



The University of the State of New York

The State Education Department

State Review Officer

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No. 17-081

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

Appearances:

Ferrara Fiorenza, PC, attorneys for petitioner, by Jennifer E. Mathews, Esq.

Legal Assistance of Western New York, attorneys for respondent, by A. Jane Grimes Chambers, 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. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which determined that the educational programs and services recommended by its Committee on Special Education (CSE) for respondent's (the parent's) daughter for the 2014-15 and 2015-16 school years were not appropriate. The appeal must be sustained.¹

¹ In September 2016, Part 279 of the Practice Regulations was amended, which became effective January 1, 2017, and is 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 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 unless otherwise specified.

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[a]). 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

While the student in this case has not continuously attended school in the district subject to this appeal, the evidence in the hearing record reflects that the student received special education and related services since approximately 2003 (see Parent Ex. 18 at pp. 2-3).² In pertinent part, the student returned to the district in or around November 2012, and the evidence in the hearing record characterizes the student's attendance at school, at that time, as "extremely poor" (id.). In February 2013, the student transferred into a Board of Cooperative Educational Services' (BOCES) program, but "scarcely attended school" from February 2013 through June 2013 (id. at p. 3; see also Tr. pp. 190-94, 198-200; Dist. Ex. 55 at pp. 1-2). In addition, the student "did not show up for her June exams" (Parent Ex. 18 at p. 3). During the 2012-13 school year, the student passed all of her courses and earned a total of 5.5 credits (see Parent Ex. 33).³

For the 2013-14 school year, the student continued to attend the same BOCES' program she entered in February 2013 (see Parent Ex. 18 at p. 3; see also Tr. pp. 198-200, 203-04; Parent

² In 2004, the student transferred to an out-of-State school district, where she remained until approximately February 2010 (see Parent Ex. 18 at p. 2). While living out-of-State, the student's disability category was changed from emotional disturbance to autism (id.). Between 2004 and 2010, the evidence in the hearing record—while sparse—reveals that the student received a variety of special education supports and services, including instruction in 12:1+1 and 15:1+1 special class placements and resource room services, per parent request (id. at p. 2). Upon returning to the State in February 2010, the student attended a different in-State school district and received instruction for "Language Arts, Math, Reading, Science, and Social Studies" in a 12:1+1 special class placement until May 2010 (id. at pp. 2-3). After May 2010, the student attended a program consisting of a 12:1+1 special class placement for "students with both social-emotional and learning difficulties" as well as speech-language therapy and counseling services (id.). The evidence in the hearing record indicates that, at that time, it was "difficult to comment on" the student's progress due to her "poor" attendance (id. at p. 3). For the following school year—2011-12 school year—the student remained enrolled at the same in-State school district and earned a total of 3.5 credits (compare Parent Ex. 18 at pp. 2-3, with Parent Ex. 33).

³ In June 2013, a BOCES' school psychologist initiated a persons in need of supervision (PINS) referral as one intervention to address the student's attendance issues manifested during the 2012-13 school year (see Dist. Ex. 60 at p. 1; see also Tr. pp. 190-94, 270-72; 341-45, 369-73, 875-76; Parent Ex. 18 at pp. 2-3). At the impartial hearing, the BOCES' principal testified that the PINS referral "[w]as not accepted" because the student was "too close to the aging-out requirement" for the referral to occur (Tr. pp. 190-94, 271-72). The BOCES' school psychologist who initiated the PINS referral testified that, after the PINS referral, the student received a "waiver" to receive "community-based services," including "family intervention services" (Tr. pp. 372-73). The parent testified at the impartial hearing that the PINS referral was "denied" because a determination had been made that the student's "nonattendance" was "disability related" and "not a behavioral issue" (i.e., such as "children who refuse and delinquency-type issues") (Tr. pp. 875-76, 953-54; see Tr. p. 271). Neither party disputes that the student's attendance issues predated the 2014-15 and 2015-16 school years at issue in this appeal (see Tr. pp. 68, 74-77, 345, 371; see Parent Ex. 18 at pp. 2-3; Dist. Ex. 57 at pp. 2-3).

Ex. 12).^{4, 5} The student's BOCES' program, which was located within the district's high school, consisted of a "self-contained setting"—namely, a 12:1+1 special class placement—staffed with a "classroom aide, a speech therapist and [a] classroom teacher" (Parent Ex. 18 at pp. 1, 3). Within this setting, the student also received related services consisting of one 30-minute session per week of individual counseling, one 30-minute session per week of counseling in a group, two 30-minute sessions per week of individual speech-language therapy, and one 30-minute session per week of speech-language therapy in a group (id. at p. 1; see also Dist. Exs. 56 at pp. 1-3; 57 at pp. 5-7). According to the evidence in the hearing record, this particular BOCES' program "focuse[d] on developing language skills necessary to be successful in and out of school" (Parent Ex. 18 at p. 1).

During the 2013-14 school year, the student was absent a total of approximately nine days from September 2013 through June 2014 (see Parent Ex. 12; see also Tr. pp. 68, 74 [describing the student's the 2013-14 school year as "exceptional" and noting that her attendance was "not really" an issue for that school year]). The evidence in the hearing record also reveals that, in the 2013-14 school year, the student passed all of her courses and earned a total of 6.0 credits (see Parent Ex. 33). In addition, the student was administered six Regents examinations in January 2014 and June 2014 (id.). According to the evidence, the student passed the Integrated Algebra

⁴ In October 2013, the BOCES' school psychologist—who had initiated the PINS referral in June 2013 and who provided counseling services to the student during the 2013-14 and 2014-15 school years—completed a "[C]linical [S]upport [S]ervices" (CSS) referral to obtain an evaluation of the student in order to access "more outside services" for the student (Tr. pp. 234-35, 261-62, 341, 343, 364-66, 378-79, 385; see Dist. Exs. 16 at pp. 1-2; 57 at p. 5; 58 at p. 1; 60; see also Dist. Ex. 29 at p. 1). As a result of the CSS referral, a consultant "affiliated" with BOCES conducted an evaluation on May 20, 2014 by administering the "Autism Diagnostic Observation Schedule-Second Edition (ADOS-2)" to the student, as well as having the parent complete a "Social Communication Questionnaire" and "Asperger Syndrome Diagnostic Scale" as part of the evaluation process (Dist. Ex. 58 at pp. 1-2; see Tr. p. 234 [noting that this individual worked as a "consultant for all but 25 area school districts" in the region]; see also Tr. pp. 378-79 [describing the same individual as an "autism evaluator"]; see generally Parent Ex. 17 [including copies of documents referred to as the "Enclosures" provided with the May 2014 evaluation report]). The BOCES' principal testified that she typically received a report generated from an evaluation within "a month of the exam," but noted "[i]f they're running late, the latest would be two months" after the evaluation (Tr. pp. 235-36; see Tr. pp. 379, 383; see generally Dist. Ex. 58). The BOCES' school psychologist testified that, after receiving the report generated from the May 2014 evaluation of the student (May 2014 evaluation report), she spoke to the parent "on the phone about the report" and provided the parent with a copy of the report (see Tr. pp. 383-84; see also Tr. p. 235). The hearing record reveals that, at the student's next annual review in May 2015—as well as at the student's annual review held in April 2016—the respective CSEs discussed the May 2014 evaluation report (see Tr. pp. 260-62, 379-83, 385; see generally Dist. Ex. 58).

⁵ In November 2013, the BOCES' school psychologist conducted a mandatory three-year reevaluation of the student (see Tr. pp. 229, 334, 359; see generally Dist. Ex. 57). As part of the student's three-year reevaluation, a speech-language evaluation also took place in May 2013 (see Tr. pp. 228-29, 231-33; Dist. Ex. 56 at p. 1). The BOCES' school psychologist testified that, at the student's annual review held in May 2015 for the 2015-16 school year, the CSE discussed all of the student's reevaluation reports (see Tr. pp. 229-33; see generally Dist. Exs. 56-57).

Regents examination on her second attempt in June 2014, but did not pass any other Regents examinations administered during that school year (*id.*).⁶

Turning to the school years at issue in this appeal, a CSE convened on May 21, 2014 to conduct the student's annual review and to develop an IEP for the remainder of the 2013-14 school year (May 2014 through June 2014) and for the 2014-15 school year (12th grade) (*see* Dist. Ex. 3 at pp. 1-2, 6; Parent Ex. 33; *see generally* Dist. Exs. 4-7).⁷ Finding that the student remained eligible for special education and related services as a student with autism, the May 2014 CSE recommended a 12-month school year program in a 12:1+1 special class placement in the same BOCES' program the student attended for the 2013-14 school year (*compare* Dist. Ex. 3 at pp. 6, 8-9, *with* Parent Ex. 18 at pp. 1, 3, *and* Tr. pp. 198-200, 203-04).⁸ In addition, the May 2014 CSE recommended the following related services: one 30-minute session per week of counseling services in a small group, one 30-minute session per week of individual counseling services, two 30-minute sessions per week of individual speech-language therapy, and one 30-minute session per week of speech-language therapy in a small group (*see* Dist. Ex. 3 at pp. 6, 8).⁹ At that time, the May 2014 CSE indicated in the IEP that the student did not require "strategies, including positive behavioral interventions, supports and other strategies to address behaviors that impede[d] the student's learning or that of others" (*id.* at p. 7). The May 2014 CSE also indicated in the IEP that the student did not require a behavioral intervention plan (BIP) (*id.*). Finally, the May 2014 CSE created annual goals to address the student's needs, and included a coordinated set of transition activities and measurable postsecondary goals (*id.* at pp. 6-7, 10). During the 2014-15

⁶ Students with disabilities can meet graduation requirements and earn a Regents diploma through a "low pass" option on Regents examinations (*see* 8 NYCRR 100.5[b][7][vi][c], [d][7]).

⁷ In August 2014, the student turned 17 years old (*see* Parent Ex. 33). As a 17-year old student, the district could not require the student to attend school because she was no longer considered to be of compulsory school-age attendance under State law (*see* N.Y. Educ. Law § 3205[1][a] [requiring students aged 6 through 16 to attend "full time instruction"]; *see also* N.Y. Educ. Law § 3202[1] [entitling students aged 5 through 21, who have "not received a high school diploma," to attend public schools]). The BOCES' principal testified at the impartial hearing that for students who have a "continual attendance issue" but are no longer considered to be of compulsory school-age attendance—such as this student beginning in the 2014-15 school year—she, as a principal, has no "disciplinary options" to exercise to compel attendance (Tr. pp. 268-71).

⁸ At the impartial hearing, the BOCES' principal testified that the student would continue to work "towards a local Regents diploma" in the 2014-15 school year (Tr. pp. 203-04).

⁹ The student's eligibility for special education programs and related services as a student with autism for the 2014-15 and 2015-16 school years is not in dispute (*see* 34 CFR 300.1[c][1]; 8 NYCRR 200.1[zz][1]).

school year, the student attended the recommended placement (see generally Dist. Exs. 8-17; Parent Ex. 33).¹⁰

Near the conclusion of the 2014-15 school year on May 12, 2015, a CSE convened to conduct the student's annual review and to develop an IEP for the remainder of the 2014-15 school year (May 2015 through June 2015) and for the 2015-16 school year (see Dist. Ex. 19 at pp. 1-2, 7; Parent Ex. 33; see generally Dist. Ex. 20-23). Finding that the student remained eligible for special education and related services as a student with autism, the May 2015 CSE recommended a 12-month school year program in a 12:1+1 special class placement in the same BOCES' program the student attended for the 2013-14 and 2014-15 school years, but at a different location than previous school years (compare Dist. Ex. 19 at pp. 7-8, and Tr. pp. 240-41, with Dist. Ex. 3 at pp. 6, 8-9, and Parent Ex. 18 at pp. 1, 3, and Tr. pp. 198-200, 203-04).¹¹ The May 2015 CSE also recommended the following related services: one 30-minute session per week of individual counseling services and two 30-minute sessions per week of individual speech-language therapy (see Dist. Ex. 19 at pp. 1, 7-9). At that time, the May 2015 CSE indicated in the IEP that the student did not require "strategies, including positive behavioral interventions, supports and other strategies to address behaviors that impede[d] the student's learning or that of others" (id. at p. 5). The May 2015 CSE also indicated in the IEP that the student did not require a BIP (id.). Finally, the May 2015 CSE created annual goals to address the student's needs, and included a coordinated set of transition activities and measurable postsecondary goals (id. at pp. 5-7, 9-10).

