The University of the State of New York

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

No. 17-075

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

Appearances:
Law Offices of Tela L. Troge, PLLC, attorneys for petitioners, by Kelly Dennis, Esq., and Tela L. Troge, Esq.

Ingerman Smith, LLP, attorneys for respondent, by Susan M. Gibson, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which found that the educational programs and services recommended by respondent's (the district's) Committee on Special Education (CSE) were appropriate. The district cross-appeals from that portion of the IHO's decision which awarded the student compensatory educational services. The appeal must be sustained in part. The cross-appeal must be sustained in part.[1]

[1] In September 2016, Part 279 of the Practice Regulations was amended, which amendments became effective on January 1, 2017, and are applicable to all appeals served upon an opposing party on or after January 1, 2017 (see N.Y. Reg., Sept. 28, 2016, at pp. 37-38; N.Y. Reg., June 29, 2016, at pp. 49-52; N.Y. Reg., Jan. 27, 2016, at pp. 24-26). Although some of the relevant events at issue in this appeal occurred before the effective date of the 2016 amendments, the new provisions of Part 279 apply, as the request for review was served upon the opposing party after January 1, 2017; therefore, citations contained in this decision are to the amended provisions of Part 279.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The hearing record reflects that at the time of the impartial hearing the student had received diagnoses of Tourette disorder, autism spectrum disorder, anxiety disorder, depression, attention deficit hyperactivity disorder (ADHD) combined type, developmental coordination disorder, developmental disorder of speech and language, and sensory integration dysfunction (Dist. Exs. 41-46).

With regard to the student's educational history, the parents referred the student to the Committee on Preschool Special Education (CPSE) in September 2011, due to their concerns relating to the student's speech intelligibility difficulties (Tr. p. 1292; see Dist. Ex. 3 at p. 1). In July 2012, an early childhood learning center conducted evaluations including a structured observation, a psychological evaluation, a social history, and a speech-language evaluation (Dist. Exs. 3 at pp. 2-3; 20-23).

On August 6, 2012, the CPSE convened to review the evaluation reports and determine the student's eligibility for special education (Dist. Ex. 3 at p. 1). The resultant August 2012 IEP reflected the CPSE determined that the student was eligible for special education as a preschool student with a disability and recommended two individual 30-minute sessions of speech-language therapy per week (id. at pp. 2, 6). The CSE meeting information summary attached to the IEP indicated that for the 2012-13 school year the student would attend a universal prekindergarten program at the early childhood learning center (id. at p. 1; see Tr. p. 119; Dist. Ex. 24 at p. 1).

On March 13, 2013, the CPSE reconvened to review additional evaluation reports from a January 2013 speech-language evaluation and a February 2013 educational evaluation, and develop an IEP for the student for the remainder of the 2012-13 school year (Dist. Exs. 4 at pp. 1-2; 24-25). The March 2013 CPSE modified the student's speech-language therapy to two 30-minute sessions in a small group (5:1) per week, and indicated that the student would be referred to the CSE in September (id. at pp. 1, 6).

On September 24, 2013, a CSE convened and developed the student's IEP for the 2013-14 school year (kindergarten) (Dist. Ex. 5 at p. 1).[2] Finding the student eligible for special education as a student with a speech or language impairment, the CSE recommended two 30-minute sessions of speech-language therapy in a small group (5:1) per week (id. at pp. 3, 7, 9).[3]

On April 21, 2014, the CSE convened to develop the student's IEP for the 2014-15 school year (first grade) (Dist. Ex. 6 at p. 1). Finding the student eligible as a student with an other health-impairment, the CSE preliminarily recommended one 30-minute session of speech-language therapy in a small group (5:1) per week, one individual 30-minute session of psychological counseling per week, and one 30-minute session of psychological counseling in a small group (5:1) per week (id. at pp. 3, 8, 10). However, the CSE meeting information summary attached to the

---

[2] A number of the meetings during the period at issue were convened by subcommittees on special education; there is no relevant distinction for purposes of this appeal and this decision will refer throughout to CSEs.

[3] The student's eligibility for special education under various disability categories is not in dispute in this matter.

IEP indicated that a consensus could not be reached and that the CSE would reconvene in May or June 2014 (id. at p. 2).

On May 19, 2014, the parents consented to amend the remainder of the student's 2013-14 school year IEP without a CSE meeting in order to request an occupational therapy (OT) evaluation (Dist. Ex. 7 at pp. 1, 11). On June 2, 2014, a private agency conducted an OT evaluation of the student (Dist. Ex. 27; see Tr. p. 512).

With regard to planning for the 2014-15 school year, by letter dated June 16, 2014, the student's developmental pediatrician indicated it was "necessary" for the student to receive "extra help, support and services" to progress (Dist. Ex. 41). The developmental pediatrician recommended providing the student with a "self-contained classroom setting", a speech-language evaluation and therapy, an OT evaluation, and counseling services (id.). The developmental pediatrician also recommended that the student receive a "social skills group," behavioral consultant services with a functional behavioral assessment (FBA) and a behavioral intervention plan (BIP), extra time to complete tasks, and a psychoeducational evaluation (id.).

On June 18, 2014, the CSE reconvened to continue developing the student's IEP for the 2014-15 school year (Dist. Ex. 8 at p. 1). According to the CSE meeting information summary attached to the IEP, the CSE reviewed the June 2014 OT evaluation report and the June 2014 letter from the student's private physician (id. at pp. 1-2). The meeting information summary further indicated that the parents were "moving towards a self-contained class," and that the student had received diagnoses of an autism spectrum disorder, an anxiety disorder, and Tourette disorder (id. at p. 1). The CSE continued its preliminary recommendations from the April 2014 IEP and added two 30-minute sessions of OT in a small group (5:1) per week; however, the meeting information summary further indicated that a consensus could not be reached and that the CSE meeting would be "tabled" (compare Dist. Ex. 6 at p. 8, with Dist. Ex. 8 at pp. 2, 9).

On August 14, 2014, the CSE reconvened to finalize the student's IEP for the 2014-15 school year (Dist. Ex. 9 at pp. 1-2). According to the CSE meeting information summary, the CSE reviewed results of a July 2014 psychoeducational evaluation and discussed the student's behavioral needs (id.). The CSE recommended a full-time 15:1+1 special class placement with four 20-minute sessions of speech-language therapy in a small group (5:1) per week, one individual 30-minute session of psychological counseling per week, one 30-minute session of psychological counseling in a small group (5:1) per week, two 30-minute sessions of OT in a small group (5:1) per week, and one hour of parent counseling and training per month (id. at p. 8). The CSE meeting information summary indicated that "[t]he parents were in attendance and in agreement with the recommendations" (id. at p. 1).

In September 2014, the student began attending school in the recommended program, where according to the parents, he had a difficult time transitioning to first grade (see Dist. Ex. 10 at p. 1). From October 6 to October 8, 2014 the student was hospitalized due to an increased frequency of tics (Parent Ex. M).

The district's behavior consultant prepared a "Recommended Behavioral Strategies" draft dated October 14, 2014, to address the student's morning transition into school (Dist. Ex. 37 at pp. 1-2). Also on October 14, 2014, the CSE convened at the request of the parents (Dist. Ex. 10 at p.

1). According to the CSE meeting information summary, a plan needed to address the student's difficulty with his morning transition into the classroom (id.). The meeting information summary indicated that the behavior consultant reviewed the plan developed to address the student's morning transition, and that the behavioral strategies plan was approved (id. at p. 2). The CSE also modified the student's disability category classification to autism based on a diagnosis from the student's private physician (id.). The CSE continued the 15:1+1 special class placement, speech-language therapy, OT, and psychological counseling recommendations from the August 2014 IEP (compare Dist. Ex. 9 at p. 8, with Dist. Ex. 10 at pp. 8-9). In lieu of the one hour of parent counseling and training per month provided at the "[h]ome [c]ounselor's [o]ffice" recommended on the August 2014 IEP, the CSE recommended 15 one hour sessions of parent counseling and training per year at the student's home (Dist. Ex. 10 at p. 9). The CSE further recommended that an FBA be conducted throughout the school day across all environments through December 19, 2014, and indicated that it would reconvene in January 2015 to determine whether the student needed a BIP (id. at pp. 2, 9).

On October 27, 2014, the CSE reconvened at the parents' request (Dist. Ex. 11 at p. 1). According to the CSE meeting information summary, the parents observed "serious avoidant behaviors" when the student was required to leave home to attend school in the morning, but once the student entered the school, his behaviors were reportedly "unremarkable" (id. at pp. 1-2). The summary indicated that although a parent trainer had provided six hours of training, none of those hours were in the home where the behaviors were manifesting, and, as the parents were not satisfied with the then-current trainer, the district's behavior consultant agreed to provide the parent training going forward (id.).[4] The summary and the IEP further noted that the CSE changed the timeline to complete an FBA to November 21, 2014—depending on the availability to conduct home and school observations—at which time a formal BIP would be "put into place" (id. at pp. 2, 9). At the CSE meeting, the parents stated that the current behavioral strategies designed to help the student were not appropriate, and on the meeting date, the district's behavior consultant revised the "Recommended Behavioral Strategies" draft and data collection sheet based on input from the October 27, 2014 CSE meeting (Dist. Exs. 11 at p. 2; 37 at pp. 3-4). The meeting information summary also indicated that the CSE agreed to the parents' request for a neuropsychological independent educational evaluation (IEE) by a specific provider (Dist. Exs. 11 at p. 2; 30-32).

By letter dated October 30, 2014, the student's developmental pediatrician indicated that due to the severity of the student's anxiety and tics, he was "completely unable to function in school and at home" (Dist. Ex. 44). She further indicated that his behaviors in the morning related to his "profound anxiety about attending school" made it "impossible for his parents to get him into the school," and as such, he required two months of home instruction and home services while the parents pursued "ongoing counseling" and medication adjustment (id.).

[4] A prior written notice dated October 27, 2014 indicated that the "[p]arents did not initially agree to parent training in the home which needs to happen if the school team is going to assist with desensitization/stress reduction at home" (Dist. Ex. 11 at p. 14).

By letter dated November 3, 2014, the district acknowledged the October 30, 2014 letter from the developmental pediatrician and informed the parents that it was in the process of arranging home instruction services for the student (Dist. Ex. 51).

In a letter dated November 10, 2014, the student's neurologist also recommended that the student receive two months of home instruction (Parent Ex. N). On November 12, 2014, the district referred the student to the private agency which completed the June 2014 OT evaluation for home instruction including speech-language therapy and OT (Dist. Ex. 52 at p. 2).

On December 2, 2014, the CSE reconvened at the parents' request (Dist. Ex. 12 at p. 1). The CSE meeting information summary reflects that home instruction was approved by the building principal and began in early November 2014, but those services, including OT and speech-language therapy, were "abruptly halted by the parents after several sessions," and that the parents had refused counseling services offered at the school building and parent counseling and training (id. at p. 2).[5] The summary also indicated that the parents had not provided the district with consent to communicate with the student's private treatment team (id. at pp. 1-2). According to the summary, the FBA was not completed due to the student's lack of attendance, noting that the parents canceled the appointment with the behavior consultant in the home to observe the student's "melt downs" (id. at p. 2). The summary also indicated that CSE meeting was ended abruptly by the parents and their advocate (id.).

By letter dated January 23, 2015, the student's developmental pediatrician indicated that the student required an additional two months of home instruction and home services due to his extreme anxiety related to attending school, "pending placement in an appropriate educational setting" such as a specified nonpublic school (Dist. Ex. 45). By letter dated April 5, 2015, the student's developmental pediatrician indicated that the student required home instruction and home services for the remainder of the 2014-15 school year for the same reasons specified in her earlier letters (Dist. Ex. 46).

A. Due Process Complaint Notice

By due process complaint notice dated May 27, 2015, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13, 2013-14, and 2014-15 school years (Dist. Ex. 1).

Initially, with respect to all three school years at issue, the parents argued that the district violated its "child find" obligation by ignoring the student's disabilities, including autism (Dist. Ex. 1 at p. 52). In addition, the parents alleged that, beginning when the student was in preschool, the district failed to provide them with required prior written notices and procedural safeguard notices (id. at p. 51). The parents also alleged that they were denied the opportunity to meaningfully participate during the CSE meetings because the CSE meeting notices they received were misleading and insufficient (id.). Next, the parents contended that they were denied meaningful participation in the development of the student's IEP because the recommendations

[5] The hearing record contains a substantial amount of evidence regarding attempts to provide the student with services while on home instruction, discussed in greater detail below.

from the student's private evaluators were ignored by the CSE committees (id. at p. 49). The parents also contended that the present levels of performance remained the same on multiple IEPs (id. at p. 50). In addition, the parents contended that the annual goals remained the same for several of the "older" IEPS (id.). The parents also contended that the district failed to conduct an FBA for the student and the BIP was inadequate because it was developed without parental participation, did not comply with regulatory requirements, and failed to address the student's anxiety disorder and autism (id.). Additionally, the parents contended that the program recommendations for the student's 2012-13, 2013-4 and 2014-15 school years were not appropriate (id. at p. 49).

Specifically, with respect to the 2012-13 school year, the parents alleged that the CPSE did not meet within 60 days from their giving the district consent to evaluate the student (Dist. Ex. 1 at p. 51). The parents also alleged that the district failed to provide them with a list of evaluators from which the parents could select an evaluator to evaluate the student (id.). Next, the parents asserted that the August 2012 and March 2013 CPSEs were improperly composed due to the absence of a special education administrator, regular education teacher, special education teacher or service provider, a person with special education expertise, or an evaluator who understood the student (id.). In addition, the parents alleged that the "services and placement" for the student were predetermined prior to the August 2012 CSE meeting (id. at p. 50).

With respect to the 2014-15 school year, the parents argued that they were denied meaningful participation the August 2014 CSE was improperly composed due to the lack of individuals who knew the student (Dist. Ex. 1 at p. 51). In addition, the parents alleged that the recommendation by the August 2014 CSE was predetermined and that the August 2014 CSE meeting resulted in predetermination due to the absence of the student's teacher (id. at pp. 50, 52). The parents also argued that the student was denied access to the curriculum because the student was not assessed to determine his present levels of performance in academic subjects and related services (id. at p. 52). Next, the parents contended that the district used incorrect assessment tools in evaluating the student in June 2014 which denied the student a FAPE (id. at p. 51). In addition, the parents contended that the June 2014 IEP included data from the psychoeducational evaluations conducted in July 2014, depriving them of their opportunity to participate in the development of the student's IEP (id. at p. 50). Next, the parents alleged that evaluative information was missing from the October 14, 2014 IEP and their comments were falsified on the IEP, depriving them of the opportunity to meaningfully participate in the development of the IEP (id.). Additionally, the parents alleged that the student's activities of daily living skills were not outlined on the IEP for the student's 2014-15 school year and the CSE failed to develop academic goals for the student (id.). Next, the parents argued that the student's grades dropped from kindergarten to first grade, showing regression (id. at p. 49). The parents also asserted that the student's placement on home instruction was predetermined and that once placed on home instruction, the student deprived of access to teachers and school programming and was not provided with appropriate instruction (id. at pp. 49, 50-51, 53).

