revising the student's BIP during summer 2016 was a material IEP implementation failure resulting in the student being denied a FAPE for the 2016-17 school year.

b. Transportation

Next, the parents raised claims related to transportation of the student to the BOCES summer program. They claimed the student was not provided with transportation for the first two weeks of school that was less than 35 minutes in duration and that the district failed to provide a harness during transportation (Dist. Ex. 28 at pp. 10-11). Although the IHO did not make a specific determination regarding transportation, as part of his findings of fact, he found that the bus did not always come on time, the student had a difficult time on the bus, and the student was not provided a harness in some instances (IHO Decision at p. 5). The district contends that the IHO erred, asserting that the student only attended class twice between July 5, 2016 and July 12, 2016, and that starting July 13, 2016 the student's bus trip took less than 10 minutes, that the student had a bus attendant every day, and that the student used a bus harness every day.

The parents testified that the student did not have a harness or a "1:1 aide"[21] during the first two weeks of transportation to the BOCES placement and, subsequently, the student had an aide but they did not believe the student received a harness (Tr. pp. 539, 542-43, 1013).[22] District staff testified that the student was initially transported with other children, but was removed after the parents expressed concern about the student being on the bus for 50 minutes (Tr. pp. 185-86, 1143-44). By the "second or third day [the student] attended" the BOCES summer program the district transported the student on a bus by himself (Tr. pp. 185-86).[23] While the father testified that the student had "difficulty getting…on the bus," and that his first suspension from BOCES was the result of an incident on the bus, as far as the school psychologist was aware there was no indication from staff that the student had behavioral issues while on the bus (Tr. pp. 187, 539-40).[24] However,

[21] The hearing record refers to a bus attendant, monitor, and aide interchangeably (see e.g. Tr. pp. 539, 1013, 1146, 1156; Dist. Ex. 12 at p. 13).

[22] During the first two weeks of school, from July 5, 2016 through July 13, 2016, the student only attended school on two days due to suspensions (Tr. pp. 1140-41; see Parent Exs. 58-59).

[23] According to the district psychologist, the original bus had no "more than six students" (Tr. pp. 185-86).

[24] Additionally, there is no indication on the student's first suspension letter, dated July 6, 2016, that the suspension was a result of behaviors that occurred on the bus or during transportation (see Parent Ex. 58).

the psychologist also testified that the student's biggest behavioral difficulties occurred while he was transitioning from "one activity to another or one location to another," and the BOCES director testified that she witnessed the student having difficulty transitioning to the bus (see Tr. pp. 212, 740-41). The school psychologist also testified that the student utilized a harness during bus rides (Tr. pp. 186-87).

The district also presented rebuttal testimony about the nature and quality of the transportation services provided to the student by three bus monitors that accompanied the student to the BOCES (Tr. pp. 1146, 1156, 1164). All three testified that they began riding on the bus with the student on July 13, 2016 to "the end of August," and that he did not present with any behavioral issues during that time (id.). The district assistant superintendent also testified that the student was first placed on a small "bus by himself" on July 13, 2016 (Tr. p. 1140). Furthermore, the three monitors and the assistant superintendent testified that the ride from the student's house to the BOCES was approximately ten minutes (Tr. p. 1141, 1146, 1157, 1165). In addition, one of the bus monitors testified that the student was provided with a harness and that he used it every day (Tr. p. 1162).

The hearing record supports a finding that the student was provided with bus monitors, a harness, and transportation to and from his house that lasted approximately ten minutes for most of the time that he was attending the BOCES summer program. While the record is less clear as to what services the student was provided on the bus before July 13, 2016, it is unlikely that this alone is more than a de minimus failure on the part of the school district and accordingly, it did not rise to the level of a denial of FAPE.

C. Relief

1. Prospective Placement

The district argues that the evidence in the hearing record failed to support the IHO's prospective placement of the student at New Beginnings. In certain limited circumstances, an award directing a district to prospectively place a student in an appropriate, but non-approved school may be proper (see Connors v. Mills, 34 F.Supp.2d 795, 802, 805-06 [N.D.N.Y. Sept. 24, 1998]). In Connors, the court stated, in dicta, that "once the Burlington prerequisites relative to a non-approved private school are met, and a parent shows that his or her financial circumstances eliminate the opportunity for unilateral placement in the non-approved school, the public school must pay the cost of private placement immediately" (id. at 805-06). However, the prospective placement at issue in Connors constituted the only available remedy that would have provided the student with an appropriate education as "both the school and the parent agree[d] that the child's unique needs require[d] placement in a private non-approved school and that there [we]re no approved schools that would be appropriate" (id. at 799, 804). At least one court has noted this distinction, citing Connors for the proposition that the court ordered the "district to pay tuition directly to [the] private school unilaterally chosen by [the] parent, when the parent and district agreed that the district could not provide a FAPE" (Z.H. v. New York City Dept. of Educ., 107 F. Supp. 3d 369, 376 [S.D.N.Y. 2015]). For the reasons discussed below, the hearing record does not, at this juncture, support a finding that the student's needs required removal of the student from the public school and placement in a non-approved private school in order to provide him

with a FAPE. Accordingly, the IHO's order to prospectively place the student at New Beginnings for the 2016-17 school year was premature.

