The University of the State of New York

The State Education Department
State Review Officer
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No. 18-010

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

Appearances:
Shaw, Perelson, May & Lambert, LLP, attorneys for respondent, by Michael K. Lambert, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their requests for an independent educational evaluation (IEE) of the student and compensatory educational services for a portion of the 2016-17 school year. The appeal must be sustained in part.[1]

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

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

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

In this case, the student's educational history has been extensively set forth in four previous appeals; as such, the parties' familiarity is presumed, and it will not be repeated herein unless it is required to provide the necessary context for the issues to be discussed (see Application of a Student with a Disability, Appeal No. 17-101; Application of the Bd. of Educ., Appeal No. 17-006; Application of a Student with a Disability, Appeal No. 16-060; Application of a Student with

a Disability, Appeal No. 16-041). Procedurally, the parents initiated proceedings related to the 2016-17 school year in four separate due process complaint notices dated June 2, 2016; June 15, 2016; July 8, 2016; and August 11, 2016—which alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2016-17 school year based upon deficiencies in both the CSE process and the June 2016 IEP (see Application of a Student with a Disability, Appeal No. 17-101; Application of the Bd. of Educ., Appeal No. 17-006). Another IHO (IHO 1) presided over the referenced impartial hearing, which occurred over six dates held between August 6, 2016 through October 25, 2016 (see Application of a Student with a Disability, Appeal No. 17-101; Application of the Bd. of Educ., Appeal No. 17-006).

While the impartial hearing proceeded, the student received pendency (stay-put) services at a district elementary school beginning on September 7, 2016, from approximately 12:00 p.m. through 3:00 p.m. (see Parent Exs. S at p. 2; V at pp. 2-3; Dist. Ex. 16 at p. 1).[2] More specifically, the student received the following as pendency services: one 60-minute session per day of applied behavior analysis (ABA) services provided by a Board Certified Behavior Analyst (BCBA); four 30-minute sessions per week of individual speech-language therapy; three 30-minute sessions per week of individual occupational therapy (OT); and three 60-minute sessions per day of tutoring by a district special education teacher (see Parent Ex. V at pp. 2-3; Dist. Exs. 65 at pp. 32-39, 116-20, 185-89; 66 at pp. 263-65).[3] In addition to the foregoing, the student also received the services of a full-time, 1:1 paraprofessional (or aide) as a part of his pendency services, and the district provided the student with an additional 60-minute session per day of ABA services by a BCBA (for a total of two 60-minute sessions per day of ABA/BCBA services) (see Parent Ex. V at pp. 2-3; Dist. Ex. 65 at pp. 32-39, 116-20).[4]

On November 15, 2016, the student sustained an "abrasion" on his lower back while attending his pendency services with three adults present in the room (Dist. Ex. 42 at pp. 1-2, 4; see Parent Ex. Z at pp. 1-6). The school nurse responded to the incident and applied ointment and

[2] In a letter to the parents' advocate dated August 31, 2016, the district's assistant superintendent (assistant superintendent) rejected the advocate's "demand[] [for] a full-day program [for the student] to be delivered largely in the parents' home" (Parent Ex. S at p. 2). The assistant superintendent advised that the advocate's demand for such a program had "no legal basis and [was] otherwise not appropriate," noting further that the parents had the "following two choices in terms of educational services" for the student: "[t]he program recommended by the CSE," or "[t]he pendency program" (id.). According to the assistant superintendent, the district was "prepared to implement either" of these programs at the district elementary school, and she requested that the parents advise "as to which option" they selected (id.). Consistent with their statutory and regulatory rights, the parents opted to enroll the student in his pendency program during the administrative proceedings; however, the parents continued to seek information—namely, a class profile—about the program recommended for the student by the CSE at the district elementary school (see Parent Exs. S at p. 2; X at pp. 1-3).

[3] In practice, the district special education teacher responsible for providing the daily tutoring services to the student remained present during the student's OT, speech-language therapy, and ABA/BCBA services between 12:00 p.m. and 3:00 p.m. (see Parent Ex. V at p. 3). According to the hearing record, the student's 1:1 aide provided services from 1:00 p.m. and 3:00 p.m. with both the district special education teacher and the BCBA present (id. at pp. 2-3).

[4] Neither party challenged the services that constituted the student's pendency placement—or the implementation of those services—in either of the two previous appeals related to the 2016-17 school year (see Application of a Student with a Disability, Appeal No. 17-101; Application of the Bd. of Educ., Appeal No. 17-006).

an adhesive strip to the abrasion (see Dist. Ex. 42 at pp. 1, 4). The district school principal contacted the parents to report the incident on the same day (id.). In an email to the district sent later that same day, the parents indicated that, because the student was not safe at school, this was their "second request for pendency," and demanded that the student immediately receive pendency services in their home (Parent Ex. Z at p. 1). Alternatively, the parents demanded that the district immediately place the student in an out-of-State nonpublic school (id. at p. 2).