As relief, the parents requested that homebound instruction constitute the student's pendency placement (Dist. Ex. 1 at p. 53). The parents also requested interim relief allowing them to choose the tutors for the student's homebound instruction (id.). Next, the parents requested the annulment of the 2014-15 IEP and BIP (id.). The parents also requested a neuropsychological IEE and a new FBA, to be conducted by evaluators of the parents' choosing (id.). The parents also

requested reading, writing, and language processing evaluations, and a new IEP with appropriate annual goals (id.). Additionally, the parents requested extended school year services with placement of the student in an appropriate school with round-trip transportation (id.). Next, the parents requested compensatory education services for the three and a half years for which they alleged the student was denied a FAPE (id.). The parents also requested parent counseling and training and teacher training by a Tourette's specialist (id.).[6]

B. Impartial Hearing Officer Decision

An impartial hearing convened on August 28, 2015, and concluded on March 31, 2017, after 12 days of proceedings (Tr. pp. 1-2104). By decision dated July 24, 2017, the IHO determined that the district offered the student a FAPE and awarded compensatory education services consisting of speech-language and OT services "for one year" (IHO Decision). The IHO found that the district and its personnel "extended themselves in devising a plan" that was successful in transitioning the student from the car to school (id.). The IHO also found that the district complied with the request to place the student on home instruction and documented the services that were provided or attempted to be delivered to the student (id.).

IV. Appeal for State-Level Review

The parents appeal, asserting that the IHO erred in finding that the district offered the student a FAPE. Initially, the parents argue that the IHO failed to address any of the claims raised in the due process complaint notice and did not cite to the hearing record or legal authority. Next, the parents argue that the IHO sent his decision by email to the district only, that the IHO did not transmit his decision to them, and that the IHO failed to render a timely decision. The parents further argue that the IHO decision failed to include the required exhibit list and the required statement advising the parents of their right to obtain a review from a SRO. The parents also argue that the IHO engaged in ex parte communications with counsel for the district, prolonged the hearing process because of his lack of availability, and refused to recuse himself when requested. Next, the parents allege that the district failed to provide them with required prior written notices and procedural safeguard notices, which made them unaware of their due process rights and tolled the limitations period. The parents further allege that the district failed in its child find responsibilities and to evaluate the student in all areas of suspected disability.[7]

Specifically, regarding the 2012-13 school year, the parents allege that the CPSE did not timely convene for an initial eligibility determination after the parents provided consent for evaluations. The parents also assert that the district failed to provide them with a list of evaluators from which the parents could select an evaluator, leading to inadequate evaluations. Next, the parents argue that the August 2012 and March 2013 CPSEs were improperly composed due to the

---

[6] The parents raised a number of claims alleging discrimination under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794[a]) (section 504) and retaliation for their advocacy on behalf of their son (Dist. Ex. 1 at pp. 50-53). As discussed below, an SRO does not have jurisdiction over these claims.

[7] Although the parents framed this claim in the due process complaint notice and on appeal as a "child find" allegation, it is more aptly characterized as a claim regarding whether the CSEs had sufficient evaluative information to ascertain the student's needs in all areas of disability.

absence of a special education administrator, regular education teacher, special education teacher or service provider, a person with special education expertise, or an evaluator who understood the student.

Turning to the 2013-14 school year, the parents argue that the IHO failed to address the student's need for "transition services." More specifically, the parents argue that the student's difficulty separating from his parents and transitioning to the classroom were apparent in a February 2013 evaluation report conducted by the early childhood learning center. In addition, the parents argue that the September 2013 CSE meeting was untimely, as it took place after the student transitioned into kindergarten. Next, the parents argue that the September 2013 IEP failed to indicate the student's present levels of performance and whether the student was able to achieve his speech-language goals from the 2012-13 school year, and that the May 2014 IEP lacked a statement of the student's present levels of performance.[8]

With respect to the 2014-15 school year, the parents contend that the April 2014 and June 2014 IEPs lacked annual goals. The parents further contended that the August 2014 IEP contained annual goals that were overly broad and lacked concrete short-term objectives, criteria for mastery, a method for measuring progress, and the projected date by which progress was to be made. The parents also allege that although the August 2014 IEP indicated that the student needed a BIP no supports were provided and no FBA was conducted. In addition, the parents assert that the neuropsychological IEE was not conducted by an independent evaluator. Next, the parents contend that the October 2014 FBA was inappropriately backdated and did not recommend appropriate strategies to address the student's behaviors. The parents further allege that the August 2014 CSE's recommendation for a 15:1+1 special class program was not appropriate because it was not in the student's least restrictive environment (LRE). Finally, the parents assert that the IHO failed to address the district's failure to implement the student's home instruction services, and that the district never made up missed services.

As relief, the parents request that an appropriate IEP be developed, placement in an appropriate educational setting, and provision of compensatory education services.[9]

---

[8] On appeal, the parents have not raised any claims related to the appropriateness of the program recommendation for the 2013-14 school year. Although the parents indicated in their due process complaint notice that the program recommendation for the 2013-14 school year was not appropriate, they articulated claims related to the 2014-15 school year (Dist. Ex. 1 at pp. 49-50). Additionally, while the parents requested relief for the 2013-14 school year and stated facts relevant thereto in their due process complaint notice, post-hearing brief, and request for review, they did not assert claims relating to the appropriateness of the program recommendation for the 2013-14; therefore, it will not be further discussed.

[9] The parents submit an additional exhibit for consideration with their request for review (Parent Ex. ZZ). Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (8 NYCRRR 279.10[b]; see, e.g., Application of a Student with a Disability, Appeal No. 15-033; see also L.K. v. Northeast Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). As this exhibit relates to claims outside of my jurisdiction and is not necessary to render a decision in this case, it will not be considered.

In an answer and cross-appeal, the district generally responds to the parents' allegations with admissions and denials and argues to uphold the IHO's determination that the district offered the student a FAPE. The district contends that the parents attempt to raise issues that were not alleged in their due process complaint notice, including their claims relating to the delay in holding a CSE meeting for the 2013-14 school year and the student's eligibility for 12-month services. The district also asserts that it provided the parents with procedural safeguard notices on multiple occasions and the parents' claims relating to the 2011-12 and 2012-13 school years are time-barred by the statute of limitations. The district further asserts that all CSE meetings at issue were duly constituted. In addition, the district asserts that it conducted all necessary evaluations and the present levels of performance in all of the IEPs at issue accurately described the student's needs. Next, the district asserts that it developed and implemented appropriate behavioral strategies during the 2014-15 school year to address the student's needs related to entering the school building. The district further contends that the annual goals developed by the August 2014 CSE were appropriate and measurable. In addition, the district asserts that the 15:1+1 special class placement recommendation was appropriate and in the LRE. Finally, the district asserts that it attempted to implement all recommended services, and that any services not provided to the student while he was on home instruction were a result of the parents' failure to cooperate with the district. The district cross-appeals the IHO's award of compensatory education services. The district asserts that the parents are not entitled to relief because the IHO found that it offered the student a FAPE for the school years at issue and that equitable considerations do not favor the parents' request for relief because they failed to cooperate in the district's attempts to provide the student with home instruction services.

In an answer to the cross-appeal, the parents contend that the IHO properly awarded compensatory education services. The parents also assert that district admitted during the impartial hearing that it was required to provide the student with compensatory education services. Finally, the parents contend that they cooperated with the district's attempts to provide home instruction services.[10]

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. of Hendrick Hudson Cent. Sch. Dist. 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 through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E.

[10] To the extent the parents raise issues in their reply that were not raised in their request for review, they will not be considered or discussed further.

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]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). 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. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [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"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see

Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[11]

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. Preliminary Matters

1. IHO Conduct

The parents raise several allegations on appeal with respect to the IHO's conduct. Initially, the parents assert that the IHO allowed this case to proceed for almost two years because the IHO was only able to meet on Fridays and failed to recuse himself, despite being requested to on multiple occasions. A review of the hearing record reveals that the parents' argument is without merit. During the impartial hearing, the IHO disclosed that he was only available on Fridays and indicated that he would consider recusing himself because he did not want to delay the hearing process (Tr. pp. 312-14). However, both parties rejected the IHO's offer (id.). More specifically, the parents' then-advocate replied, "I think that would belabor the process, if you recuse now in the present state" (Tr. pp. 313-14). Similarly, counsel of the district, responded, "I don't want you to recuse yourself. I would request that you retain and continue your jurisdiction" (id.).[12]

Next, the parents assert that the IHO's decision failed to address any of their claims, cite to the record, provide analysis, or cite to legal authority. State regulations provide in relevant part that "[t]he decision of the impartial hearing officer shall be based solely upon the record of the proceeding before the impartial hearing officer, and shall set forth the reasons and the factual basis

[11] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

[12] To the extent the parents assert that the IHO engaged in improper ex parte communications with counsel for the district; the hearing record reflects confusion regarding whether counsel for the parents were properly noticed of the hearing (see Tr. pp. 367-71, 408-10; Parent Ex. F). To the extent they assert the IHO communicated only with counsel for the district regarding scheduling of hearing dates, the hearing transcript disproves this contention (Tr. pp. 185, 565-66, 1228-29, 1825, 1963-64).

for the determination. The decision shall reference the hearing record to support the findings of fact" (8 NYCRR 200.5[j][5][v]). In addition, IHOs are required to "render and write decisions in accordance with appropriate standard legal practice" (8 NYCRR 200.1[x][4][v]). The parents are correct that the IHO's decision does not comply with the requirements set forth in State regulation. Although the hearing record contains over 2000 pages of hearing transcript, developed over 12 days of proceedings conducted over a period of almost a year and a half, and over 120 exhibits, the IHO issued a one half-page decision devoid of any specific reference to the hearing record or to any legal authority (see IHO Decision). Moreover, it appears that the IHO simply ignored the issues raised by the parents in their due process complaint notice. In addition, the IHO provided no explanation for how he reached his conclusion that the district offered the student a FAPE. The FAPE determination in favor of the district also contradicts the IHO's award of compensatory services for the student. The IHO's failure to reference the facts in the hearing record on which he relied and the legal standards upon which the decision was based, and to provide the reasons for his determinations, is not helpful to the parties in understanding the decision or in formulating their arguments on appeal. In short, the decision fails to adhere to any standard legal practice. The IHO is reminded to comply with State regulations by addressing the issues set forth in a party's due process complaint notice, citing to relevant facts in the hearing record, and comport with standard legal practice by citing to relevant authority.

With respect to the parent's argument that the IHO failed to include an exhibit list and the required statement advising the parents of their right to obtain review of his decision by an SRO, the parents are correct and the IHO is reminded to "attach to the decision a list identifying each exhibit admitted into evidence," identifying "each exhibit by date, number of pages and exhibit number or letter," and to "include a statement advising the parents and the board of education of the right of any party involved in the hearing to obtain a review of such a decision by the State review officer in accordance with" 8 NYCRR 200.5(k) (8 NYCRR 200.5[j][5][v]). Notwithstanding these errors, the parents do not allege that the IHO's failures caused any harm to the student in this instance, and the parents were not prevented from timely initiating this appeal.

The parents also argue that the IHO failed to render a timely decision and that the IHO failed to transmit his decision to them. Although the IHO determined the record to be closed on June 12, 2017, he issued his decision 42 days after that date, in violation of State regulation requiring the decision to be rendered and mailed no later than 14 days from the record close date (8 NYCRR 200.5[j][5]). The IHO is cautioned that he is required to abide by the regulatory requirements governing the timelines within which impartial hearings must be conducted and IHOs must issue decisions. The IHO is further reminded that an impartial hearing officer shall "render a decision, and mail a copy of the written, or at the option of the parents, electronic findings of fact and the decision to the parents" (id.).

2. Scope of Review

Before reaching the merits in this case, a determination must be made regarding which claims are properly before me on appeal. First, there are a number of issues which have not been raised on appeal that were previously asserted in the parents' due process complaint notice. To the extent the parents do not raise arguments on appeal regarding claims which were alleged in the

due process complaint notice and were not reached by the IHO, these claims are deemed abandoned and will not be further addressed (8 NYCRR 279.8[c][2], [4]).

The parents also allege for the first time on appeal that the student did not have an IEP in place at the start of the 2013-14 school year. The IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[c][2][E][i][I]; [f][3][B]; 34 CFR 300.508[d][3][i]; 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [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][i][b]).] Where, as here, the parents did not seek the district's agreement to expand the scope of the impartial hearing to include this issue, and did not include this issue in their due process complaint notice, I decline to review this issue for the first time on appeal. To hold otherwise inhibits the development of the hearing record and would render the IDEA's statutory and regulatory provisions that limit the issues meaningless (see 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]). "By requiring parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.'" (R.B. v. Dep't of Educ., 2011 WL 4375694, at *6 [S.D.N.Y. Sept. 16, 2011], quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir. 1992]; see C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *12 [S.D.N.Y. Sept. 22, 2011]). Nor did the district open the door to this claim by raising evidence relating to it as a defense to a claim that was identified in the due process complaint notice (M.H., 685 F.3d at 249-51).

The parents also assert on appeal that the IHO failed to address the issue of their requested IEE. More specifically, in the parents' due process complaint notice, the parents requested an independent neuropsychological evaluation as relief (Dist. Ex. 1 at p. 53). However, a review of the hearing record reveals that the IHO awarded the parents an independent neuropsychological evaluation while the impartial hearing was pending (Tr. pp. 252-53). Moreover, the parents' attorney informed the parties during the impartial hearing that the parents had chosen an evaluator to conduct the independent neuropsychological evaluation for the student (Tr. pp. 254-55). Furthermore, the district director of pupil personnel services and special education (director) testified that based on the IHO's order, she sent a letter to the evaluator chosen by the parents informing the evaluator that the district would fund the evaluation (Tr. p. 563; Parent Ex. L). However, a review of the hearing record reveals that an independent neuropsychological evaluation was never conducted pursuant to the IHO's award. In any case, as the parents do not request a neuropsychological IEE as relief on appeal, this issue will not be discussed further.

Lastly, the parents raise claims outside the scope of the IDEA and the Education Law. Specifically, on appeal, the parents allege violations of section 504 and retaliation by the district for the parents' advocacy on the student's behalf. State law does not make provision for review of

such claims through the State-level appeals process authorized by the IDEA and the Education Law (see Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Therefore, an SRO has no jurisdiction to review any portion of the parents' claims or the IHO's findings regarding section 504, discrimination, retaliation, abuse, or neglect (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 n.17 [E.D.N.Y. 2012] ["Under New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"]; see also D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 507 [S.D.N.Y. 2013]). Accordingly, the parents' claims related to section 504 and retaliation shall not be reviewed on appeal.