By the conclusion of the 2014-15 school year, the student had been absent a total of approximately 91 school days from September 2014 through June 2015 (see Parent Ex. 13). The evidence in the hearing record reveals that, in the 2014-15 school year, the student passed all of her courses and earned a total of 5.0 credits (see Parent Ex. 33). For the 2015-16 school year, the student attended the recommended placement pursuant to the May 2015 IEP (see generally Dist. Exs. 24-26; Parent Ex. 33).

During the 2015-16 school year, the evidence in the hearing record reveals that, similar to the 2014-15 school year, the student struggled with attendance (compare Parent Ex. 13, with Parent

¹⁰ Despite having an "exceptional year" in the 2013-14 school year in terms of her attendance, the student's attendance issues resurfaced in the 2014-15 school year (compare Tr. pp. 68, 74, and Parent Ex. 12, with Tr. pp. 215-17). In an attempt to address the student's attendance issue, the BOCES' school psychologist—as early as September 2014—"set up" a "Single Point of Access" (SPOA) and reached out to "some other agencies to get services for [the student] so they could help get her to school" (Tr. pp. 216-18, 373-75, 416; see Parent Ex. 13; Dist. Ex. 60 at p. 1 [referencing SPOA contact person]). The BOCES' school psychologist described SPOA services as "family services" that worked with BOCES and "home . . . to try to get [the student] to school" (Tr. pp. 374-75). The BOCES' school psychologist communicated with the SPOA contact person, and it appears that SPOA "remained involved" with the student and her family through at least the conclusion of the 2014-15 school year (Tr. pp. 375-76, 416).

¹¹ At the impartial hearing, the BOCES' principal explained that, during the 2015-16 school year, the student would continue to attend the same BOCES' program that she attended in the 2014-15 school year, but at a different "location" that focused on "career skills and working on transitional s[kills]" (Tr. pp. 240-41). At the impartial hearing, the parent testified that the May 2015 CSE decided to change the location of the student's program because "there was no other option and that that would be the viable solution" (Tr. pp. 885-86).

Exs. 14-15). On October 21, 2015, the student's "education team" at BOCES met and, among other things, "brainstorm[ed]" ideas to help the student with her attendance (Dist. Ex. 60 at p. 1; see Tr. pp. 253-54; Parent Ex. 34 at p. 1). On that same day, a BOCES' "consultant" (BOCES' consultant) was in the building and, having "heard the conversation," the consultant—who "worked with students with autism"—"gave some suggestions" to the team to improve the student's attendance (Tr. p. 254; see Parent Ex. 34 at pp. 1-2; Dist. Ex. 60 at p. 1). For example, the BOCES' consultant suggested permitting the student to arrive "late" so that the student had "power to help make some choices" (Tr. pp. 254-55). In addition, the BOCES' consultant suggested creating a "contract with rules, [a] shortened day (starting late), [and] no discussion of attend[ance]" with the student (Dist. Ex. 60 at p. 1; see Tr. pp. 255-56; Parent Ex. 34 at pp. 1, 3).¹² Consistent with the consultant's recommendation, BOCES' staff created the contract; on a "[c]ouple" of days, the student took advantage of the contract and arrived at school "late" (Tr. p. 255; see Parent Ex. 34 at p. 3; Dist. Ex. 60 at p. 1). However, the student did not continue to use this intervention, and the BOCES' principal testified that the parent "asked [BOCES] to stop focusing on [the student's] attendance so it wouldn't cause so much stress" (Tr. pp. 255-56).

On April 8, 2016, the parent reached out to the district to "discuss inviting [the] Autism specialist [BOCES' consultant] to the upcoming CSE meeting" on April 26, 2016 (Parent Ex. 39 at p. 1). At that time, district staff informed the parent that they did "not deal with [the BOCES' consultant] directly, nor d[id] they add anyone to the meeting," and the parent "would have to contact [the BOCES' consultant] herself" (id.). Consistent with this directive, the parent left a message for the BOCES' consultant asking her to attend the student's upcoming CSE meeting "to advocate for [the student's] needs," but the parent did not receive any further contact from the consultant about the meeting as of April 13, 2016 (id.).

In an email dated April 18, 2016, the BOCES' consultant advised the parent that she contacted the "CSE office" and provided staff with her contact information (Parent Ex. 40 at pp. 1-2). The BOCES' consultant also advised the parent that she would contact the parent after she "hear[d] back" from the district (id. at p. 2). The parent responded to the BOCES' consultant on

¹² In an email to the parent dated November 13, 2015, the BOCES' school psychologist reported information from the "education team" meeting held on October 21, 2015, as well reporting additional follow-up and plans regarding the student (see generally Parent Ex. 34). In particular, the BOCES' school psychologist indicated that she would ask the district to have the BOCES' consultant—who made suggestions to address the student's attendance issues at the October 21, 2015 meeting—to provide a "consult, as she ha[d] a very firm understanding of students like" this student (id. at p. 3). As follow-up on this recommendation, the BOCES' school psychologist noted that the BOCES' principal "stated that this would have to wait until the CSE meeting" (id.). Based upon the November 13, 2015 email, it appeared that the BOCES' school psychologist anticipated having a CSE meeting on "November 30, 2015" (id. at p. 1). Although a meeting did occur on November 30, 2015, the hearing record does not identify it as a CSE meeting (see Dist. Ex. 60 at p. 2). Shortly thereafter in an email dated December 9, 2015, the parent asked for a "follow up meeting for [the student's attendance contract," and indicated that she would be "requesting a CSE Team meeting for mid to late January to revisit attendance with [the BOCES' consultant]" (Parent Ex. 35). The parent inquired whether the "contract" could be amended to define a "late" arrival as no later than "10:00 am," as later arrival times for the student interfered with "other committed appointments" (id.). The hearing record does not include any request by the parent for a CSE meeting to be scheduled in "mid to late January," or on any other date (see generally Tr. pp. 1-966; Parent Exs. 10-18; 20; 25; 27; 33-35; 38-42; 44-45; Dist. Exs. 1-17; 19-49; 51; 53-58; 60; IHO Exs. 1-7).

the same day by email (id. at p. 1). The parent thanked the BOCES' consultant for speaking with her and expressed that the student "may benefit from [her] advocacy" (id.).

Subsequently, in an undated email to the parent, the BOCES' consultant indicated that she "heard from the [BOCES' principal]," who had been in contact with district staff (Parent Ex. 40 at p. 1). The BOCES' consultant informed the parent that "they want[ed] to wait to have the meeting before making any decisions about [the BOCES' consultant's] involvement," so that the "team c[ould] make a plan and decide together" (id.). The BOCES' consultant also added that this plan worked out well for her, as she was "booked until June" and "wouldn't be available to attend an April or May meeting anyway" (id.). In an email dated April 26, 2016, the parent responded and thanked the BOCES' consultant for her response, indicating that she would "keep [her] updated and look[ed] forward to working with [the BOCES' consultant] in the near future" (id.).

On April 26, 2016, a CSE convened to conduct the student's annual review and to develop an IEP for the remainder of the 2015-16 school year (April 2016 through June 2016) and for the 2016-17 school year (see Dist. Ex. 27 at pp. 1-2, 7; see generally Dist. Ex. 28-31).¹³ Finding that the student remained eligible for special education and related services as a student with autism, the April 2016 CSE recommended a 12-month school year program in a 12:1+1 special class placement in the same BOCES' program and location the student attended during the 2015-16 school year (compare Dist. Ex. 27 at pp. 7-8, with Dist. Ex. 19 at pp. 7-8). The April 2016 CSE recommended the following related services: one 30-minute session per week of individual counseling services and two 30-minute sessions per week of individual speech-language therapy (see Dist. Ex. 27 at pp. 1, 7-8). At that time, the April 2016 CSE indicated in the IEP that, although the student did require "strategies, including positive behavioral interventions, supports and other strategies to address behaviors that impede[d] the student's learning or that of others," the student did not require a BIP (id. at p. 5). Finally, the April 2016 CSE created annual goals to address the student's needs, and included a coordinated set of transition activities and measurable postsecondary goals (id. at pp. 5-7, 9).

In June 2016, an "emergency action" taken by the State required the district superintendent to "make a local determination as to the academic proficiency for eligible students with disabilities to graduate with a local diploma" ("Superintendent Determination of Graduation with a Local Diploma," at p. 1, Office of Special Educ., Special Educ. Field Advisory [June 2016], available at <http://www.p12.nysed.gov/specialed/publications/documents/SuperintendentDeterminationAdvisoryRevised6-20.pdf>; see also http://www.regents.nysed.gov/common/regents/files/616p12a5_revised.pdf). The State action amended section 100.5 of the Regulations of the Commissioner of Education to require that a district superintendent determine, for those students with disabilities "otherwise eligible to graduate in June 2016 and thereafter, . . . if a student with a disability ha[d] otherwise met the standards for graduation with a local diploma when such student ha[d] not been successful, because of his/her disability, at demonstrating his/her proficiency on the Regents examinations required for graduation" (id.). The State field advisory further indicated that a superintendent "must ensure that every student with a disability who d[id] not meet the graduation

¹³ The April 2016 CSE meeting minutes reflected that the student was now "[w]orking toward" a Career Development and Occupational Standards (CDOS) credential (Dist. Ex. 29 at p. 1; see Tr. p. 194).

standards through the existing appeal and safety net options [was] considered for the Superintendent Determination" of graduation with a local diploma, and the "determination d[id] not need to be formally requested by the student or parent" (*id.* at p. 2; *but cf.* "Superintendent Determination of Graduation with a Local Diploma-UPDATED," at p. 1, Office of Special Educ. Mem. [Feb. 2017], available at <http://www.p12.nysed.gov/specialed/publications/2017-memos/documents/superintendent-determination-of-graduation-with-a-local-diploma-updated.pdf> [requiring that, after the effective date of the "revised rule" on October 18, 2016, a superintendent "may only make a determination whether an eligible student ha[d] met the requirements for graduation through the superintendent determination option upon receipt of a written request from an eligible student's parent or guardian"] [emphasis in original]).

On June 16, 2016, a CSE convened for a "Requested Review" (Dist. Ex. 34 at p. 1; *see* Dist. Exs. 32 at pp. 1-2; *see also* Dist. 29 at p. 1; *see generally* Dist. Exs. 33-36). At this meeting, the CSE "[e]xplained the new appeal process for graduation" and created a "pros and cons" chart to explore the differences between earning a "[d]iploma" and the student's current program (Dist. Ex. 34 at pp. 3-4; *see* Tr. p. 840). The CSE meeting minutes indicated that the parent—who attended the June 2016 CSE meeting with the student—was "[r]esistant to [the student] leaving [high school without] life skills," but acknowledged that the student "missed many of the opportunities at [her current BOCES' program] due to absences" (Dist. Ex. 34 at p. 3). The CSE meeting minutes also indicated that the parent "believe[d] [the BOCES' consultant] would have helped immensely" (*id.*). In response, the BOCES' principal and the student's then-current teacher at BOCES explained to the parent that they "use[d] strategies suggested" by the BOCES' consultant; in addition, the district CSE chairperson explained to the parent the BOCES' consultant's "role w[ith] families and staff" (*id.*; *see* Tr. pp. 201-02; Dist. Ex. 35).¹⁴ According to the CSE meeting minutes, the district CSE chairperson also "offered to try to get [the BOCES' consultant] to join [them]," but the parent "refused" the consultant's participation and added, "it wouldn't help" (Dist. Ex. 34 at p. 3).¹⁵

By the conclusion of the 2015-16 school year, the student had been absent a total of approximately 103 school days from September 2015 through June 2016 (*see* Parent Ex. 15). The evidence in the hearing record reveals that, in the 2015-16 school year, the student passed all of her courses and earned a total of 4.0 credits (*see* Parent Ex. 33). Pursuant to the June 2016

¹⁴ At the impartial hearing, the district CSE chairperson testified that, based upon her own understanding, the BOCES' consultant primarily "support[ed] teachers, related service providers, with strategies and other educational pieces to support students in the classroom" (Tr. p. 860). The parent testified that she understood the BOCES' consultant "provided consultation and would advise on additional supportive measures, program needs, [and] could give advisement specifically for students with autism and program supports that might be beneficial" (Tr. p. 891). The parent also testified that she requested a consultation for the student's program—by the BOCES' consultant—at the April 2016 CSE meeting (Tr. pp. 897-98, 904). In addition, the parent testified that she was "frustrated" that the BOCES' consultant did not attend the June 2016 CSE meeting, as she believed a BOCES' school psychologist (who provided counseling to the student during the 2015-16 school year) also thought the student would "benefit" from the BOCES' consultant's involvement (Tr. pp. 904-05, 907-09; *see* Tr. p. 95).