On November 29, 2016, a subcommittee on special education (CSE subcommittee) convened for a "Program Review" and developed an IEP to be implemented from November 29, 2016 through June 23, 2017 (November 2016 IEP) (Dist. Ex. 4 at p. 1; see generally Parent Ex. BB). Finding that the student remained eligible for special education and related services as a student with autism, the November 2016 CSE subcommittee recommended a 12-month school year program in a 6:1+2 special class placement with the following related services: one 30-minute session per week of counseling in a small group; one 30-minute session per week of individual counseling; three 30-minute sessions per week of individual OT; four 30-minute sessions per week of individual speech-language therapy; and two 30-minute sessions per month of parent counseling and training (see Dist. Ex. 4 at pp. 1, 11-12). In addition, the November 2016 CSE subcommittee recommended the services of a full-time, individual aide; the use of noise cancelling headphones; ongoing communication with the parents; and the implementation of a sensory diet with the student (id. at pp. 11-12). At that time, the November 2016 CSE subcommittee indicated in the IEP that the student required "strategies, including positive behavioral interventions, supports and other strategies to address behaviors that impede[d] the student's learning or that of others" (id. at p. 8). The November 2016 CSE subcommittee also indicated in the IEP that the student required a

behavioral intervention plan (BIP) (id.).[5] Finally, the November 2016 CSE subcommittee created approximately 17 annual goals to address the student's needs (id. at pp. 9-10).[6]

On December 20, 2016, IHO 1 issued a decision concluding that the June 2016 IEP failed to offer the student a FAPE for the 2016-17 school year, which the district appealed to the Office of State Review (see Application of the Bd. of Educ., Appeal No. 17-006).[7]

After January 12, 2017, the student did not return to the district elementary school to receive pendency services (see Parent Ex. Z at pp. 25-27; Dist. Ex. 5 at p. 6). On January 27, 2017, the district completed an updated BIP for the student (see generally Dist. Ex. 30). In an email to the parents dated February 6, 2017, the district school psychologist (school psychologist)—who was attempting to reschedule a CSE meeting set for February 2, 2017 that was cancelled by the parents—expressed concern about the student's "14 consecutive school day[]" absence since January 12, 2017 (Parent Ex. Z at pp. 26-27; see Dist. Ex. 28 at p. 1). The parents responded in an email dated February 7, 2017, noting that the student "missed the last couple of weeks due to illness and also because he [was] greatly resisting going to school out of fear and anxiety" (Parent Ex. Z at p. 25). The parents continued to express concerns about the student's safety at the district elementary school and asked the district to place the student "at home pendency or send him to [an

[5] A notation in the November 2016 IEP indicated that a functional behavioral assessment (FBA) and BIP already existed for the student (see Dist. Ex. 4 at p. 8). The notation also indicated that "[a]ll staff working" with the student used "this plan and with the support of the BCBA to help continue to develop this plan to his current placement and situation" (id.). The notation revealed that the parents had "not signed consent to update [the] FBA" and that the "[c]urrent FBA w[ould] be utilized and [the] BIP w[ould] continue to be changed and worked as appropriate to best support [the student's] behavior management needs" (id.; see generally Dist. Ex. 21).

[6] During the November 2016 CSE subcommittee meeting, the parents "heard a noise outside of the room" and the student's mother left the CSE meeting room because she "thought it was [the student] 'having behaviors'" (Dist. Ex. 4 at p. 2; see Parent Ex. BB; see also Parent Ex. Z at pp. 8-9). When the student's mother returned to the CSE meeting, the parents asked about how the student got on the school bus (see Dist. Ex. 4 at p. 2; see also Parent Ex. BB). The student's then-current special education teacher and his BCBA explained that, due to "some behaviors" the student demonstrated over the past two weeks, district staff returned to using a "two person escort" to get the student to the school bus, and the sound the parents heard had been the student "laughing at a video just before getting on the bus" (see Dist. Ex. 4 at p. 2; see also Parent Ex. BB; Dist. Ex. 25 at p. 1). Later that same day, the parents emailed the district superintendent and described the events of the November 2016 CSE subcommittee meeting (see Parent Ex. Z at p. 8). The parents requested pendency services to be provided in their home due to safety concerns related to how they described district staff assisting the student to the school bus (id.). From November 29, 2016, through approximately December 9, 2016, the parents sent several emails to the district expressing the same or similar concerns about the student and requesting pendency services in their home (see Parent Ex. Z at pp. 8-21). Additionally, on or about December 6, 2016, the parents filed a State complaint alleging that the district failed to address the student's "behavioral needs when transitioning from the educational setting to the school bus" in a BIP for the 2016-17 school year (see Dist. Ex. 44 at pp. 1, 3; see generally 34 CFR 300.151-300.153; 8 NYCRR 200.5[*l*]).

