The University of the State of New York

The State Education Department
State Review Officer
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No. 17-042

Application of the BOARD OF EDUCATION OF THE MOUNT VERNON CITY 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:
Ingerman Smith LLP, attorneys for petitioner, Thomas Scapoli, Esq., of counsel

Gina DeCrescenzo, PC, attorneys for respondent, Gina M. DeCrescenzo, 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 a decision of an impartial hearing officer (IHO) which determined that the services recommended by its Committee on Special Education (CSE) for respondent's (the parent's) son for the 2014-15, 2015-16, and 2016-17 school years were not appropriate. The appeal must be sustained in part.

II. Overview—Administrative Procedures

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

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such

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

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

III. Facts and Procedural History

From kindergarten through sixth grade, the student attended school in another district (see Dist. Ex. 18 at p. 6). The student then attended a parochial school located in the district where he repeated sixth grade during the 2013-14 school year (Tr. pp. 187, 1147-48; Dist. Ex. 18 at p. 6). While attending the parochial school, the parent indicated that the student was called derogatory names in reference to his sexual orientation (Tr. pp. 1147-49). In December 2013, the student was referred to the CSE due to parent concerns about the student's academic skills and progress (Tr. pp. 1149-50; Dist. Ex. 3 at p. 1). A psychoeducational evaluation of the student was completed on January 16, 2014 and, on January 23, 2014, a CSE found the student ineligible for special education (Dist. Exs. 5; 6 at pp. 1, 4). However, because a district school psychologist noted that the student was exhibiting language deficiencies, the January 2014 CSE obtained the parent's consent to conduct a speech-language evaluation of the student, which was completed on March 12, 2014 (Tr. p. 172; Dist. Exs. 5 at p. 6; 6 at p. 1; 7; Parent Ex. O at p. 1). The CSE reconvened on May 7, 2014 and again determined that the student was ineligible for special education services (Parent Ex. O).

During summer 2014, the parent also had the student evaluated by both a pediatric neurologist and a psychologist who conducted a neuropsychological evaluation (Dist. Ex. 10; Parent Ex. M). For the 2014-15 school year (seventh grade) the student attended a district middle school (Dist. Ex. 18 at p. 6). In September 2014, the parent and district school psychologist discussed the parent's concerns about the student's academic skills, and the parent provided the school psychologist with the neuropsychological and neurological evaluation reports (Tr. pp. 992-94, 1152-54; see Tr. p. 1006; Dist. Ex. 10; Parent Ex. M). In October or November 2014, the student was referred to a "child study team" and provided with various interventions and supports to address his academic difficulties (Tr. pp. 502, 556-57, 1042-43). District staff developed an accommodation plan pursuant to section 504 of the Rehabilitation Act of 1973 ("section 504"), 29 U.S.C. § 794 for the student ("504 plan") on March 20, 2015 (Dist. Ex. 11).

On June 16, 2015, district personnel developed a second 504 plan for the student to be implemented in the 2015-16 school year (Dist. Ex. 12). By letter dated July 8, 2015, the pediatric neurologist who completed the August 2014 private neurological evaluation of the student recommended that the student be classified by the CSE as multiply disabled (Dist. Ex. 13; see Parent Ex. M).[1] On September 11, 2015, the school psychologist developed a safety plan for the student that identified district staff the student could go to when he felt unsafe (Dist. Ex. 14). At the suggestion of the school psychologist, the parent re-referred the student to the CSE and signed consent for evaluations on October 13, 2015 (Tr. pp. 1035, 1068; Dist. Ex. 15). Subsequently, the CSE conducted an October 2015 occupational therapy (OT) evaluation, a November 2015 social history update, a December 2015 speech-language evaluation, and a December 2015 psychoeducational evaluation of the student (Dist. Exs. 16-19).

The CSE convened on February 11, 2016, and found the student eligible for special education and related services as a student with an other health-impairment (Dist. Ex. 20 at p. 1).[2] The CSE discussed the parent's concern that the student was bullied, and the IEP noted that the student "has been bullied at school," that he experienced "a lack of connection with his peers," and included an annual goal to improve the use of positive strategies during social conflict with peers and adults (Dist. Exs. 20 at pp. 6, 9; 30 at pp. 18-19, 61, 78-79). The CSE recommended that the student receive one daily 42-minute session of resource room services and one 30-minute session of individual counseling per week (Dist. Ex. 20 at p. 9). Additionally, the CSE recommended one 30-minute speech-language consultation per week in the classroom (id. at p. 10).[3]

Following an incident at school where, according to the parent, one student would not let her son leave a classroom and called him derogatory names, she removed the student from the middle school he was currently attending (Tr. pp. 1188-91). Approximately one week after the incident, in April 2016, the student began attending a different district middle school where he completed the remainder of the 2015-16 school year (Tr. pp. 1191-92).

[1] While the letter was unaddressed and directed to "whom it may concern," it was stamped as received by the district on July 8, 2015 (Dist. Ex. 13).

[2] The student's eligibility for special education and related services as a student with an other health-impairment is not in dispute, after the February 2016 CSE meeting (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

[3] On February 26, 2016, the parent filed the original due process complaint notice in the present matter, which she later amended, as described below (Dist. Ex. 1; see Dist. Ex. 23).

On June 10, 2016, a subcommittee on special education (CSE subcommittee) convened to develop the student's IEP for the 2016-17 school year (Dist. Ex. 22 at p. 1). During the meeting, the CSE discussed the parent's view that the student was more "relaxed" at the new middle school, the student's past experience with bullying at the previous middle school, and an annual counseling goal that could be applied to the student's perception of bullying (Dist. Ex. 32 at pp. 11-14, 54-57, 59, 90-92). Additionally, the CSE discussed adding to the IEP a "special alert" statement regarding the student's history of bullying, the parent's concerns about the student's safety, that the student would receive counseling services, and that "bullying was addressed in [the student's] goals" (id. at p. 120). The CSE recommended that the student receive integrated co-teaching (ICT) services for both English language arts (ELA) and mathematics (Dist. Ex. 22 at p. 7). Additionally, the June 2016 CSE recommended one daily 42-minute session of resource room services, one 30-minute session of individual counseling per week, and two 30-minute sessions of group speech-language therapy services per week (id.). The June 2016 IEP reflected that the student was transferred to the new middle school due to the parent's concerns that the student was bullied at the prior middle school, and included counseling annual goals addressing his ability to interact with others and use positive strategies to resolve social conflicts (id. at pp. 1-2, 7).

A. Due Process Complaint Notice

In an amended due process complaint notice dated July 5, 2016, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) during the 2014-15, 2015-16, and 2016-17 school years (Dist. Ex. 23 at pp. 9-11).

The parent asserted that as far back as the 2013-14 school year, the district had "abundant information" regarding the student but "continuously failed and/or refused" to classify him as a student with a disability (Dist. Ex. 23 at p. 9). With respect to the 2014-15 and 2015-16 school years the parent contended that the district violated its child find obligations despite the parent's "repeated requests for evaluations" and the district staff's knowledge of the student's "cognitive and academic deficits" (id.). The parent further claimed that the district did not timely complete evaluations of the student in the 2015-16 school year, as the evaluations were completed more than 60 days after receipt of consent from the parent on October 13, 2015 (id.). The parent also maintained that the district "failed and refused" to complete a functional behavioral assessment (FBA) to identify the student's "problem behaviors or assess the cognitive and affective factors" contributing to those behaviors for the 2014-15 and 2015-16 school years; consequently, the parent maintained that the district failed to develop a behavioral intervention plan (BIP) during the two school years impacting his ability to benefit from his education (id.). The parent further argued that the district took "grossly inadequate actions" to protect the student, to the point "of willfully and purposefully refusing to address his safety concerns," despite being aware of both physical and emotional harassment by the student's peers (id. at p. 10). The parent also claimed that the district failed to recommend or implement "Cognitive Behavioral Therapy" or any "alternative behavior modification services," and failed to offer any speech-language therapy (id.). Additionally, the parent claimed that the district failed to implement the accommodations included in the student's 504 plan and did not provide the student with consistent and appropriate counseling services (id.). Overall, the parent contends that the district's failures resulted in a "failure to provide [the student] with an IEP for the 2014-2015 and 2015-2016 school years" (id.).

For the 2016-17 school year, the parent asserted that the district failed to develop an adequate safety plan and identified a specific district high school as being inappropriate for the student to attend as students who previously harassed him would be attending that school (Parent

Ex. 23 at p. 11). The parent also claimed that the district failed to develop an appropriate transition plan for the student (id.). The parent noted that, to the extent such arguments are procedural, such allegations impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE, and caused a deprivation of educational benefit (id.).

For relief, the parent requested: immediate placement outside of the district; provision of an appropriate IEP for the 2016-17 school year designed to "protect [the student] against future bullying"; compensatory education services in the form of 1:1 tutoring, speech-language therapy services, counseling, and OT; independent evaluations to be performed by providers of the parent's choosing at district expense, including a speech-language evaluation, a neuropsychological evaluation, an OT evaluation, and an FBA; and reimbursement to the parent of "any payments for private related services commissioned due to the [d]istrict's failure to offer [the student] a FAPE" for the 2014-15 and 2015-16 school years (Parent Ex. 23 at pp. 11-12).

B. Facts Post-Dating the Due Process Complaint Notice

The student attended a different district high school than the one identified in the parent's due process complaint notice for the 2016-17 school year (see Parent Ex. Y). A CSE subcommittee convened on October 5, 2016 to review the student's program (Dist. Ex. 27). The CSE continued the recommendations for resource room, ICT services in ELA and math, counseling, and speech-language therapy, and added a 1:1 teaching assistant to the student's program to "assist with academics and transitions throughout the school day," and use of break periods as a program modification (id. at pp. 1, 10). The IEP also added a special alert indicating that a safety plan would be developed with the student, parent, and district staff to address the parent's concerns about the bullying that she reported occurred when the student was in middle school (id. at p. 1).