¹⁵ At the impartial hearing, the parent explained that she refused the district CSE chairperson's offer because the chairperson wanted to "set up a phone conference on her own" and the parent wanted a "face-to-face meeting with everyone so there weren't prior conversations going on about involvement and need" (Tr. pp. 908-09).

amendment to State regulations described above, the district superintendent in this case determined that the student met the requirements for graduation with a local diploma on or about June 23, 2016 (compare "Superintendent Determination of Graduation with a Local Diploma," at pp. 1-3, with IHO Ex. 2 at pp. 4-20, and Parent Ex. 33). Notwithstanding the district superintendent's determination about the student's graduation, however, the district proceeded to provide the student with special education and related services during summer 2016 to "help with transition" given the "short notice" related to the new regulation imposed for graduating with a local diploma (see Tr. pp. 108-09, 112, 114-23, 738-39, 742-70; Dist. Exs. 37; 40 at p. 1; see generally Parent Exs. 41-45).

On July 13, 2016, district staff contacted the parent via email (see Parent Ex. 41). The district staff indicated that the district CSE chairperson would also contact her regarding "setting up a CSE meeting to discuss [the student's] transition to post-secondary outcomes" (id.). Additionally, district staff advised that, "due to [the] lack of a provider," the district could not provide speech-language therapy services recommended in student's IEP and the student's IEP required an amendment to reflect "this circumstance" (id.). In an email dated July 15, 2016, the district CSE chairperson contacted the parent (see Parent Ex. 42). The chairperson indicated that, since the student could receive summer 2016 services, the district "need[ed] to add summer school back to [the student's] IEP" and suggested July 26, 2016 as a date for the CSE meeting (id.). The parent responded to the district CSE chairperson's email on July 23, 2016 (see Parent Ex. 44). The parent indicated she was "not available" for a CSE meeting on July 26, 2016 (id.). The parent also noted that both the April 2016 and June 2016 IEPs included summer 2016 services, and questioned the need to "add it back" as a reason to convene a CSE meeting (id.). Finally, the parent indicated that she would "check the availability of [the student's] service coordinators" in order to set up the "August 9 transition meeting date" (id.).

On July 26, 2016, a CSE convened—without the parent in attendance—and amended the student's IEP by removing the recommendation for speech-language therapy services during summer 2016 (see Dist. Exs. 38 at p. 8; 40 at p. 1; 41).

In an email dated July 26, 2016, the parent contacted the BOCES' consultant and questioned whether the district "ever reached out to [her] regarding [her] future consultant services" for the student (Dist. Ex. 53 at p. 2). The parent noted that further "discussions" had taken place at "meetings about [her] involvement concerning written requests from the school psychologist, as well as [her]self, wanting [the BOCES' consultant's] expertise and adding IEP services" for the student (id.).

Responding to the parent's email in an email dated August 8, 2016, the BOCES' consultant noted that she had been in contact with district staff to "get an update" on the student's program "since [they] all last spoke" (Dist. Ex. 53 at p. 1). The BOCES' consultant provided the parent with the same information she provided to district staff concerning her future involvement with the student's program (id.). Significantly, the BOCES' consultant indicated that, because the student was "nearing graduation" and she had not worked with the student "in the past," she did not "feel that [her] involvement would be necessarily beneficial" (id.). The BOCES' consultant also noted that she did not "do 'evaluations' or transition services for students nearing the post-secondary stages of their education" (id.). In addition, the BOCES' consultant described her "role

[as] more of a 'support' to school district teams [that she] provided through classroom observations, team meetings, and material sharing with an emphasis on early interventions (pre and primary school if possible) through [high school] but typically not for student in . . . BOCES programs" (id. [emphasis in original]). Finally, the BOCES' consultant added that the student's "service provider . . . would be the most beneficial in terms of supporting [the student] through her transition to post-secondary services and programs" (id. at p. 2).

Finally, on August 9, 2016, a CSE convened (see Dist. Ex. 43 at pp. 1-2; see generally Dist. Exs. 47; 49; 51).¹⁶ According to the CSE meeting minutes, the student's "[p]rogram [and] services end[ed]" on August 19, 2016 (Dist. Ex. 45 at p. 1). The August 2016 CSE discussed a variety of topics related to the student's transition to postsecondary services, including but not limited to, independent or supported living, prevocational and "[s]upported [e]mployment," and counseling through Adult Career and Continuing Education Services-Vocational Rehabilitation (ACCES-VR) (see generally Dist. Ex. 45). The CSE meeting minutes reflected that the parent "expressed frustration that [the BOCES' consultant] wasn't invited" to the meeting and that the parent "believe[d] that [the student] ha[d] not been supported w[ith] direct needs for autism" (id. at p. 3; see Tr. p. 861).

A. Due Process Complaint Notice

By due process complaint notice dated August 18, 2016, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2014-15 and 2015-16 school years (see IHO Ex. 1 at pp. 3-4). Generally, the parent asserted that the district failed to engage an "autism specialist" to evaluate the student, participate at CSE meetings, and to assist in the development of the student's IEPs (id. at p. 3). The parent also asserted that the district failed to conduct a functional behavioral assessment (FBA) or create a BIP to address the student's "high absenteeism," which the parent characterized as one of the "manifestations" of her disabilities and which resulted in the student missing "many days of instruction and class work" (id.). In addition, the parent contended that the district's failure to conduct an FBA and develop a BIP affected the student's "postsecondary efforts in employment, accessing adult services and further education" because all require "consistent and reliable attendance" (id.).

Turning more specifically to the 2014-15 school year, the parent alleged that the student failed to make progress on her annual goals "due to her absences," and the district failed to hold any CSE meetings to modify the student's IEP to enable the student to make progress (IHO Ex. 1 at p. 4). The parent also alleged that the district failed to provide for "adequate transition planning" (id.). Specifically, the parent asserted that the student's IEP failed to include "measurable postsecondary goals" (id.).

With regard to the 2015-16 school year, the parent asserted that the district failed to offer the student an "appropriate placement" and failed to provide the student with a 12-month school year program (IHO Ex. 1 at p. 3). The parent also asserted that the BOCES' program location for the 2015-16 school year was not appropriate to meet the student's "need and abilities and transition

¹⁶ The parent, the student, and the parent's attorney attended the August 2016 CSE meeting (see Dist. Ex. 46).

goals" and could not provide the student with instruction, work experience, or field trips "related to her goal" to work with animals (*id.*). Next, the parent asserted that the BOCES' program location for the 2015-16 school year could not provide the student with the "structured educational environment, predictable routines, clear and concise rules and minimal distractions" as required by her IEP (*id.* at p. 4). Additionally, the parent alleged that the BOCES' program location for the 2015-16 school year could not properly redirect the student and failed to adequately supervise the student (*id.*).

Similar to the 2014-15 school year, the parent contended that, for the 2015-16 school year, the student failed to make progress on her annual goals "due to her absences," and the district failed to hold any CSE meetings to modify the student's IEP to enable the student to make progress (IHO Ex. 1 at p. 4). The parent also alleged that the district failed to provide for "adequate transition planning" (*id.*). Specifically, the parent asserted that the student's IEP failed to include "measurable postsecondary goals" (*id.*). The parent further indicated that the student did not meet those goals due to the "lack of rigorous instruction" in mathematics and English provided at the BOCES' program location for the 2015-16 school year (*id.*). Relatedly, the parent alleged that the BOCES' program location for the 2015-16 school year failed to "provide any field trips or other experience with group home living or independent living skills" to enable the student to meet a "goal to . . . live independently" (*id.*).

Finally, the parent alleged that the CSE convened in July 2016—without the parent in attendance—and removed the recommendation for speech-language therapy services during summer 2016 because no provider was available (*see* IHO Ex. 1 at p. 4). The parent further alleged that the district failed to reschedule the meeting even though she advised the district she could not attend the meeting (*id.*).

As relief, the parent requested that the student receive "compensatory education and services" (IHO Ex. 1 at p. 3). The parent specified that the student should receive "special education and related services" in a 12:1+1 special class placement (*id.*). The parent also requested that the student receive individual speech-language therapy and counseling services, as well as counseling services in a small group, a 12-month school year program, "testing accommodations, an evaluation by the Autism Consultant, and additional supplementary aids and services" to meet the student's needs (*id.*).

B. Impartial Hearing Officer Decision

On September 30, 2016, the IHO conducted a "telephone conference," at which time the issue of the student's pendency (stay-put) placement arose (IHO Ex. 5 at p. 1; *see generally* IHO

Exs. 2-4).^{17, 18} Thereafter, on December 15, 2016, the parties proceeded to an impartial hearing, which concluded on March 31, 2017, after seven days of proceedings (see Tr. pp. 1-966). In a decision dated August 18, 2017, the IHO determined that the district failed to offer the student a FAPE for the 2014-15 and 2015-16 school years (see IHO Decision at pp. 9-15). To reach this determination for both school years, the IHO found that the district failed to conduct two evaluations: first, an evaluation by an "autism specialist," and second, an FBA by a "behavioral specialist" (*id.* at pp. 9-14). With regard to the needed evaluation by an "autism specialist," the IHO explained that the parent's request for an "Autism Consultant" to meet with the student "never materialized"; consequently, the IHO found that the district failure to "formally employ the services of the requested autism consultant denied the [p]arent participation in the process" (*id.* at pp. 10-11). With regard to the needed FBA by a "behavioral specialist," the IHO explained that, while the district "implemented many strategies to try to address the [s]tudent's absences," the district's failure to undertake a "formal evaluation that could potentially have offered insight into the [s]tudent's interfering behaviors . . . denied the [p]arent [the] opportunity to participate in a meaningful way or make decisions regarding the IEP" (*id.* at pp. 13-14).

In addition to the absence of evaluative information, the IHO found that the district failed to provide the student with "adequate transition planning" in light of the student's largely unanticipated graduation date (IHO Decision at pp. 14-15). The IHO also linked the district's failure to "establish a viable transition plan" to the district's failure to address the student's "school refusal[] problem" (*id.* at p. 14). Concluding that the aforementioned violations resulted in a failure to offer the student a FAPE, the IHO "dispense[d] with the remaining issues in the [due process complaint notice]" and turned to crafting a remedy consisting of compensatory educational services (*id.* at p. 15).

After reciting the relevant legal authority as guidance for fashioning relief, the IHO noted the need to rely upon his own "judgement" because the parent failed to "provide clear evidence for what compensatory education the [s]tudent c[ould] use and benefit from" (IHO Decision at pp. 15-

¹⁷ In an interim order on pendency, dated October 14, 2016, the IHO concluded that, since the student's graduation on "August 19, 2016" postdated the parent's due process complaint notice of August 18, 2016, the student was entitled to pendency services and ordered the district to "implement pendency forthwith" (IHO Ex. 5 at pp. 2-4). As neither party appealed the IHO's interim order on pendency, the IHO's determination has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see *M.Z. v. New York City Dep't of Educ.*, 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). In addition, although the district superintendent determined that the student earned a local diploma on or about June 23, 2016 and the IHO found in the pendency order that the student graduated on "August 19, 2016," neither party disputes that the student met the requirements to graduate with a local diploma based upon the process set forth in the new regulation described in the June 2016 field advisory (*compare* IHO Ex. 5 at p. 4, *with* IHO Ex. 4 at pp. 5-6).

¹⁸ To the extent that the September 30, 2016 "telephone conference" constituted a prehearing conference, State regulations require that, when the IHO conducts a prehearing conference, a "transcript or written summary of the prehearing conference shall be entered into the record by" the IHO (8 NYCRR 200.5[j][3][xi]). No such transcript or written summary was included in the hearing record transmitted to the Office of State Review.