[7] On January 5, 2017, the parents completed an incident report with a local police department concerning the November 15, 2016 incident at the district elementary school (see Parent Ex. DD at p. 1). At that time, the officer who received the complaint reported that he did not observe any "injuries" as described by the parents (id. at p. 2). According to the report, the parents were advised by an "outside association . . . to make a report to the Police" (id. at p. 1). After a brief internet search, the officer could not identify any such "outside association" as identified by the parents (id.).

out-of-State nonpublic school]" (id. at pp. 25-26). In support of their requests, the parents attached two letters—dated January 13, and January 19, 2017, respectively—to the February 7, 2017 email to the school psychologist (id. at pp. 26, 28-29).[8]

Shortly thereafter, in anticipation of the CSE meeting that she was attempting to reschedule, the school psychologist emailed the parents on February 16, 2017 and forwarded copies of an agenda for the meeting, as well as the "reports" to be discussed, which included the student's updated BIP and "academic data to update" the present levels of performance and annual goals (Parent Ex. Z at pp. 22-23). The school psychologist also expressed concern about the student's absences and the need for "consistent attendance [as] integral to [his] continued progress" (id. at p. 23).[9, 10]

On March 9, 2017, a CSE subcommittee convened for a "Progress Review" and developed an IEP to be implemented from March 9, 2017 through June 23, 2017 (March 2017 IEP) (Dist. Ex. 5 at p. 1).[11] Finding that the student remained eligible for special education and related services as a student with autism, the March 2017 CSE subcommittee recommended the same special education programing and related services as set forth in the November 2016 IEP (compare Dist.

[8] At the impartial hearing, the school psychologist testified that she did not recall receiving the January 2017 letters purportedly attached to the parents' February 7, 2017 email until March 2017 (Tr. pp. 129-34).

[9] In an email to the school psychologist dated February 26, 2017, the parents again requested that the district provide the student's pendency services in their home and forwarded copies of two January 2017 letters in addition to a new letter—dated February 15, 2017 from the student's doctor—in support of their request (see Parent Ex. Z at pp. 24, 28-30). In response, the school psychologist sent the parents an email, dated February 28, 2017, which forwarded a letter and three consent forms seeking the parents' consent to "discuss these recommendations with these professionals to allow all involved to have a better understanding of what the situation [was] at th[at] time" (Parent Ex. II at pp. 1-3). The parents responded in an email dated March 5, 2017, noting that they were attempting to "have one of the individuals present at the [upcoming] CSE meeting" (id. at p. 1). In addition, the parents indicated that the CSE "may speak to this individual only about what he observed and reported pertaining to the letter and the current isolation setting . . . imposed upon [their] son" (id.). Thereafter, if necessary, the parents indicated that the CSE could then speak to the "other two individuals . . . [but] only under the same conditions" (id.).

[10] In addition to the letters described as being forwarded to the district by the parents, the evidence in the hearing record also includes three additional letters—dated February 9, February 24, and March 7, 2017—composed by the same doctor who authored the February 15, 2017 letter sent to the district (compare Parent Ex. Z at p. 30, with Parent Ex. HH at pp. 1-3). In the two letters dated February 2017, the doctor indicated that the student was under his "medical care," and as a result, the student's absences from January 13, 2017 through February 24, 2017—should be excused (see Parent Ex. HH at pp. 1-2). The third letter, dated March 7, 2017, indicated that the student had been out of school "due to his level of anxiety and apprehension regarding" attending the district elementary school, and the doctor recommended a "home based educational program until placement [was] more firmly finalized" (Parent Ex. HH at p. 3). However, it is unclear from the hearing record whether the parents provided these three additional letters to the district.

[11] Although the parents indicated in an email sent to the school psychologist prior to the March 2017 CSE meeting that they anticipated having one of the individuals responsible for drafting either the January 13, January 19, or February 15, 2017 letters present at the CSE meeting, no such individual attended the meeting (compare Parent Ex. II at p. 1, with Dist. Ex. 5 at pp. 1-2). It does appear, however, that the topic of the student's absences and the reason for his absences arose at the March 2017 CSE meeting (see Dist. Ex. 5 at p. 3).