C. Impartial Hearing Officer Decision

On October 7, 2016, the parties proceeded to an impartial hearing, which concluded on March 9, 2017, after nine days of proceedings (see Tr. pp. 1-1339).[4] By decision dated April 25, 2017, the IHO determined that the district failed to offer the student a FAPE for the 2014-15, 2015-16, and 2016-17 school years (see IHO Decision at pp. 36-54). The IHO found that the district violated its child find obligation and denied the student a FAPE during the 2014-15 and 2015-16 school years (id. at pp. 36-42). Initially, although the IHO noted that the parent did not raise issues in the due process complaint notice related to the 2013-14 school year, the IHO found that the January and May 2014 CSEs' determination that the student was ineligible for special education during the 2013-14 school year denied the student a FAPE and "had profound effects on the events that transpired in the [20]14-15 school year" (id. at pp. 37, 39). In making her child find

[4] It appears that many of the exhibits contained in the hearing record as well as the transcript include notations made by an unidentified individual(s), most likely the IHO in many instances. While I can appreciate that an IHO may have a need to make notes on an extra copy of the materials, I remind the IHO that it is necessary to avoid annotating the copy that is maintained as the official record of the proceedings as it becomes very difficult during subsequent administrative and judicial review to decipher what notations, if any, should be attributed to the various document authors or the even to the party offering the exhibit. In most cases, it falls within an IHO's discretionary authority to order the parties provide the IHO with an additional courtesy copy of the exhibits if necessary to assist the IHO in conducting the proceeding in an effective and efficient manner and then prepare a decision within the stringent deadline imposed on the IHO by the IDEA.

determination, the IHO found that the student's history "coupled with his 'marginal test scores' clearly was a 'red flag' that this student should have been eligible for special education services" (id. at pp. 37, 39).[5] Furthermore, the IHO found that the district had knowledge of the student's inattentiveness, social issues, and failing grades, which the IHO identified as clear indicators of the student's disability (id. at p. 40). Additionally, the IHO noted that the district did not "timely consider" the private evaluations completed in summer 2014 that "clearly support that [the student] should have been eligible for special education services" (id.). Furthermore, the IHO found that the district's "policy not to hold a new eligibility meeting was a serious procedural violation of the IDEA" (id. at p. 41). The IHO found that the district violated its child find obligations for the 2015-16 school year for "the same reason as previously noted" for the 2014-15 school year and because the "March 504 plan" was not effective in helping the student's academic or social/emotional needs (id. at p. 42).

Related to bullying, the IHO utilized the four-part test set forth in T.K. v. New York City Department of Education, 779 F. Supp. 2d 289 (E.D.N.Y. 2011) to find that the student was denied a FAPE as the result of bullying for the 2014-15, 2015-16, and 2016-17 school years (IHO Decision at p. 42).[6] The IHO found that the student was a victim of bullying, the district was on notice of the bullying, and the district was indifferent as staff "did little to correct the situation" and whatever steps had been taken by the district were insufficient (id. at pp. 43-48). Furthermore, the IHO determined that the bullying substantially restricted the student's educational opportunities because the student missed "numerous" classes as a result of being bullied and was not motivated or able to concentrate as a result of being bullied (id. at pp. 48-49).

Additionally, relative to both the 2014-15 and 2015-16 school years, the IHO found that the district should have conducted an FBA and developed a BIP to "assist[] the school in developing a better strategy in response to the ongoing bullying" (IHO Decision at pp. 49-50). The IHO also found that the district failed to offer the student speech-language therapy services during this time frame (id. at p. 50). However, the IHO did not find that the district failed to offer adequate behavior modification services (id.). The IHO also found no evidence to support the parent's contention that the student's 504 plan was not implemented (id.).

Regarding the 2016-17 school year, the IHO noted that the parent was "not challenging the appropriateness of the program created for the 2016-17 school year," but rather, was challenging the district's failure to develop a transition plan and to develop an adequate safety plan, as well as the appropriateness of the particular school that the district assigned the student to attend (IHO Decision at p. 51). The IHO first found that there were two possible district schools the student could attend and that neither was an appropriate school for the student to attend for the 2016-17 school year (id.). Regarding the district public school identified in the parent's due process complaint notice, the IHO determined, based on the representation of the parent's counsel, that five out of the seven students the student identified as having subjected him to bullying during prior school years were anticipated to attend the school and, therefore, the school would not be appropriate for the student (id. at pp. 52-53). With respect to the other school, which the student

[5] The IHO noted that the student was found ineligible for services in January and May 2014 based "solely on test scores" (IHO Decision at p. 39).

[6] However, in summarizing her finding later in the decision, the IHO only found a denial of FAPE on this basis for the 2014-15 and the 2015-16 school years, stating that "clearly the [b]ullying has denied [the student] a FAPE for the 2014-15 and 2015-16 [school years]" (IHO Decision at p. 49).

attended for the 2016-17 school year, the IHO found that the school was inappropriate because the student experienced instances of bullying from the beginning of the 2016-17 school year (id. at p. 51-52). The IHO noted that the student "was assigned a 1:1 aide" after the October 2016 CSE meeting and found that, although the presence of the additional staff member reduced the instances of physical bullying, the student was still subjected to instances of verbal harassment (id.). Next, the IHO determined that, in light of the instances of bullying during prior school years, district staff was aware that there was a substantial probability that bullying would restrict the student's educational opportunity and a safety plan should have been included in the student's IEP for the 2016-17 school year (id. at pp. 53-54). Finally, the IHO determined that the postsecondary goals identified in the June 2016 IEP were appropriate, as was the transition plan generally (id. at p. 54).

For relief, the IHO directed that the district should "immediately find an appropriate placement [for the student] outside of the . . . [d]istrict" and that an IEP should be developed to ensure that bullying does not substantially limit the student's educational opportunities and to protect him "from future bullying" (IHO Decision at p. 57). The IHO also awarded compensatory educational services consisting of 120 hours of 1:1 tutoring, 36 hours of speech-language therapy, and 14 hours of counseling, all to be delivered by providers of the parent's choosing (id. at pp. 55-56, 58). The IHO denied the parent's request for compensatory OT (id. at p. 56). The IHO also granted the parent's request for an independent speech-language evaluation and an independent FBA but denied her request for independent neuropsychological and OT evaluations (id. at pp. 56-58). Furthermore, the IHO ordered the district to reimburse the parent for private related services obtained because of the failure to offer the student a FAPE for the 2014-15 and 2015-16 school years upon presentation of proof of payment (id. at pp. 57, 58).

IV. Appeal for State-Level Review

The district appeals, asserting that the IHO erred in finding that the district failed to offer the student a FAPE for the 2014-15, 2015-16, and 2016-17 school years. The district argues that the IHO improperly found that it had violated its child find obligations from September 2014 through February 2016 and ordered compensatory education services as relief. The district claims that the IHO inappropriately disregarded the opinions of district witnesses, who were all professional educators, regarding the district's child find obligations and appropriateness of the student's 504 plans and IEPs, despite the lack of testimony from a professional that would otherwise rebut the district's evidence. Furthermore, the district contends the IHO erred in finding that the district violated child find when it failed to classify the student upon the student's enrollment in the district. The district argues that its child find obligations were satisfied when it evaluated the student "in accordance with established procedures." The district also claims that it properly implemented response to intervention (RtI) strategies and provided services under a 504 plan before referring the student to the CSE. The district maintains that the IHO's reliance on the student's lack of progress under the 504 plan in determining whether the district met its child find obligations was improper because it was "'after the fact review' prohibited by the courts."

Related to bullying, the district argues that the IHO's determination that it had knowledge of the "main perpetrators" was not supported by the evidence because the student was unable to identify the alleged harassers on "most occasions." Furthermore, the district argues that the evidence in the hearing record establishes that the district investigated and responded to all bullying allegations. The district maintains that the IHO improperly relied upon allegations of bullying that arose prior to the student's eligibility for services in the 2014-15 and 2015-16 school years, as any allegations of bullying prior to the student's eligibility were not relevant to a claim

under the IDEA. Additionally, the district claims that the IHO improperly ordered that it complete an FBA to address bullying, as there was no evidence in the hearing record supporting that an FBA be completed, and the IHO relied on evidence outside of the record to make her determination.

The district asserts that the IHO incorrectly found that there was a "substantial probability of bullying" during the 2016-17 school year. The district contends that, at the time of the June 2016 CSE meeting, the student had switched schools and the bullying had ceased. The district also claims that the IHO incorrectly determined the IEP denied the student a FAPE because it did not include a safety plan; the district notes that there is no legal requirement that a safety plan be set forth or incorporated in an IEP and that the IEP already included emotional supports and counseling for the student. Additionally, for the 2016-17 school year, the district asserts that the IHO improperly permitted testimony related to allegations of bullying arising after the hearing began.

Next, the district claims that the IHO improperly determined that the student had a speech or language impairment prior to his classification at the February 2016 CSE meeting, which the IHO found entitled the student to "compensatory speech services." Specifically, the district argues that the IHO failed to "identify a specific language disorder, or any speech or language goals which would have been appropriate based upon the testing." Furthermore, the district claims that, in finding the student eligible for special education and entitled to "compensatory tutoring services," the IHO improperly relied upon the parent's "lay opinion" of the student's reading skills to make an eligibility finding, that the neuropsychological evaluation report provided by the parent was insufficient to rebut opinions of the district witnesses related to the student's disability, and that the IHO improperly relied upon the "private evaluation report."

In an answer, the parent generally asserts admissions and denials to the district's allegations, and requests 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 or CPSE 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).

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; see Endrew F. v. Douglas County Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 998-1001 [2017] [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; 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]).