3. Statute of Limitations

Turning next to the parties' dispute over the applicability of the IDEA's statute of limitations, the parents assert that the statute of limitations should be tolled because the district failed to provide them with prior written notices or procedural safeguards notices. The district argues that it provided the parents with prior written notices and procedural safeguards notices on several occasions and that the parents' claims related to the 2012-13 school year should be dismissed as time-barred.[13]

The IDEA requires that, unless a state establishes a different limitations period under state law, a party must request a due process hearing within two years of when the party knew or should have known of the alleged action that forms the basis of the complaint (20 U.S.C. § 1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 34 CFR 300.511[e]; 8 NYCRR 200.5[j][1][i]). New York State has affirmatively adopted the two-year period found in the IDEA (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j][1][i]). The parents concede in both their request for review and due process complaint notice that certain of their claims are time-barred if an exception does not apply to the statute of limitations (Dist. Ex. 1 at p. 3). An exception to the timeline to request an impartial hearing applies if a parent was prevented from filing a due process complaint notice due to the district withholding information from the parent that the district was required to provide (20 U.S.C. § 1415[f][3][D][ii]; 34 CFR 300.511[f][2]; 8 NYCRR 200.5[j][1][i]). Case law interpreting the "withholding of information" exception to the limitations period has found that the exception applies to the requirement that parents be provided with certain procedural safeguards required under the IDEA (see D.K. v. Abington Sch. Dist., 696 F. 3d 233, 246 [3rd Cir. 2012]; Bd. of Educ. of North Rockland Cent. Sch. Dist. v. C.M., 2017 WL 2656253, at *9-*10 [S.D.N.Y. June 20, 2017]; R.B. v. Dept. of Educ., 2011 WL 4375694, at *4, *6 [S.D.N.Y. Sept. 16, 2011]; El Paso Indep. Sch. Dist. v. Richard R., 567 F. Supp. 2d 918, 943-45 [W.D. Tex. 2008]). Such safeguards include the requirement to provide parents with a procedural safeguards notice containing, among other things, information about requesting an impartial hearing (see 20 U.S.C. § 1415[d]; 34 CFR 300.504; 8 NYCRR 200.5[f]). Under the IDEA and federal and State regulations, a district must provide parents with a copy of a procedural safeguards notice annually (20 U.S.C. § 1415[d][1][A]; 34 CFR 300.504[a]; 8 NYCRR 200.5[f][3]). However, regardless of

[13] During the impartial hearing, the parties made several requests that the IHO render a determination regarding the statute of limitations; however, the IHO did not make a clear ruling on this matter and did not address this issue in the IHO Decision. (IHO Decision; Tr. pp. 20-22, 1155-1159).

whether a district has provided the parent with a procedural safeguards notice, if a parent is aware of his or her procedural rights under the IDEA, the failure to provide the procedural safeguards does not under all circumstances prevent the parent from requesting an impartial hearing (see D.K., 696 F.3d at 246-47; C.M., 2017 WL 2656253, at *9-*10; R.B., 2011 WL 4375694, at *7; Richard R., 567 F. Supp. 2d at 944-45).

In the instant case, the hearing record reflects that on June 12, 2012, the district sent a prior written notice to the parents that references the procedural safeguards notice as an attached enclosure, however, the attachment is not included with the exhibit (Dist. Ex. 3 at p. 13). The hearing record further reflects that between September 13, 2012 and October 27, 2014, the district on multiple occasions sent prior written notices to the parents which stated, "[p]reviously you have received a Procedural Safeguards Notice that explains your rights regarding the special education process" (Dist. Exs. 3 at p. 14; 4 at p. 12; 7 at p. 9; 8 at p. 16; 9 at p. 17; 10 at p. 15; 11 at p. 14). However, the parents testified during the impartial hearing that they did not receive any prior written notices or procedural safeguards notices until the December 2, 2014 CSE meeting (Tr. pp. 1305, 1619-20, 1793-94).[14] New York law provides a presumption of mailing and receipt by the addressee where there is proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed (Nassau Ins. Co. v. Murray, 46 N.Y.2d 828, 829 [1978]; see News Syndicate Co. v. Gatti Paper Stock Corp., 256 N.Y. 211, 214 [1931] [stating that the presumption is founded on the probability that the officers of the government will do their duty and the usual course of business]). As long as there is adequate testimony by one with personal knowledge of the regular course of business, it is not necessary to solicit testimony from the actual employee in charge of the mailing (Nassau Ins. Co., 46 N.Y.2d at 829-30; In re Lumbermens Mutual Casualty Co. v. Collins, 135 A.D.2d 373, 374 [1st Dep't 1987]; Gardam & Son v. Batterson, 198 N.Y. 175, 178-79 [1910] [stating that "the rule upon the subject requires . . . in the absence of any evidence as to its being deposited with the post office authorities, that the proof shall establish the existence of a course of business, or of office practice, according to which it naturally would have been done"]; but see Rhulen Agency, Inc. v. Gramercy Brokerage, Inc., 106 A.D.2d 725, 726 [3d Dep't 1984] ["It is necessary to prove by testimony of the person who mails them that letters are customarily placed in a certain receptacle and are invariably collected and placed in a mailbox."]). In order to rebut the presumption of mailing and receipt, the addressee must show more than the mere denial of receipt and must demonstrate that the sender's "routine office practice was not followed or was so careless that it would be unreasonable to assume that the notice was mailed" (Nassau Ins. Co., 46 N.Y.2d at 829-30).

Here, the director testified that after working with the parents over time, the parents frequently expressed that they did not receive documents (see Tr. pp. 2083-84). The director further testified that in response, the district "began to make sure that mail was either hand-delivered or was delivered to [the parents] in multiple ways" (Tr. p. 2084). When asked whether there was a specific protocol in sending IEPs or prior written notices, the director testified that a "copy of the IEP is inserted into the file" and a "letter is generated for every piece of mail that goes out. . . so we have a record" (Tr. pp. 2084-85). The director further explained that IEPs are sent to parents "via regular mail," but the district eventually sent the parents mail through "either certified

[14] The director testified that she "personally handed" the parents all of the documents they requested at the December 2014 CSE meeting (Tr. p. 2084).

or priority mail. . . because the parents had asserted that they weren't receiving documents" (Tr. p. 2085). Although the parents claim that they did not receive the prior written notices or procedural safeguards notices from the district, this assertion would be insufficient by itself to rebut the presumption of mailing (Nassau Ins. Co., 46 N.Y.2d at 829-30; T.C. v. New York City Dep't of Educ., 2016 WL 1261137, at *10 [S.D.N.Y. Marc.30, 2016]). Nevertheless, in the instant case, the district failed to establish that it is entitled to the presumption of mailing because the director did not provide testimony regarding a detailed description of standard office mailing procedures, other than the district sent IEPs "via regular mail" (Tr. p. 2085). Also, the director's testimony did not establish the timeframes when the district allegedly sent the parents prior written notices and procedural safeguards notices via regular mail and when these documents were sent to the parents via certified or priority mail. Absent this information, certified mail receipts or tracking information would adequately support a finding that the district mailed the prior written notices and procedural safeguards notices to the parents (State Farm Mut. Auto Ins. Co. v. Kankam, 3 A.D.3d 418, 716 [1st Dep't 2004] [finding that an addressee's signature on a certified mail return receipt supports a finding that the addressee received the notice]). However, the record is devoid of such evidence. Therefore, under the circumstances of this case, the district is not entitled to a presumption of mailing.

For the withholding of information exception to the statute of limitations to apply, the hearing record must demonstrate that the parent was prevented from requesting a hearing as a result of the district's failure to provide required information (D.K., 696 F.3d at 246-48). Here, there is nothing in the hearing record to indicate that the parents were aware of their rights until shortly prior to their commencement of the present proceeding (see Richard R., 567 F. Supp. 2d at 944-45). The student's mother testified that during the student's preschool year, the parents "were very new to special ed services, so we didn't know a lot of [] what was out there and no one was even telling us what we could get for [the student]" (Tr. pp. 1308-09). While obtaining the assistance of an individual with expertise in special education procedures would create some record basis for a finding that knowledge of the limitations period and other due process rights could be imputed to the parent, in this case there is no indication in the hearing record that the parents obtained assistance from a family advocate prior to September or October 2014 (Tr. pp. 1459-61; Dist. Ex. 11 at pp. 1-2; see Richard R., 567 F. Supp. 2d at 945 [noting that the hearing record contained "no documentation of [the student's] parents having direct, actual knowledge of their right to a due process hearing" and holding that "in the absence of some other source of IDEA information, a [district's] withholding of procedural safeguards would act to prevent parents from requesting a due process hearing to administratively contest IDEA violations until such time as an intervening source apprised them of their rights"]; cf. C.M., 2017 WL 2656253, at *10 [finding that the exception did not apply where the parent engaged the services of an advocate and special education attorney, and acknowledged receiving the procedural safeguards notice, more than two years prior to filing the due process complaint notice]; R.B., 2011 WL 4375694, at *7 [finding that the exception did not apply where the parent attended a CSE meeting with an "attorney who specialize[d] in education law"]).

Therefore, the hearing record supports a finding that the withholding of information exception to the IDEA's limitations period applies in this instance and the parents' claims regarding the 2012-13 school year are not barred by the two-year limitations period for requesting a hearing (20 U.S.C. § 1415[f][3][D]; see Application of the Dep't of Educ., Appeal No. 12-221 [concluding

that the withholding of information exception applied where the district failed to provide the parent with copies of the procedural safeguards notice or prior written notice in the parent's native language and the hearing record did not indicate that the parent was aware of his rights prior to the commencement of the proceeding]; see also Application of a Student with a Disability, Appeal No. 15-088 [concluding that the withholding of information exception applied because the hearing record did not indicate that the district provided the parents with the procedural safeguards notice or that the parents were aware of their right to request a due process hearing]; Application of the Bd. of Educ., Appeal No. 14-109 [finding that the withholding of information exception applied because the evidence in the hearing record revealed that the district did not provide the parent with a procedural safeguards notice in the manner required by the IDEA and no information suggested that the parent was aware of her right to request a due process hearing]).

B. 2012-13 School Year

1. List of Evaluators

Initially, the parents argue that when they referred the student to the CPSE, the district failed to timely provide them with a list of evaluators to conduct the student's initial evaluation.[15]

Under the New York State Education Law, once a student is referred to the CPSE, the district must provide the parents with a list of approved evaluators in the geographic area from which the parents may select to evaluate the student (Educ. Law § 4410[4][b]).

In the instant case, the student's mother testified that the parents did not receive a list of evaluators from the district after the student was referred to the CPSE but that the district directed the parents to the early childhood learning center (Tr. pp. 1292-93). The hearing record reflects that on June 12, 2012, the district sent a prior written notice to the parents that references a list of evaluators as an enclosure; however, the enclosure is not included with the exhibit (Dist. Ex. 3 at p. 13). Furthermore, the parents testified during the impartial hearing that they did not receive any prior written notices until the December 2, 2014 CSE meeting (Tr. pp. 1305, 1619-20, 1793-94). Assuming that the district failed to provide the parents with a list of evaluators, the parents do not allege with any particularity how such a procedural violation significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits to the student during the 2012-13 school year (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). The absence of any evidence of how the district's failure to provide a list of evaluators to the parents affected the student or significantly impeded the parents' ability to participate in the August 2012 CPSE process leads to the conclusion that there is no denial of a FAPE on this basis. Furthermore, as discussed further below, a review of the evaluations conducted by the early childhood learning center does not support the parents' contentions that the evaluations were insufficient or that the

[15] The parents also argue on appeal that despite "first ask[ing] the school district for help" and consenting to evaluations in September 2011, the CPSE did not meet for an eligibility meeting until August 2012 (Tr. pp. 1292-93; see Dist. Ex. 3). State regulations require that a preschool student suspected of having a disability shall be referred in writing to the chairperson of the district's CPSE (8 NYCRR 200.16[b][1][i]). However, the hearing record does not contain a written referral to the CPSE or the parents' written consent for the district to evaluate the student.

CPSE was required to obtain additional evaluative information to develop a program for the student.

2. CPSE Composition

The parents allege that the August 2012 CPSE and March 2013 CPSE were not properly composed due to the lack of a "special education administrator." The parents also allege that the August 2012 CPSE failed to include a regular education teacher.

The IDEA and State regulations require a CPSE to include to include the following members: the parents; a regular education teacher of the student (if the student was, or may be, participating in the regular education environment); a special education teacher of the student or special education provider of the student; a district representative (who serves as the chairperson of the committee); an individual capable of interpreting instructional implications of evaluation results (who may be the regular education teacher, special education teacher or provider, district representative, or a school psychologist); and other persons having knowledge or special expertise regarding the student as designated by the parents or district (20 U.S.C. § 1414[d][1][B]; 34 CFR 300.321[a]; 8 NYCRR 200.3[a][2]). At the time of the August 2012 and March 2013 CPSE meetings, State regulations further required an additional parent member of a student with a disability (8 NYCRR 200.3[a][2][former v] [Apr. 2012 and Jan. 2013]).

The August 2012 IEP indicated that the August 2012 CPSE included a CPSE chairperson, a special education teacher from the early childhood learning center, and the parents (Dist. Ex. 3 at p. 9). The March 2013 IEP indicated that the March 2013 CPSE included a CPSE chairperson, a county representative, an additional parent member, a regular education teacher, a speech-language pathologist, the director of the early childhood learning center, and the parents (Dist. Ex. 4 at pp. 1, 10).

Addressing the parents' specific challenges; first, there is no requirement that a "special education administrator" be present at a CPSE meeting; therefore, the parents' argument that the August 2012 and March 2013 CPSEs were improperly composed due to the absence of the director or the assistant director has no merit. Furthermore, as noted above both the August 2012 and March 2013 CPSE meetings included a district representative, the assistant director was the chairperson at the August 2012 CPSE meeting, and the director was the chairperson at the March 2013 CPSE meeting (Dist. Exs. 3 at p. 9; 4 at pp. 1, 10).

Turning to the parents' argument that the August 2012 CPSE lacked the attendance of a regular education teacher, the hearing record reveals that the August 2012 CPSE indicated that the student would participate in a general education placement with speech-language therapy (Dist. Ex. 3 at pp. 6-7). Therefore, a regular education teacher was a required member of the CPSE (20 U.S.C. § 1414[d][1][B][ii]; 34 CFR 300.321[a][2]; 8 NYCRR 200.3[a][2][ii]). The August 2012 CPSE attendance page did not reflect the attendance of a regular education teacher (id.). Based on the foregoing, the absence of a regular education teacher at the August 2012 CPSE meeting constitutes a procedural violation.

However, the parents do not assert, and the hearing record does not provide a basis upon which to conclude, that this procedural inadequacy impeded the student's right to a FAPE,

significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). A review of the IEP indicates that the parents attended the August 2012 CPSE meeting (see Dist. Ex. 3 at pp. 3-, 9). Moreover, as discussed below the August 2012 CPSE had the benefit of recent comprehensive academic and social/emotional evaluations of the student conducted by the early childhood learning center. The parents do not assert any additional services or supports the student required during the 2012-13 school year to receive educational benefit that were not recommended as a result of the absence of a regular education teacher from the August 2012 CPSE. Accordingly, although the August 2012 CPSE was required to include a regular education of the student at the August 2012 CPSE meeting, this record does not lead me to conclude that this procedural violation impeded the parents' opportunity to participate in the decision-making process, denied the student a FAPE, or otherwise caused a deprivation of educational benefit.[16]

3. Sufficiency of Evaluative Information

The parents assert on appeal that the district failed to evaluate the student for reading disorders, autism, ADHD, Tourette disorder, sensory impairments, and motor function weaknesses and other needs requiring OT services; thus failing to evaluate the student in all areas of suspected disability.[17]

An evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

A review of the evidence in the hearing record demonstrates that the August 2012 CPSE considered and relied upon the following July 2012 evaluative information to develop the August 2012 IEP: a structured observation report, a psychological evaluation report, a social history report, and a speech-language evaluation report (Dist. Exs. 3 at pp. 2-3; 20-23).

The July 2012 structured observation report indicated that the student was observed in an evaluation setting with a number of developmentally appropriate toys available (Dist. Ex. 21). When provided with the opportunity to play, the student sought out his two older siblings and spent

---

[16] The hearing record reflects that at the time the initial evaluations were conducted, the student had not previously attended a daycare or preschool program (Dist. Ex. 20 at p. 1).

[17] The hearing record contains no indication that the student received any of these diagnoses prior to June 2014 (see Parent Ex. JJ at pp. 5-6; Dist. Ex. 41; see also Dist. Ex. 8 at p. 1).

time happily interacting with them and coloring pictures (id.). According to the report, the student appeared quite animated and vocal while engaged in play, and when it was time to leave, appropriately said goodbye to the evaluator (id.).