18).¹⁹ As such, the IHO ordered the district to conduct an updated "functional vocational evaluation by a provider of the [s]tudent's choice" in order to assist the student's "movement from school to post-school activities, including post-secondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation" (*id.* at p. 18). Next, the IHO ordered the district to conduct an FBA and to develop a BIP, if needed (*id.*). The IHO also ordered the district to enlist the services of a Board Certified Behavior Analyst (BCBA) "who work[ed] with autism"—and as selected by the student—to conduct the evaluation (*id.*). The IHO further clarified that the "context of the evaluation and plan" was to "promote movement from school to post-school activities, including post-secondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation" (*id.*). Next, the IHO ordered the district to provide the student with a "bank of ninety-six (96) hours of consultant services to be delivered by a BCBA who work[ed] with autism" and as selected by the student (*id.* at pp. 18-19). The IHO ordered the consultant services to "teach the [s]tudent, [p]arent, employers, [and] instructors skills for managing the [s]tudent's behavior and to train said persons to help the [s]tudent utilize instruction as it relate[d] to community experiences, the development of employment and other post-school adult living objectives and if appropriate, acquisition of daily living skills" (*id.*). Finally, the IHO ordered the district to fund the "services and evaluations" awarded and that the "services and evaluations" must be completed within "24 months of the date of this order" or be forfeited (*id.* at p. 19).

IV. Appeal for State-Level Review

The district appeals, and argues that the IHO erred in finding that it failed to offer the student a FAPE for the 2014-15 and 2015-16 school years. The district contends that the evidence in the hearing record does not support the IHO's determination that the district's failure to "formally evaluate the [s]tudent significantly impeded the [p]arent's right to participate in making decisions about the [s]tudent's IEP." Next, the district argues that the IHO erred in finding that it failed to offer the student a FAPE based upon the absence of an FBA of the student. The district also argues that the IHO erred in concluding that the district failed to provide adequate transition services and incorrectly tied this finding to the district's alleged failure to address the student's absenteeism.

¹⁹ Contrary to the IHO's statement, the parent—in addition to requesting specific relief in the due process complaint notice—further refined the following as the relief she sought in a memorandum of law submitted to the IHO at the conclusion of the impartial hearing: order the matter remanded to the district to convene within two weeks of the date of the decision, and provide the student with the following as compensatory educational services: placement at a specifically identified BOCES' location for the 2017-18 and 2018-19 school years; conduct an evaluation by an autism specialist to assist with appropriate teaching methods and behavioral interventions to be used with the student; conduct an FBA related to the student's anxiety and autism and develop a BIP with an autism specialist; provide the student with 12 30-minute sessions of speech-language therapy for those services the district failed to provide during summer 2016; and provide a "specific, and measurable transition plan with representatives from appropriate adult services agencies, including, but not limited to, [ACCES-VR] and [a local] ARC" (IHO Ex. 6 at pp. 24-25).

Alternatively, the district contends that, even if the district failed to offer the student a FAPE for both school years, the student was not entitled to compensatory educational services absent the IHO finding a gross violation of the IDEA. Similarly, the district argues that, even if it failed to offer the student a FAPE for both school years and committed a gross violation of the IDEA, no further relief is warranted as the student received six months of compensatory educational services through pendency. The district also argues that the IHO—in ordering an FBA and the development of a BIP, if necessary, and BCBA consultant services—lacked jurisdiction over the entities directed to use the BIP and BCBA consultant services. As such, the district seeks to annul the IHO's decision in its entirety.²⁰

In an answer, the parent responds to the district's allegations and generally argues to uphold the IHO's decision in its entirety.²¹

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 by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. 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]).

²⁰ While seeking to annul the IHO's decision in its entirety, the district takes no position concerning the IHO's order directing the district to conduct an "updated functional vocational evaluation" of the student by a provider selected by the student (compare Req. for Rev. at pp. 2-9, with IHO Decision at p. 18). The district's accompanying memorandum of law offers no further insight (see generally Dist. Memo. of Law).

²¹ As noted previously, the parent requested 12 30-minute sessions of speech-language therapy services as relief for the district's failure to provide speech-language therapy services to the student "during the 2016 summer session" (IHO Ex. 6 at pp. 24-25). As a remedy for the district's failure to offer the student a FAPE for the 2014-15 and 2015-16 school years, the IHO did not, however, grant this relief as requested by the parent (compare IHO Ex. 6 at pp. 24-25, with IHO Decision at pp. 18-19). Although aggrieved by the IHO's failure to award speech-language therapy services, the parent did not cross-appeal this, or any, portion of the IHO's decision (see generally Answer). Since the parent did not challenge the IHO's failure to award the requested speech-language therapy services related to summer 2016, this determination has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z., 2013 WL 1314992, at *6-*7, *10).

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 least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

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

needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).²²

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

The district initially contends on appeal that the IHO erred in finding that the student was entitled to an award of compensatory educational services because the IHO applied the wrong legal standard to arrive at this conclusion.

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education may be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). In New York State, a student who is otherwise eligible as a student with a disability, may continue to obtain services under the IDEA until he or she receives either a local or Regents high school diploma (34 CFR 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]; Application of the Bd. of Educ., Appeal No. 05-084; Application of the Bd. of Educ., Appeal No. 05-037), or until the conclusion of the 10-month school year in which he or she turns age 21 (Educ. Law §§ 3202[1], 4401[1], 4402[5][b];²³ 8 NYCRR 100.9[e], 200.1[zz]; see 34 CFR 300.102[a][1], [a][3][ii]; Application of a Child with a Disability, Appeal No. 04-100). The Second Circuit has held that compensatory educational services may only be awarded to a student who is no longer eligible for special education by reason of age or graduation where the district has 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. Nov. 3, 2011]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2, 113 n.6 [2d Cir. 2008]; Garro v. State of Conn., 23 F.3d 734, 737 [2d Cir. 1994],

²² 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).

²³ If a student with a disability who reaches age 21 during the period commencing July 1st and ending on August 31st and if he or she is otherwise eligible, the student shall be entitled to continue in a July and August program until August 31st or until the termination of the summer program, whichever shall first occur (Educ. Law § 4402[5][a]).

citing Burr v. Sobol, 888 F.2d 258 [2d Cir. 1989], aff'g prior holding in Burr v. Ambach, 863 F.2d 1071 [2d Cir. 1988]; Mrs. C. v. Wheaton, 916 F.2d 69, 75 [2d Cir. 1990]).²⁴

In this instance, the student graduated from high school with a local diploma and, consequently, was no longer statutorily eligible for special education programs or related services. And as noted previously, neither party disputes that the student met the requirements to graduate with a local diploma based upon the process set forth in the June 2016 field advisory. Given the fact that graduation and receipt of a high school diploma are generally considered to be evidence of educational benefit (Pascoe v. Washington Cent. Sch. Dist., 1998 WL 684583, at *4, *6 [S.D.N.Y. Sept. 29, 1998]; see also Rowley, 458 U.S. at 207 n.28; Walczak, 142 F.3d at 130), the receipt of which terminates a student's entitlement to a FAPE (34 CFR 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]; 200.4[i]), when taken together with the Second Circuit's standard requiring a gross violation of the IDEA during the student's period of eligibility (see Garro, 23 F.3d at 737; Mrs. C., 916 F.2d at 75), it is a rare case where a student will graduate with a high school diploma and yet still qualify for an award of compensatory educational services (see, e.g., Application of a Student with a Disability, Appeal No. 16-079; Application of a Student with a Disability, Appeal No. 13-215; Application of a Student with a Disability, Appeal No. 13-110; Application of a Student with a Disability, Appeal No. 11-159). In this case, although the IHO recited the Second Circuit's gross violation standard, the IHO did not apply this standard—and wholly ignored the fact that the student earned a local diploma—to determine whether the student was entitled to an award of compensatory educational services to remedy the district's purported violations of the IDEA during the 2014-15 and 2015-16 school years (see IHO Decision at pp. 15-19).

Even putting aside the gross violation standard applicable to the facts of this case, a review of the district's failures during the 2014-15 and 2015-16 school years, the services the student actually received during that period, and the student's achievements—due in no small part to the

²⁴ In addition, compensatory education may be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). Within the Second Circuit, compensatory education relief in the form of supplemental special education or related services has been awarded to such students if there has been a denial of a FAPE (see Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *23 [E.D.N.Y. Oct. 30, 2008] [finding that compensatory education may be awarded to students under the age of 21]; see generally R.C. v. Bd. of Educ. of Hyde Park Cent. Sch. Dist., 2008 WL 9731053, at *12-*13 [S.D.N.Y. Mar. 6, 2008], adopted, 2008 WL 9731174 [S.D.N.Y. July 7, 2008]). SROs have awarded compensatory "additional services" to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]; see, e.g., Application of a Student with a Disability, Appeal No. 09-111 [adding summer reading instruction to an additional services award]; Application of the Bd. of Educ., Appeal No. 09-054 [awarding additional instructional services to remedy a deprivation of instruction]; Application of a Student with a Disability, Appeal No. 09-044 [awarding "make-up" counseling services to remedy the deprivation of such services]; Application of a Student with a Disability, Appeal No. 09-035 [awarding 1:1 reading instruction as compensation for a deprivation of a FAPE]).

district's efforts to accommodate the student's absenteeism, as well as the student's own efforts to make up missed work—shows that the student benefitted from instruction to the extent that an award of compensatory educational services would not be an appropriate form of relief.²⁵

Next, assuming for the sake of argument that the IHO properly concluded that the failure to conduct an "autism evaluation" and failure to conduct an FBA of the student constituted procedural inadequacies, as explained more fully below, the hearing record fails to contain sufficient evidence to support the IHO's conclusion that these procedural violations significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student rising to the level of a failure to offer the student a FAPE (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). More importantly, the hearing record is devoid of evidence to support the conclusion that these procedural violations—either alone, or cumulatively, together with the failure to provide the student with adequate transition services—resulted in a gross violation of the IDEA during the student's period of eligibility in the 2014-15 and 2015-16 school year, entitling the student to compensatory educational services as relief (see Garro, 23 F.3d at 737; Mrs. C., 916 F.2d at 75; see generally Tr. pp. 1-966; Parent Exs.10-18; 20; 25; 27; 33-35; 38-42; 44-45; Dist. Exs. 1-17; 19-49; 51; 53-58;

²⁵ The purpose of an award of compensatory educational services or additional services is to provide an appropriate remedy for a denial of a FAPE (see E. Lyme Bd. of Educ., 790 F.3d at 456; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994] [holding that "[a]ppropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA"). Accordingly, an award of additional services should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; S.A. v. New York City Dep't of Educ., 2014 WL 1311761, at *7 [E.D.N.Y. Mar. 30, 2014] [noting that compensatory education "serves to compensate a student who was actually educated under an inadequate IEP and to catch-up the student to where he [or she] should have been absent the denial of a FAPE"] [internal quotations and citation omitted]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. 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"]; Puyallup, 31 F.3d at 1497 [finding "[t]here is no obligation to provide a day-for-day compensation for time missed"]).

60; IHO Exs. 1-7).²⁶ Based upon the IHO's failure to apply the appropriate legal standard, the IHO's determinations that the district failed to offer the student a FAPE for the 2014-15 and 2015-16 school years must be reversed.

B. CSE Process—Evaluative Information

Turning to the district's challenge to the IHO's determination that the district failed to conduct two necessary evaluations, federal and State regulations require that a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree, and must conduct one at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). 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, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

In this case, the focus of any analysis regarding whether the district offered the student a FAPE for the school years at issue must take into consideration the student's significant absenteeism. In finding that the district failed to conduct an autism evaluation of the student, the IHO linked the absence of any "direct observation" of the student to the district's inability to manage the student's "difficulties," namely, her absenteeism (IHO Decision at pp. 9-11). The district argues that the evidence in the hearing record does not support the IHO's determination that the district's failure to "formally evaluate the [s]tudent significantly impeded the [p]arent's right to participate in making decisions about the [s]tudent's IEP." In arguing this point, the district contends that the IHO's finding ignored evidence of the autism evaluation conducted in May 2014,

²⁶ The parent points to the IHO's alleged determination in what can generously be described extensive footnote after the signature of the IHO's decision, finding that the student demonstrated regression during this period of eligibility and, thus, determined that the district committed a gross violation of the IDEA; however, the parent's argument is not persuasive (see IHO Decision at p. 20 fn.i [heading of "Placement"]). The IHO used unsound logic related to IEP planning in order to reach the conclusion that the student had substantially regressed. The comparison of the annual goals cited by the IHO as evidence of regression is insufficient to establish the student's loss of skill over time, particularly given the evidence in the hearing record, discussed below, which shows that the student made progress during the relevant school years. This is not evidence of loss of skills learned previously.

and further ignored evidence that the district implemented suggestions made by the BOCES' consultant to address the student's absenteeism. As the district correctly asserts, the IHO's analysis appears to overlook, and certainly does not consider, that the district did conduct an autism evaluation of the student in May 2014 (id.).