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

VI. Discussion

A. Child Find During the 2014-15 and 2015-16 School Years

The district argues that the IHO improperly found it had violated its child find obligations. The purpose of the "child find" provisions of the IDEA are to identify, locate, and evaluate students who are suspected of being a student with a disability and thereby may be in need of special education and related services, but for whom no determination of eligibility as a student with a disability has been made (see Handberry v. Thompson, 446 F.3d 335, 347-48 [2d Cir. 2006]; E.T. v. Bd. of Educ., 2012 WL 5936537, at *11 [S.D.N.Y. Nov. 26, 2012]; A.P. v. Woodstock Bd. of Educ., 572 F. Supp. 2d 221, 225 [D. Conn. 2008], aff'd, 370 Fed. App'x 202 [2d Cir. Mar. 23, 2010]; see also 20 U.S.C. § 1412[a][3][A]; 34 CFR 300.111; 8 NYCRR 200.2[a][1], [7]). The IDEA places an ongoing, affirmative duty on State and local educational agencies to identify, locate, and evaluate students with disabilities residing in the State "to ensure that they receive needed special education services" (20 U.S.C. § 1412[a][3]; 34 CFR 300.111[a][1][i]; Forest Grove, 557 U.S. at 245; E.T., 2012 WL 5936537, at *11; see 20 U.S.C. § 1412[a][10][A][ii]; see also 8 NYCRR 200.2[a][1], [7]; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 400 n.13 [N.D.N.Y. 2004]). The "child find" requirements apply to "children who are suspected of being a child with a disability . . . and in need of special education, even though they are advancing from grade to grade" (34 CFR 300.111[c][1]; see 8 NYCRR 200.2[a][1], [7]; D.K. v. Abington Sch. Dist., 696 F.3d 233, 249 [3d Cir. 2012]; J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 660 [S.D.N.Y. Nov. 18, 2011]). To satisfy the requirements, a board of education must have procedures in place that will enable it to identify, locate, and evaluate such children (34 CFR 300.111[a][1]; 8 NYCRR 200.2[a][1], [7]).

Because the child find obligation is an affirmative one, the IDEA does not require parents to request that the district evaluate their child (see Reid v. District of Columbia, 401 F.3d 516, 518 [D.C. Cir. 2005] [noting that "[s]chool districts may not ignore disabled students' needs, nor may they await parental demands before providing special instruction"]; see also Application of the Bd. of Educ., Appeal No. 11-153; Application of a Student Suspected of Having a Disability, Appeal Nos. 11-092 & 11-094).[7] A district's child find duty is triggered when the district has "reason to suspect a disability and reason to suspect that special education services may be needed to address that disability" (J.S., 826 F. Supp. 2d at 660, quoting New Paltz Cent. Sch. Dist., 307 F. Supp. 2d at 400 n.13). Additionally, the "standard for triggering the Child Find duty is suspicion of a disability rather than factual knowledge of a qualifying disability" (Reg'l Sch. Dist. No. 9 Bd. of Educ. v. Mr. and Mrs. M., 2009 WL 2514064, at *12 [D. Conn. Aug. 7, 2009]). To support a finding that a child find violation has occurred, "the [d]istrict must have 'overlooked clear signs of disability' or been 'negligent by failing to order testing,' or there must have been 'no rational

[7] However, a student may be referred by a student's parent or person in parental relationship (see 34 CFR 300.301[b]; 8 NYCRR 200.4[a][1][i]; see also 8 NYCRR 200.1[ii][1]-[4]). State regulations do not prescribe the form that a referral by a parent must take, but do require that it be in writing (8 NYCRR 200.4[a]; Application of a Child Suspected of Having a Disability, Appeal No. 05-069; Application of a Child Suspected of Having a Disability, Appeal No. 99-69).

justification for deciding not to evaluate'" (J.S., 826 F. Supp. 2d at 661, quoting Bd. of Educ. v. L.M., 478 F.3d 307, 313 [6th Cir. 2007]; see A.P., 572 F. Supp. 2d at 225).

Related to child find is the referral process. State regulation requires that a student suspected of having a disability "shall be referred in writing" to the chairperson of the district's CSE—or to a "building administrator" of the school in which the student attends—for an "individual evaluation and determination of eligibility for special education programs and services" (8 NYCRR 200.4[a]).[8] If a "building administrator" or "any other employee" of a district receives a written request for referral of a student for an initial evaluation, that individual is required to immediately forward the request to the CSE chairperson and the district must, within 10 days of receipt of the referral, request the parent's consent to initiate the evaluation of the student (see 8 NYCRR 200.4[a][2][ii], [a][2][iv][a], [a][3]-[a][5]; see also 34 CFR 300.300[a]). State regulation also provides that, upon receiving a referral, a building administrator may request a meeting with the parent and the student (if appropriate) to determine whether the student would benefit from additional general education support services as an alternative to special education, including speech-language services, academic intervention services (AIS), and any other services designed to address the learning needs of the student (see 8 NYCRR 200.4[a][9]). Any such meeting must be conducted within 10 school days of the building administrator's receipt of the referral and must not impede the CSE from continuing its duties and functions (see 8 NYCRR 200.4[a][9][iii][a]-[b]).

As an initial matter, the IHO appears to have reached issues outside of the scope of the impartial hearing and, to some extent, conflated the district's obligations under child find with the student's eligibility to receive special education services as a result. Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (see 20 U.S.C. § 1415[b][7][A]; 34 CFR 300.507[a]-[b]; 300.508[a]; 8 NYCRR 200.5[j][1]; Application of a Student with a Disability, Appeal No. 13-151; Application of a Student with a Disability, Appeal No. 09-141). However, 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]).

Here, while the January and May 2014 CSEs determined that the student was ineligible for special education services, the parent did not raise any issues related to the 2013-14 school year or the CSEs eligibility determinations in the original or amended due process complaint notices (see generally Dist. Exs. 1; 23). Further, the parent did not seek the district's agreement to expand the scope of the impartial hearing to include this issue, and did not include seek permission to further amend her due process complaint notice (see generally id.; see also B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012] [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]]"; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *13 [S.D.N.Y. Dec. 16, 2011]). The IHO acknowledged this but, nevertheless, found

[8] A district "must initiate a referral and promptly request parental consent to evaluate the student" to determine whether the student needs "special education services and programs if a student has not made adequate progress after an appropriate period of time when provided instruction" in a school district's RtI programs (8 NYCRR 200.4[a]; see also 8 NYCRR 100.2[ii]).

that the January and May 2014 CSEs determinations that the student was not eligible for special education were unsupported by the information available to the CSEs and amounted to "a violation of [the district's] child find obligations" (IHO Decision at pp. 37, 39). While it may have been appropriate for the IHO to consider the district's awareness of the student's needs leading up to the relevant time frame, the IHO erred in reaching an issue outside of the scope of review—i.e., the appropriateness of the January and May 2014 CSEs' determinations that the student was not eligible for special education—and, further, in relying on that determination to find what amounts to a continuing violation by the district as a result—i.e., that the CSEs' findings of ineligibility resulted in a child find violation on a going forward basis.

While it is clear that the parent would have preferred the CSE to have found the student eligible for special education earlier than February 2016, child find is a distinct question from eligibility, and "[t]he IDEA does not call for instantaneous classification of a student upon suspicion of a disability; rather, '[o]nce a school has reason to suspect a disability,' the school must conduct an evaluation of the child within a reasonable time'" (W.A. v. Hendrick Hudson Cent. Sch. Dist., 2016 WL 6915271, at *24 [S.D.N.Y. Nov. 23, 2016] [internal citations and quotation marks omitted], quoting Murphy v. Town of Wallingford, 2011 WL 1106234, at *3 [D. Conn. Mar. 23, 2011]). Without opining about the appropriateness of the eligibility determinations made by the January and May 2014 CSEs, the only issue to be addressed is whether the district violated its child find obligations to the student during the 2014-15 and 2015-16 school years prior to February 2016.

Turning to the crux of the dispute, the parent's communications to the district about her concerns regarding the student's needs and her provision to the district of private evaluations must be examined to determine whether they constituted a referral of the student or should have otherwise triggered the district's suspicion that the student may have been a student with a disability.

During summer 2014, the parent obtained private pediatric neurology and neuropsychological evaluations to determine what, if anything, was contributing to the student's academic struggles (Tr. pp. 1152-53, 1155, 1230-32; see Dist. Ex. 10; Parent Ex. M). The August 2014 neuropsychological evaluation report indicated that the student's academic functioning varied from the average to low average range, and the student's performance on the Test of Written Language-Fourth Edition (TOWL-4) reflected the presence of a writing disorder with below average scores on subtests measuring vocabulary, spelling, punctuation, and sentence combining with the logical sentences subtest score falling in the poor range (Dist. Ex. 10 at pp. 3-4, 8). The evaluator also noted that there seemed to be a personal interest and motivation component to the student's academic performance (id. at pp. 6-7).

In contrast to the district's January 2014 psychoeducational evaluation report, which noted that the student did not present with any severe social or emotional concerns that impacted academics, the August 2014 neuropsychological evaluation report indicated that the student exhibited emotional overreactions and that administrations of the Depression Self-Rating Scale for Children and the Center for Epidemiological Studies Depression Scales for Children yielded scores indicative of depression (compare Dist. Ex. 5 at p. 6, with Dist. Ex. 10 at p. 6). Additionally, in August 2014, the parent's responses on the Connor's Rating Scale-Third Edition reflected significantly elevated scores in the areas of learning problems, peer relations, inattention, and executive functioning (Dist. Ex. 10 at pp. 2, 7-8). The August 2014 neuropsychological evaluation report also indicated that the student appeared lethargic during the evaluation; the evaluator noted

that he fell asleep while writing, demonstrated slow processing of information during writing tasks, avoided tasks, and exhibited low motivation (id. at p. 2). Furthermore, the evaluator offered the student diagnoses of an attention deficit hyperactivity disorder (ADHD), a disorder of written expression, and depression (id. at p. 8). The evaluator recommended, among other things, that the student obtain a psychiatric consult to address depressive symptoms, and cognitive behavioral therapy to address issues surrounding the student's sexual identity and to facilitate the student's coping skills (id. at p. 8).

The August 2014 pediatric neurology evaluation report also indicated that the student presented with "considerable" anxiety with ADHD, and that the student manifested "considerable motor and cognitive dysfunction characterized by a developmental coordination disorder and a mixed receptive-expressive language disorder" (Parent Ex. M at pp. 3-4). The evaluator recommended that the student be classified by the CSE as multiply disabled (id. at p. 4). The August 2014 pediatric neurological evaluation report also recommended psychotherapy for self-esteem, psychopharmacotherapy to mitigate attention dysfunction, and a neuropsychological evaluation, among other recommendations (id.).