According to the July 2012 psychological evaluation report, administration of the Wechsler Preschool and Primary Scale of Intelligence-Third Edition (WPPSI-III) to the student yielded a full scale IQ of 95 (37th percentile), indicating performance within the average range of cognitive functioning (Dist. Ex. 22 at pp. 1-2). The report indicated that the student's verbal skills appeared relatively better developed than his nonverbal skills, but overall reflective of average cognitive functioning (id. at pp. 1-2, 4). Informal assessment of the student's pre-academic skills revealed the student's abilities to identify some colors and shapes, and count in numerical order (id. at p. 3). However, the student was not able to identify number and letters, spell, or write his name (id.).

Completion of the Vineland Adaptive Behavior Scales-Second Edition (Vineland-II) Parent Rating Form yielded a socialization domain standard score (SS) of 110 (75th percentile), within the average range (Dist. Ex. 22 at pp. 2-4). With regard to interpersonal relationships, the report revealed the student showed interest in children his age, engaged in friendship-seeking behavior, played cooperatively with other children for lengthy periods of time, and engaged in age appropriate imaginative play (id. at p. 3). The July 2012 psychological evaluation report reflected that although the student did not remain in his seat, he was attentive and cooperative throughout the evaluation (id. at p. 2). Parent responses to the Connors' Attention Deficit Scale-Parent Version (CADS) yielded scores within normal limits on all scales, which indicated that the student was not demonstrating significantly problematic behaviors within the home environment (id. at pp. 2-4).

According to the July 2012 social history report, the student's physical development, birth and medical histories were essentially unremarkable and developmental motor milestones were acquired within normal limits (Dist. Ex. 20 at p. 2). The July 2012 psychological evaluation report reflected that the student's standard score of 100 (50th percentile) in the motor skills domain of the Vineland-II indicated that his overall motor skills were in the average range, and he demonstrated the ability to walk, run, jump, alternate feet while going up and down stairs, and ride a bike with training wheels (Dist. Ex. 22 at p. 4). In the area of fine motor skills, the student stacked blocks, built three-dimensional structures with blocks, completed simple puzzles, wrote with a pencil, and was beginning to use scissors to cut (id.).

The student's standard score of 91 (27th percentile) in the communication domain of the Vineland-II indicated his overall receptive and expressive language skills were within the average range (Dist. Ex. 22 at p. 3). According to this assessment, receptively, the student occasionally listened to stories for brief periods of time, pointed to body parts and pictures in books, followed directions with an action and an object, and occasionally followed "if-then" instructions (id.). Expressively, the student used more than 100 recognizable words, spoke in complete sentences, and asked and answered questions (id.).

The student's standard score of 100 (50th percentile) in the daily living skills domain on the Vineland-II indicated his overall adaptive self-help skills were within the average range related to personal hygiene, dressing skills, feeding, domestic skills such as helping with chores and community-oriented adaptive skills that involved interaction with others, safety concerns, and

judgment (Dist. Ex. 22 at p. 3). The student was toilet trained during day and night, dressed himself and typically put shoes on the correct feet, occasionally put away his possessions, helped with chores when asked to do so, and had an awareness of basic safety rules (id.).

According to the July 2012 speech-language evaluation report, an administration of the Preschool Language Scale-5 (PLS-5) to the student yielded overall language scores in the average range (standard score 93/32nd percentile), with average scores in both his ability to understand language (auditory comprehension, standard score 92/30th percentile) and his ability to use language to communicate (expressive communication, standard score 96/39th percentile) (Dist. Ex. 23 at pp. 1, 5-6). Pragmatic language skills were determined to be age appropriate at the three to four year old range (id. at pp. 3, 6). The student's sentence length could not be accurately analyzed due to his speech sound production errors, and administration of the Goldman-Fristoe Test of Articulation-2 (GFTA-2) (standard score 70/6th percentile) and the Khan-Lewis Phonological Analysis-Second Edition (KPLA-2) (standard score 72/7th percentile) revealed that both the student's articulation skills and phonological development were significantly delayed (id. at pp. 2-6). The student's speech intelligibility was assessed as poor, and he presented with severe tongue thrust that distorted many of his speech sounds during co-articulation (id. at pp. 5-6).

The March 2013 CPSE considered and relied upon the aforementioned evaluations, along with information from the January 2013 speech-language evaluation report and the February 2013 educational evaluation report to identify the student's communication, academic, social, motor, and adaptive behavior strengths and needs (Dist. Ex. 4 at pp. 2-5; Dist. Exs. 24; 25).

With respect to the January 2013 annual speech-language report, the student had been receiving two speech-language therapy sessions per week and continued to work on and made progress towards the articulation and phonological goals on his IEP (Dist. Ex. 25 at pp. 1, 7). Administration of the Clinical Evaluation of Language Fundamentals-Preschool-Second Edition (CELF-P2) to the student revealed that his receptive language (standard score 94) and expressive language (standard score 98) skills were within normal limits (id. at pp. 2-3, 7). Using norm-referenced and developmental measures to analyze a spontaneous speech-language sample uttered by the student, the student demonstrated age appropriate mean length of utterance (id. at pp. 5, 7). Completion of a checklist indicated the student's pragmatic language skills were below age appropriate expectations (id. at pp. 6-7).

Results of a re-administration of the GFTA-2 indicated that the student's articulation skills were at age appropriate levels (standard score 95) (Dist. Ex. 25 at pp. 4, 7). The student's phonological skills were also at age expected levels according to results of the KLPA-2 (standard score 98) (id.).[18] However, the student continued to demonstrate various phonological processes in spontaneous speech, which affected his speech intelligibility index (73-77 percent intelligible speech), as well as tongue protrusion and distortion during production of specific sounds (id. at

[18] The January 2013 results of the GFTA-2 reflect the student's improvement in articulation performance on the test when compared to results of a previous administration of the GFTA-2 (standard score 70/6th percentile) in July 2012 (compare Dist. Ex. 23 at pp. 2-6, with Dist. Ex. 25 at pp. 4, 7). Similarly, the student demonstrated improvement on the KLPA-2 since July 2012 (standard score 72/7th percentile) (compare Dist. Ex. 23 at pp. 2-6, with Dist. Ex. 25 at pp. 4, 7).

pp. 4-5, 7).[19] In addition, the student's speech intelligibility decreased when he became excited, as his rate of speech increased (id. at pp. 5, 7). Oral motor functioning was judged to be within normal limits for purposes of speech production and eating (id. at pp. 6-7).

The February 2013 annual educational evaluation report indicated that administration of the Developmental Assessment of Young Children-Second Edition (DAYC-2) to the student yielded a general development quotient of 85 (16th percentile), in the below average range of functioning (Dist. Ex. 24 at pp. 3-4). The student's scores were within normal limits for the cognitive domain (standard score 95/37th percentile), the communication domain (standard score 95/37th percentile), the physical domain (standard score 93/32nd percentile), and the adaptive domain (standard score 91/27th percentile) (id.). The student's score in the social/emotional domain fell 1.9 standard deviations below the mean (standard score 72/3rd percentile) (id. at pp. 2-4). The annual educational evaluation report indicated that in the classroom the student preferred being alone than with his peers, needed prompts to share and take turns, displayed task avoidant behaviors towards non-preferred activities, and continued to have difficulty following classroom rules and demonstrating knowledge of the classroom routine (id.).

As discussed in detail above, the hearing record shows that the student was sufficiently evaluated in a number areas including cognitive, pre-academic, attention, daily living skills, speech-language skills (including articulation and phonological development), social/emotional, and fine and gross motor skills in order to identify his skills and needs (Dist. Exs. 3-4; 20-25). Evaluative documentation included in the hearing record revealed that the student performed within age expectations or within the average range for all areas tested, except for delays in articulation on the July 2012 administration of the GFTA-2 and KLPA-2, in social skills on the February 2013 administration of the DAYC-2, and on a January 2013 pragmatic language checklist (Dist. Exs. 4 at pp. 2, 4; 23; 24; 25 at pp. 6-7).

To provide a view of the student's social/emotional behaviors and pragmatic language skills as demonstrated by the documentary evidence available to the CPSEs at the time the 2012-13 IEPs were developed, the July 2012 social history report indicated that the parents described the student "as a loving and affectionate boy who like[d] to play with other children and share[d]" very well with them (Dist. Ex. 20 at p. 2). The parents also described the student as a "comedian" who liked to make others laughed and who enjoyed cuddling (id.). The parents described the student's activity level as "bordering high," and indicated he was very observant (id.). The parents reported that at times the student had tantrums when he did not get his way but accepted limits and could be redirected (id.). As discussed above relative to the July 2012 structured observation report, the student sought out and played "happily" with his siblings, and was "quite animated and vocal while engaged in play" (Dist. Ex. 21). Behavioral observations noted in the July 2012 psychological evaluation report indicated the student willingly joined the evaluator at the evaluation table, easily transitioned to the formal evaluation, and was generally cooperative and attentive throughout the evaluation (Dist. Ex. 22 at pp. 1-2). The psychological evaluation report indicated the student did not remain seated during the evaluation, but seemed to be trying his best and was pleased with his successes (id. at p. 2). The evaluating psychologist described the student

[19] According to the speech-language evaluation report, a child of the student's age should have a speech intelligibility index closer to 100 percent (Dist. Ex. 25 at pp. 4-5, 7).

as a "very social youngster who seemed to enjoy interacting with the evaluator," and reported that he engaged in a great deal of spontaneous discourse, and readily responded to test questions (id.). Behavioral observations noted in the July 2012 speech-language evaluation report indicated that during the evaluation the student was quiet but cooperative as testing commenced (Dist. Ex. 23 at p. 1). The student initially remained near his father, but engaged in informal conversation with the evaluating speech-language pathologist and quickly built a rapport with her (id.). The student completed tasks with minimal prompting and smiled proudly in response to praise and positive reinforcement (id.). During informal play, the student encouraged the evaluator and his parents to join his activities by commenting on preferred toys (id.). The student made and maintained eye contact with the evaluator, transitioned easily between activities while exhibiting an excellent attention span, and demonstrated no temper tantrum behavior (id.). The speech-language evaluation report included that the parents indicated the student's performance during the evaluation accurately reflected his capabilities (id.). The January 2013 annual speech-language report described the student as a "happy boy" who transitioned well to the treatment room within the classroom and who participated in all activities (Dist. Ex. 25 at p. 1). The student was motivated by verbal praise and "high fives" during speech-language therapy sessions (id.).

Although the February 2013 educational evaluation report indicated that the student became distracted easily, required prompts to stay on task, needed reminders to follow classroom rules/routines, and at times exhibited difficulty transitioning into the classroom and separating from his parents in the morning, the report also indicated that the student was easily redirected and was able to "pull himself together quickly when redirected to an activity" (Dist. Ex. 24 at p. 1). The report further indicated that the student demonstrated difficulty retaining learned concepts and readiness skills, and lacked motivation to complete non-preferred activities including academic activities; however, he scored within normal limits on the cognitive assessment portion of the evaluation (id. at pp. 1-3).

Based on the above, the evidence in the hearing record demonstrates that the student was adequately evaluated with respect to his cognitive, adaptive behavior, communication, social/emotional, and motor skills; and that the August 2012 and March 2013 CPSEs identified the student's needs and recommended related services (Dist. Exs. 3 at pp. 2-4; 4 at pp. 2-5; 20-25). Contrary to the parents' assertion, an independent review of the hearing record reflects that the evaluative information considered by the August 2012 and March 2013 CPSEs provided sufficient functional, developmental, and academic information about the student and his individual needs to develop an appropriate IEP (D.J. v. New York City Dep't of Educ., 2013 WL 4400689, at *4 [S.D.N.Y. Aug. 15, 2013] [holding that the district is not required to conduct every assessment that might provide useful information where it has sufficient information]; M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *8 [S.D.N.Y. Mar. 21, 2013] [noting the CSE's "discretion to determine that no new evaluation is necessary"]).

Lastly, regarding the parents' assertion that the August 2012 and March 2013 CPSEs failed to discuss all of the student's diagnoses federal and State regulations do not require the district to set forth the student's diagnoses in an IEP; instead, they require the district to "gather functional, developmental, and academic information" to assist in determining whether the student is a student with a disability, and in developing an IEP that will enable the student to "participate in appropriate activities" (34 CFR 300.304[b][1]; 8 NYCRR 200.4[b][1]; see Fort Osage R-1 Sch. Dist. v. Sims,

641 F.3d 996, 1004 [8th Cir. 2011]; Application of a Student with a Disability, Appeal No. 09-126 ["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"]). In addition, despite relative weaknesses in some areas described above, a review of the results of the evaluations do not raise concerns that the student at that time, exhibited needs that went unaddressed associated with his subsequently received diagnoses.[20]

C. 2013-14 School Year

1. Sufficiency of Evaluative Information and Present Levels of Performance

Turning to the 2013-14 school year, the parents assert that the district failed to evaluate the student for reading disorders, autism, ADHD, Tourette disorder, sensory impairments, and motor function weaknesses and other needs requiring OT services. In addition, the parents assert that the September 2013 IEP failed to indicate whether the student achieved his speech-language goals from the 2012-13 school year. The parents also assert that the May 2014 IEP did not include the student's present levels of performance.

On September 24, 2013 a CSE convened to transition the student from receiving CPSE (preschool) services to receiving CSE (school-age) services and to develop an IEP for the 2013-14 school year (kindergarten) (Dist. Ex. 5 at pp. 1, 10). The hearing record reveals that the September 2013 CSE reviewed and considered the same evaluative information as discussed above from the March 2013 CPSE, including a July 2012 structured observation report, a July 2012 psychological evaluation report, a July 2012 social history report, a July 2012 speech-language evaluation report, a January 2013 speech-language evaluation report, and a February 2013 educational evaluation report (compare Dist. Ex. 4 at pp. 2-3, with Dist. Ex. 5 at pp. 3-4; see Dist. Exs. 20-25). Additionally, according to the meeting information summary, a kindergarten screening revealed that the student had many articulation errors, but his overall speech intelligibility was considered "acceptable" (Dist. Ex. 5 at p. 2). The meeting information summary also noted that the speech-language pathologist indicated the student exhibited "some oral motor problems," but that he had improved (id.). The meeting information summary further noted that at times, the student chose not to participate in some activities (id.). The classroom teacher indicated that in the large group setting it was difficult to understand the student and he had to be slowed down (id.). Also, the parents indicated the student was having difficulty in the community and he reported that students were teasing him about his speech (id.).

With regard to the student's present levels of performance, the September 2013 IEP indicated that the student's articulation skills continued to be delayed (Dist. Ex. 5 at p. 5). The student's former speech-language pathologist indicated he improved over the previous school year, but continued to demonstrate errors which affected his overall intelligibility (id.). The September 2013 IEP noted that peers and adults had difficulty understanding the student at times, that he was aware of his weaknesses, and that his difficulty affected him academically and socially (id.). The September 2013 CSE determined that the student's cognitive abilities and academic levels were

[20] The parents do not allege any specific needs relating to these diagnoses that went unaddressed during the 2012-13 school year.

within age appropriate expectations, and that there were no cognitive or academic needs to be addressed through special education at that time (id.).

Socially, the September 2013 IEP indicated that the student had positive interactions with peers and adults, but it was sometimes difficult for his teacher and peers to understand his speech (Dist. Ex. 5 at p. 5). The IEP described the student as "very motivated," noting that the student participated in classroom activities, and loved outdoor activities and playing with friends (id.). However, his articulation skills affected his success academically and socially (id.). The student's physical levels and abilities were within age appropriate expectations, he participated in all school activities, and appeared to have no physical needs to be addressed through special education at that time (id.).

With respect to the student's management needs, the September 2013 IEP indicated that the student needed to improve his oral motor and articulation skills, and to slow down his rate of speech to improve his communication with peers and adults (Dist. Ex. 5 at p. 5). The September 2013 IEP also included annual speech-language goals targeting the student's articulation skills (id. at p. 6).