Ex. 5 at pp. 1, 12-13, with Dist. Ex. 4 at pp. 1, 11-12). The March 2017 CSE subcommittee did, however, modify portions of the student's present levels of performance and individual needs in the IEP and created approximately 35 annual goals to address the student's needs (compare Dist. Ex. 5 at pp. 6-7, 9-12, with Dist. Ex. 4 at pp. 6-7, 9-10). While reflecting that the student continued to require "strategies, including positive behavioral interventions, supports and other strategies to address behaviors that impede[d] the student's learning or that of others"—and to wit, a BIP—the March 2017 IEP also reflected that an "updated BIP" had been "developed and reviewed" (compare Dist. Ex. 5 at p. 9, with Dist. Ex. 4 at p. 8). Near the conclusion of the CSE subcommittee meeting, the school psychologist requested the parents' consent to allow the district to conduct the student's mandatory reevaluation (see Dist. Ex. 5 at p. 3).[12]

In a decision dated March 10, 2017, an SRO upheld IHO 1's finding that the district failed to offer the student a FAPE for the 2016-17 school year (see Application of the Bd. of Educ., Appeal No. 17-006). But because IHO 1 did not address the parents' request for compensatory educational services as a remedy for the district's failure to offer the student a FAPE, and the hearing record did not provide an "adequate basis to determine whether the student require[d] compensatory [educational] services to remedy the district's failures during the 12-month portion of the 2016-17 school year," the SRO remanded the matter to IHO 1 to allow IHO 1 to make determinations about the parents' remaining requests for relief "in the first instance" (id.). In addition to remanding the matter with regard to compensatory education, the SRO directed the district to take the "actions necessary to begin the process of revising the student's BIP to ensure that it [was] appropriate, consistent with the requirements of the June 2016 IEP and the findings within the body of th[at] decision" (id.). Upon remand the impartial hearing was reconvened, and it continued over four days of proceedings from May 2, 2017 through August 8, 2017 (see Application of a Student with a Disability, Appeal No. 17-101).[13,14]

Having received the parents' consent to conduct the student's mandatory three-year reevaluation, the district administered the following to the student during April and May 2017: a speech-language evaluation, a psychological reevaluation, an OT evaluation, and an education evaluation (see generally Dist. Exs. 38; 48-51).

[12] In addition to seeking the parents' consent to conduct the student's mandatory three-year reevaluation on March 9, 2017 at the CSE subcommittee meeting, the district previously requested the parents' consent to reevaluate the student through prior written notices dated November 28, 2016, and January 9, 2017 (see generally Dist. Exs. 20; 27; 33).

[13]

[14] By prior written notice dated March 20, 2017, the district, again, sought the parents' consent to conduct the student's mandatory three-year reevaluation (see generally Dist. Ex. 36). In a letter to the parents dated March 21, 2017, the school psychologist identified the evaluators who would be conducting the student's reevaluations (see Dist. Ex. 37). On March 29, 2017, the parents executed the consent for the student's reevaluations (see Dist. Ex. 38).

On or about May 15, 2017, the student resumed school attendance at district middle school where he received pendency services through the conclusion of the 2016-17 school year in June 2017 (see Dist. Exs. 47 at p. 2; 52; 53).[15]

A. The Parents' Due Process Complaint Notices

While the remand proceeding was pending, the parents—in a due process complaint notice dated July 7, 2017 (July 2017 due process complaint notice)—alleged that they disagreed with the district's evaluations of the student conducted in April and May 2017 (see IHO Ex. I at p. 1). The parents indicated that the student scored "lower" than expected on the district's recent evaluations due to the student's "limited reading, writing, math and all other academic services" (id. at p. 5). Additionally, the parents alleged that the district failed to use "any brain mapping procedures to accurately diagnose [the student's] IQ," which could be accomplished with the administration of a "Quantitative Electroencephalography (QEEG)" (id. at pp. 1, 5). As relief, the parents requested, in part, an IEE—consisting of a complete neuropsychological evaluation and a QEEG to be conducted by an out-of-State evaluator specifically identified by the parents—together with payment of all "traveling and lodging expenses" to obtain the IEE from this evaluator (id. at pp. 1, 6-8). Next, the parents indicated that the district failed to provide the student with an "appropriate tutor/teacher since mid-January 2017" (id. at p. 5).[16]

In a second due process complaint notice dated August 7, 2017 (August 2017 due process complaint notice), the parents advised that they "still" did not know the student's "IQ" or "academic levels" (IHO Ex. II at p. 1). In addition, the parents indicated that although they continued to disagree with the district's evaluations, the district "refuse[d] to pay for a neuropsychological evaluation and Quantitative Electroencephalography (QEEG) Brain Mapping" with the out-of-State evaluator previously identified by the parents in the July 2017 due process complaint notice (id. at pp. 1, 10; compare IHO Ex. II at p. 1, 10-11, with IHO Ex. I at pp. 1, 6). The parents alleged that they had requested an IEE "for the past 2 years" to conduct a neuropsychological and "QEEG brain mapping" because "[a]ll of [the student's] disabilities [had] not [been] identif[ied]" (id. at p. 10). Next, the parents indicated that they disagreed with the FBA and "positive behavior intervention plan (PBIP)" in place for the student that was "not implemented and was not effective

[15] The student's reevaluations were discussed and reviewed at a CSE meeting held on June 15, 2017, wherein the CSE developed an IEP for the 2017-18 school year that was later revised at a CSE subcommittee meeting held on July 10, 2017 (see Parent Ex. KK at pp. 1-3; compare Parent Ex. KK at pp. 1-3, with Dist. Ex. 46 at pp. 1-2).