In the context of the student's eligibility for special education, the district takes issue with the IHO's reliance on the private evaluations and asserts that the private evaluations were insufficient to rebut the opinions of district staff. However, as noted above, the student's eligibility is not at issue in this case and, therefore, the greater import arising from the private evaluations is the district's response to its receipt of the reports. While the district may have been within its right to consider the relative weight to afford the opinions of the private evaluators, the more appropriate forum for such a consideration would be in a CSE context. The testimony of the district school psychologist regarding the thoroughness, validity, or accuracy of the August 2014 private neuropsychological evaluation (see Tr. pp. 45-56) does nothing to explain whether the district reviewed the evaluations, whether the district held opinions about the merit of the evaluations at the time they were received, and, if so, whether the district shared such opinions with the parent.

The parent testified that she provided the evaluation reports to the school psychologist in September 2014, but that the district school psychologist explained to her, because the student was already tested earlier in the year, he wasn't eligible to be retested again through the district and to "give it some time" (Tr. pp. 1152-53; see Tr. p. 1006).[9] The school psychologist testified that she was aware that a neuropsychological evaluation and a pediatric neurology evaluation were obtained by the parent during the summer, but it was not clear from her testimony whether anyone else in the district had received and/or reviewed these evaluation reports (see Tr. p. 1006).

Additionally, the school psychologist testified that the parent sought her out in September 2014 because the parent "felt [the student] was having academic issues," despite having been

[9] There is nothing in writing from the parent to the district indicating that the parent intended the provision of the private evaluations to the district to amount to a referral of the student for a determination of eligibility for special education and the parent has not directly asserted throughout the impartial hearing process that this was her intent. Rather, there is some testimony that the student was at one point represented by an educational advocate who recommended a 504 plan be developed for the student instead of an IEP (although the parent seems to have thought the advocate was a district employee) (Tr. pp. 485-87, 1154-55). In turn, while there is no direct indication that the district treated the parent's provision of the private evaluations to be a referral, the parent's description of the district school psychologist's response to her receipt of the evaluations implies that the psychologist understood that the parent wished, at least in part, for a CSE to consider the private evaluations for the purpose of determining whether the student was eligible for special education.

previously referred to the CSE and found ineligible, and she was concerned about how the student's "academic progress would go" at the middle school (Tr. p. 993). The school psychologist testified that she advised the parent that "because [the student] had just had a CSE meeting" and "because it was the beginning of the school year," they "should wait to see" how the student did (Tr. p. 994). The director of student services also found no basis to refer the student to the CSE at that time because the student had just come from a private school and district staff were "unsure at that time what supports had been put in place . . . , if he had been provided with research-based instruction, [or] if he had been provided with appropriate instruction," and, therefore, she opined that the district "couldn't determine whether . . . it was a disability or just a lack of education" (Tr. pp. 501-02).

The stated reasoning of the district school psychologist and the director of student services for deciding not to refer the student for evaluation are unpersuasive. With regard to the testimony of the district staff regarding the district's previous testing of the student in 2014, the district continues to press on appeal that its obligations related to child find were satisfied when the CSE first evaluated the student in early 2014 "in accordance with established procedures." The district conducted a psychoeducational evaluation and a speech-language evaluation of the student when he was first referred to the CSE during the 2013-14 school year; subsequent to the completion of those evaluations, the CSE determined that the student was ineligible for special education services (see Dist. Exs. 5-7; Parent Ex. O).[10, 11] Notwithstanding the district's evaluation of the student in 2014, child find is a "continuing obligation" and, as part of that continuing duty, a district may be required to complete another initial evaluation of a student (P.P. v. W. Chester Area Sch. Dist., 585 F.3d 727, 738 [3d Cir. 2009]; Kruvant v. District of Columbia, 2005 WL 3276300, at *8 [D.D.C. Aug. 10, 2005] [noting that there is no federal regulation that limits a district's obligation to conduct "an 'initial evaluation' to a single occurrence that forever fulfills its 'child find' obligations," and that such an interpretation would be at odds with other provisions that recognize a child's disability status is subject to change]; but see J.G. v. Oakland Unified Sch. Dist., 2014 WL 12576617, at *10 [N.D. Cal. Sept. 19, 2014] [relying on expert testimony that reassessment for the particular disorder at issue would be unnecessary absent a material change in

[10] The January 2014 psychoeducational evaluation report indicated that the student's full-scale I.Q. of 73 on the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) was in the borderline range (Dist. Ex. 5 at p. 2). The student demonstrated borderline ability in verbal comprehension, and extremely low ability related to processing speed (id.). The student's standard scores on the Wechsler Individual Achievement Test-Third Edition (WIAT-III) indicated the student exhibited skills below expectations for his age on eight of the eleven subtests including pseudo-word decoding (82, below average), reading comprehension (80, below average), spelling (83, below average), sentence composition (72, below average), essay composition (52, low), numerical operations (84, below average) addition (82, below average), subtraction (75, below average), and multiplication (73, below average), resulting in composite scores reflecting that the student's writing skills were in the low range (66) and his mathematic fluency skills were in the below average range of ability (75) (id. at p. 4).

[11] The evaluator who conducted the student's March 2014 speech-language evaluation administered the Clinical Evaluation of Language Fundamentals-Fourth Edition (CELF-4), which yielded a core language score of 73, which was in the low range of speech-language functioning (Dist. Ex. 7 at pp. 1-2). The report also noted the student's receptive language standard score of 70 (very low range), expressive language standard score of 80 (borderline range), and language memory standard score of 72 (low range) (id. at p. 4). The evaluator further indicated that after an hour of testing the student became drowsy and inattentive, his response time decreased, and he appeared lethargic (id. at p. 1). The evaluator opined that although the student's language needs were contributing to his poor school performance, his physical disposition needed to be further evaluated by an appropriate medical professional (id.).

circumstances]).[12] While it may have been appropriate for the district to take into account the proximity in time of the May 2014 CSE meeting in determining whether to refer the student for another initial evaluation, the district also had available to it new information in the form of the private evaluation reports and the parent's expressed concerns that should also have weighed in the district's decision (see Pasatiempo v. Aizawa, 103 F.3d 796, 801-03 [9th Cir. 1996] [noting that "determinations regarding a student's ability can be flawed" and "[t]he informed suspicions of parents who may have consulted outside experts, should trigger the statutory protections"]).

Moreover, the testimony of the director of student services referencing the student's attendance at the private school as the basis for the district's decision not to refer the student is also without merit. The district's child find obligations extend to students attending nonpublic elementary and secondary schools within the district (8 NYCRR 200.2[a][7]). Further, while the district states broadly that it did not have information about the student's education at the nonpublic school during the 2013-14 school year, there is no evidence in the hearing record that the district requested information from the nonpublic school or otherwise attempted to observe the student at the nonpublic school or communicate with the student's teachers notwithstanding that the district conducted an evaluation of the student during the time he attended the nonpublic school.[13]

Even assuming that the parent's communications to the district in September 2014 and her provision of the private evaluation reports to the district did not amount to a referral under State regulations (see 8 NYCRR 200.4[a][2][ii], [a][2][iv][a], [a][3]-[a][5]) or otherwise trigger the district's obligation under child find, by fall 2014, it was becoming clear that the student was having difficulties both academically and socially/emotionally. The parent testified that the student was struggling academically as of September 2014 (Tr. pp. 1154-56). The principal of the middle school also testified that the student was experiencing academic difficulties, and the school psychologist testified that sometime in either the "first or second semester" the student's grades were beginning to "slip" (Tr. pp. 996-97). The school psychologist's testimony is corroborated by the student's report card which shows that his grades had dropped from the first marking period to the second marking period (Parent Ex. W). During the first marking period, the student received a 72 in science, a 66 in home and careers, an 86 in health, an 88 in social studies, and a 96 in physical education; by the second marking period, the student received a 55 in science, a 70 in

[12] Further, the State regulatory requirement that 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]) applies in the case of students with disabilities who have already been found eligible for special education services.

[13] The documentation from the January and May 2014 CSE meetings stated generally that the student's nonpublic school "did not provide the school district with a comprehensive referral with concerns and intervention" (Dist. Ex. 6 at p. 1; Parent Ex. O at p. 1).

home and careers, a 71 in health, a 76 in social studies, and a 78 in physical education (id.).[14] The school psychologist also noted that the student's teachers expressed that he "presented as being tired," that he would sometimes fall asleep and was otherwise "very lethargic," and that he wasn't completing his work "consistently" (Tr. pp. 996-97). In addition, while the student's private therapist initially believed that the student was tired in school because of boredom, the therapist later stated that the student's difficulties might have been academically related, especially when the student expressed that he would fall asleep in class because he didn't "understand what the teacher [was] talking about," and he had "no idea [what was] happening" (Tr. pp. 717-18).

On appeal, the district points to the "host of interventions" it implemented for the student to address his needs, including RtI programs and 504 plans. The evidence in the hearing record shows that, in response to observations of the student's difficulties, the student was referred to the child study team in October or November 2014; the school psychologist testified that the purpose of the child study team was to "put interventions into place" for struggling students prior to referring them to the CSE (Tr. pp. 1042-43). The school psychologist further testified that she met with the student's teachers at the child study team meeting two to three times approximately every eight to ten weeks to see if the interventions were helping (Tr. pp. 1004, 1006). According to the school psychologist, the teachers at the child study team meetings expressed that the student's grades were slipping and he was failing; his teachers also communicated that the student's home and class work were not being completed consistently (Tr. pp. 1005, 1044-45).[15]

The principal of the middle school testified that the student was enrolled in the "Strategic Reading" program, which was "designed to provide students with more remedial skills so they c[ould] better demonstrate" their understanding of what they read (Tr. pp. 556-57). The principal also testified that the student was enrolled in several extended day programs to support him, including "Homework Zone," "which occur[ed] multiple days after school," and "Saturday Academy," "which [wa]s a multiple hour program" that took place on the weekend (Tr. p. 557).[16] The school psychologist also testified that the student received preferential seating close to his teacher and that she had provided the student with strategies and support for completing his work (Tr. p. 1044).