Based on the above, and consistent with the conclusions reached reaching the 2012-13 school year, the hearing record reveals that the September 2013 CSE had sufficient evaluative information upon which to develop the student's IEP, and furthermore, that the evaluative reports considered by the CSE provided sufficient functional, developmental, and academic information about the student and his individual needs to develop his IEP (D.J., 2013 WL 4400689, at *4; M.Z., 2013 WL 1314992, at *8). Also, a review of the results of the evaluations do not indicate that the student exhibited needs at the time of the September 2013 CSE meeting that went unaddressed associated with his subsequently received diagnoses.[21]

With respect to the parents' argument that the September 2013 IEP failed to indicate whether the student achieved his speech-language goals from the 2012-13 school year, the hearing record contains a June 2013 quarterly speech-language progress report from the student's preschool that reflects the progress the student made toward his speech-language annual goals contained in the August 2012 and March 2013 IEPs (Parent Ex. DD; Dist. Exs. 3 at p. 5; 4 at pp. 5-6). Consistent with the information reflected in the September 2013 IEP, the June 2013 quarterly speech-language progress report indicated that the student continued to make progress toward his IEP goals and that he demonstrated delays in articulation and phonological skills (compare Dist. Ex. 5 at p. 5, with Parent Ex. DD).

Finally, the parents' argument that the May 2014 IEP does not contain the student's present levels of performance has no merit because review of that IEP shows present levels of performance in the areas of academic achievement, social development, physical development, and management need (Dist. Ex. 7 at pp. 2-4).

[21] The parents assert on appeal that the April 2014 IEP contained "red flags" with respect to reading disorder and other disabilities. As mentioned above, the April 2014 CSE meeting was convened to develop an IEP for the 2014-15 school year, and the student's needs related to that school year will be discussed below.

2. Consideration of Special Factors—Interfering Behaviors

Next, the parents argue that the CSE should have conducted an FBA and created a BIP for the student for the 2013-14 school year.

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. of the Shenendehowa Cent. Sch. Dist., 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]). State regulation defines an FBA as the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and includes, but is not limited to,

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

(8 NYCRR 200.1[r]). According to State regulation, an FBA shall be based on multiple sources of data including, but not limited to, "information obtained from direct observation of the student, information from the student, the student's teacher(s) and/or related service provider(s), a review of available data and information from the student' record and other sources including any relevant information provided by the student's parent" (8 NYCRR 200.22[a][2]). An FBA must also be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]).

Although State regulations call for the procedure of using an FBA when developing a BIP, the Second Circuit has indicated that, when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F.3d at 190; see L.O. v. New York City Dep't of Educ., 822 F.3d 95, 113 [2d Cir. 2016]). The Court also noted that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE," but that in such instances particular care must be taken to determine whether the IEP addresses the student's problem behaviors (R.E., 694 F.3d at 190).

In the instant case, it is undisputed that the September 2013 CSE did not conduct an FBA or develop a BIP for the student (see Dist. Ex. 5). However, while one evaluation report relied on by the September 2013 CSE to develop the IEP indicated the student exhibited some difficulty transitioning into the classroom and avoidance behaviors, overall the results of all of the evaluations the CSE considered—as described in detail above—do not suggest the student was exhibiting interfering behaviors of the type that required an FBA (Dist. Exs. 3-5; 20-25). The February 2013 educational evaluation report indicated that the student sometimes exhibited

difficulty transitioning into the classroom and separating from his parents in the morning in preschool, but exhibited the ability to "pull himself together quickly when redirected to an activity" (Dist. Ex. 24 at p. 1).[22] Consistent with the February 2013 annual education evaluation report, the student's mother testified that the student displayed separation anxiety problems, including crying and not wanting to get out of the car in the morning, from the first day of kindergarten in September 2013 through the entire school year (Tr. pp. 1323-24). The student's kindergarten teacher during the 2013-14 school year also testified that at the beginning of the kindergarten school year the student had difficulty separating from his parents and saying good-bye to them (Tr. p. 889; see Dist. Ex. 39 at p. 1). The teacher also noted that the student might have some tears drying on his face, but he never "bawled or all-out cried" (Tr. p. 893).

While the September 2013 IEP indicated the student needed positive behavioral interventions, supports and other strategies to address behaviors that impeded his learning or the learning of others, it also indicated the student did not need a BIP (Dist. Ex. 5 at p. 6). Positive behavioral interventions and supports used during the 2013-14 school year to address the student's difficulty transitioning to school in the morning included those provided by a classroom teaching assistant who implemented the "morning care" program to help the student separate from his parents by giving him a "job" (Tr. p. 890; Dist. Ex. 38 at p. 1). The "job" consisted of the student walking coolers of breakfast food down to the classrooms (Tr. p. 890; Dist. Ex. 39 at p. 1). The teacher indicated that most of the time, the student opted to walk the coolers down to the classrooms, which helped him enter the classroom (Tr. pp. 890-91). In addition, the kindergarten teacher gave the student stickers and praise for trying and doing his best (Tr. p. 891). While the teacher indicated that this practice continued throughout the school year, she testified that it was not as necessary at certain times, such as midyear when his transitions were "better" (id.). On rare occasions the student asked when he would see his parents (Tr. p. 893). In response to the student's question and to help him learn to understand the routine, the teacher showed the student the schedule displayed on the wall and discussed with him the sequence of the activities of the day (Tr. p. 894). According to the hearing record, the student had 18 absences the first trimester of the 2013-14 school year, and his transition into the classroom upon his return to school after an absence was more difficult for him (Tr. pp. 891-92; Dist. Ex. 38). However, the teacher testified that although his absences affected his ability to transition into the classroom, once in the classroom, his behavior was "good," and that "[m]ost days he was fine" (Tr. pp. 892-93).

Further, documents generated during the 2013-14 school year do not show the need for an FBA or BIP (see Dist. Exs. 26; 27; 38 at p. 2). A March 2014 speech-language report indicated the student seemed to enjoy coming to speech therapy and transitioned easily (Dist. Ex. 26). Although the report noted that the student's attention skills were task dependent, the report also indicated that the student produced a specific sound correctly during therapy sessions (id.). Furthermore, a June 2014 OT evaluation report indicated the student was cooperative and transitioned easily with the evaluator (Dist. Ex. 27 at p. 1). Moreover, the student's kindergarten

[22] Additionally, although available at the time the September 2013 IEP was developed, it does not appear that the September 2013 CSE considered a June 2013 speech-language quarterly progress report (see Parent Ex. DD at p. 1; Dist. Ex. 5 at pp. 3-4). While the progress report indicated that the student continued to use avoidance behaviors, he made progress toward his IEP goals, was typically happy and transitioned well to speech without his parents, participated in all activities, and was a pleasure to work with (Parent Ex. DD at p. 1).

report card revealed that throughout the 2013-14 school year, the student received a designation of "M," indicating that the student "Meets Expectations" for skills related to social development (demonstrates self-control, takes responsibility for actions, cooperates in group activities: shares, waits his turn, and respects: peers, authority, property, and rules) (Dist. Ex. 38 at p. 2). Additionally, a review of the kindergarten report card revealed that overall, the student received "M" designations for the majority of learning habit tasks throughout the school year, including completing tasks independently, showing effort, listening attentively in class, participating in class discussion and remaining on topic, and following directions (id.).

Based upon the foregoing, the evidence in the hearing record supports a finding that the student's behavioral needs did not impede his learning or that of other students to the extent the district was required to conduct an FBA or develop a BIP for the student during the 2013-14 school year.

D. 2014-15 School Year

1. CSE Composition

On appeal, the parents allege that the August 2014 CSE was not properly composed because it did not include the student's regular education kindergarten teacher.[23]

The IDEA requires a CSE to include, among others, not less than one regular education teacher of the student if the student is or may be participating in a general education environment (20 U.S.C. § 1414[d][1][B][ii]; see 34 CFR 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]). The regular education teacher "shall, to the extent appropriate, participate in the development of the IEP of the child, including the determination of appropriate positive behavioral interventions and supports and other strategies and supplementary aids and services, program modifications, and support for school personnel" (20 U.S.C. § 1414[d][3][C]; 34 CFR 300.324[a][3]; 8 NYCRR 200.3[d]).

As an initial matter, the hearing record reveals that the student was attending a general education kindergarten classroom for the 2013-14 school year (Dist. Ex. 5 at p. 9). Thus, a regular education teacher was a required member of the CSE (20 U.S.C. § 1414[d][1][B][ii]; see 34 CFR 300.321[a][2]; 8 NYCRR 200.3[a][1][ii]). A review of the hearing record reveals that a regular education teacher did not attend the August 2014 CSE meeting even though the student's placement on the continuum had been tabled from prior meetings (Dist. Ex. 9 at p. 11). Therefore, the district committed a procedural violation in not meeting the requirement to ensure that a regular education teacher of the student participated at the August 2014 CSE meeting.[24] Of relevance to

[23] The parents raise several claims related to the April and June 2014 IEPs; however, both CSE meetings were tabled as a consensus could not be reached (Dist. Exs. 6 at p. 2; 8 at p. 2). The April and June 2014 IEPs were superseded as result of the August 2014 IEP, which became the operative IEP for the 2014-15 school year for purposes of the impartial hearing and subsequent State-level review (Dist. Ex. 9; see M.P. v. Carmel Cent. Sch. Dist., 2016 WL 379765, at *5 [S.D.N.Y. Jan. 29, 2016]; McCallion v. Mamaroneck Union Free Sch. Dist., 2013 WL 237846, at *8 [S.D.N.Y. Jan. 22, 2013]). Accordingly, the parents' claims related to the April and June 2014 IEPs will not be further discussed.

[24] Under the circumstances of this case, it is unnecessary to determine whether this procedural violation—standing

mitigating any effect that might have flowed from the lack of a regular education teacher at the August 2014 CSE meeting, the student's kindergarten teacher provided the CSE with a letter dated August 7, 2014, which indicated her impression of the student along with information regarding the student's needs and abilities (Dist. Ex. 39 at pp. 1-3). Furthermore, during the tabled April and June 2014 CSE meetings which convened for preparation of the student's IEP for the 2014-15 school year, the student's kindergarten teacher participated and attended both meetings and provided input regarding the student's progress and behaviors in the classroom (Dist. Exs. 6 at p. 1; 8 at pp. 1, 12; see L.B. v. New York City Dep't of Educ., 2016 WL 5404654, at *13-*14 [S.D.N.Y. Sept. 27, 2016]; M.C. v. New York City Dep't of Educ., 2015 WL 4464102, at *5 [S.D.N.Y. July 15, 2015]).

Notwithstanding the above, during the impartial hearing, when asked whether the student needed a self -contained classroom, the student's kindergarten teacher responded "[a]bsolutely not" (Tr. pp. 922-23). This testimony by a district teacher who was familiar with the student undermines any conclusion that the absence of a regular education teacher had no effect. Given that the August 2014 CSE recommended a special class placement for the student, the lack of the student's regular education teacher who may have suggested methods or strategies to include in the August 2014 IEP to address the student's needs in the general education setting, contributed to the district's failure to follow the appropriate procedures to offer the student a program in the LRE, as further described below.

2. Sufficiency of Evaluative Information and Present Levels of Performance

The parents also assert that the district failed to evaluate the student for reading disorders, autism, ADHD, Tourette disorder, sensory impairments, and motor function weaknesses and other needs requiring OT services for the 2014-15 school year.

A review of the hearing record demonstrates that the August 2014 CSE considered and relied upon evaluative information including: a July 2014 psychoeducational evaluation report, a March 2014 speech-language evaluation report, and an August 2014 kindergarten teacher report (Tr. pp. 931; Dist. Exs. 9 at pp. 1-3; see Dist. Exs. 26; 28; 39).[25]

The July 2014 psychoeducational evaluation report indicated that the student presented as a quiet, sweet boy who cooperated with and was agreeable to all that was presented to him (Dist. Ex. 28 at pp. 1-2). The student's level of concentration and attentiveness were acceptable throughout the testing session (id. at p. 2). The student tended to ask off-topic questions during testing, particularly when the testing became more challenging for him (id.). However, he was easily redirected back to task, or if needed, after being provided with a short break, testing continued (id. at p. 2). On verbal tasks, the student frequently gave short answers, but was able to elaborate on his responses when asked to do so (id.). On nonverbal tasks, the student worked at a slow and steady pace (id.). Furthermore, the evaluator noted it appeared the student's attention and concentration were adequate throughout the 1:1 testing session, therefore the results of the

alone—rose to the level of a denial of FAPE.

[25] The IEP also lists results from tests administered in 2012 and 2013 (Dist. Ex. 9 at pp. 3-5).

evaluation were considered an accurate reflection of the student's then present level of functioning (id.).

Administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) yielded a full scale IQ of 99 (47th percentile), in the average range (Dist. Ex. 28 at pp. 2-3). Verbal ability as measured by the verbal comprehension index yielded a standard score of 98 (45th percentile), in the average range (id.). Manipulation of concrete materials or processing of verbal stimuli to solve problems nonverbally as measured by the perceptual reasoning index yielded a standard score of 106 (66th percentile), in the average range (id.). Short-term memory as measured by the working memory index yielded a standard score of 102 (55th percentile), in the average range (id.). Cognitive processing efficiency of simple or routine visual material as measured by the processing speed index yielded a standard score of 88 (21st percentile), in the low average range (id.).

Administration of subtests of the Woodcock-Johnson Tests of Achievement-Third Edition (WJ-III), measuring the student's academic achievement, yielded a total achievement standard score of 99, in the average range (Dist. Ex. 28 at p. 4). The student achieved a broad reading cluster standard score of 102 (55th percentile), within the average range (id.). The student performed in the average range on subtests measuring sight-word recognition, and the ability to identify a missing key word in a written passage; however, a subtest measuring the student's ability to read printed statements rapidly and respond true or false to each statement was discontinued and a score was not calculated because the student was unable to read the sample items (id.). Review of the subtests within the broad math (standard score 79/8th percentile/borderline range), and broad written language (standard score 106/66th percentile/average range) clusters revealed math fluency skills in the borderline range, and deficits in calculation and writing fluency as the student was unable to complete the sample items (id. at pp. 4-5). The evaluation report indicated that on any test requiring the student to write, he reported his hand was tired, and he required encouragement to continue (id. at p. 5).

The March 2014 speech-language evaluation report indicated that speech-language therapy had focused on improving production of the "s, ch, t, d" sounds, whereupon the student made "nice progress" (Dist. Ex. 26). Results of administration of the GFTA-2 to assess the student's articulation skills revealed the student achieved a standard score of 96, within the average range (id.). At the word level, the student demonstrated difficulty producing "s" and "th" sounds (id.). During speech therapy when the student knew the speech-language pathologist was looking for proper tongue placement to produce the sound correctly, the student was able to do so (id.). She judged the student's overall speech intelligibility to be "good" in known and unknown contexts (id.). Behaviorally, the speech-language evaluation report indicated the student seemed to enjoy going to speech therapy and transitioned easily (id.). His attention skills were task dependent in that if he enjoyed the activity presented to him the student was able to maintain focus (id.). However, when tasks involved "unfavorable" or disfavored skills, such as writing or reading, the student tended to lose focus (id.).

The August 2014 kindergarten teacher report summarized the student's progress over the course of the 2013-14 school year (Dist. Ex. 39). The teacher report indicated the student presented in the beginning of the school year with a great deal of difficulty separating from his parents (id.).