As noted previously, a consultant "affiliated" with BOCES (evaluator) administered the Autism Diagnostic Observation Schedule-Second Edition (ADOS-2) to the student in May 2014 (Dist. Ex. 58 at pp. 1-2; see Tr. pp. 378-79 [describing the same individual as an "autism evaluator"]). In the May 2014 evaluation report, the evaluator described the ADOS-2 as a "semi-structured, standardized assessment of communication, social interaction, play/imaginative use of materials, and restricted and repetitive behaviors for individuals who have been referred because of possible Autism Spectrum Disorder (ASD)" (Dist. Ex. 58 at pp. 1-2). Based primarily on the student's "expressive language skills" and, "secondarily," on her "chronological age," the evaluator selected the "Module 4" form of the ADOS-2 as the "most appropriate" to assess the student (id. at p. 2). The evaluator noted that Module 4 was "designed for use with older adolescents and adults who ha[d] fluent language skills, and who may have [had] some level of independence regarding making every day choices" (id.). Module 4 included a "Communication portion," which assessed the student's use of "Stereotyped/Idiosyncratic Use of Words or Phrases"; "Conversation"; "Descriptive, Conventional, Instrumental, or Informational Gestures"; and "Emphatic or Emotional Gestures" (id. at pp. 4-5). Module 4 also included a "Reciprocal Social Interaction section" to assess the student's "Unusual Eye Contact," "Facial Expressions Directed to Examiner," "Comments on Others' Emotions/Empathy," "Responsibility," "Quality of Social Overtures," "Quality of Social Response," and "Amount of Reciprocal Social Communication" (id. at p. 5). Based upon the results of the Module 4 portion of the ADOS-2, the evaluator found that the student's scores in each area "met or exceeded all scoring criteria to receive an ADOS-2 classification of Autism or Autism Spectrum" (id. at p. 5).

Next, the May 2014 evaluation report reflected the results of the parent's responses to the "Social Communication Questionnaire" (SCQ), as well as the parent's and the student's then-current teacher's responses to the "Asperger Syndrome Diagnostic Scale" (ASDS) as part of the evaluation process (Dist. Ex. 58 at pp. 1-2, 5-6). The SCQ was described as a "rating scale that look[ed] at behaviors relating to an ASD" (id. at p. 2). Here, the parent's responses resulted in a "Total Score" of 24, which exceeded the "cut-off [score] of 15 [and were] usually considered significant and a positive screen for ASD" (id. at p. 5). The parent further reported that she "could not have a to and fro conversation with [the student]" because the student used "odd phrases or sa[id] the same thing over and over in almost exactly the same way" (id.). The parent also reported that the student's "facial expressions d[id] not seem appropriate at times," the student had "interests that preoccup[ied] her and [were] unusual in their intensity," and the student had "deliberately hurt herself" (id.). With regard to the student's functioning as a four- to five-year-old, the parent reported that she did not "talk to others just to be friendly," and she did not demonstrate "good eye contact or a range of facial expressions" (id.). However, the parent also reported that, as a younger child, the student used "gestures," she had "friends," she showed an interest in "other things" and would "comfort others if they were sad or hurt," and she engaged in "some pretend play or make believe games" (id.).

According to the May 2014 evaluation report, the ASDS was used to assess students "aged 5 through 18 years who may manifest the characteristics of Asperger Syndrome" (Dist. Ex. 58 at p. 2). The parent's ratings on the ASDS resulted in an "Asperger Syndrome Quotient of 128," in the "Very Likely" range of the "Probability of Asperger Syndrome" scale (*id.* at p. 5). The parent's ASDA scoring "validated all 9 symptoms from the Language subscale," "all 13 characteristics from the Social subscale," "9 of the 11 Maladaptive behaviors," "all 10 of the Cognitive characteristics," and "6 out of the 7 Sensorimotor symptoms" (*id.* at pp. 5-6). The parent further indicated that the student's "unusual behaviors began around 5 months of age, and that the behaviors occur[red] in all settings" (*id.* at p. 6).

In contrast to the parent's ratings, the ratings reported by the student's then-current teacher reflected an "Asperger Syndrome Quotient of 77," in the "Unlikely" range of "Probability of Asperger Syndrome" (*compare* Dist. Ex. 58 at p. 5, *with* Dist. Ex. 58 at p. 6). However, the student's then-current teacher also reported observing the student exhibit the following behaviors: "talking excessively about a favorite topic that h[e]ld[] no interest for others," "interpret[ing] conversations literally," having "difficulty in beginning and continuing a conversation," "avoid[ing] or limit[ing] eye contact," having "difficulty in relating to others," "not respect[ing] others' personal space," having "difficulty understanding social cues," an inability to "change her behavior to match the environment," and "display[ing] anti-social behavior" or "immature" behavior (*id.*). According to the student's then-current teacher, at that time, the student functioned "best when engaged in familiar and repeated tasks," and she demonstrated an "excellent rote memory," but she lacked "organizational skills and common sense" (*id.*).

Based upon all the information provided, the results of the Module 4 of the ADOS-2, ratings from the SCQ and the ASDS, history provided by the parent, as well as the evaluator's interactions with the student, the evaluator concluded that "it would be appropriate to view [the student] as an individual with an Autism Spectrum Disorder" (Dist. Ex. 58 at p. 6).²⁷ The evaluation report also included "very general recommendations . . . with the understanding that they may have been tried in the past or [were] currently in use" and that, as "with any new technique or strategy, it [was] important to implement only one at a time so as to determine its efficacy" (*id.* at p. 7). The recommendations included references to attached handouts related to pragmatic language and internet websites that provided visuals and social stories, as well as videos, to address social skills (*id.*). Recommended resources also related to the changes the student would experience as she aged—such as a social skills training guide for teaching assertiveness, relationship skills and sexual awareness, a guide for transitioning to adulthood for those with

²⁷ While the evaluator indicated that it would be appropriate to view the student as "an individual with an Autism Spectrum Disorder," the evaluator also indicated that the ADOS-2 was "only one component of a full diagnostic evaluation for ASD," noting that it was "important to distinguish between an ADOS-2 classification and an overall clinical diagnosis" (Dist. Ex. 58 at p. 6 [emphasis in original]). The evaluator further indicated that the "ADOS-2 classification should always be considered in the context of a full evaluation, and should never be used in isolation to determine an individual's clinical diagnosis or eligibility for services" (*id.*).

Autism and Asperger Syndrome—as well as contact information for outside agencies that worked with students in her age bracket (id. at pp. 7-8; see Parent Ex. 17 at pp. 9-47).²⁸

The evidence in the hearing record also reflects that—while not considered by the IHO in the decision—upon receiving the May 2014 evaluation report within one to two months of the assessment, the BOCES' school psychologist spoke to the parent "on the phone about the report" and provided the parent with a copy of the report (see Tr. pp. 383-84; see also Tr. pp. 235-36, 379, 383). The evidence in the hearing record further reveals that, while the May 2014 evaluation report was not available to discuss at the student's annual review held in May 2014, the May 2014 evaluation report was discussed at the student's subsequent annual reviews held in May 2015 and April 2016 (see Tr. pp. 260-62, 379-83, 385; see generally Dist. Ex. 58). Thus the IHO's determination that the district committed a procedural violation due to the lack of an autism evaluation was unsound as he overlooked the May 2014 evaluation conducted by the district in his decision.

Turning to the next aspect of the IHO's finding—that the lack of an autism evaluation significantly impeded the parent's participation in the development of the student's IEP—such finding is also very tenuous when considering the entirety of the circumstances. It appears that the IHO focused the inquiry about an "Autism Consultant"—and the district's related failure to conduct an "evaluation by an autism specialist"—by primarily relying upon two factors identified by the IHO, rather than the aforementioned evidence: namely, that the parent's "request to have an Autism Consultant meet with the [s]tudent never materialized" despite making such a request at the April 2016 CSE meeting, and the hearing record contains "written requests for input from an autism specialist" (IHO Decision at pp. 10-11 [citing Tr. pp. 265, 891-92, 899-905; Dist. Ex. 53 at p. 2]).²⁹ Here, even though BOCES' staff initially broached the idea of engaging the BOCES' consultant as a result of the consultant's voluntarily offering suggestions regarding the student's absenteeism during the 2015-16 school year in or around October 2015, neither the district staff, BOCES' staff, or the parent pressed this issue until all parties became aware in June 2016 that the student would potentially be graduating as the result of new regulatory changes (see, e.g., Parent Exs. 34 at pp. 1-3; 35 [noting that the parent intended to request a CSE meeting for "mid to late January to revisit attendance" with the BOCES' consultant]; 39 at p. 1 [relaying parent's conversation with district staff to "discuss inviting" the BOCES' consultant to the April 2016 CSE meeting]; 40 at p. 1 [reflecting that district staff and BOCES' staff wanted to "have the meeting before making any decisions" about the consultant's involvement, the consultant's inability to attend any meeting scheduled for April or May, and the parent's response]; compare Dist. Ex. 29 at pp. 1-2, with Dist. Ex. 34 at p. 3 [reflecting June 2016 CSE meeting minutes wherein parent

²⁸ At the time of the May 2014 evaluation, the student was not exhibiting excessive absenteeism and, accordingly, the evaluator's recommendations did not address the student's attendance (see Dist. Ex. 58 at pp. 7-8; see also Tr. p. 68).

²⁹ Given that the IHO confined his analysis of this issue to the 2015-16 school year, it is unclear how any failure to enlist the services of an "autism specialist" or the alleged failure to conduct an "evaluation by an autism specialist" during the 2015-16 school year could contribute to the IHO's conclusion that the district failed to offer the student a FAPE for the 2014-15 school year (see IHO Decision at pp. 10-11, 15).

raised the issue of the BOCES' consultant]). In addition, even when contemplated as a resource upon which the CSE could rely to address the student's needs, no party ever indicated an intent to have the BOCES' consultant conduct a formal evaluation of the student (see generally Tr. pp. 1-966; Parent Exs.10-18; 20; 25; 27; 33-35; 38-42; 44-45; Dist. Exs. 1-17; 19-49; 51; 53-58; 60; IHO Exs. 1-7).³⁰ Based upon the evidence it appears that, after October 2015, all parties involved—including the BOCES' consultant—remained satisfied with the status quo of potentially engaging the consultant, and contrary to the IHO's finding, the hearing record does not include any evidence that the failure to enlist the consultant's services during the 2015-16 school year significantly impeded the parent's opportunity to participate in the development of the student's IEP in either the April 2016, June 2016, July 2016, or August 2016 CSE meetings (see generally Tr. pp. 1-966; Parent Exs.10-18; 20; 25; 27; 33-35; 38-42; 44-45; Dist. Exs. 1-17; 19-49; 51; 53-58; 60; IHO Exs. 1-7).

C. May 2014 IEP and May 2015 IEP

1. Consideration of Special Factors—Interfering Behaviors

Next, the district argues that the IHO erred in finding that it failed to offer the student a FAPE for the 2014-15 and 2015-16 school years because the district failed to conduct an FBA to address the student's absenteeism. The district asserts that the IHO failed to recognize that the student's IEPs addressed her absenteeism, and the district used suggestions made by the BOCES' consultant—and implemented additional strategies—to combat the student's absenteeism, and therefore, the district was not required to conduct an FBA.

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

³⁰ As summarized above, in August 2016, the BOCES' consultant communicated to the parent that she did not "do 'evaluations' or transition services for students nearing the post-secondary stages of their education" and described her role as more of a support for school staff (Dist. Ex. 53 at p. 1).

(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's 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).