By March 2015 district staff developed a 504 plan for the student (Dist. Ex. 11 at p. 1). The director of student services testified that a 504 plan was developed for the student after speaking with his education advocate who told her that the student "doesn't need to be referred back to the CSE, but he probably needs a 504 plan," because his sexual identity was his "biggest issue" and that he wouldn't have experienced "so many issues" if he was more comfortable with

[14] By the end of the school year, the student received final grades of a 59 in science, a 65 in home and careers, a 74 in health, a 75 in social studies, and an 81 in physical education (Parent Ex. W). While the report card does not identify the student's scores in Spanish, English, and math for the first two marking periods, the student eventually received final grades of 68 in Spanish, 58 in English and 55 in math (id.).

[15] Furthermore, from December 2014 to March 2015 the parent testified that the student's grades were failing and that his teachers were reporting that he wasn't concentrating and he was "visually distracted" (Tr. pp. 1169-170).

[16] The director of student services also believed that the student received AIS, which the director characterized as including "Saturday Academy" and other programs or services provided during the school day and after school (Tr. p. 502). The evidence in the hearing record is not clear as to the frequency with which the student had actually attended these support programs.

his sexual identity (Tr. pp. 485-87, 490). The school psychologist testified that district staff decided to develop a 504 plan because the student's "situation" related to bullying "wasn't getting any better" and to "get [the student's] academics up" (Tr. pp. 1006-08). The school psychologist also testified that the student was provided with a 504 plan because "he just had the IEP meeting, and they didn't find him eligible" so she believed that they would first provide the student with a 504 plan to determine if any of the interventions were effective prior to conducting an evaluation (Tr. p. 1007). She further reasoned that, since the most recent testing was completed less than a year ago, there "need[ed] to be some time," and the student was provided with a 504 plan "in the meantime" (Tr. pp. 1007-08). Similarly, the parent testified that she spoke with the school psychologist concerning the student's academics in approximately December 2014, at which point the psychologist again explained to her that the student "wasn't eligible to take . . . testing for the IEP again, because it was still in 2014" and that it is only "yearly" that they do testing (Tr. pp. 1167-68).[17]

States are encouraged to develop "effective teaching strategies and positive behavioral interventions to prevent over-identification and to assist students without an automatic default to special education" (Los Angeles Unified Sch. Dist. v. D.L., 548 F. Supp. 2d 815, 819 [C.D. Cal. 2008], citing 20 U.S.C. § 1400[c][5]). Additionally, AIS or RtI may be implemented with a student to help determine if the student needs special education services (8 NYCRR 200.4[a]; see also 8 NYCRR 100.1[g]; 100.2[ii]).[18] However, a district may not use an RtI process to "delay or deny the provision of a full and individual evaluation" to a student suspected of having a disability ("A Response to Intervention (RTI) Process Cannot Be Used to Delay-Deny an Evaluation for Eligibility under the Individuals with Disabilities Education Act (IDEA)" OSEP Mem. [January 2011], available at https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/osep11-07rtimemo.pdf; see Letter to Ferrara, 60 IDELR 46 [OSEP 2012]). Further, a district has no flexibility to opt to provide services and accommodations under section 504 when the student is eligible for special education under the IDEA; rather, a district must comply with both statutes (Yankton Sch. Dist. v. Shramm, 93 F.3d 1369, 1376 [8th Cir. 1996]). Compliance with both statutes requires that the district satisfy its child find obligation under the IDEA notwithstanding that a student is receiving services pursuant to a 504 plan.

Based on the foregoing, the district's "wait and see approach" effectively cut the parent out of the process of determining whether to move forward with the referral and initiate an evaluation or to determine whether the student would benefit from additional general education or section

[17] As discussed above, the district's position that, in all instances, a student suspected of being a student with a disability may not be evaluated more than one time in a year is without legal support.

[18] A district may provide an RtI program in lieu of AIS (8 NYCRR 100.2[ee][7]). As defined in State regulation AIS "means additional instruction which supplements the instruction provided in the general curriculum and assists students in meeting the State learning standards . . . and/or student support services which may include guidance, counseling, attendance, and study skills which are needed to support improved academic performance; provided that such services shall not include . . . special education services and programs" (8 NYCRR 100.1[g]). RtI programs are defined as "[a] school district's process to determine if a student responds to scientific, research-based instruction," including "increasingly intensive levels of targeted intervention and instruction for students who do not make satisfactory progress in their levels of performance and/or in their rate of learning" (8 NYCRR 100.2[ii]; see 8 NYCRR 100.1[g][7]).

504 support services as an alternative to special education (see 8 NYCRR 200.4[a][9]; see also Educ. Law §4401-a[3]).[19]

Finally, the district also maintains that the IHO improperly relied upon allegations of bullying that arose prior to the student's eligibility for services in the 2014-15 and 2015-16 school years, as any allegations of bullying prior to the student's eligibility were not relevant to a claim that the district denied the student a FAPE under the IDEA. However, contrary to the district's position, as students with disabilities are disproportionately affected by bullying, circumstances involving a student being bullied who has not previously been identified as a child with a disability under the IDEA may trigger a school's child find obligations under the IDEA (Dear Colleague Letter, 61 IDELR 263 [OSERS/OSEP Aug. 2013]; see Krebs v. New Kensington-Arnold Sch. Dist., 2016 WL 6820402, at *6 [W.D. Pa. Nov. 17, 2016] [denying a motion to dismiss the parent's child find claim relating to allegations that the district failed to evaluate a student despite having knowledge of her declining grades, self-harming behaviors, "multiple diagnoses and harassment at the hands of her peers"]).[20] Therefore, bullying will only be addressed here to the extent that it may have triggered the district's duty to identify, locate, and evaluate the student.

Here, the evidence in the hearing record shows that the student was subject to bullying during the 2014-15 school year, which impacted him both academically and socially/emotionally.[21] The hearing record shows that the student has a significant history related to being bullied at school (Dist. Exs. 5 at p. 1; 10 at p. 2; 14 at p. 1; 18 at p. 6; 20 at p. 6; 30 at pp. 60-63; Parent Exs. A at pp. 4, 8-9; F; H-L). The January 2014 psychoeducational evaluation report included information from the parent that the student was often "bullied and teased" at school, and the August 1, 2014 neuropsychological evaluation report referred to the student being bullied as early as the fourth grade (Dist. Exs. 5 at p. 1; 10 at p. 2).

Specific to the 2014-15 school year, the evidence indicates that the student was bullied on numerous occasions and that such bullying had impacted him negatively, both academically and socially/emotionally. The student testified that he was "bullied a lot" during the 2014-15 school year (Tr. p. 762). Although the school psychologist was not mandated to provide counseling

[19] Additionally, State regulations did not preclude the district from pursuing both a referral to the CSE as well as a referral to the district's child support team (8 NYCRR 200.4[a][2][ii], [a][2][iv][a], [a][3]-[a][5]).

[20] However, there is some merit to the district's position to the extent that the test set forth in T.K.—"whether school personnel was deliberately indifferent to, or failed to take reasonable steps to prevent bullying that substantially restricted a child with learning disabilities in her educational opportunities"—which the IHO relied upon to find that the student was denied a FAPE as the result of bullying (779 F. Supp. 2d at 316 [emphasis added]; see IHO Decision at p. 42) is not applicable to a student suspected of having a disability. Thus, the IHO's determinations and the district's arguments on appeal that relate specifically to the test set forth by the district court in T.K. will not be further discussed with respect to the 2014-15 and 2015-16 school years (i.e., whether the district investigated and responded to all bullying allegations and whether the student had knowledge of the main perpetrators of the bullying).

[21] The United States Department of Education has stated that "[b]ullying [is] characterized by aggression used within a relationship where the aggressor(s) has more real or perceived power than the target, and the aggression is repeated, or has the potential to be repeated, over time. Bullying can involve overt physical behavior or verbal, emotional, or social behaviors (e.g., excluding someone from social activities, making threats, withdrawing attention, destroying someone's reputation) and can range from blatant aggression to far more subtle and covert behaviors" (Dear Colleague Letter, 61 IDELR 263 [OSERS/OSEP 2013]). The district does not challenge whether the incidents the student reported constituted bullying and so whether those incidents are properly characterized as bullying is not at issue in this case.

services to the student, she testified that, at the beginning of the year, the student came to see her once or twice per week for 10 to 15 minutes at a time (Tr. pp. 997-98). As the school year progressed, the school psychologist and student both testified that the student visited the psychologist's office almost every day and would sometimes stay for a full class period at a time, missing his classes as a result (Tr. pp. 789, 998-99, 1009-10). During those visits, the student and the psychologist talked about the student's difficulties regarding school work, peer relationships, and "teasing" (Tr. pp. 996-98). Moreover, the school psychologist testified that the student was going to her about once or twice a week to report bullying incidents and that these incidents were "clearly affecting him negatively" as he "felt uncomfortable' and reported to her that "he didn't want to be in school, and he didn't want to go to his classes" (Tr. p. 1019). The parent also testified that, during the March 2015 section 504 meeting, she reported that the student was "scared to go to school" as a result of being bullied (Tr. p. 1174). The student's private therapist further testified that, during the 2014-15 school year, he had begun to view the student as depressed and withdrawn, and that the depression had gotten worse as the student aged (Tr. pp. 715-16, 722). Additionally, the student's private therapist testified that he "strongly believe[d] that the bullying had a huge impact on [the student]," and that, generally, it was "very difficult [for the student] to concentrate" and to pay attention and focus "when all that bullying is happening day after day" (Tr. pp. 721-22). The private therapist also testified generally that "it's difficult for any child to be able to learn in a . . . hostile environment," and that it's "difficult to then regroup and sit in the class and then not think about what just happened" (Tr. p. 714).