Consistent with the teacher's previously noted testimony, her written report summarized how she and her staff helped the student transition into school, whereupon he showed improvement (Tr. pp. 889-91; Dist. Ex. 39 at p. 1). The teacher report noted the student slowly gained confidence and eventually walked into school on his own (Dist. Ex. 39 at p. 1). The teacher indicated it was discussed with the student that if he was able to transition well from his parents in the morning then the teacher would be comfortable having his parents come into the classroom to volunteer (id.). When his parents volunteered in school the student had an easier time transitioning in the morning, reinforcing his "brave" behavior (id.). The teacher report indicated that the last month of the 2013-14 school year was difficult because the parents were unable to come into the classroom (id.). The report also indicated the parents told the teacher at that time the student again had trouble transitioning into school because the parents were unable to volunteer in his class (id.). Although the parents reported that the student was very upset transitioning, the teacher indicated that by the time the student got to the classroom in the morning he was not crying (id.). The teacher report indicated the student's attendance was an issue most of the school year, with more absences occurring at the beginning and end of the year (id. at p. 2). The teacher indicated the student's absences effected his ability to receive proper instruction, and noted the parents tried to "make up" the work the student missed (id.).

Socially, the teacher report indicated that the student was well-liked by his classmates, usually interacted well with others, and was learning to understand interactions between himself and others (Dist. Ex. 39 at p. 2). On rare occasions he pinched a classmate for seemingly no reason, and at the start of the 2013-14 school year misinterpreted the actions of others, but as the school year progressed his interpretation of events "became a little more clear and accurate" (id.).

With regard to in-class behavior, the teacher report indicated that the student worked well in a 1:1 situation (Dist. Ex. 39 at p. 2). The teacher noted the student liked the attention and, especially in the beginning of the school year, needed more encouragement to complete the work (id.). As the year progressed and the work became harder, the student's attention became a little less focused (id.). She attributed his difficulty with focus to not knowing the work, not being able to practice good working habits due to his many absences, and lack of letter and sound knowledge (id.). The teacher reported the work the student and his parents did at home to improve letter and sound knowledge improved the student's focus and development of self-motivation and independence (id.). The student also received additional help from the teaching assistant who conducted a small group almost daily, reinforcing letter names, sounds, and blending and segmenting words (id.). The teacher report indicated that toward the end of the school year, the student showed significant improvement in this area, although the teacher was "very concerned" about how long it took him to learn the letter names, sounds, and segmenting and blending of those sounds (id.).

The teacher report also discussed her concerns about the student's fine motor skills (Dist. Ex. 39 at p. 2). Although the student tried very hard, he had difficulty staying within the lines when coloring (id.). In writer's workshop, the teacher found his drawings to be "immature," and frequently lacking details (id.). She indicated the organization of the student's writing was of concern, as he usually wrote text from left to right, but at times his writing became "listed" on the right-hand side of the page (id.). The student fatigued easily when writing or cutting, something the teacher attributed to the student's difficulty with stamina with sticking with a difficult task, and

being "physically tired in his hands" (id.). It took a very long time for the student to hold scissors the correct way, and he continued to need extra time for activities that required cutting and pasting (id.). The teacher acknowledged possible tactile issues as the student did not like to have glue or other "gooey substances" on his hands and wore the same pair of pants to school every day (id.).

The teacher report indicated the student's writing showed great improvement since the middle of the school year (Dist. Ex. 39 at p. 3). He was able to write a simple sentence, most of the vowels and consonants that were heard in words, and some of the high frequency words correctly (id.). He did not consistently write with spaces between his words, place a period at the end of a sentence, or use correct capital and lowercase letters (id.). His subject matter was usually of high interest to him and related to sports, family, deep sea diving, and being a hero or knight in shining armor (id.).

In math, the teacher reported the student showed improvement in all areas (Dist. Ex. 39 at p. 3). He got 9 out of 12 items correct on an end of year benchmark test, an assessment given to all kindergarten students across the district (id.). At the time of the report, the student was still working on writing numbers correctly and not writing them backwards (id.). The student successfully completed addition and subtraction problems with manipulatives, but experienced more difficulty with word problems (id.).

The teacher report indicated that the student exited kindergarten reading on a level "C" and that children leaving kindergarten were "required to read on level D or E" (Dist. Ex. 39 at p. 3). The student knew most of the sight words while reading books on his level, and he passed three out of five foundations assessments for the kindergarten school year (id.).

In summary, the teacher described the student as a sweet little boy who required reassurance daily (Dist. Ex. 39 at p. 3). She "check[ed] in" with the student periodically in class, and gave him a wink or a "thumb[s-]up" to let him know she was "with him" (id.). The teacher indicated the student showed progress in all academic areas, although he was not on grade level in all of them (id.). The teacher noted that learning to write his name and learning the letters and sounds took an abnormally long time, something that was of great concern to her (id.). She indicated the student showed growth socially with his peers (id.).

Review of the August 2014 IEP shows that the parents' claim that the IEP does not contain the student's present levels of performance has no merit. According to the August 2014 IEP, in reading, the student was able to comprehend what was read to him orally, but he had difficulty with letter names/sounds, decoding words, and comprehending what he read (Dist. Ex. 9 at p. 5). In writing, the student demonstrated effort and used pictures/words to express his ideas (id.). He had difficulty with fine motor skills, especially when forming letters, and had great difficulty creating a simple sentence (id.). The student reportedly needed to improve his ability to write complete sentences (id. at p. 6). In mathematics, the student showed effort; however, he needed to practice addition and subtraction problems (id. at p. 5). With regard to speech-language skills, the IEP indicated the student's articulation errors were characterized by a mild frontal lisp (id. at p. 6). He was able to produce the "s" sound correctly when prompted, but had not yet learned to self-correct (id.). He did not produce the "th" sound correctly, an error characterized on the IEP as developmentally appropriate at his age (id.). Overall, the student's intelligibility was judged as

"good at the conversational level" (id.). The IEP indicated the student enjoyed peer and adult interaction, listening to books, and playing educational games (id.).

Socially, the August 2014 IEP indicated that the student's social/emotional levels were generally within age appropriate expectations, except for some delay in social skills with peers, which may be the result of a speech-language delay (Dist. Ex. 9 at p. 6). The IEP indicated that the student tended to get embarrassed/nervous when other students teased him and according to the parents, he tended to act out when that happened (id.). The IEP noted the student demonstrated self-control, took responsibility for actions, respected peers and adults, and was cooperative, but that he needed to learn how to communicate effectively in social situations (id.).

Physically, the August 2014 IEP indicated the student had a bee sting allergy and had an Epi Pen available in school (id.). According to the IEP, the student's physical levels and abilities were within age appropriate expectations, he appeared to have no physical problems, and was able to participate in all school activities (id.).

With regard to management needs, the August 2014 IEP indicated the student required the additional support of related services to be successful in the regular education classroom (Dist. Ex. 9 at p. 6). In addition, specific to the effect of the student's needs on his involvement and progress in the general education curriculum, the IEP included the student had a significant delay in social skills and attentional skills, which interfered with his participation in age appropriate activities (id.).

In planning for the 2014-15 school year, new evaluative information was considered by the CSE that continued to identify the student's evolving needs. Based on the above, the hearing record reveals that the August 2014 CSE had sufficient evaluative information, and furthermore, that the evaluative reports considered by the CSE provided sufficient functional, developmental, and academic information about the student and his individual needs to enable it to develop his IEP (D.J., 2013 WL 4400689, at *4; M.Z., 2013 WL 1314992, at *8). While the parents assert that the evaluative information available to the August 2014 CSE and present levels of performance contained in the August 2014 IEP did not sufficiently describe the student's diagnoses, they do not reference any needs related to these diagnoses in particular that went unaddressed.[26]

2. Annual Goals

Next, the parents argue that the annual goals in the August 2014 IEP were not appropriate because the annual goals were "overly broad" and contained no short-term objectives. The parents specifically argue that the annual goals contained no identified criteria for mastery or procedures to be used for measuring progress.

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability

[26] While the June 2014 meeting information summary reflected the student had received diagnoses of an autism spectrum disorder, anxiety disorder, Tourette disorder, and ADHD, that he had sensory needs, and that the CSE reviewed an "OT report," this information was not included on the August 2014 IEP (Dist. Ex. 8 at pp. 1-2).

to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

First, contrary to the parents' argument that the annual goals were overly broad, did not identify criteria for mastery, were not measurable, and did not contain evaluation schedules, review of the August 2014 IEP shows that each annual goal contained mastery criteria (i.e., 75 percent over 10 months, 80 percent over ten months), methods of how progress would be measured (i.e., recorded observations, classroom and standardized tests), and a schedule of when progress would be measured (i.e., quarterly) (Dist. Ex. 9 at pp. 7-8).

With respect to the parents' argument that the August 2014 IEP did not include short-term objectives, short-term objectives—described as "measurable intermediate steps between the student's present levels of performance and the measurable annual goal"—are required only for students who take New York alternate assessments and preschool students with disabilities (see 8 NYCRR 200.4[d][2][iv]; see also 20 U.S.C. §1414[d][1][A][i][I][cc]; 34 CFR 300.320[a][2][ii]). As the August 2014 CSE did not recommend the student participate in alternate assessments, short-term objectives were not required in the student's IEP (Dist. Ex. 9 at p. 9).

3. Consideration of Special Factors—Interfering Behaviors

The parents argue that the district failed to conduct an FBA at the August 2014 CSE meeting and an FBA was never finalized. The district argues that it properly addressed the student's difficulty transitioning into the school building and created strategies to address his behavioral difficulties.

At the time of the August 2014 CSE, as noted on the meeting information summary attached to the August 2014 IEP, the parents reported that the student demonstrated "outbursts" (Dist. Ex. 9 at p. 1). The August 2014 CSE did not conduct an FBA of the student, rather, the August 2014 CSE determined that the student required strategies, including positive behavioral interventions, to address behaviors that impeded the student's learning or that of others, and also did not recommend the development of a BIP for the student (id. at p. 7). A review of the previously discussed evaluative information in the hearing record supports a finding that the August 2014 CSE was not required to conduct an FBA or develop a BIP for the student at that time (see Dist. Exs. 27; 28; 38; 39; 67).

Additionally, in a written report reviewed by the August 2014 CSE and in her testimony, the kindergarten teacher reported the student demonstrated difficulty separating from his parents (Tr. p. 889; Dist. Ex. 39 at p. 1). The kindergarten teacher also reported that on occasion, the student showed difficulties socially (Tr. p. 899; Dist. Ex. 39 at p. 2). The kindergarten further described the student as a "sweet little boy" who required reassurance daily (Tr. pp. 889, 916; Dist. Ex. 39 at p. 3). The kindergarten teacher also indicated that she provided him with a "check in"

periodically in class, and a wink or a thumbs up to let him know she was "with him" (Dist. Ex. 39 at p. 3). Additionally, the teacher indicated the student showed progress in all academic areas (id.). Furthermore, as previously discussed, the student's kindergarten report card indicated he received a designation of "Meets Expectations" for skills related to social development (demonstrates self-control, takes responsibility for actions, cooperates in group activities: shares, waits his turn, and respects: peers, authority, property, and rules) (Dist. Ex. 38 at p. 2).

Accordingly, the evidence in the hearing record leads to the conclusion that the student's in-school behavioral needs did not impede his learning or that of other students to the extent that the August 2014 CSE was required to conduct an FBA or develop a BIP for the student.[27]

With respect to the October 14, 2017 CSE meeting, the hearing record indicates that the CSE met for a requested review initiated by the parents (Dist. Ex. 10 at pp. 1, 4-11). Describing the student's behaviors, the meeting information summary indicated that the parents reported the student had a difficult time transitioning to first grade (id. at p. 1). The parents further reported that the student's tics had gotten worse, and that the week prior to the CSE meeting the student came home from school displaying more pronounced tics and walking into furniture (id.). In addition, the parent testified that typically, getting the student to school was extremely difficult (Tr. p. 1752). The parent also reported that they would sometimes call the teachers before school to let them know the student was pulling his clothes off, crying, scratching, and "doing anything not to get into the car" (id.). Many times, the parent had to pick up the student and bring him into the car while he engaged in these behaviors, whereupon he would start vomiting (Tr. p. 1753). The parents indicated they got the student to school but it was a "nightmare" (id.).

The October 14, 2014 IEP provided annual goals designed to improve the student's ability to identify his emotions and feelings, the intensity of those emotions/feelings, and strategies to manage them; as well as adapt to changes in his environment (Dist. Ex. 10 at p. 8). The CSE also recommended that the student receive both individual and small group psychological counseling services (id.). Similar to the August 2014 CSE, the October 14, 2014 CSE determined that the student required strategies, including positive behavioral interventions, to address behaviors that impeded the student's learning or that of others, but did not recommend the development of a BIP for the student at that time (id. at p. 7).

However, to address the student's behaviors, the October 14, 2014 meeting information summary indicated that the district behavior consultant reviewed a behavioral strategies plan developed to address the student's difficulty with the morning transition, which the CSE approved (Dist. Exs. 10 at pp. 2; 37 at pp. 1-2). The meeting summary also indicated that the parent trainer would develop additional "social stories" (Dist. Ex. 10 at pp. 2). In addition, the meeting information summary indicated that after some discussion, the CSE agreed to increase parent training to 15 hours yearly, to provide more flexibility over the course of the year, on an as needed basis (id.; see Dist. Ex. 10 at p. 9). Notably, the meeting information summary noted that an FBA was approved and would be conducted through December, whereupon the CSE would reconvene in January 2015 to determine if a BIP was necessary for the student (Dist. Ex. 10 at p. 2).

[27] In an effort to address the parents' concerns about the student's outburst, the CSE recommended one hour of parent counseling and training per month in the counselor's office (Dist. Ex. 9 at p. 8).

Furthermore, the meeting information summary included there had been a discussion about assigning an aide to the student, but that the CSE did not recommend this, as the student's current class was "set-up with a classroom aide and an individual aide" (id.). The October 2014 IEP continued the August 2014 program recommendations for the student including a 15:1+1 special class and related services of OT, speech-language therapy, and psychological counseling services (id. at pp. 1, 8).

The October 14, 2014 draft of "Recommended Behavioral Strategies" represented the behavior consultant's then-ongoing assessment of steps the district would try out (Tr. pp. 842, 844; Dist. Ex. 37 at pp. 1-2).[28] Review of the Recommended Behavioral Strategies draft included strategies to target the student's difficulty getting out of the car when asked upon arriving at school, and targeting the student's ability to appropriately respond to an unplanned change in his school schedule or unexpected event (Tr. p. 844; Dist. Ex. 37 at pp. 1-2). Strategies to address these target behaviors included the use of social stories (Dist. Ex. 37 at p. 1). Additional strategies to target the student's ability to transition into the school building involved a series of steps for school personnel and the parents to follow (id. at pp. 1-2). The student's first grade teacher testified that when the student had difficulty getting out of the car, "we would try and find something maybe special to bring in to show his friends" (Tr. pp. 1070-71). The teacher further testified that she would wait for the student until he was ready and she would "kind of take him by the hand" and they would "walk in together" (Tr. p. 1070).

Other strategies to address the student's behaviors involved providing the student with verbal prompts and praise upon leaving the car, the opportunity to participate in a favorite activity upon entering the classroom, and social stories (Tr. pp. 787, 819-22, 2003-05; Dist. Exs. 82-83). The team met weekly to address the student's situation (Tr. p. 763). Also, the student's arrival time was modified to occur after other students had arrived, minimizing social pressure the student might feel if others saw him trying to transition into the building (Tr. p. 800).[29] Data collection sheets revealed that through mid-October 2014, the student generally functioned independently in meeting classroom obligations, maintained appropriate behavior in the classroom, ate his lunch, and overall presented in a good mood (see Dist. Ex. 76 at pp. 1-11).