When determining an appropriate placement on the educational continuum, a CSE is required to first determine the extent to which the student can be educated in a public school setting with nondisabled peers before considering a more restrictive nonpublic school option (see E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *15 [E.D.N.Y. Aug. 19, 2013] [explaining that "[u]nder the law, once [the district] determined that [the public school setting] was the least restrictive environment in which [the student] could be educated, it was not obligated to consider a more restrictive environment, such as [a nonpublic school]"]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *8 [S.D.N.Y. Mar. 19, 2013] [finding that "[o]nce the CSE determined that [the public school setting] would be appropriate for the [s]tudent, it had identified the least restrictive environment that could meet the [s]tudent's needs and did not need to inquire into more restrictive options such as nonpublic programs"]). Thus, a directive that required placement of the student in a nonpublic school would impede the important statutory purpose of attempting, whenever possible, to have disabled students access the public school system through placement in a public school with their nondisabled peers (see Walczak, 142 F.3d at 132 [noting that the preference for educating students in the least restrictive environment applies even when no mainstreaming with nondisabled peers is possible]). Here, the evidence in the hearing record does not support a finding that the student's removal from the public school and his placement in a non-approved private school is necessary in order for him to receive a FAPE. Rather, the hearing record shows that although the 12-month services recommended were not appropriate, the program developed for the student in the district beginning in September 2016, with the additions of a mandated sensory diet and an updated BIP, could have provided the student with a FAPE (Dist. Ex. 12 at pp. 13-14).

The student's fall 2016 program and placement consisted of an in-district 6:1+2 special class with counseling, OT, and speech-language therapy; a full-time 1:1 aide, and the addition of noise cancelling headphones, a communication log to be used with the parents, and a sensory diet (Dist. Ex. 12 at pp. 10-11). Specifically, the hearing record shows that the student's occupational therapist developed a sensory diet for the student based on the questionnaire provide to the parents in June 2016 (Tr. pp. 193-94, 230-31, 258, 298; Dist. Exs. 12 at pp. 2, 11; 22; 23).[25] The June 16, 2016 sensory profile revealed that the student scored in the "typical" range for low endurance/tone, sensory sensitivity, and fine motor perceptual skills; in the "probable difference" range for oral sensory processing; and in the "definite difference" range for sensory seeking, emotionally reactive, inattention/distractibility, and poor registration (Dist. Ex. 22 at p. 1). Accordingly, the occupational therapist developed a sensory diet, which consisted of a "specific schedule of activities" and a variety of alternatives to choose from for the purpose of helping the student "feel calm, alert and organized" during the day; the sensory diet also provided the student with more appropriate ways to express his sensory needs physically rather than becoming aggressive (Tr. p. 196; Dist. Ex. 22 at p. 2). For example, the student was to be provided "arousing" activities to

[25] Despite the advocate's claim that the occupational therapist was not qualified to develop a sensory diet, the student's occupational therapist previously testified at the hearing and stated during the June 2016 CSE meeting that she was qualified to develop sensory diets (Tr. pp. 178-79; Dist. Exs. 12 at p. 3; 31 at p. 16; Parent Ex. 33). The school psychologist also testified that the occupational therapist was "qualified under the scope of her certification" to develop sensory diets (Tr. p. 232).

become more focused and attentive, such as bouncing, jumping, finger painting, and eating crunchy foods (Dist. Ex. 22 at pp. 3, 5, 7). The student was also to be provided "organizing" activities to reach an ideal learning state, such as pulling heavy items in a wagon, drinking thick liquids through a straw, and blowing a whistle (id. at p. 5, 7). Finally, the sensory diet included "calming" activities to help the student relax, such as slow rocking and deep breathing (id. at pp. 4, 7-8). Additionally, although not identified as a specific special education program and/or service, the June 2016 IEP indicated that when the student returned to the district, a "psychologist with a BCBA will be on staff" as a resource (Dist. Ex. 12 at pp. 2-3). While overall the 10-month 2016-17 program continues to suffer from the lack of an updated BIP or information in the IEP that otherwise addresses the student's specific behavioral and sensory needs, these failures are partially remedied by the recommendation for and completion of a sensory diet for the student. Additionally, the hearing record supports a finding that—given the district's awareness of the behavioral interventions and sensory strategies that were successfully used with the student in spring 2016—with the completion of a new BIP, a public school setting could address the student's needs.[26] Thus, under the circumstances in this case, prospective placement relief would not be appropriate (see Straube v. Florida Union Free Sch. Dist., 801 F. Supp. 1164, 1179-80 [S.D.N.Y. 1992] [while a court may provide conditional approval for an appropriate placement in the event there are no State-approved nonpublic schools that can meet the student's needs, the more appropriate course of action is to remand the matter to the CSE to find an appropriate program as it is the province of the local educators to initially determine placement]).