Once again, the student's significant absenteeism is the primary focus of this inquiry, together with the district's obligation, if any, to conduct an FBA of the student during the 2014-15 and 2015-16 school years. Initially, there is no dispute that the district did not conduct an FBA of the student. Rather, the evidence presented by the district at the impartial hearing repeatedly emphasized that the district was not required to conduct an FBA—or for that matter, prepare a BIP—because the student did not exhibit any behaviors at school that impeded her learning or that of others (see, e.g., Tr. pp. 518, 715-19, 809-11, 815-17).³¹ The BOCES' school psychologist testified that, generally, an FBA would be conducted in school and "[n]ot typically" in a student's home, but that staff would communicate with a parent "to see what's happening at home" (Tr. pp. 518-19; see Tr. pp. 516-18 [describing generally the function of an FBA and BIP]). When asked to describe the student's behavior at school, the BOCES' school psychologist characterized it as "Exemplary" (Tr. p. 519). The BOCES' principal testified that, based upon her understanding, the student's absenteeism related directly to her "anxiety [about] coming to school" and "attendance was always talked about" at meetings (Tr. pp. 326-28). She also testified that, when the student did return after absences, the student was "fine" and "[y]ou would never know she missed a day," and she socialized, did "what she need[ed] to, [and] ma[de] up the work"; the principal further noted that "we did not see the same things at school that mom saw at home" (Tr. pp. 327-28).

The BOCES' school psychologist who provided services to the student during the 2013-14 and 2014-15 school year testified that the student's anxiety was not "necessarily school related," rather, it was "across the board" and manifested as an "aversion to leaving the house" as opposed to an "aversion to coming to school" (Tr. p. 346; see Tr. pp. 341, 343, 364-66, 378-79, 385). She

³¹ At the impartial hearing, the BOCES' principal explained that the April 2016 CSE decided to reflect in the IEP that the student required "strategies including positive behavioral interventions, supports and other strategies to address behaviors that impede the students' learning or that of others" because "we wanted to implement a contract" with the student as a "strategy" to improve her attendance (Tr. pp. 715-18; see Dist. Ex. 27 at p. 3). She further explained that the April 2016 CSE decided to reflect in the IEP, however, that the student did not require a BIP because "we didn't feel it was behavior, it was anxiety" (Tr. pp. 718-19).

also testified that she did not observe the student as being anxious at school and that an FBA was not warranted for this student because she did not demonstrate "any behaviors at school" (Tr. pp. 338-41; see Tr. p. 323). The school psychologist further testified that a BIP was not developed to "address behaviors that [were] only seen at home" (Tr. pp. 339-40). During the 2015-16 school year, however, the student's anxiety was "triggered" by certain activities at school, such as "[g]reeting customers in the retail store" or when "initiating phone calls," but the student "was able to work through it" with reassurances from adults (Tr. pp. 464-65). The BOCES' school psychologist who provided counseling services to the student in the 2015-16 school year testified that she believed the student's "anxiety" was a "general anxiety"—meaning that she had "trouble leaving the house"—rather than a "school-based" anxiety (Tr. p. 467).

At the impartial hearing, the parent described what a "typical" morning at home looked like for the student on a school day (Tr. pp. 881-82). The parent explained that, on "some mornings," the student would "be ready" but would then "start perseverating about issues that had happened the day before at school" (id.). The parent also indicated that the student would "begin pacing" and could have a "meltdown"—making "[r]edirection" difficult—and that the student could "go into a tantrum because of issues prior, [or] because of the way she was treated" (Tr. p. 882). She also testified that she communicated with the BOCES' school psychologist "numerous times" about her observations of the student's behavior at home and had "numerous phone calls back and forth" (Tr. pp. 882-83).

In addition to communications with the BOCES' school psychologist, the parent testified that she described these observed behaviors at CSE meetings (see Tr. pp. 889-90). While the parent could not recall the specific CSE discussions, she testified that "generally the discussions [were] regarding her meltdowns and her perseverations" and how the student would "talk about or have anxieties or fears over what happened the previous day" (Tr. p. 890). The parent indicated that the student would begin to "get ready [for school]" but because "she kn[ew] the bus [was] coming, . . . she ha[d] an instant reaction of returning" (id.). According to the parent, the student exhibited "multiple reactions" that prevented her from attending school, such as "intestinal" issues occurring "right before the bus" arrived, a "meltdown" not easily redirected, "general anxiety of leaving," or anxiety related to "whatever happened previously the day before" (i.e., "how she was spoken to or misunderstanding of rules" and "how she was supposed to respond to other students or her activities for the day") (Tr. pp. 890-91; see Tr. p. 955). The parent further testified that the student's reactions depended on "what happened" and were "situational," and the student did not "handle pressure very well" (Tr. p. 891). Additionally, if the student engaged in a "meltdown or a tantrum in the morning," the parent explained that it could "throw her off course"—altering her entire day—since the student could not "process as she normally would" and she would need "quiet" and to be approached "differently" (Tr. pp. 954-55). The parent also testified that, at times, the student "needed additional medication to calm down," which could make her "sleepy" and unable to "continue with her day out of the home" (Tr. pp. 955-56).

During cross-examination at the impartial hearing, the parent acknowledged that, based upon information or notes she provided to the district for evaluations of the student or as referenced in the student's IEPs, the student "prefer[red] not to leave the house . . . depending on the situation" (Tr. pp. 925-26). The parent also acknowledged that the student's experience with anxiety was

"not just related to going to school," but was also "related to leaving the house in general" (Tr. p. 926).

The parent recalled that the CSEs "continually discussed attendance issues due to [the student's] anxiety and needs and issues that were not addressed or how they were addressed according to her needs" (Tr. p. 884). With respect to the student's absenteeism during the 2014-15 school year, the parent testified that, based on her own perceptions, the student would "continue to have difficulties related to her autism with the anxiety piece," the student "needed a more structured environment and more precise rules and more intensive supports, [and] predictable expectations" (Tr. pp. 884-86). The parent also testified that, during the 2014-15 school year—and, in particular, at the May 2015 CSE meeting—a "lot of social issues were discussed" but were not addressed in the manner typical "for an autistic student because of the way that [the student] responded with further avoiding" (Tr. pp. 885-89; see Dist. Ex. 21 at p. 1). The parent further testified that at the May 2015 CSE meeting she "request[ed] additional supports geared to [the student's] specific needs," such as "a more precise program" (Tr. pp. 887-88).

Turning more specifically to the information before the disputed May 2014 and May 2015 CSEs regarding the student's absenteeism, initially, the evidence in the hearing record indicates that, during the 2013-14 school year—the school year during which time the May 2014 IEP was developed—the student attended school regularly, missing only approximately nine days from September 2013 through June 2014 (see Parent Ex. 12; see also Tr. pp. 68, 74). Accordingly, there appears no basis in the hearing record to conclude that the May 2014 CSE should have found that the student's behavior impeded her learning or that of others such that an FBA would have been warranted at that time, and the IHO's decision to the contrary must be reversed.

Next, in contrast to the student's regular attendance during the 2013-14 school year, during the 2014-15 school year, the student's attendance record reflects that from September 2014 through January 16, 2015, the student had been absent approximately 25 days (see Parent Ex. 13). Thereafter, the student's attendance dropped precipitously (id.). At the impartial hearing, the BOCES' principal testified regarding some of the interventions used to improve the student's attendance in the 2014-15 school year. For example, the BOCES' school psychologist went to the student's home to "try to get [the student] to come to school," she set up contact with outside agencies (i.e., SPOA) to "get services for [the student] so they could help get her to school," BOCES' and district staff held parent meetings to "brainstorm ideas" and to discuss the student's attendance, and a "staff member" attempted to have a "therapy dog" at school for the student to take care of and as an incentive for the student to come to school (Tr. pp. 217, 218; see also Tr. pp. 78-81; see generally Dist. Ex. 60). However, due to the student's sporadic attendance, they were unable to coordinate a day to get the dog to the school on the same day that the student attended school (see Tr. p. 218). The BOCES' principal also testified that, when the student attended school, they would take her to the "work site" at another BOCES' program location because she "enjoyed going over there" (id.).

The BOCES' principal also testified that, in an effort to get the student to school more often, they set up an internship for the student on a "set day of the week" at the local Humane Society, based on her interest in, and love of, animals (see Tr. pp. 204-07; see also Tr. p. 627). However, if the student was absent on the day she was scheduled to go to the Humane Society, she

did not go to the internship (see Tr. p. 207). Overall, while the BOCES' principal could not recall the exact number of days the student went to the Humane Society, she characterized her "perception" of the student's attendance at the internship as "minimum" (Tr. pp. 207-09). She further explained, however, that "especially for [this student]," BOCES's staff tried to help the student make up the missed sessions and provided her with "extra" opportunities because the student "enjoyed the Humane Society so much" (Tr. pp. 204-08). The BOCES' principal also testified that during the 2014-15 school year, the student toured an animal care program at a local Technical and Career Center, and, while she met the academic requirements to enroll in the program, she was not accepted into the program due to her attendance issues (see Tr. pp. 210-12).

The evidence in the hearing record further reflects that, despite the student's declining attendance in the 2014-15 school year leading up to the May 2015 CSE meeting, she made progress on the annual goals in the May 2014 IEP and passed all of her courses (see generally Dist. Exs. 8-16; Parent Ex. 33). For example, the student's 2014-15 progress report reflected that she achieved her reading annual goal in April 2015, achieved portions of a speech-language annual goal by November 2014 and January 2015, and made gradual or inconsistent progress toward the remainder of her annual goals during that school year (see Dist. Ex. 16 at pp. 1-2). Teacher and therapists' comments reported on the 2014-15 progress report also indicated that, when the student was at school, she had shown "wonderful maturity" working in group situations and was a "good student" who engaged during speech-language therapy (id. at p. 1). The student's counselor for the 2014-15 school year reported that when the student was in school she did "very well" in counseling (id. at p. 2).

Interim progress reports and reports cards issued during the 2014-15 school year included teacher comments indicating, among other things, that the student received lower grades due to missing work, the student had not been able to make up assignments due to frequent absences, her absences affected her progress, her performance did not reflect her potential, and her absences affected her grades (see generally Dist. Exs. 8-9; 11-14).³² However, comments in these same documents also reflected that, when the student did attend school: she was a pleasure to have in class, was attentive during lessons, actively participated in class, and contributed positive input and ideas to class discussions; she took responsibility to make up missed work and successfully completed all missed assignments; she displayed good effort and was a good student; and she made valuable contributions to class discussions in English (see generally Dist. Exs. 8-10; 12; 14-15).

At the impartial hearing, the district witnesses' testimony confirmed that, "despite her poor attendance," the student made "educational progress" during the 2014-15 school year based upon a review of the student's report cards and the progress report (Tr. pp. 84-86; see Dist. Ex. 16 at pp. 1-2). The BOCES' principal testified that she reviewed the student's 2014-15 report cards and, although the student's grades "fluctuated," her grades "improve[d]" and she completed the work for the teachers to grade her" and the student was "making progress" (Tr. pp. 214-15). The principal explained that the student "passed [the] assessments" given to her by her teachers and received

³² For example, comments reported on the student's 2014-15 interim progress report indicated that the student's grades in "Government 12" and "World History and Geography Year 1" classes reflected her "grade[s] based on work completed" (Dist. Ex. 14).

passing grades; furthermore, she testified that "when [the student] was absent she wasn't showing regression" (Tr. pp. 224-25). Based upon a review of the student's 2014-15 progress reports on the annual goals in the May 2014 IEP, the principal testified that the student made progress toward her annual goals "even though she had absences" (Tr. pp. 215-16). She also testified that teachers were required to "keep notes" on the student's "progress" toward her annual goals and, when she met with teachers "every two weeks," the BOCES' principal reviewed the teachers' "charting" on progress (*id.*).