The student's academic and social/emotional struggles also continued during the 2015-16 school year. Prior to the February 2016 CSE when the student was found eligible for special education, the student did not make any significant academic gains, and he continued to experience bullying. There were several reports detailing incidents during the 2015-16 school year, and the student testified that, generally, the bullying got "a little worse" in the eighth grade (Tr. pp. 790-91; Parent Exs. A at pp. 8-9; F-L). Academically, the student's report card for the 2015-16 school year also showed that he continued to receive very low grades during the first and second marking periods; specifically, by the end of the second marking period the student received a 55 in English and math, a 60 in living environment, a 62 in health, a 60 in social studies, and a 75 in physical education (Parent Ex. X).

Taking all of the foregoing into account, while no singular piece of evidence alone conclusively demonstrates the student's need for additional or new evaluations, the "mosaic of evidence in this case portrays a student who was in need of a special education evaluation," and the district's failure to initiate procedures pursuant to child find during all or a portion of the 2014-15 and 2015-16 school years constituted a procedural violation that denied the student a FAPE (Jana K. v. Annville Cleona Sch. Dist., 39 F. Supp. 3d 584, 603 [M.D. Pa. 2014]; see Application of the Bd. of Educ., Appeal No. 15-116; Pennsbury Sch. Dist., 65 IDELR 220 [SEA Pa. Mar. 2, 2015] [finding that, while it remained to be "determined whether or not the [s]tudent [was] actually IDEA eligible," the district's failure to refer the student for an evaluation violated its child find obligations, which, as a procedural violation, satisfied the "first prong of the Burlington/Carter test in and of itself"], citing Forest Grove, 557 U.S. at 230, 241; see also Compton Unified Sch. Dist. v. Allen, 598 F.3d 1181 [9th Cir. 2010] [noting that a district "cannot afford to ignore a student's ongoing academic struggles, especially when they are combined with emotional or behavioral difficulties" and, further, that a district's failure to evaluate a student "suspected of having a disability can lead to liability for a child find violation"]). As stated previously, to support a finding that a child find violation has occurred, school officials must have overlooked clear signs of

disability and been negligent by failing to order testing, or have no rational justification for deciding not to evaluate the student (A.P., 572 F. Supp. 2d at 225, quoting L.M., 478 F.3d at 313).

In summary, by the time district staff developed the student's first 504 plan in March 2015, it had been more than a year since the January 2014 psychoeducational evaluation and the March 2014 speech-language evaluation had been completed (see Dist. Exs. 5; 7). During that time frame, the school psychologist was provided with the private evaluation reports, including the August 2014 private neurological evaluation report, which included a recommendation that the student be classified by the CSE as multiply disabled, and she knew that the parent had concerns about the student's academic and social/emotional functioning early in the school year (Tr. pp. 992-94, 1152-53; Parent Ex. M at p. 4; see Dist. Ex. 10). Further, by the second semester of the 2014-15 school year, district staff had been aware that the student was performing poorly in most of his classes and that the academic interventions put into place in fall 2014 were largely unhelpful. District staff was also aware that the student was the subject of near-constant bullying. Thus, I find that the district violated its child find obligations by March 2015, at the latest, for having overlooked clear signs of disability and providing no rational justification when it failed to evaluate the student.

Furthermore, because the student was later found to have been eligible for special education services by the district, for purposes of finding a violation of the IDEA, this case is unlike those in which courts have interpreted the child find obligation as "distinct from the requirement [for a school district] to provide [a] FAPE to its residents" (E.T., 2012 WL 5936537, at *11, quoting District of Columbia v. Abramson, 493 F. Supp. 2d 80, 85 [D.D.C. 2007]; see also 20 U.S.C. § 1412[a][10][A][ii]; 8 NYCRR 200.2[a][7]), and those in which a student is ultimately deemed ineligible for special education (see D.G. v. Flour Bluff Indep. Sch. Dist., 481 Fed. App'x 887, 891-93 [5th Cir. 2012] [holding that "IDEA does not penalize school districts for not timely evaluating students who do not need special education"]). This student was found eligible for IDEA special education services by the February 2016 CSE after his parent referred him, which makes the district's task of proving that the student would not have been found eligible earlier all the more difficult. Though based on different reasoning, the evidence in the hearing record supports the IHO's ultimate determination that the student was denied a FAPE as a result of the district's failure to satisfy its child find obligations.

Finally, the district also claims that the IHO improperly ordered an FBA be completed to address bullying, and asserts that the IHO relied on evidence outside of the hearing record to make such a determination, as there was no testimony at the hearing or evidence in the record that an FBA should be conducted. To reiterate, the purpose of the "child find" provisions are to identify, locate, and evaluate students who are suspected of being a student with a disability and, to satisfy those requirements, a board of education must have procedures in place that will enable it to identify, locate, and evaluate such children (34 CFR 300.111[a][1]; 8 NYCRR 200.2[a][1], [7]). When the child find obligation is triggered, the result is referral to the CSE for an initial evaluation (see 8 NYCRR 200.4[a]). State regulation requires that an initial evaluation include a variety of assessment tools and strategies, identifies specific assessments that must be conducted as a part of an initial evaluation, and also requires "other appropriate assessments or evaluations, including [an FBA] for a student whose behavior impedes his or her learning or that of others, as necessary to ascertain the physical, mental, behavioral and emotional factors which contribute to the suspected disabilities" (8 NYCRR 200.4[b][1]). Initially, while the parent maintained that the district failed to complete an FBA during the 2014-15 and 2015-16 school years prior to the February 2016 CSE's determination that the student was eligible for special education, the parent does not challenge the February 2016 and June 2016 CSEs' determination that the student did not need a

BIP and did not need supports and other strategies to address behaviors that impede the student's learning or that of others (Dist. Ex. 20 at p. 7).[22] As the CSE has already met and determined that the student did not exhibit the type of behaviors requiring an FBA and a BIP and the CSEs determinations have not been challenged in this proceeding, the appropriate course is to limit review in this matter to remediation of past harms that have been explored through the development of the underlying hearing record. Furthermore, as I have already found that the district denied the student a FAPE for both the 2014-15 and 2015-16 school years due to its failure to meet its child find obligations, I find little reason to discuss this issue in any greater detail. Thus, for those reasons, I reverse the IHO's finding to the extent that she determined that the district was required to provide the student with an FBA during the 2014-15 and 2015-16 school years.

B. June 2016 IEP

The district claims that the IHO improperly relied upon allegations of bullying that occurred during the 2016-17 school year to find that the June 2016 IEP was not appropriate. The district also asserts that the IHO incorrectly found that there was a "substantial probability of bullying" during the 2016-17 school year and that the IHO improperly determined that the district was indifferent to bullying and that the student's IEP should have included a safety plan.

The IHO and the parties agreed that the parent's due process complaint only challenged whether the district failed to develop an adequate safety plan and transition plan, and whether a specific district high school was appropriate (IHO Decision at p. 51; Tr. pp. 460-61). As discussed above, 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]).

As it relates to the appropriateness of the district high schools, the parent argued in her July 2016 amended due process complaint notice that a specific district high school was inappropriate because the same students that "tormented" the student during middle school would be attending this district high school for the 2016-17 school year (Dist. Ex. 23 at p. 11).[23] During the hearing, the district argued that the parent's claims related to the district high school were speculative because the June 2016 IEP recommended that the student attend a different district high school (Tr. p. 26; see Dist. Ex. 22 at p. 1). Prior to the start of the 2016-17 school year, the parent was given the option of enrolling the student at either of two district high schools (Tr. pp. 395-98; see

[22] Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ., 361 Fed. App'x 156, 160 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider developing a BIP for a student that is based upon an FBA (8 NYCRR 200.4[d][3][i], 200.22[a], [b]).

[23] The district subsequently defended the appropriateness of the high school identified in the parent's due process complaint notice in its answer thereto (Dist. Ex. 24 at pp. 5-6).

Dist. Ex. 22 at p. 2). After the parent amended her due process complaint notice in July 2016 identifying one of the high schools, the student began attending the other district high school for the 2016-17 school year (see Parent Ex. Y).

At the time of the impartial hearing, the parent adjusted her argument from that alleged in her July 2016 due process complaint notice; the parent argued that evidence the student was bullied during the 2016-17 school year was relevant to her claim that the high school the student actually attended was inappropriate (see Tr. pp. 336-40; see also Dist. Ex. 22 at p. 1; IHO Exs. I-II). Initially, to the extent the parent challenges the June 2016 CSE's selection of the high school the student ultimately attended, the parent does not assert that other students who had participated in bullying the student in the past would be attending that high school.[24] In addition, in changing the focus of her claim from the presence of other students who had participated in the bullying of the student at a proposed school, to the school's effectiveness in responding to and preventing incidents of bullying, the parent altered the underlying nature of her claim, changing it from a claim regarding the selection of a school location to a claim regarding the implementation of the June 2016 and October 2016 IEPs.[25] Further, to the extent the parent challenges implementation of the June 2016 and October 2016 IEPs, those IEPs were not implemented until September 2016, after

[24] A discussion between the IHO and the parties at the impartial hearing and an email from the IHO to the parties on November 30, 2016 indicated that none of the students who had previously bullied the student attended the high school the student attended for the 2016-17 school year (Tr. pp. 393-94; IHO Ex. VII). The IHO relied on evidence of "numerous telephone conferences" with the parties prior to the beginning of the 2016-17 school year to determine which students would be attending the school (IHO Decision at p. 52). However, documentation of these conferences calls is not included in the hearing record. There is only one email from the parent's attorney in the record that identified that the student believed five students who previously bullied him would be attending the high school the parent identified in the July 2016 amended due process complaint notice (id. at p. 52; IHO Ex. IV). Otherwise, there is no additional evidence in the record that supports the parent's contention that students who had previously bullied the student would have attended either of the two district high schools the student could have attended.