Based on the above, the hearing record demonstrates that while the student had difficulty separating from his parents at the beginning of the 2014-15 school year, school staff developed and used strategies that enabled the student to enter the school building and classroom such that this behavior did not impede his learning (see Tr. pp. 787, 819-22, 1070-72, 2003-05; Dist. Exs. 82-83). The 15:1+1 classroom special education teacher also provided the student with appropriate

[28] The social worker's testimony indicated that most of the strategies included in the October 14, 2014 draft were used to help the family with the student prior to the date on the document (Tr. p. 765). Testimony by the behavior consultant indicated the October 2014 document was not an FBA, but rather a summary of the behavioral strategies the district was "piloting" (Tr. p. 855).

[29] It is not an alleged violation in this case nor is it a basis for any finding against the district, however the district is reminded that modifying the length of the school day for a student with a disability without making a determination that a shorter school day is necessary to provide the student with a FAPE, and providing for such on the student's IEP, may under some circumstances constitute an impermissible modification (see Rye City Sch. Dist., 115 LRP 50578 [OCR 2015]).

positive behavioral interventions, supports, and other strategies to address his anxiety about and difficulty with transitioning into the classroom and separating from his parents during the time he was in school at the beginning of the 2014-15 school year (Tr. pp. 1070-72, 2005; Dist. Ex. 37 at pp. 1-2).

On October 27, 2014, the CSE met for a requested review initiated by the parents (Dist. Ex. 11 at p. 1). The meeting information summary reflected the parents report that the student's anxiety disorder manifested itself into serious avoidance behaviors, which included aggression, vomiting, crying, and attempting to remove his clothing (id.). The parents further reported that maintaining the student in the car was a struggle (id.). In addition, the meeting information summary indicated the parents felt the current behavioral strategies designed to help the student were not appropriate (id. at p. 2). According to the meeting information summary, once the student entered the building any symptoms that were observed at home (i.e., vomiting, hitting, removing clothing) were not observed at school, he entered the classroom without incident, and was engaged throughout the day (id. at pp. 1-2). In addition, the meeting information summary noted a social story was developed during September 2014 with the parent trainer, in her effort to provide some "rehearsal" for the student (id. at p. 2). The parents reported the social story was "useless" (id.).

With respect to the FBA, the October 27, 2014 IEP indicated that the FBA completion timeline was moved up to November 21, 2014 (Dist. Ex. 11 at p. 9). In addition, the meeting information summary indicated such change was dependent on the ability to conduct home observations as well as school observations (id. at p. 2). The IEP also indicated that the CSE determined that the student required strategies, including positive behavioral interventions, to address behaviors that impeded the student's learning or that of others, and recommended for the first time the development a BIP for the student (id. at p. 7). During the meeting, some minor changes were made to the morning strategy and a revised data collection sheet related to the student's day to day activities and moods would be used (id. at p. 2; Dist. Ex. 37 at pp. 3-4).

To document the student's behaviors described above, the social worker testified that the team kept a communication log documenting data about the "[Student's] Morning Transition: Car to Class" (Tr. p. 781; Dist. Ex. 76 at pp. 11-12). The data included how much time it took for the student to leave the car and enter the school building, his mood once he was in the building, and any notes of significance or anything the teacher wanted to communicate to the social worker and/or the behavior consultant (Tr. p. 781; Dist. Ex. 76 at pp. 11-13).[30] In addition, review of the data sheets revealed it took the student a minimum of one minute to get out of the car upon arrival to school and enter the school building, and a maximum of 14 minutes for the student to do so after he had been absent for several days (Tr. p. 783; see Dist. Ex. 76 at pp. 11-13). Other data collection

[30] The same document included "This is how my day went today" sheets documenting various aspects of the student's day (i.e., level of independence for unpacking and completing morning routine, following directions, completion of assigned work, listening attentively, engagement in readers' workshop and independent reading, amount of lunch eaten, level of independence packing up, related service providers seen that day, and "color" of behavior zone in the morning and afternoon portions of the school day per a behavior management tool the teacher used) (Tr. pp. 2031-32; Dist. 76 at pp. 1-9). Testimony by the student's teacher indicated she sent these sheets home with the student in a binder (Tr. pp. 2022, 2033). Additional documentation beginning in August 2014 reflected the special education teacher's frequent and various modes of communication with the parents (i.e., telephone calls, email, and meetings) (Tr. p. 781; Dist. Ex. 76 at pp. 14-15).

sheets revealed that the student functioned independently in meeting classroom obligations, maintained appropriate behavior in the classroom, ate his lunch, and overall presented in a good mood (see Dist. Ex. 76 at pp. 5-9, 11). In addition, data taken by the behavior consultant reflected the student was on-task the three times he was observed specifically for that target behavior (Tr. p. 875; Dist. Ex. 77 at p. 1). During an observation of the student on the playground, the student was observed to be "fine" running around with three or four other students (Dist. Ex. 77 at p. 1).

To further support and address the student's behaviors, testimony by the director referenced the agreement at the October 27, 2014 CSE meeting that the behavior consultant would go to the student's home to provide parent training and to observe the student (Tr. p. 653; see Dist. 11 at pp. 1-2). The director reported the CSE felt that was the best thing to do, because the parents described the student's serious difficulties in the morning with vomiting, removing clothing, and becoming very upset and anxious, behaviors that were not observed in school (Tr. p. 653). The director also testified that the behavior consultant and the team were always in agreement that the student needed a set of behavioral interventions to lessen his anxiety, and they worked on different protocols that had been implemented with the student (Tr. p. 705). The behavior consultant testified that he needed to see the student in the home environment to fully develop a desensitization plan, because home was where the behavior problems occurred, and if the student was going to be desensitized to coming to school, home would be the place to start (Tr. p. 874). The social worker testified that the behavior consultant was scheduled to go to the student's home the day after the October 27, 2014 CSE meeting, but the parent canceled the meeting (Tr. p. 777).

On October 27, 2014 the behavior consultant drafted a second version of the "Recommended Behavioral Strategies," which formally changed the student's arrival time to 9:10 AM and was to first be implemented on October 29, 2014 (Tr. pp. 783-84, 870; see Dist. Ex. 37 at pp. 3-4). However, the parents and student did not arrive to school, and the school did not receive a phone call apprising it of the student's absence (Tr. p. 784). The social worker noted the new plan incorporated desensitization strategies for the student, but the parents refused to comply with the part of the plan where they lifted the student out of the car because they said the student's neurologist advised them not to do so (Tr. p. 785; see Dist. Ex. 37 at pp. 3-4). The social worker reported she requested the parents provide her with access to the student's "home" providers (i.e., neurologist and developmental pediatrician), but permission to speak to the providers was not granted (Tr. p. 789).

At the time of the October 27, 2014 CSE meeting, the question of whether the FBA was valid or complete was raised (Dist. Ex. 11 at p. 2). In addition, the meeting information summary noted that completion of an FBA presented "some paradoxical challenges," as although the behaviors were manifesting in the home, a trainer had not been able to be present in the home to observe the events, and the student's behavior at school was "unremarkable" (id.). A review of the hearing record reveals that the district did not fully complete an FBA for the student as promised. However, based upon the foregoing, including the legal standard set forth above with respect to the October 27, 2014 IEP, the evidence in the hearing record supports a finding that, even considering the CSE's failure to complete an FBA as a serious procedural violation, it would not rise to the level of a denial of a FAPE or otherwise contribute to such a finding because the October 27, 2014 CSE had sufficient information regarding the student's behaviors, and the October 27, 2014 IEP adequately identified and recommended supports and services to meet the student's

behavioral needs including a BIP, social stories, social/emotional annual goals, psychological counseling services, and parent counseling and training (Dist. Ex. 11 at pp. 7-9; see Dist. Ex. 37 at pp. 3-4; R.E., 694 F.3d at 190). In addition, up until this point, the district frequently met with the parents and communicated with them to consider and address their concerns and the student's needs (Tr. p. 781; Dist. Exs. 6-11; 76 at pp. 14-15). Moreover, the behavior consultant and the team worked diligently in their attempts to develop an FBA for the student and to help him successfully monitor his in-school behaviors and performance (Tr. pp. 777, 784-85, 2031-32; Dist. Exs. 10; 11; 37; 76; 77). Lastly, the district made staff changes per the parents' request specific to parent counseling and training, and it was willing to address behaviors the student demonstrated in the home that made it difficult for him to get to school (Tr. p. 874; Dist. Ex. 11 at pp. 1-2, 9).

4. 15:1+1 Special Class and LRE

Next, the parents argue that the August 2014 CSE's recommendation of a 15:1+1 special class was not appropriate because it was not the student's LRE.

The IDEA requires that a student's recommended program must be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 111; Gagliardo, 489 F.3d at 105; Walczak, 142 F.3d at 132; Patskin, 583 F. Supp. 2d at 428). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. North Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobol, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 CFR 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 CFR 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 CFR 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and the continuum makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 CFR 300.115[b]).

To apply the principles described above, the Second Circuit adopted a two-pronged test for determining whether an IEP places a student in the LRE, considering (1) whether education in the general education setting, with the use of supplemental aids and services, can be achieved

satisfactorily for a student, and, if not, (2) whether the district has mainstreamed the student to the maximum extent appropriate (Newington, 546 F.3d at 119-20; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048-50 [5th Cir.1989]). A determination regarding the first prong, (whether a student with a disability can be educated satisfactorily in a general education class with supplemental aids and services), is made through an examination of a non-exhaustive list of factors, including, but not limited to "(1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class" (Newington, 546 F.3d at 120; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50). The Court recognized the tension that occurs at times between the objective of having a district provide an education suited to a student's particular needs and the objective of educating that student with non-disabled peers as much as circumstances allow (Newington, 546 F.3d at 119, citing Daniel R.R., 874 F.2d at 1044). The Court explained that the inquiry is individualized and fact specific, taking into account the nature of the student's condition and the school's particular efforts to accommodate it (Newington, 546 F.3d at 120).

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

In the instant case, the August 2014 CSE recommended a 15:1+1 special class placement for the 2014-15 school year (Dist. Ex. 9 at. p. 1). When asked during the impartial hearing why the CSE recommended a 15:1+1 special class placement for the student, the director responded that "it [wa]s largely due, in part, with [the developmental pediatrician's] request that he be considered for our self-contained class, as well as the parents' request" (Tr. p. 177). The director further testified that the CSE's recommendation was "really on the advice of [the developmental pediatrician]" and "[t]he parents presented a letter indicating that [the student] was under her care and wanted the CSE to consider a smaller class size setting for [the student]" (Tr. p. 450). A June 2014 letter from the student's developmental pediatrician indicated that, "due to the severity" of the student's condition, the student needed a "self-contained classroom setting (Dist. Ex. 41).

While the CSE was correct to consider the recommendation of the developmental pediatrician and the parents' request for a special class placement, review of the hearing record reveals that the August 2014 CSE failed to make reasonable efforts to consider accommodations for the student in a general education classroom and whether he could be satisfactorily educated in a general classroom with the use of supplemental aids and services. Furthermore, the prior written notice from the August 2014 CSE meeting indicates that the CSE did not consider any other placement options for the student (Dist. Ex. 9 at p. 17). Instead the August 2014 CSE made its recommendation to remove the student from the general education environment in favor of a 15:1+1 special class placement solely on the basis of a letter from the developmental pediatrician and the parents' request for a self-contained classroom. Therefore, the hearing record failed to

contain evidence to establish that the August 2014 CSE undertook any analysis of the factors described in Newington to determine whether the 15:1+1 special class placement met the student's LRE requirements. Accordingly, the hearing record supports a finding that the district failed to meet its obligation to consider whether the student could satisfactorily be educated in the general education setting with supplemental aids and services, and there is no reason to discuss the second prong of the LRE analysis. Accordingly, absent evidence that the district undertook the necessary analysis, the hearing record cannot support a finding that the district offered the student a FAPE in the LRE as required (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]).[31]

E. Compensatory Educational Services

Having determined that the district failed to offer the student a FAPE for the 2014-15 school year based on the district's failure to recommend an appropriate placement in the LRE, the next inquiry is to determine whether the hearing record supports the parents' request for compensatory relief.

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147, 151 [N.D.N.Y. 1997]). The Second Circuit has held that compensatory education may be awarded to students who are ineligible for services under the IDEA by reason of age or graduation only if the district committed a gross violation of the IDEA which resulted in the denial of, or exclusion from, educational services for a substantial period of time (see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 n.15 [2d Cir. 2015]; French v. New York State Dep't of Educ., 476 Fed. App'x 468, 471 [2d Cir. 2011]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2, 113 n.6 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69, 75-76 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071, 1078-79 [2d Cir. 1988], aff'd on recon. sub nom. Burr v. Sobol, 888 F.2d 258 [2d Cir. 1989]). However, compensatory education relief may also be awarded to a student with a disability who remains eligible for instruction under the IDEA, and the purpose of such an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014] [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; Newington, 546 F.3d at 123; see also E. Lyme, 790 F.3d at 456; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school

[31] Although the parents now argue on appeal that the 15:1+1 special class placement was not the student's LRE, as noted above, at the time of the August 2014 CSE meeting the parents were requesting a special class placement and presented a letter from the developmental pediatrician recommending a special class placement. Furthermore, additional evidence received from the parties indicates that beginning in November 2015, the student attended an 8:1+1 special class placement in a charter school at the parents' initiation (Parent Supp. Exs 1; 3; 15 at p. 1; Dist. Supp. Ex. Nov. 12, 2015 IEP at p. 1). The district subsequently determined that this placement was overly restrictive and recommended that the student receive consultant teacher services in a general education classroom with a full-time 1:1 aide (Parent Supp. Ex. 15 at pp. 1-2, 11; Dist. Supp. Ex. Mar. 8, 2015 Prior Written Notice). During the 2016-17 school year, the student attended a public school 8:1+2 special class program in a different school district (Parent Supp. Ex. 9 at p. 1).

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; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

Prior to a discussion of the specific relief sought by the parents, a background of the district's efforts in providing home instruction and related services to the student is necessary.

After receiving the October 2014 letter from the developmental pediatrician indicating that the student required two months of home instruction due to his anxiety, the director informed the parents by letter dated November 3, 2014 that she was in the process of arranging home instruction services for the student (Dist. Exs. 44; 51). By letter of same date, the district requested that a private agency provide home instruction and related services to the student (Dist. Ex. 52). After the student began to receive home instruction services from the private agency, in an email dated November 13, 2014, the district social worker informed the director of an incident that occurred between the parents and the special education teacher from the private agency (Dist. Ex. 74). The district social worker explained that the teacher from the private agency indicated that she was upset because when providing the student with home instruction, the parents refused to sign her sessions notes which she needed in order to be paid by the private agency (id.). The teacher further indicated that the sessions were videotaped and the parents attended the November 10 and November 13, 2014 sessions with their advocate (id.). In an email dated November 17, 2014, the director advised the parents that the teacher was no longer interested in working with the student; however, she indicated that she would "put a new instructor in place as soon as possible" (Dist. Ex. 78 at p. 1). The director further advised the parents that videotaping and the presence of outside individuals would not be allowed in future sessions (id.). By email dated November 21, 2014, the director acknowledged the parents' request for another agency to provide services and "advised [the parents] that the district has the right and the obligation to arrange the service," but that she would attempt "to find another provider as per your request" (Parent Ex. X). By reply email dated November 25, 2014, the parents indicated that the private agency had not been informed that the parents were "not using them anymore" and claimed that they had become aware that the district had not contacted other agencies as requested (id.; see Dist. Ex. 56 at p. 2). In an email dated November 25, 2014, the director confirmed the parents' request that they no longer wanted teachers from the private agency to instruct the student (Dist. Ex. 79). The director also advised the parents that she had been in touch with other agencies and, while she was attempting to honor their request, the parents should be prepared to work with available providers, and that another home instruction provider would be contacting the parents (id.).