There are relatively few cases that address the question of whether New York's FBA procedures require a district to employ an FBA when the student's behavior in school falls within normal parameters, and concerns manifest only in the home environment. FBAs have been employed as appropriate practice in a variety of circumstances for decades before the regulations defining FBAs were established.³³ With matters such as an anxiety disorder some education professionals may opt to try an FBA as an early step. Others, such as the district personnel in this case would not use an FBA as an early step, if at all. Even fewer cases address the situation in which the student's in which the only behavior is periods of chronic absenteeism interspersed with periods of improved attendance.³⁴ FBAs usually include indirect assessment (i.e. checklists, interviews), direct observational assessment and functional analysis (manipulation of the circumstances thought to contribute to the behavior), and in the circumstances of this case, it is unclear how much data could be successfully collected. For example, even limited manipulation of the home environment by allowing the student to come in late under the attendance was not well tolerated due to other needs that the parent had to address. It is unknown whether the locks on the student's bedroom could be removed to support obtaining direct observational data of the student or further manipulation of the environment when she was engaged in avoidance. I cannot easily find fault in either party and it shows the complexity of the issue in deciding whether to pursue an FBA. The potential breadth of the FBA in this case is not readily apparent, when, as the parent described, the triggers or antecedents of the student's anxiety related behavior appear to be situational—that is they shift depending on the situation and can be hours apart or occur on the day preceding the behavior.³⁵ Anxiety, including forms of school anxiety that manifest in absenteeism, is a multifaceted conundrum and it oversimplifies the matter to presume that FBAs and BIPs are always a required component of any student with an anxiety disorder because the approaches to addressing anxiety vary considerably. Best practices identified by educational professionals thus far recognize school anxiety as a potential source of chronic absenteeism, but

³³ The regulations regarding FBAs and BIPs were needed in no small part encourage the use of positive behavioral interventions before resorting to the use of aversive behavioral interventions for student with disabilities such as electric shock devices, physical restraints, and time out rooms (see e.g., "Amendments to the Regulations of the Commissioner of Education" [June 23, 2006] available at <http://www.p12.nysed.gov/specialed/behavioral/amendments.pdf>).

³⁴ Policymakers have in recent years begun to examine and collect data on the issue of chronic absenteeism, which takes into account absences for all reasons and is described as excused and unexcused absences for ten percent or more of enrolled school days (see "Chronic Absenteeism Reports Now Available in SIRS" [May 2, 2016] available at http://www.p12.nysed.gov/sss/documents/FINALchronicabsenteeismmemo_May2_2-16.pdf).

they neither explicitly include nor exclude assessments like FBAs as a possible tool (see "Chronic Absenteeism Reports Now Available in SIRS" [May 2, 2016] available at http://www.p12.nysed.gov/sss/documents/FINALchronicabsenteeismmemo_May2_2-16.pdf). In summary, it is unclear from the evidence if an FBA would be mandated in this case or whether one would yield sufficient, useful information to assist the student, but assuming one was required, the consequence for not conducting one is addressed next.

Assuming that an FBA was warranted in this instance, the evidence in the hearing record shows that it would not result in a finding that the district denied the student a FAPE, since the IEP addressed the student's absenteeism (see R.E., 694 F.3d at 190). While the May 2015 CSE did not memorialize all of the strategies utilized by the district during the 2014-15 school year, it did acknowledge that the student's absenteeism had become problematic (Dist. Ex. 19 at pp. 3-4). Consistent with the efforts detailed above, the IEP also indicated that "[t]he school ha[d] been in constant contact with home and outside services about [the student] and her struggles" (id.). In addition, the evidence reflects that the May 2015 CSE's decision to change the location of the student's BOCES' program constituted one intervention aimed to improve the student's attendance (see id. at p. 7). According to the BOCES' principal, the May 2015 CSE decided on this "change of location" as another intervention to address, in part, the student's attendance issues, and to also address, in part, the parent's concerns expressed at the meeting that the Regents "exams were a lot of pressure [on the student] and she didn't want to focus on those" (Tr. p. 241; see Tr. pp. 89-90; Dist. Ex. 21 at p. 1 [noting that "[a]nxiety [was] keeping her from passing Regents"]). In addition, the BOCES' principal testified that the student had already been to this new location as a "work site," which she "enjoyed"; therefore, the May 2015 CSE decided to change the location of the student's program to "focus on some careers" and "change some things up, . . . [to] get [the student] some career goals, more job opportunity, [and] more transition skills" so the student could be employed when she graduated (Tr. p. 241). The May 2015 CSE also determined that the student could start her program at this new location before the end of the 2014-15 school year (see Tr. pp. 241-42).

Moreover, while the evidence in the hearing record does not precisely link the description of the skills on which the student worked pursuant to the IEP with her absenteeism—and, in particular, skills worked on in her related services—there appears to be some relationship based on the general description of the student's anxiety, summarized above, such as the "situational" nature of the student's anxiety and the manner in which the student would persevere on negative thoughts (Tr. pp. 881-82, 891). For example, in speech-language therapy, the May 2015 IEP reflected that the student worked on "key points" of communication but "had difficulty practicing beyond a role play with a script" (Dist. Ex. 19 at p. 3). The IEP indicated that, in "non-stressful" sessions of speech-language therapy, the student improved in "her clarity and detail of message" (id.). The present levels of performance noted that the student's therapy "concentrated" on the student's skills related to recognizing "negative thoughts" and "countering with positive thoughts" (id.). For annual goals in the area of speech-language therapy, the IEP indicated that the student would continue to learn about negative thoughts and positive interactions (id. at pp. 6-7). With respect to negative thoughts, the IEP indicated that the student would learn concepts such as "how to recognize her own physical reactions to negative thoughts, determine counter-active reactions to negative feelings, recognize negative thoughts, [learn] how to determine the part of the thought

that [wa]s extreme, think of what the outcomes could be, and how to determine something positive about a given situation or person" (*id.* at p. 6). As for positive interactions, the goal provided that the student would work on skills such as "understanding of vocal, facial and body expressions in context, understanding and providing verbal and visual social cues, everyday communications with others, giving constructive criticism, dealing with anger, making apologies, [and] responding with a definitive 'yes' or 'no'" (*id.* at pp. 6-7). In the area of social development, the May 2015 IEP indicated that the student's attendance and success in school appeared to be related to her relationship with a male student (*id.* at p. 4). According to the IEP, in counseling, the student had been working on "building her self-esteem" and learning about healthy relationships (*id.*). Her annual goals in the area of social/emotional/behavioral skills provided that the student would "discuss the differences between healthy and unhealthy relationships then develop strategies to manage and/or terminate unhealthy relationships and strategies to maintain and/or foster healthy relationships (*id.* at p. 7). Additionally, the IEP indicated that, in group counseling, the student would "develop and practice a variety of different topics she c[ould] use when socializing with her peers" (*id.*).

Turning to the IHO's decision, the IHO—while primarily focusing on the student's absenteeism—did not wrestle with the crux of the issue at hand: whether the district was required to conduct an FBA of the student when the purported interfering behaviors that, as described by the parent, prevented the student from attending school only occurred in the student's home (see IHO Decision at pp. 11-14). Instead, the IHO found that, although the district attempted to address the student's absenteeism, it did so without the "guidance of a formal evaluation that could potentially have offered insight into the [s]tudent's interfering behaviors," which "denied" the parent the opportunity to participate in a "meaningful way or make decisions regarding the IEP" (*id.* at pp. 13-14). As set forth above, however, the evidence in the hearing record belies this determination. The hearing record is replete with evidence that everyone involved in the student's CSE meetings and in developing the student's IEPs or in providing services to the student knew about her attendance issues, and the parent, herself, testified that she described the student's behaviors that she observed on a typical school morning at CSE meetings and that the student's attendance issues were routinely discussed at CSE meeting or other informal meetings throughout the school years at issue (see, e.g., Tr. pp. 884-89). Thus, it is unclear how the absence of an FBA significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student such that it resulted in the district's failure to offer the student a FAPE for either the 2014-15 or 2015-16 school year.

I am not convinced, as a general principal, that a district is never required to conduct FBA in cases where, as here, the student's behavior in school is within normal parameters, but that behavior such as truancy or chronic absenteeism, for whatever reason, affects the student's ability to attend the learning environment. However, with respect to this case in particular, even assuming that the absence of an FBA constituted a serious procedural violation that resulted in the district's failure to offer the student a FAPE in this case, the fact that the district employed strategies to aid the student's success and the fact that the student made progress during the 2015-16 school year

despite her absenteeism and earned a local diploma defeats any claim that the denial of a FAPE that satisfies the gross violation standard articulated by the Second Circuit Court of Appeals.³⁶

Understandably, the regulation change revising the options for a local diploma that was imposed on the district in June 2016 seismically shifted, at a minimum, the parent's understanding of the student's continued educational path with very little notice to all parties involved in this appeal. However, the parent does not challenge the fact that the student earned a local diploma,³⁷ and I suspect that the sudden, unanticipated requirement to exit the student from special education services as a result of a graduation is the true predicament that the parent has been trying to avoid. I am sympathetic to the parent's dilemma and, as noted above, policy makers eventually saw the need to change the rules as well and allow the option for superintendent's local diploma determination to be exercised only upon the request of the student's parent or guardian, however that limitation applies only in cases in which the determination is made after October 18, 2016, several months after the determination was required to be made by the superintendent in this case (see <http://www.regents.nysed.gov/common/regents/files/1216brca17.pdf>), and I am constrained to apply the rules in effect during the events of this case.

In this case, a review of the hearing record reveals that, while significant, the student's absenteeism only interfered with her learning to the extent that it affected her ability to maximize her potential. A comparison of the student's grades across the 2013-14, 2014-15, and 2015-16 school years demonstrates that when the student attended more frequently—i.e., during the 2013-14 school year—she earned grades that averaged between 84 and 91 (see Parent Ex. 33). However, during the school years when the student attended less frequently—i.e., 2014-15 and 2015-16 school years—the student earned grades that averaged between 67 to 78 and between 67 to 72, respectively (id.). Thus, the evidence above tends to suggest that the student may have been able to achieve higher grades during the 2014-15 and 2015-16 school years had she attended school more often.

The evidence in the hearing record shows that, during the 2015-16 school year, the student's attendance issues continued during summer 2015 and remained essentially unchanged through June 2016 (see Parent Exs. 14-15). However, similar to the 2014-15 school year—and consistent with the district's argument—the evidence in the hearing record reveals that the district

³⁶ While the strategies implemented by the district during the 2015-16 school year and the student's progress under the May 2015 IEP may constitute retrospective evidence as they relate to a review of the appropriateness of the IEP at the time it was drafted and the recommendations made therein by the May 2015 CSE (R.E., 694 F.3d at 185 [finding that "a deficient IEP may not be effectively rehabilitated or amended after the fact through testimony regarding services that do not appear in the IEP"]), the effect that the educational plan as implemented is relevant to the gross violation standard, that is whether there has been denial of, or exclusion from, educational services for a substantial period of time (see Mrs. C., 916 F.2d at 75).

³⁷ While administrative hearing officers in due process typically address the special education disputes in a change in placement attendant to graduation and can take into account the facts regarding a diploma dispute, disputes over curriculum standards and the act of whether or not to grant a diploma itself in light of those standards is a matter that is addressed in an appeal to the Commissioner of Education (see Appeal of K.D., Decision No. 16,460 [2013]; Appeal of a Student with a Disability, Decision No. 15,589 [2007]; Appeal of a Student with a Disability, Decision No. 13,791 [1997]).

implemented strategies to improve the student's attendance in the 2015-16 school year. Testimony by the student's 2015-16 classroom teacher indicated that, although the student "enjoyed" working with a therapy dog that came to the class "every week," it did not improve the student's overall attendance (Tr. pp. 610-12). However, several other interventions or strategies were used during the 2015-16 school year to improve the student's attendance, including the following: creating an attendance contract allowing the student to come in late, having the student graph her own attendance and compare it to her peers' attendance, creating a contract that enabled the student to earn a field trip as a reward for attending school for a certain number of days, offering to pick the student up at her home, scheduling field trips picked specifically for the student, assigning the student to her favorite activities when she came to school, giving the student choices in workshop activities, praising her for coming to school while not focusing on the student's absences, and telling the student that staff missed her when she was absent (see Tr. pp. 254-55, 497-98, 610-12, 683-84, 713-14, 935-36; Dist. Ex. 27 at p. 4). In addition, the student's 2015-16 classroom teacher testified that she spoke to the parent "frequently" about the student's attendance, and also met, at times, with the parent, the BOCES' school psychologist, and the student's contact at an outside agency to discuss how they could help the student with her attendance (Tr. pp. 613-14). Finally, in addition to attempting to improve the student's attendance during the 2015-16 school year, BOCES' staff made an extra effort to accommodate the student's absences by rescheduling missed counseling sessions and work site sessions to the days the student attended school (see Tr. pp. 501-02, 680-83; Dist. Ex. 27 at p. 4).