[26] To the extent that the parent asserts that the recommended 6:1+2 special class in the district did not exist at the start of the school year, generally, the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). However, the Second Circuit has held that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (M.O., 793 F.3d at 245; see Y.F. v. New York City Dep't of Educ., 2016 WL 4470948, at *2 [2d Cir. Aug. 24, 2016]; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. 2016]; B.P. v. New York City Dep't of Educ., 634 Fed. App'x 845, 847-49 [2d Cir. 2015]). Such challenges must be "tethered" to actual mandates in the student's IEP (see Y.F. v. New York City Dep't of Educ., 2016 WL 4470948, at *2 [2d Cir. Aug. 24, 2016]). In order for such challenges to be based on more than speculation, a parent must allege that the school is "factually incapable" of implementing the IEP (J.D. v. New York City Dep't of Educ., 2015 WL 7288647, at *16 [S.D.N.Y. Nov. 17, 2015], quoting K.C. v. New York City Dep't of Educ., 2015 WL 1808602, at *12 [S.D.N.Y. Apr. 9, 2015]; see also Z.C. v. New York City Dep't of Educ., 2016 WL 7410783, at *9 [S.D.N.Y. Nov. 28, 2016]; L.B. v. New York City Dept. of Educ., 2016 WL 5404654, at *25 [S.D.N.Y. Sept. 27, 2016]; G.S., 2016 WL 5107039, at *15; M.T. v. New York City Dep't of Educ., 2016 WL 1267794, at *14 [S.D.N.Y. Mar. 29, 2016]) based on something more than the parent's speculative "personal belief" that the assigned public school site was not appropriate (K.F. v. New York City Dep't of Educ., 2016 WL 3981370, at *13 [S.D.N.Y. Mar. 31, 2016]; Q.W.H. v. New York City Dep't of Educ., 2016 WL 916422, at *9 [S.D.N.Y. Mar. 7, 2016]; N.K. v. New York City Dep't of Educ., 2016 WL 590234, at *7 [S.D.N.Y. Feb. 11, 2016]). While both parties agree that there is currently no 6:1+2 special class at the district elementary school, contrary to the parents' claim, the school psychologist testified that this was because less children than expected returned from "BOCES" and, based upon the parents' assertions the student would not attend the district elementary school, the school was led to believe that "there was no need to create that second classroom" at that time (see Tr. pp. 395-97, 398-402, 830-32). Furthermore, both the school psychologist and the district superintendent confirmed that if the parents decided to place their student at the district elementary school, they could "create another classroom" as "the services [and] the support[s] [are] there [for the student]" (Tr. pp. 398-402, 482).

2. Remand – Compensatory Education

Although the remedy of prospective placement awarded by the IHO is premature, in this instance, the student is not left without any available relief for the district's denial of a FAPE and relief in the form of compensatory education, which was requested by the parents in their due process complaint notice, may be available (see Dist. Ex. 28 at pp. 17-19). Specifically, the parents requested compensatory education for the time that the student was at the BOCES summer program, a "[b]ehavioralist" for one hour per day, mileage reimbursement for the times they had to provide transportation to the BOCES summer program, oral-motor therapy conducted by a licensed speech pathologist to be implemented at home "with parent counseling and training," an assistive technology evaluation, five sessions of home-based OT per week, and all new goals (id. at pp. 17-19). However, the IHO did not address the parents' requests for compensatory education in his decision.

When an IHO has not addressed claims set forth in the due process complaint notice, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not address (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]). In this case, determining that the parents are correct that the district failed to fulfill its obligations to the student under the IDEA, but finding that the student is not entitled to any remedy, would constitute a hollow victory (see Connors, 34 F. Supp. 2d at 804). However, the hearing record before me does not provide an adequate basis to determine whether the student requires compensatory services to remedy the district's failures during the 12-month portion of the 2016-17 school year. Therefore, although the parents did not affirmatively seek relief in the form of compensatory education from the SRO or assert that the IHO failed to address the issue, the IHO should be given the opportunity in the first instance to make determinations regarding the parents' remaining requests for relief and this matter is remanded to the IHO for that purpose.

VII. Conclusion

Based on the above, I concur with the IHO's determination that the student was not provided with a FAPE for the 2016-17 school year. However, the IHO's order that the student be placed at New Beginnings is reversed as being premature at this juncture, and for the reasons set forth above, this matter is remanded to the IHO for a determination regarding whether compensatory education may be available to remedy the district's denial of a FAPE for the 2016-17 school year.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated December 20, 2016 is modified, by reversing those portions which directed the district to place the student at New Beginnings at the district's expense; and

IT IS FURTHER ORDERED that within 30 days of the issuance of this decision, the district takes the actions necessary to begin the process of revising the student's BIP to ensure that it is appropriate, consistent with the requirements of the June 2016 IEP and the findings within the body of this decision; and

IT IS FURTHER ORDERED that the IHO's decision, dated December 20, 2016, is remanded to the same IHO who issued the December 20, 2016 decision to determine the merits of the unaddressed requests for compensatory education contained within the parents' amended due process complaint notice consistent with the body of this decision.

Dated: **Albany, New York**
March 10, 2017

CAROL H. HAUGE
STATE REVIEW OFFICER