[16] Based upon a review of the IHO's decision, it appears that on or about July 17, 2017, the district moved to dismiss the parents' July 2017 due process complaint notice as insufficient "because it did not contain sufficient facts to identify the alleged problem or sufficient facts to identify the proposed resolution" (IHO Decision at p. 3). Similarly, it also appears that in an order dated July 21, 2017, the IHO found the July 2017 due process complaint notice sufficient and denied the district's motion to dismiss (id. at pp. 3-4). Neither the district's motion to dismiss nor the IHO's order denying the same were entered into the administrative record at the impartial hearing (see generally Tr. pp. 1-639; Parent Exs. A-K; M-S; V-Z; AA-MM; PP; RR; TT-VV; Dist. Exs. 1-44; 46-69; IHO Exs. I-V[B]). The district is reminded that the record of an impartial hearing includes, among other things, "all briefs, arguments or written requests for an order filed by the parties for consideration by the impartial hearing officer" and "all written orders, rulings or decisions issued in the case including an order granting or denying a party's request for an order" (8 NYCRR 200.5[j][5][vi][b], [c]). Accordingly, the district was required to file, as part of the administrative hearing record, copies of its motion to dismiss and the IHO's order denying the district's motion with the Office of State Review (8 NYCRR 279.9[a]).

when [the student] had a meltdown" (id. at pp. 2, 10). The parents also indicated that the student's "PBIP" lacked "positive interventions" to change the student's behaviors, and since attending the district's elementary school, the student demonstrated new behaviors—such as "flopping on the ground and refusing to get up"—"in response to the way [the district] treat[ed] him" (id. at p. 2). According to the parents, when the student engaged in these behaviors, district staff "picked [him] up and/or dragged" the student, and thus, the parents believed that the district elementary school was an unsafe place for the student (id.).

Next, the parents expressed that they "disagree[d] with the nonexistent 6-2-1 class" at the district elementary school (IHO Ex. II at p. 2). The parents alleged that, contrary to the district staff claims, the student did not receive ABA therapy because neither a BCBA therapist nor an "ABA therapist" provided "direct hands on therapy" to the student (id.). Instead, the parents indicated that a "BCBA and/or ABA therapist . . . supervis[ed] school staff to manhandle [the student] and call[ed] it ABA therapy" (id.). Finally, the parents noted that the student received one hour per day of "academic instruction" based solely on the teacher's discretion and without regard to implementing the State curriculum (id.).

Turning to the student's IEPs dated November 29, 2016; March 9, 2017; June 15, 2017; and July 10, 2017; the parents alleged that each IEP had been created "by school staff with little to no input" from them (IHO Ex. II at p. 4). Relatedly, the parents indicated that the 6:1+2 special class placement recommendation at the district elementary school "never" existed, and they "never agreed to any class and/or placement" at the district elementary school (id. at pp. 4-7). More specifically, the parents alleged that the 6:1+2 special class placement recommendation at the district elementary school remained "on hold" one year later, pointing to the 8:1+3 special class placement recommendation in the student's July 2017 IEP as support for this contention (id. at p. 5). In further support, the parents indicated that "no physical classroom" existed at the district elementary school within which to house the 6:1+2 special class placement recommendation and that the district did not follow through on its stated intentions to create this classroom or hire a "new psychologist" and a "BCBA" regardless of whether the student attended the 6:1+2 special class placement (id. at pp. 5-6). Next, the parents alleged that although the student needed ABA therapy, the IEPs failed to include it, and they "disagree[d] with 'support ABA therapy,'" which district staff claimed the student was receiving (id. at p. 7). With respect to parent counseling and training, the parents alleged that the IEPs did not include a "set duration" and failed to identify the individual responsible for providing those services to the parents (id. at p. 8). The parents indicated they wanted an "ABA therapist/BCBA occupational and speech therapist" to provide them with parent counseling and training, but "without [the district school psychologist] present" (id.). Next, the parents indicated that the IEPs failed to identify the student's access to "science, social studies/history, Art, Music, [and] Gym," which, according to the parents, the student had not received for the "past 2 years" (id. at p. 9). Similarly, the parents maintained that the district did not follow any State curriculum for the "past 2 years" (id.).