Similar to the 2014-15 school year, the evidence in the hearing record reflects that, despite the student's significant absenteeism in the 2015-16 school year, she made progress on the annual goals in the May 2015 IEP and passed all of her courses (see generally Dist. Exs. 24-25; Parent Ex. 33). With regard to the 2015-16 school year, comments reflected in progress reports on the student's annual goals indicated the student's absences continued to be an area of concern, interfering with the continuity of the program, affecting her work product, and in measuring her performance on her annual goals (see generally Dist. Ex. 24). However, the progress report comments also reflected that, when the student was present at school, she was "pleasant and cooperative," "communicate[d] well with all of her peers," and that she could use the "computer to independently research various interests" (*id.* at p. 1). The progress report indicated that, in January 2016, the student was "progressing satisfactorily" toward her annual goals in reading and writing (*id.* at pp. 1-2, 4).³⁸ With regard to the annual goals related to the area of speech-language, the progress report indicated that, when she was present, the student "continue[d] to show potential for improvement with social communication," and she was capable of "verbalizing the concept of negative thoughts/actions in various forms and situations" as well as "using presented verbal responses to interact with others" (*id.* at p. 2). Overall, the student was rated as "progressing inconsistently" toward the applicable annual goals in speech-language (*id.* at pp. 3-4). Looking at the area identified as "social/emotional/behavioral" in the progress report, the student was rated as "progressing satisfactorily" on the first annual goal in April 2016 (addressing the student's ability

³⁸ At times, the student's 2015-16 progress report reflected a code identified as "SC"—which according to the legend, referred to "See Comments" (Dist. Ex. 24 at pp. 1-4). While a narrative description of the student's progress accompanied the use of each code (as defined by the legend), when an "SC" code was used, the narrative generally focused on the student's absences and how her absences affected her performance on a particular annual goal (see, e.g., *id.* at pp. 1, 4).

to "discuss the differences between healthy and unhealthy relationships"); however, for the remaining reporting periods and annual goals, either the student's attendance or the failure to receive "group counseling" was noted as the obstacle toward progress (id.).

The hearing record also includes a progress report pertaining to the implementation of annual goals from the student's April 2016 IEP for the June 2016 reporting period (compare Dist. Ex. 25, with Dist. Ex. 27 at pp. 6-7). According to this progress report, in June 2016, the student was rated as "progressing satisfactorily" and was "expected to achieve" the annual goals related to study skills, writing, and mathematics (see Dist. Ex. 25 at pp. 1-2). In the area identified as "speaking/listening," the progress report indicated that the student was rated as "progressing inconsistently" and "may not achieve" the annual goal (id. at p. 2). Finally, with regard to the area identified as "social/emotional/behavioral," the narrative description of the student's progress reflected that the student "had very few counseling sessions since th[e] goal was instituted" (id.). As a result, the student's progress toward that annual goal was "not measured" (id.). At the impartial hearing, district witnesses' testimony about the student's ability to make progress toward her annual goals—notwithstanding her absenteeism—was consistent with the information presented in the 2015-16 progress reports and that the student received "education[al] benefit" during the 2015-16 school year (see, e.g., Tr. pp. 124-25, 206-07, 274, 326-29, 463-65).³⁹

In summary, even assuming that the May 2015 CSE erred by failing to recommend that an FBA be completed for the student, the student ultimately received educational benefit during the 2015-16 school year and earned her local diploma, thereby achieving one of the major goals and milestones that the IDEA is intended to support—that place being graduation with a local diploma (see Reid, 401 F.3d at 518). In other words, no compensatory education is required for the district's denial of a FAPE, since the deficiencies were already mitigated in a substantial way (see Phillips v. District of Columbia, 932 F. Supp. 2d 42, 50 & n.4 [D.D.C. 2013] [collecting authority for the proposition that an award of compensatory education is not mandatory in cases where a denial of a FAPE is established]).

2. Transition Services

With respect to the IHO's finding that the district failed to provide the student with adequate transition services, the district argues that the IHO incorrectly tied this finding to the district's

³⁹ In reviewing the "Post-Secondary Student Exit Summary Report" completed by the student's 2015-16 classroom teacher, one area of need identified within the "Social Development" section reflected that the student required "strategies to work with young people with autism" (Dist. Ex. 49 at p. 2; see Tr. pp. 705-08). At the impartial hearing, the classroom teacher acknowledged that "teaching and reteaching skills" constituted one such strategy used when working with students with autism and that she had used this strategy with this particular student, at times, during the 2015-16 school year in the area of academic skills (Tr. pp. 707-08). The classroom teacher explained that the need to use "teaching and reteaching" with the student depended upon her "attendance," and as an example, explained that if the student "was there for three days in a row she might need to be exposed to the lesson and then retaught it the next day," but on the third day, the student "could do it" (Tr. p. 708). However, if the student "missed a day in between or two days," she would "have to reteach [the lesson] from the beginning again" (Tr. pp. 708-09). When asked if what she described was "called regression"—here, meaning "it takes longer to relearn a concept than if you're there every day"—the classroom teacher responded, "I believe it is" (Tr. p. 709).

alleged failure to address the student's absenteeism. The district asserts that the evidence in the hearing record does not support the IHO's determination, and instead, supports a finding that the transition plan and services were appropriate. Moreover, the district asserts that the evidence in the hearing record reveals that staff arranged transition activities for the student to accommodate absences and the student was afforded "extra opportunities to participate in transition activities, including activities in her preferred field of animal care."

Under the IDEA, to the extent appropriate for each individual student, an IEP must focus on providing instruction and experiences that enable the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34]; see Educ. Law § 4401[9]; 34 CFR 300.43; 8 NYCRR 200.1[fff]). Accordingly, pursuant to federal law and State regulations, an IEP for a student who is at least 16 years of age (15 under State regulations), or younger if determined appropriate by the CSE, must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills (20 U.S.C. § 1414[d][1][A][i][VIII]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]).⁴⁰ An IEP must also include the transition services needed to assist the student in reaching those goals (id.). Transition services must be "based on the individual child's needs, taking into account the child's strengths, preferences, and interests" and must include "instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation" (20 U.S.C. § 1401[34][B]-[C]; 8 NYCRR 200.1[fff]). It has been found that "a deficient transition plan is a procedural flaw" that will only rise to a denial of a FAPE if it 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 (M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6, *9 [S.D.N.Y. Mar. 21, 2013], citing Klein Indep. Sch. Dist. v. Hovem, 690 F.3d 390, 398 [5th Cir. 2012] and Bd. of Educ. of Tp. High Sch. Dist. No. 211 v. Ross, 486 F.3d 267, 276 [7th Cir. 2007]; see F.L. v. New York City Dep't of Educ., 2016 WL 3211969, at *8-*9 [S.D.N.Y. June 8, 2016]; C.W. v City Sch. Dist. of the City of New York, 171 F. Supp. 3d 126, 134 [S.D.N.Y. 2016]; J.M. v New York City Dep't of Educ., 171 F. Supp. 3d 236, 247-48 [S.D.N.Y. 2016]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *11 [S.D.N.Y. Mar. 19, 2013]).

Upon review of the evidence in the hearing record, the student's May 2015 IEP—consistent with the applicable regulations—included a coordinated set of transition activities and measurable postsecondary goals (Dist. Ex. 19 at pp. 5-7, 9-10).⁴¹ Here, as a measurable postsecondary goal,

⁴⁰ In addition, State regulations require districts to conduct vocational assessments of students age 12 to determine their "vocational skills, aptitudes and interests" (8 NYCRR 200.4[b][6][viii]).

⁴¹ In analyzing the issue of transition services, the IHO did not appear to address the transition services or measurable postsecondary goals pertaining to the 2014-15 school year as reflected in the May 2014 IEP, but rather focused on the 2015-16 school year and the discussions that took place at the August 2016 CSE meeting (see IHO Decision at pp. 14-15). Nevertheless, a review of the May 2014 IEP reveals that it, too, included all of the components required by regulations for a coordinated set of transition activities and measurable postsecondary goals; additionally, many aspects of this portion of the May 2014 IEP were carried over into the May 2015 IEP (compare Dist. Ex. 3 at pp. 7, 10, with Dist. Ex. 19 at pp. 9-10).

the May 2015 IEP identified the student's desire to become "employed in the area of animal rehabilitation," which related to the student's stated career interest as "[p]ossibly work[ing] with animals" after leaving high school (Dist. Ex. 19 at p. 5; see Dist. Ex. 51 at p. 1 [documenting responses to "Parent Level One Assessment" in the areas of the student's career interests, school experiences, and home and community]). To facilitate the student's movement from school toward this goal, the May 2015 IEP identified a coordinated set of transition activities for the student in the areas required by regulation (compare Dist. Ex 19 at pp. 9-10, with 8 NYCRR 200.1[fff][1]-[5]). First, with regard to instruction, the May 2015 IEP provided that the student would receive "classroom instruction to improve her skills in reading, writing, math and science" in order to build the "foundation skills necessary to achieve her postsecondary goal" of working with animals (Dist. Ex. 19 at p. 9). Second, with regard to related services, the May 2015 IEP reflected the student would "increase her pragmatic and social situational skills in order to successfully work with others when caring for animals"; additionally, the IEP noted that the student would "discuss differences and strategies to deal with healthy and unhealthy relationships," as well as developing and practicing a "variety of different topics to use when socializing with peers" (id. at p. 10). For community experiences, the May 2015 IEP provided that the student with the "opportunity to identify and discuss participation in school activities" (id.). With regard to the development of employment and other post-school adult living objectives, the May 2015 IEP indicated that the student would "volunteer at the Humane Society through the School to Work program" (id.). Finally, for the acquisition of daily living skills, the May 2015 IEP indicated the student would be provided with the "opportunity to develop her self-advocacy and social skills in [a] small group setting" (id.). The May 2015 IEP also identified that the student would "complete a vocational assessment prior to attending" a local Technology and Career Center "in the future" (id.).

At the impartial hearing, the student's 2015-16 classroom teacher described the student's 2015-16 BOCES' program, itself, as a "transitional program" designed to prepare students to "transition into the adult world" (Tr. p. 723). She explained that the BOCES' program was a setting for "18 to 21[-year-old] transition students who really had left their high schools and needed more education" (Tr. p. 602). The classroom teacher further testified that the setting was "in a separate location" in the community—rather than in the high school setting—and the program's focus "concentrate[ed] on students learning within their own communities and learning how to do . . . social skills, interacting with people, [and] money skills" (Tr. p. 602). The classroom teacher further testified that the reading content presented in the program focused on "how to get a position in a vocation and how to keep that vocational position" and that many "soft skills" were taught to students that they had not received while in high school (Tr. pp. 602-03). According to the classroom teacher's testimony, students in the BOCES' program learned how to prepare a resume, make an apartment budget, and other activities of "that nature . . . to prepare students to transition into the adult world" (Tr. p. 723).⁴²

⁴² The August 2016 CSE meeting solely focused on the student's needs related to work, career, and transitioning to postsecondary activities upon leaving school (see generally Dist. Exs. 43-47; 49).

In light of the foregoing, the evidence in the hearing record does not support the IHO's conclusion that the district failed to establish adequate transition services and measurable postsecondary goals because the district had "not yet addressed" the student's attendance issues.

VII. Conclusion

In summary, a review of the hearing record supports the conclusion that the district's failure to conduct an autism evaluation or an FBA of the student during the 2014-15 and 2015-16 school years—either individually or cumulatively—did not impede the student's right to a FAPE, significantly impede the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or cause a deprivation of educational benefits (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). The evidence in the hearing record also indicates that the lack of these assessments did not amount to a gross violation of the IDEA entitling the student to compensatory educational services as relief. Moreover, the evidence in the hearing record shows that the post-secondary transition plans included in the student's IEPs complied with State regulations and did not contribute to a denial of a FAPE to the student. I have considered the parties' remaining contentions and find them unnecessary to address in light of the determinations made herein.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated August 18, 2017, is modified by reversing that portion which found that the district failed to offer the student a FAPE for the 2014-15 and 2015-16 school years.

IT IS FURTHER ORDERED that the IHO's decision, dated August 18, 2017, is modified by reversing that portion which ordered the district to provide the student compensatory education in the form of services and evaluations.

Dated: **Albany, New York**
 October 29, 2017

JUSTYN P. BATES
STATE REVIEW OFFICER