[25] Generally, parents are entitled to participate in determining the educational placement of a student with a disability (34 CFR 300.116[a]; 300.327; 300.501[c]); however, a district's assignment of a student to a particular school site is an administrative decision which must be made in conformance with the CSE's educational placement recommendation (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244-45 [2d Cir. 2015]; R.E., 694 F.3d at 191-92; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419-20 [2d Cir. 2009] [holding that educational placement refers to the "general educational program—such as the classes, individualized attention and additional services a child will receive—rather than the 'bricks and mortar' of the specific school"]). A district's assignment of a student to a particular public school site must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (M.O., 793 F.3d at 244; R.E., 694 F.3d at 191-92; T.Y. 584 F.3d at 419-20; see C.F., 746 F.3d at 79 [holding that, while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). 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]). In this matter, the June 2016 IEP did not include a limitation as to whether the student could attend a school location with certain other students (Dist. Ex. 22). Accordingly, the parent's claim related to the selection of a school location containing students who the student identified as having subjected him to bullying him in the past is not a prospective challenge to the school's capacity to implement the IEP and is speculative (see M.E. v. New York City Dept. of Educ., 2016 WL 703843, at *11 [S.D.N.Y. Feb. 23, 2016] [allegation that an appropriate program for the student must include the presence of other students with specific skills and abilities treated as an impermissible substantive attack on the IEP, couched as a challenge to the chosen school location]).

the parent commenced this proceeding and amended her due process complaint notice in July 2016 (see Dist. Exs. 22; 23; 27).

Since the IHO drew conclusions on the parent's claim that the student was subjected to bullying during the 2016-17 school year, notwithstanding the fact that this claim could not have been raised at the time of the July 2016 amended due process complaint notice, the next inquiry focuses on whether the IHO properly reached determinations on the issues because the district "open[ed] the door" under the holding of M.H. v. New York City Department of Education, 685 F.3d at 250-51 (see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 59 [2d Cir. June 18, 2014]; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 327-28 [S.D.N.Y. 2013]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, *9 [S.D.N.Y. Aug. 5, 2013]). A lengthy discussion took place during the hearing between the parties and the IHO concerning whether the parent would be permitted to elicit testimony from witnesses related to events that occurred after the June 2016 IEP (see Tr. pp. 337-48, 385-07; Dist. Exs. 22 at p. 1; 23 at p. 1).[26] Over the district's objections, the IHO agreed with the parent that such information would be relevant to determine whether it would be appropriate for the student to attend either of the two district public schools for the 2016-17 school year, and, in her decision, the IHO determined that both schools were inappropriate for the student (IHO Decision at pp. 51-53; Tr. pp. 341-42, 385-87; IHO Ex. VII). Given the district's consistent objections, it cannot be said that the district opened the door to claims postdating the due process complaint notice by raising such issues as a defense to a claim that was identified in the due process complaint notice (M.H., 685 F.3d at 250-51; see B.M., 569 Fed. App'x at 59). According, such claims were outside the scope of the impartial hearing and the IHO erred in reaching issues that post-dated the July 2016 due process complaint notice.

Nevertheless, the IHO's determination that there was a substantial probability of the student being subjected to future bullying at the time the June 2016 IEP was developed and that the June 2016 IEP denied the student a FAPE because it did not include a safety plan must still be addressed. Contrary to the district's position, as discussed above, there was extensive documentation of the student's struggles with bullying in previous years. The district court in T.K. held that "evidence of past bullying and its impact on the disabled student's learning opportunities is important in determining whether an educational program is reasonably calculated to provide a disabled child with a FAPE" (T.K., 32 F. Supp. 3d 418, citing T.K., 779 F. Supp. 2d 289).

As the student had been bullied in previous school years, the IHO found that there was a "substantial probability" that bullying would restrict the student's educational opportunities for the 2016-17 school year and that this warranted the CSE's inclusion of a safety plan in the June 2016 IEP (IHO Decision at pp. 53-54). In reaching this conclusion, the IHO relied on the district court's decision in T.K. after remand, which stated that "'[w]here there is a substantial probability that bullying will severely restrict a disabled student's educational opportunities, as a matter of law an anti-bullying program is required to be included in the IEP. An educational plan that fails to acknowledge a serious problem being faced by a disabled child cannot be said to have been reasonably calculated to offer her a FAPE'" (IHO Decision at p. 53, citing T.K. v. New York City

[26] The district entered four documents into evidence related to the 2016-17 school year that postdated the June 2016 IEP and the July 2016 due process complaint notice (see Dist. Exs. 25; 26; 27; 29). However, these documents were entered only after the IHO determined that testimony and evidence related to this time-period was admissible (Tr. pp. 384-87, 545, 671).

Dep't of Educ., 32 F. Supp. 3d 405, 422 [E.D.N.Y. 2014.] [emphasis in the original]). However, I am aware of no authority for the proposition that a CSE is required to include a "safety plan" in an IEP where there has been a history of bullying, and neither the Second Circuit nor the district court decisions in T.K. provide that a CSE is required to develop a safety plan or that an "anti-bullying program" is synonymous with a safety plan (see T.K. v. New York City Dep't of Educ., 810 F.3d 869 [2d Cir. 2016]; T.K., 32 F. Supp. 3d 405; T.K., 779 F.Supp.2d 289).[27], [28]

Here, while the student's special education teacher did not recall whether a "specific conversation about safety" occurred during the June 2016 CSE meeting and did not remember any conversation about the type of safety plan that would be provided to the student, she testified that the parent had concerns about his safety and "had made it known [to the CSE] that it was a concern" of hers (Tr. pp. 465, 469). The school psychologist who participated in the June 2016 CSE meeting testified that, during the meeting, the CSE discussed a safety plan and the ways in which bullying would be addressed (Tr. pp. 325-26). The parent also testified that she voiced her concerns about "bullying and . . . safety" during the June 2016 CSE meeting and that the CSE "talked about . . . different strategies" for the student related to bullying; the parent also noted that she had discussed the safety plan because she felt that the student was going to need a safety plan in high school (Tr. pp. 1193-94; see also Dist. Exs. 22 at pp. 1-2; 32 at pp. 112, 115-16).

There is one reference to the student's past experiences with bullying in the meeting information section in the June 2016 IEP: a notation that the student was transferred to his then-current middle school due to the parent's concerns and report that the student was bullied at the previous middle school (Dist. Ex. 22 at p. 1). At the June 2016 CSE meeting, the special education teacher and CSE chairperson agreed that the IEP should include a special alert that the student had a history of being bullied, but the alert was never included on the IEP (see Dist. Exs. 22; 32 at p. 120).[29] The July 21, 2016 prior written notice also indicated that a safety plan should be in the IEP, but no such information was included (see Dist. Exs. 22; 28 at p. 1).

On the other hand, the present levels of performance indicated that the student could identify positive characteristics about himself that could be used during social interactions with peers and adults and further noted that the student needed continued assistance to control his emotions as well as strategies to cope with frustrating situations (Dist. Ex. 22 at p. 4). The June 2016 IEP also included three annual goals to address the student's social/emotional needs (id. at p. 7). The goals included verbalizing personal qualities and how they may impact the student's interactions with others, identifying roles played by others in the student's environment and being able to verbalize their impact on him, and utilizing "positive strategies" to resolve social conflicts

[27] Additionally, the district court in T.K. did not define the parameters of an anti-bullying program (32 F. Supp. 3d at 422), and the IHO does not specify what she meant by a safety plan.

[28] The Second Circuit in T.K. did not explicitly adopt the district's court test regarding bullying and focused, instead, on the parents' ability to participate in the development of the student's IEP in that case and found that the district's "refusal to discuss [the student's] bullying at important junctures in the development of her IEP 'significantly impeded' Plaintiffs' right to participate in the development of [the student's] IEP" that constituted a denial of FAPE (T.K., 810 F.3d 876-77).

[29] The alert was included in the October 2016 IEP (Dist. Ex. 27 at p. 1); however, as there is no indication that the October 2016 IEP was developed as part of a resolution session and the Second Circuit has limited district's ability to remedy deficiencies in a challenged IEP without penalty to the resolution period, the addition of the special alert in the October 2016 IEP is not considered in determining whether the district offered the student a FAPE (R.E., 694 F.3d at 188).

in the future (id.). The school psychologist who participated in the development of the June 2016 IEP testified that the CSE included these goals to specifically address concerns related to bullying (Tr. pp. 322, 324). The June 2016 CSE also recommended that the student receive one 30-minute session of individual counseling per week (id. at p. 7).

Given the discussion at the June 2016 CSE meeting and the references in the prior written notice, the evidence in the hearing record indicates that the IEP should have included a special alert and/or a safety plan of some sort. Nevertheless, while the CSE should have included more information related to the student's struggles with bullying in the June 2016 IEP, the IEP included annual goals and counseling services to address the student's needs in this area. Accordingly, where the needs are addressed with appropriate supports, it would seem that the lack of a special alert or safety plan would not, in and of itself, automatically render the IEP deficient (cf. C.F. v. New York City Dep't of Educ., 746 F.3d 68, 80 [2d Cir. 2014] [finding that the lack of an FBA or BIP does not automatically render the IEP inadequate where the IEP identifies the behavior and provides for ways to address it]; M.W. v. New York City Dep't of Educ., 725 F.3d 131, 139-41 [2d Cir. 2013] [same]; R.E., 694 F.3d at 190 [same]). Based on the foregoing—and given the discussion below—the evidence in the hearing record does not support a finding that the district denied the student a FAPE for the 2016-17 school year such that relief would be warranted as a result.

C. Relief

Having determined that the district failed to offer the student a FAPE for all or a portion of both the 2014-15 and 2015-16 school years based on its failure to satisfy its child find obligations, the next inquiry is whether the hearing record supports the compensatory relief awarded by the IHO. The district argues that there was insufficient evidence to support the IHO's award of compensatory education services in speech-language therapy and 1:1 tutoring services. The district also generally maintains that the IHO's determinations related to compensatory education should be overturned.

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education relief may be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; see also Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; Reid, 401 F.3d at 524 [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address [] the problems with the IEP"]; S.A. v. New York City Dep't of Educ., 2014 WL 1311761, at *7 [E.D.N.Y. Mar. 30. 2014] [noting that compensatory education

"serves to compensate a student who was actually educated under an inadequate IEP and to catch-up the student to where he [or she] should have been absent the denial of a FAPE"] [internal quotations and citation omitted]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; L.M., 478 F.3d at 316 [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"]).