The parents also alleged that while the student "was denied hospital/homebound instruction," he was "restricted" to receiving five hours per week of "academics" (IHO Ex. II at p. 8). In support of this contention, the parents point to the testimony of a district school psychologist on June 10, 2016, who explained, at that time, that either State policy or regulation limited home instruction to five hours per week (id. at p. 9).

Next, the parents alleged that the student did not have a "sensory diet developed by a licensed occupational therapist registered (OTR)" (IHO Ex. II at p. 10). In addition, the parents disagreed with the sensory diet developed by the certified occupational therapy assistant (COTA), who they asserted "worked out of her certification and scope of practice by developing the sensory diet with the OTR who never observed [the student]" (id.).[17] The parents also disagreed with the COTA's ability to provide the student with "pressure massage," noting that only a "licensed massage therapist" could provide this service (id.).

With respect to pendency services, the parents noted that the district made no plan to provide the services to the student on the first day of school: September 6, 2016 (see IHO Ex. II at p. 7). The parents also noted that, "for years," they "disagreed with one hour of academics per day"; furthermore, the parents indicated that because the pendency placement was "not a hospital/homebound placement," the student's pendency placement "should be for a school day" and the parents sought "compensatory education for the past 2 years" (id. at p. 8).

Based upon the foregoing violations, the parents requested the following as relief in the August 2017 due process complaint notice: the student's placement in an out-of-State nonapproved nonpublic school (NPS); "compensatory education, therapy and services" equivalent to the "real ABA therapy" the student would have received during the "past 2 years" had he attended the NPS; and an IEE as previously described (IHO Ex. II at pp. 10-11).[18]

B. The District's Due Process Complaint Notice

In a due process complaint notice dated September 11, 2017, the district requested an impartial hearing in connection with the parents' request for an IEE consisting of a "neuropsychological evaluation with QEEG brain mapping" by the out-of-State evaluator (IHO Ex. III at p. 1). The district alleged that the April and May 2017 evaluations of the student were appropriate, and therefore, the parents were not entitled to an IEE at public expense (id. at p. 2).

[17] It appears that the parents mistakenly referred to the COTA as "CODA" in the August 2017 due process complaint notice (compare IHO Ex. II at p. 10, with Tr. p. 108).

[18] Consistent with State regulations, the IHO exercised his discretion and consolidated the parents' July 2017 and August 2017 due process complaint notices (Aug. 21, 2017 Interim IHO Decision; see 8 NYCRR 200.5[j][3][ii][a][1]-[6]).

C. Impartial Hearing Officer Decision

On September 18, 2017, the parties proceeded to an impartial hearing, which concluded on November 2, 2017, after two days of proceedings (see Tr. pp. 1, 297, 639).[19, 20] In a decision dated January 10, 2018, the IHO ultimately concluded that the parents were not entitled to either an IEE at public expense or compensatory educational services (see IHO Decision at pp. 15-23). Initially, the IHO enumerated nine issues from the parents' July 2017 and August 2017 due process complaint notices as the subject of the instant impartial hearing, as well as the issue raised in the district's due process complaint notice (id. at pp. 3-5). After summarizing the findings of fact, the IHO turned to the issue of whether the district offered the student a FAPE for the 2016-17 school year (id. at pp. 15-20). Noting that IHO 1 "addressed the alleged denial of a FAPE from the summer of 2016 through January 2017," the IHO found that the "issue before [him] [was] limited to whether the [d]istrict denied the student a FAPE from January 2017 through May of 2017" (id. at p. 19).

Relying, in part, on an SRO's previous finding that the district's "proposed" 6:1+2 special class placement with related services and accommodations "could have provided the student FAPE as of September 2016 had the parents' [sic] enrolled the student in the placement," together with IHO 1's previous finding that the district's "updated BIP" in January 2017 was appropriate to meet the student's needs, the IHO concluded that the hearing record demonstrated that the "June and November 201[6]" IEPs—with the updated BIP—"could have provided the student with FAPE had the parents' [sic] chose to place the student in the recommended program" (IHO Decision at p. 19).[21] Next, the IHO indicated that while the recommended 6:1+2 special class placement "did not exist in September 2016 or in January 2017" at the district elementary school, the hearing record demonstrated that the district was "reading and willing and able to create the class in the event the parents agreed to enroll the student in the proposed program" (id. at pp. 19-20). Consequently, the IHO found that, contrary to the parents' contentions, the nonexistence of the 6:1+2 special class placement did not result in a determination that the district failed to offer the student a FAPE (id. at p. 20).

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[19] On the first day of the impartial hearing, the parents' agreed to allow the IHO to consolidate the district's due process complaint notice with the parents' due process complaint notices (see Tr. pp. 30-33; IHO Decision at p. 5).