In an attempt to provide the student with a tutor, on November 29, 2014, the director sent an email to the parents advising them that she would see if a second tutoring service would be able to provide home instruction for the student (Dist. Ex. 80). The director noted that the parents did not have the right to choose the instructor but that she would "try to find a better fit" if the parents were unhappy (id.). The director reiterated that "the conditions of tutoring remain the same," to wit: no one other than the parents and the student should be present, no videotaping would be permitted, and the parents would be expected to sign a session note to establish that services were provided without demanding that specific additional comments be included on the note (id.).

On December 2, 2014, the CSE reconvened at the parents' request (Dist. Ex. 12 at p. 1). As mentioned above, the CSE meeting information summary reflects that home instruction was approved by the building principal and began in early November 2014, but those services, including OT and speech-language therapy, were "abruptly halted by the parents after several sessions," and that the parents had refused the counseling services offered at the school building, and parent training (id. at p. 2).[32] The director, the new tutor, and the tutoring service exchanged a series of emails between December 2, 2014, and January 15, 2015 (Dist. Ex. 59 at pp. 1-24). The tutor explained that she felt uncomfortable being videotaped by the parents while providing instruction to the student and ultimately indicated that she was no longer available to provide the student with home instruction (id. at pp. 19-24). In a letter dated January 23, 2015, the student's developmental pediatrician indicated that the student continued to require home instruction for the next two months due to the student's anxiety (Dist. Ex. 45). In an email to the parents dated January 30, 2015, the director advised the parents that she was able to find a retired special education teacher to provide home instruction for the student (Parent Ex. AA). By email dated February 3, 2015, the parents confirmed that they would meet the retired special education teacher at the library (id.). By email dated February 4, 2015, the parents advised the director that they had not heard from the occupational therapist to provide OT to the student (Parent Ex. EE). In an email dated February 4, 2015, the occupational therapist informed the director that due to "snow days and delays and changes to [her] schedule," she did not reach out to the parents to schedule OT services but would schedule services to "begin this week" (Parent Ex. QQ).

In an email dated March 16, 2015, the director advised the parents' advocate that videotaping sessions would not be permitted (Dist. Ex. 70). The director further indicated that there were no contracted tutoring agencies available because many of them had resigned due to being videotaped or because of the parents' behaviors (id.). The director further indicated that she would have the "most recent agency" contact the parents directly as "time was of the essence" (id.). During March 11, 2015 through March 18, 2015, the parents and the director exchanged a number of emails (Dist. Ex. 58). The e-mail exchange reflects that the director found tutors to provide instruction to the student; however, the tutors suddenly quit or were unable to provide services due

[32] According to the hearing record, the parents filed a State complaint with the New York State Education Department on November 10, 2014 (Parent Ex. RR at pp. 1-3). The findings from the State complaint issued on January 29, 2015, concluded that after the CSE convened on December 2, 2014, and recommended a 15:1+1 special class placement, the district was no longer required to provide the student with instruction and related services at home (Parent Ex. II at p. 5). The findings also indicated that the student should have returned to school and, since the student did not return to school, the district should have considered the student absent and implemented its attendance policy (id.).

to distance (id.). In several emails dated March 18, 2015 through March 23, 2015, a third tutoring service sent emails indicating that the two tutors that were initially assigned to the student suddenly quit (Dist. Ex. 61). After several attempts to provide home instruction to the student, on March 30, 2015, the director sent an email to the parents indicating that she arranged a tutor for the student and that home instruction would be provided at a district elementary school (Dist. Ex. 72 at pp. 1, 3). In response, the parents sent an email to the director dated March 30, 2015, rejecting the district's offer as the student was "still traumatized from the abuse and the bullying he suffered" while attending the district's schools (id. at p. 2). The director reiterated the district's offer of providing home instruction in a portable building/classroom at the school in emails of April 9 and April 13, 2015 (id. at pp. 3-4). The director also noted that the letter from the student's physician was no longer sufficient for the purposes of approving home instruction, as it was "essentially the same letter" previously provided without any indication of the treatment provided or progress made (id. at p. 4). On April 22, 2015, the parents sent an email to the director informing her that they would not allow the student to receive speech-language services from anyone employed by the private agency (Dist. Ex. 56 at pp. 13-16).

During the impartial hearing, counsel for the district asserted in her opening statement that the district would "provide make-up services for any services that were missed while [the student] was on home instruction, even though it is the District's position that most of those missed sessions were not pursuant to the fault of the District" (Tr. p. 111). Counsel for the district further acknowledged that the district was "well aware that it owes this [student] compensatory education and has made valiant efforts . . . to provide the [student] with home instruction" (Tr. p. 233). Ultimately, the IHO awarded the student compensatory education services in the form of OT and speech-language services (IHO Decision). However, the IHO failed to indicate the total number of compensatory education services hours by frequency and duration, and created further confusion by awarding these services without finding a basis for a denial of a FAPE.

On appeal, the parents request clarification of the compensatory education services awarded by the IHO. The district departs from its original position asserted during the impartial hearing and cross-appeals the IHO's award of compensatory education services. The district asserts that the parents are not entitled to relief because the IHO found that it offered the student a FAPE for the school years at issue and the parents failed to cooperate in its attempt to provide the student with home instruction and related services.

After an independent review of the entire hearing record, it became apparent that there was a lack of information and clarity relevant to calculating an award of compensatory education services, and that additional evidence was needed in order to render an appropriate award of compensatory education services for the student. Accordingly, by letter to both parties dated October 4, 2017, the parties were directed to provide the Office of State Review with additional documentary evidence and identify their position regarding what would constitute an appropriate compensatory education remedy (see 8 NYCRR 279.10[b]). The parties were also requested to provide this office with evidence about the student's current functioning, along with information that would clarify the dates the student received home instruction and any information pertaining to delivery of the related services that the student received while on home instruction.

By letter dated October 25, 2017, the district responded and asserted that the parents are not entitled to compensatory education services for the 2014-15 school year because the parents failed to cooperate with the district when it tried to provide home instruction services to the student. However, the district asserted that should an SRO find that the student is entitled to compensatory education services, they should be limited to the time period from November 1, 2014 to March 27, 2015—the time frame from when the student was first placed on home instruction until the district offered to provide the student all of his mandated services in a portable building/classroom. The district further articulates that the student was entitled to the following services over that 17 week period: (1) 85 hours of home instruction (five hours per week);[33] (2) 22.7 hours of speech-language therapy services (four 20-minute sessions per week); (3) 17 hours of OT services (two 30-minute sessions per week); and, (4) 17 hours of counseling services (two 30-minute sessions per week).[34] The district further asserts that the student received 14 hours of home instruction (and was absent without excuse for another 3 hours) and 3 hours of speech-language therapy, and that the parents refused all OT and counseling services. The district contends that its acknowledgements during the impartial hearing that it was responsible for providing compensatory education services for missed home instruction were made "within the context of [settlement] negotiations" ongoing at that time. In addition, the district argues that the parents' actions "effectively thwarted the District's ability to provide services to [the student]."

By letter dated October 25, 2017, the parents responded, articulating their position on compensatory education services. Initially, the parents assert that an appropriate compensator remedy would be payment of tuition at a specific nonpublic school. This remedy was not requested in the parents' due process complaint notice or their request for review, and was not raised during the impartial hearing. Even if the parents could permissibly raise this request for relief at this late stage, absent any evidence in the hearing record regarding the nonpublic school placement now requested by the parents, it cannot be considered as an appropriate remedy under the circumstances of this case. In addition, the parents argue that the student is entitled to receive the following as compensatory education: (1) 96 hours of 1:1 OT services, delivered in two 30-minute sessions per week; (2) 127 hours of 1:1 speech-language therapy services, delivered in four 20-minute sessions per week; (3) 48 hours of 1:1 counseling delivered in one 30-minute session per week; (4) a 1:1 aide and a 1:1 teaching assistant to accompany the student to the nonpublic school; (5) an iPad for use at home and school; and, (6) 1:1 special education teacher services. However, with respect to the amount of 1:1 special education teacher services, the parents argue that it is "difficult to quantify the approximate amount of time [the student] should be awarded . . . due to the totality of the denial of FAPE by the District."

Neither party in their submissions addressed the specific standards for compensatory education awards set forth above, and a thorough review of the hearing record and the additional evidence submitted by the parties does not provide a sufficient evidentiary basis on which to

[33] Home instruction is an educational service and is defined as "special education provided on an individual basis for a student with a disability confined to the home, hospital or other institution because of a disability" (8 NYCRR 200.1[w]). Home instruction must be provided for a minimum of five hours per week at the elementary level and 10 hours per week at the secondary level (8 NYCRR 200.6[i]).

[34] The district attached a document for review, including home instruction invoices from December 2014 and January 2015, and speech-language provider notes from January and February 2015.

premise such an award. In fact, it appears that both parties relied to some extent on the levels of services in the August 2014 IEP to formulate their respective calculations. The district and parents agree that to the extent I find a compensatory award warranted, the student should receive four 20-minute sessions per week of speech-language therapy and two 30-minute sessions per week of OT. The district indicates the student would be entitled to two 30-minute sessions per week of counseling, while the parents request one 30-minute session per week.

As I have found a denial of a FAPE for the district's failure to comply with the LRE procedures mandated by the IDEA, it is unclear on what basis an award of compensatory education in the form of special education instruction and related services would be relevant to remedying the denial of a FAPE for the time period the student remained in school pursuant to the August 2014 and October 2014 IEPs. Specifically, it is unlikely that any harm caused to the student by the district's failure to provide him with a placement in a less restrictive setting with greater access to nondisabled peers could be remedied by an award of 1:1 services that are similarly provided away from his nondisabled peers, and the parents make no specific argument in this respect. As the compensatory award should attempt to place a student in the position he would have occupied but for the district's failure to offer the student a FAPE, I considered viewing the matter in the light most favorable to the parents and to formulate an award based upon the student's August 2014 IEP. The student was entitled to 5.5 hours of instruction per day pursuant to the August 2014 IEP, and one option would be to direct the district to provide that level of instruction for each day the student did not receive services (Dist. Ex. 9 at p. 8). However, a calculation based on instruction in a 15:1+1 special class placement is not comparable to a compensatory award of 1:1 instruction and would not provide an appropriate remedy to effectuate the purposes of compensatory education services, which is to provide educational services that would place the student in the position that he would have been but for the denial of a FAPE. As it is altogether unclear what the parents are requesting as relief for missed home instruction, an hour-for-hour approach to the calculation of the compensatory education award using a home instruction model is the best approximation for formulating an appropriate equitable award. Accordingly, the district must provide the student with five hours of home instruction per week for the period he was on home instruction.

It is also necessary to consider whether other equitable considerations warrant a modification of this relief (E. Lyme, 790 F.3d at 456, quoting Somoza, 538 F.3d at 109 n.2; Wenger, 979 F. Supp. at 151). As noted above, a review of the hearing record reflects that the district made a number of attempts to provide home instruction to the student, prior to making instruction available in a portable building/classroom on the grounds of a district elementary school. Initially, the director indicated that a certified special education teacher would be available in a "classroom space" at a district elementary school for three hours per day "in order to provide make up time as well as his daily time," beginning March 31, 2015 (Dist. Ex. 72 at p 1). After the parents objected to the student being required to attend on instruction in a district public school, the director indicated that the district had made arrangements to provide instruction to the student in a district building "in light of the fact that the district cannot secure a teacher to provide instruction in your home or the library" (id. at pp. 2-3). The director also indicated that the district had chosen the specific elementary school "because it offers a location outside of the main building in the portable," and that the parents could bring the student to the portable building/classroom without entering the main school building (id. at pp. 3-4). While the parents asserted valid

concerns relating to the student's anxiety with respect to attending in the school building, the hearing record establishes that the district made multiple attempts to obtain home providers for the student, and proposed services in a portable building/classroom on school property only after exhausting other alternatives. Accordingly, while it is appropriate for the student to receive compensatory services for the time the district failed to provide home instruction, the relief shall be limited to five hours per week of 1:1 instruction for the time period between November 1, 2014, and March 30, 2015, less the amount received by the student during that time period.[35]

However, while the district asserts that it offered to provide related services in the portable building/classroom, the hearing record and additional evidence submitted by the district do not support this assertion. Rather, the director only mentioned the presence of a certified special education teacher in her March and April 2015 emails (Dist. Ex. 72 at pp. 1, 3-4). Furthermore, while the district submitted time sheets with the name of the special education teacher between March and June 2015, it did not submit any evidence indicating that related services providers were also available (Dist. Supp. Ex. Instruction Hours Completed).

On balance, and subject to the conditions prescribed below, I find that an equitable resolution of this matter is that the student should receive compensatory award of related services for the period from November 1, 2014, through the end of the 2014-15 school year. Utilizing the recommendations for related services from the student's August 2014 IEP, the student is entitled to the following services on a weekly basis: four 20-minute sessions of speech-language therapy; two 30-minute sessions of OT; and one 30-minute sessions of counseling services. In addition, the hearing record supports the district's assertion that the student received three hours of speech-language therapy while on home instruction, reflecting that the student received one 40-minute session in November 2014, two 30-minute sessions in January 2015, and three 30-minute sessions in February 2015 (Dist. Ex. 54; Dist. Supp. Exs. Jan. 2015 Speech-Language Therapy at pp. 2-3; Feb. 2015 Speech-Language Therapy at pp. 2-3). Accordingly, the award of compensatory speech-language therapy shall be reduced by three hours.

However, despite the district's failure to ensure the provision of all the home instruction and related services to which the student was entitled, a review of the hearing record as a whole reflects that the parents were uncooperative with the district's attempts to provide instruction and speech-language therapy to the student, and they themselves were significantly responsible for the missed instruction (Tr. pp. 1498-499, 1654, 1724; Parent Ex. X; Dist. Exs. 56 at pp. 2, 13-16; 58 at pp. 14, 16; 59 at pp. 19-24; 69; 70; 72; 74; 78; 79; 80). However, I find that the one who is least at fault was the student himself, and I will provide one opportunity to recoup the instructional time described above. Notwithstanding the strained relationship between the parties, the parents are expected to act reasonably by making the student available and improving their cooperativeness with the district's efforts to provide the compensatory education services due to the student. The selection of providers shall be a matter within the district's discretion, and any appointment to provide compensatory services that is cancelled with by the parents upon less than 72 hours notice to the provider shall constitute a waiver of such scheduled services. Moreover, the parents shall

[35] The district asserts that the student received 14 hours of home instruction, and the award shall be calculated based on the district's representation. However, the hearing record seems to indicate that the student received 18 hours of home instruction between November 2014 and February 2015 (see Dist. Exs. 53; 57 at p. 2; 60).

be prohibited from videotaping compensatory education appointments, and shall waive the time scheduled for a compensatory education appointment if they attempt to videotape a session.

VII. Conclusion

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that that the IHO's decision, dated July 24, 2017, is modified, by reversing those portions which found that district offered the student a FAPE for the 2014-15 school year and directed that the district provide compensatory speech-language therapy and OT services for one school year; and

IT IS FURTHER ORDERED that the district shall provide the student with compensatory instructional services; speech-language therapy services; OT services; and counseling services in accordance with the body of this decision by June 30, 2019.

Dated: **Albany, New York**
November 27, 2017

____
JUSTYN P. BATES
STATE REVIEW OFFICER