The IHO awarded relief to remedy the district's denial of a FAPE to the student, which included, among other things, compensatory education services in the form of 120 hours of 1:1 tutoring services, 36 hours of speech-language therapy, and 14 hours of counseling (IHO Decision at pp. 55-57). The district fails to set forth any analysis on appeal to explain why the IHO's findings related to compensatory education were inappropriate. In fact, neither the district nor the parent entered any documentary evidence into the hearing record or provided any testimony at the impartial hearing that was related to whether compensatory education services would be appropriate in this case. Furthermore, the parent does not now request any compensatory education or any other relief in addition to that awarded by the IHO in her answer to the district's request for review (see generally Answer). As the burden of proof has been placed on the school district during an impartial hearing by State law, SROs have consistently allocated to districts some burden of going forward with respect to a parental request for compensatory education and have expected a district to address such a burden by describing its views, based on a fact-specific inquiry set forth in an evidentiary record, regarding an appropriate compensatory education remedy that would most reasonably and efficiently place the student in the position that he would have been but for the denial of a FAPE (Educ. Law § 4404[1][c]; see Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-050; Application of a Student with a Disability, Appeal No. 16-033; Application of a Student with a Disability, Appeal No. 14-179; Application of a Student with a Disability, Appeal No. 13-168). Here, the parent has raised concerns regarding the student's academic difficulties as far back as the beginning of the 2014-15 school year, and the district has failed to set forth its position as to what an appropriate award would be or why the specific awards ordered by the IHO were inappropriate. Thus, considering the student was without special education services for the 2014-15 school year and a significant portion of the 2015-16 school year, even taking into account the accommodations provided for in the student's March 2015 and June 2015 504 plans, the IHO's award of 120 hours of compensatory academic instruction does not exceed the expected remedy for placing the student in the position he would have been in but for the denial of a FAPE.

Further comment on the district's position relating to the IHO's award of 36 hours of compensatory speech-language therapy is warranted (IHO Decision at p. 55). The district argues that there was insufficient evidence to support the IHO's determination that the student had a speech-language impairment; the district also maintains that the IHO failed to identify a specific speech-language disorder or goals that would have been appropriate for the student. The IDEA provides that a student's special education programming, services, and placement must be based upon a student's unique special education needs and not upon the student's disability classification or a specific disorder (20 U.S.C. § 1412[a][3] ["Nothing in [the IDEA] requires that children be classified by their disability so long as each child who has a disability . . . and who, by reason of that disability, needs special education and related services is regarded as a child with a

disability"]). Furthermore, given the "IDEA's strong emphasis on identifying a disabled child's specific needs and addressing them, . . . the particular disability diagnosis affixed to a child in an IEP will, in many cases, be substantively immaterial because the IEP will be tailored to the child's specific needs (see Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011]). The district's argument related to the IHO's failure to identify a specific disorder or impairment are of little consequence in this case as the district failed to address or explain why the IHO had erred in finding that the student had speech-language needs that warranted speech-language therapy during the 2014-15 and 2015-16 school years. This is especially so given that, when the student was found eligible for special education in February 2016, the CSE recommended a weekly speech-language consultation and then, in June 2016, the CSE recommended two sessions of speech-language therapy per week (Dist. Exs. 20 at p. 10; 22 at p. 7). As the student exhibited speech-language needs at the time he was found eligible for services, and the district has not established that it satisfied its child find obligations during all or portions of the 2014-15 and 2015-16 school years or presented any evidence regarding a compensatory remedy, there appears no basis in the hearing record to disturb the IHO's award of 36 hours of compensatory speech-language therapy.[30]

Finally, a further discussion of what a compensatory remedy for the 2016-17 school year would consist of is necessary. As compensatory education is an equitable remedy, relief should take into consideration changes in the student's program that might otherwise mitigate the very deficiencies suffered by the student (N. Kingston Sch. Comm. v. Justine R., 2014 WL 8108411, at *9 [D.R.I. Jun. 27, 2014] [noting that a request for compensatory education "should be denied when the deficiencies suffered have already been mitigated"], report and recommendation adopted, 2015 WL 1137588 [D.R.I. Mar. 12, 2015] see Phillips v. Dist. of Columbia, 932 F. Supp. 2d 42, 50 & n.4 [D.D.C. 2013] [collecting authority for the proposition that an award of compensatory education is not mandatory in cases where a denial of a FAPE is established]). Here, while the after-the-fact evidence on which the IHO relied upon regarding bullying in the 2016-17 school may have fallen outside the scope of the parent's July 2016 due process complaint notice, it is nevertheless relevant to a discussion of equitable relief.

The CSE reconvened on October 5, 2016 to revise the student's IEP (see Dist. Ex. 27). The October 2016 IEP also included a "special alert" that stated a "safety plan w[ould] be developed with [the student], parent, social worker, case manager and principal of his school to address the parent's concerns about bullying that she reported while [the student] attended [the district middle school]" (Dist. Ex. 27 at p. 1).[31] In addition, the October 2016 CSE recommended a 1:1 teaching assistant to "assist with academics and transitions throughout the school day" (id. at p. 10).[32] The

[30] Additionally, the evidence in the hearing record supports the IHO's finding that the student had speech-language needs (see Tr. pp. 179, 200-02, 204-05 265-68; Dist. Exs. 7; 17; 30 at pp. 50, 83-85).

[31] The hearing record includes a document titled "safety plan," dated September 16, 2016, which was developed by the social worker and identified that, if the student was involved in an incident where he was harassed or hit by another student he should immediately inform the school social worker, the dean of students, or the assistant principal (Dist. Ex. 26 at p. 1). However, the hearing record is unclear as to whether or not this document was intended to represent the safety plan referenced in the October 2016 IEP and the student testified that he did not have a safety plan at the high school at the time of the impartial hearing (Tr. p. 809).

[32] At various times in the hearing transcript, the teaching assistant is referred to as the "aide"; however, the October 2016 IEP identifies that the student would be provided with a teaching assistant, and the director of student services confirms that it was a teaching assistant, not an aide (see Tr. pp. 514, 1215-16; Dist. Ex. 27 at p. 10).

IEP further stated that the student would be provided with "constructive breaks," whereupon the teaching assistant would "assist in the transition in/out of classroom as needed" (id.).

Evidence in the hearing record suggests that the teaching assistant supported the student as it related to bullying. The parent testified that the assistant was "supposed to walk [the student] to class and make sure he was ok" and also had a role related to the student's academic needs (Tr. p. 1203). The parent also testified that the assistant was "like [the student's] own personal security guard" (Tr. p. 1204). The parent noted that the student no longer needed to report incidents of bullying because the assistant was "with him all the time" and so the threat of physical harm no longer existed (see Tr. p. 1259). The supervisor of special education for the district testified that the teaching assistant was only included in the October 2016 IEP to address the student's sleeping and academic issues (Tr. p. 643). However, the student later testified that the teaching assistant did not assist him with class work, as "she doesn't really know what it is," or with homework, tests, or other projects; additionally, the student testified that the assistant did not assist him when he fell sleeps in class (Tr. pp. 812, 814). The student further testified that the teaching assistant was with him every day, and that other students would not "mess with [him] because" the assistant was with him and students do not want to be reported (Tr. pp. 804, 806-07).

Based on the foregoing, the October 2016 IEP—and particularly the addition of the support of the 1:1 assistant—appears to have largely mitigated any deficiencies that appeared in the July 2016 IEP related to bullying, such that it would be difficult to envision a remedy to place the student in the position he would have been but for the lack of a special alert or safety plan in the July 2016 IEP, as discussed above.

Moreover, to the extent that the IHO ordered that the district prospectively place the student outside of the school district, such an order was premature. At this point in the school year, and in accordance with its obligation to review a student's IEP at least annually, the CSE should have already convened to revise the student's program and developed a new IEP for the student for the 2017-18 school year (see 20 U.S.C. § 1414[d][4][A]; Educ. Law § 4402[2]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]). The IHO's order dictating that the CSE place the student in a school location outside of the district circumvented the statutory process, pursuant to which the CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing a student's needs (see Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008] [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]). This is especially the case where the IHO's order directing placement was made in the absence of adequate evidence regarding the student's current needs, such as an assessment of the effectiveness of the special education supports available in the district, including the October 2016 CSE's recommendation for a 1:1 aide, as well as consideration of LRE requirements (see Dear Colleague Letter, 61 IDELR 263 [OSERS/OSEP 2013] [noting that, "[w]hile it may be appropriate to consider whether to change the placement of the child who was the target of the bullying behavior, placement teams should be aware that certain changes to the education program of a student with a disability (e.g., placement in a more restrictive "protected" setting to avoid bullying behavior) may constitute a denial of the IDEA's requirement that the school provide FAPE

in the LRE"]).[33] Accordingly, the IHO should have limited the exercise of her authority in this matter to the remediation of past harms that had been explored through the development of the underlying hearing record rather than prospective placement for the 2017-18 school year (see Eley v. District of Columbia, 2012 WL 3656471, at *11 [D.D.C. Aug. 24, 2012] [noting that prospective placement is not an appropriate remedy until the IEP for the current school year has been completed and the parent challenges the IEP for the current year]). Furthermore, although I can appreciate the parent's concerns regarding the impact that past incidents of bullying had on the student and the student's possible future interactions with students who previously bullied him, at this point, removing the student from the district without further review by the CSE is not warranted under the circumstances in this case (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]).

Based on the foregoing, there appears no basis to modify the IHO's ultimate award of compensatory education relief. However, the IHO's order directing the district to place the student outside of the district is reversed.

VII. Conclusion

In summary, the evidence in the hearing record supports the IHO's ultimate determination that the student was not provided with a FAPE for the 2014-15 and 2015-16 school years, and that the compensatory education services as identified above are warranted to remedy these denials of FAPE. However, for the reasons detailed above, the IHO's order requiring the district to find a school location for the student to attend outside of the school district, is reversed.

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 April 25, 2017 is modified by reversing that part which ordered the district to locate a school location for the student to attend outside of the school district.

Dated: **Albany, New York**
August 7, 2017

SARAH L. HARRINGTON
STATE REVIEW OFFICER

[33] A location outside of the school district in which the student resides could likely represent a more restrictive placement in terms of distance from the student's home; LRE requirements provide that the placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 CFR 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 CFR 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]).