[20] On October 23, 2017, IHO 1 issued a decision related to the remanded proceedings, which found that the student was entitled to receive compensatory educational services for the district's failure to offer the student a FAPE for that portion of the 2016-17 school year covering July and August 2016, as well as September 2016 through January 27, 2017 (see Application of a Student with a Disability, Appeal No. 17-101). IHO 1 ordered the district to provide the student with "'150 hours of services, to be provided by both a special education teacher and a well credentialed, professional behavioral support consultant with experience in working with students with autism'" (id. [emphasis in original]). The parents appealed—and the district cross-appealed—IHO 1's October 2017 decision, and in a decision dated December 29, 2017, another SRO upheld IHO 1's compensatory educational services award (id.).

[21] In the decision, the IHO referred to an IEP developed in "November 2017"; however, the hearing record did not include a November 2017 IEP, but instead, included an IEP developed in November 2016 (see Dist. Ex. 4 at p. 1; see generally Tr. pp. 1-639; Parent Exs. A-K; M-S; V-Z; AA-MM; PP; RR; TT-VV; Dist. Exs. 1-44; 46-69; IHO Exs. I-V[B]). It appears that the IHO's reference to a November 2017 IEP was a typographical error.

The IHO then moved on to the parents' assertions that the student was entitled to compensatory educational services (see IHO Decision at pp. 20-21). The IHO noted that, according to the parents, they were "forced to remove the student from his pendency program" at the district to "protect the student from harm" (id. at p. 20). However, the IHO found that the evidence in the hearing record did not support this assertion (id.). Specifically, the IHO reviewed a letter written by an "outside provider who claimed that the student told him that he was being harmed at school" (id.). The IHO noted that although the "author" of the letter did not testify at the impartial hearing, this "allegation was not otherwise substantiated" by the evidence in the hearing record (id.). Based upon the evidence in the hearing record, the IHO also found that it was "very unlikely that that student related this claim in a full sentence" given his "very limited speech" and evidence demonstrating that the student could not "formulate a full sentence without significant prompts" (id.). The IHO was also troubled by the fact that the parents did not provide the district with a copy of this letter—dated January 13, 2017—"until February 7, 2017, which undermine[d] the alleged urgency of the matter" (id.). Finally, the IHO added that the "police conducted [an] investigation and determined that the allegation was unfounded" (id.). In light of the foregoing, the IHO concluded that the parents removed the student from his pendency services at the district "without justification" and the district was therefore "not obligate[d]" to provide the student's pendency services in an "alternative location" or to provide the student with compensatory educational services "for this time period" (id. at pp. 20-21).

Next, the IHO noted that because the parents' contentions regarding the "BIP, ABA services, parent counseling service and the student's sensory diet" were all issues before IHO 1, the "principles of res judicata and collateral estoppel" precluded the parents from "re-litigating these issues before the undersign[ed]" IHO (IHO Decision at p. 21).

Thereafter, the IHO analyzed whether the parents were entitled to an IEE at public expense (see IHO Decision at pp. 21-22). On this point, the IHO found that the evidence in the hearing record supported a determination that the district's evaluations of the student were appropriate (id. at p. 22). The IHO indicated that the evidence demonstrated that "each evaluation was conducted with the standard protocols and that all of [the] evaluations were of the type that [were] typically used and generally accepted in the educational setting in order to determine a student['s] cognitive and academic functioning" (id.). In addition, the IHO noted that the assessments used with respect to "OT and speech" were "standard assessments used in each of the respective disciplines" (id.). Thus, the IHO found that the district's evaluations were appropriate, and moreover, the parents failed to present sufficient evidence at the impartial hearing to warrant the requested IEE from the out-of-State evaluator (id. at pp. 22-23). As a final point, the IHO indicated that while the district did not "immediately move to initiate a hearing to defend its evaluations," the district's filing of its due process complaint notice in September 2017 was "not an unreasonable and/or an unnecessary delay" (id. at p. 23). Consequently, the IHO denied the parents' request for an IEE at public expense and dismissed the parents' due process complaint notices "in their entirety" and "with prejudice" (id.).

IV. Appeal for State-Level Review

The parents appeal.[22] Initially, the parents argue that the IHO "refused to schedule hearing dates," notwithstanding the parents' "protest" to the delays. Next, the parents assert that the IHO improperly denied their request for an IEE consisting of a neuropsychological evaluation and "QEEG brain mapping" by an out-of-State evaluator, and relatedly, denied the parents the right to present evidence to support the requested IEE. The parents also disagree with the IHO's decision limiting their selection of an IEE evaluator to a specific geographic location. In addition, the parents disagree with the IHO's finding that the OT evaluation, speech-language evaluation, and the Brigance[23] were "adequate and appropriate." The parents disagree with the IHO's findings that the student was safe at the district elementary school and not "being hurt." The parents also disagree with what they characterize as "inaccurate" and "irresponsible" statements in the IHO's decision. Next, the parents reference the IHO's statement in the decision that they did not provide the district with a letter, dated January 19, 2017, until February 7, 2017, and further note that the IHO found that the "parents were wrong to stop sending [the student] to school after [January 12, 2017]." The parents disagree with the IHO's decision that the district was "'ready and willing and able'" to create the recommended 6:1+2 special class placement, and further note that the IHO failed to acknowledge the parents' continued "efforts to learn about the proposed classroom in order to evaluate the program" and that they were denied a class profile. Next, the parents disagree with the IHO's decision that the BIPs were appropriate. Similarly, the parents disagree with the IHO's decision that the June 2016, November 2016, and March 2017 IEPs—together with the January 2017 BIP—were appropriate and offered the student a FAPE. The parents note that the IHO failed to acknowledge that the district did not accommodate the student's hearing sensitivities in the January 2017 BIP, and the IHO erroneously ruled that the district's sensory diet was appropriate and implemented with the student.

With regard to pendency services, the parents disagree with the IHO's decision that the student received two hours per day of BCBA services and "appropriate ABA" services. The parents also disagree with the IHO's contention that the pendency services offered the student a FAPE and that the student's behaviors improved. Relatedly, the parents note that the IHO failed to recognize that the district did not properly implement the student's pendency services. Finally, the parents disagree with the IHO's decision that parent counseling and training was appropriate when delivered to the parents by the BCBA and the school psychologist. As relief, the parents seek "compensatory damages" consisting of "ABA, special education tutoring, and outside social activities," together with a fully-funded neuropsychological IEE with "QEEG brain mapping" with an out-of-State evaluator.

In an answer, the district responds to the parents' allegations, and generally argues to uphold the IHO's decision in its entirety. Additionally, the district argues, in part, to dismiss the parents' appeal because the amended request for review and memorandum of law fail to comply

[22] Although captioned as a "Notice of Request for Review," the parents' pleading, dated February 20, 2017, is more aptly referred to as an "Amended Request for Review," and will be referenced as such throughout this decision.

[23] It is presumed that the parents are referring to the Brigance Comprehensive Inventory of Basic Skills, an instrument that, as described below, was used to assess the student's academic readiness skills (see Dist. Ex. 51).

with various regulations governing practice before the Office of State Review. The district also argues to reject the parents' memorandum of law based upon its failure to comply with the pleading requirements. Next, the district identifies a list of rulings that it argues should be deemed final and binding, as these rulings were not appealed. Similarly, the district identifies a list of claims it asserts the IHO properly found to be barred by principles of res judicata. The district also asserts that the parents' appeal should be dismissed for advancing issues not before the IHO, and which, therefore, were not addressed by the IHO. Finally, the district contends that the IHO's rulings in dismissing the parents' due process complaint notices and IEE request were fully supported by the evidence in the hearing record.[24]

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]). 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

[24] The district also asserts that the parents' appeal must be dismissed due to improper service but fails to articulate any facts in support of this argument (see Answer ¶ 19).

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]).[25]

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).

[25] 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).

VI. Discussion

A. Preliminary Matters—Compliance with Practice Regulations

The district contends that the amended request for review must be dismissed for failing to comply with the form requirements for pleading (8 NYCRR 279.8[c][1]-[3]). More specifically, the district asserts that the SRO should no longer condone the parents' continued failure—"despite numerous warnings"—to "clearly identify the issues presented for review, the precise rulings presented for review, the specific relief sought with specific, pertinent citation to the [hearing] record, or even to limit the issues referenced" in the pleadings and memorandum of law to the issues at the impartial hearing. The district argues that the parents' failure to comply with the form requirements for pleadings results in a "denial of fundamental due process" to the district because it does not have the "opportunity to respond to cogent allegations in a meaningful way."

The district also argues for the SRO to reject the parents' memorandum of law submitted in support of the amended request for review for failing to comply with the requirements set forth in 8 NYCRR 279.8(b), (d)(1), and (d)(2). On this point, the district argues that the memorandum of law "simply constitutes a re-hashing of prior briefs involving different school years and different issues that are largely unrelated to the issues" before the IHO.

State regulations provide that a request for review "shall clearly specify the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and order to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate what relief should be granted by the [SRO] to the petitioner" (8 NYCRR 279.4[a]). Additionally, the request for review "must conform to the form requirements in section 279.8 of this Part" (8 NYCRR 279.4[a]). State regulation requires, in relevant part, that a request for review shall set forth:

> (1) the specific relief sought in the underlying action or proceeding;
>
> (2) a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review; and
>
> (3) citations to the record on appeal, and identification of the relevant page number(s) in the hearing decision, hearing transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number.
>
> (4) any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer.

(8 NYCRR 279.8[c][1]-[4]).

State regulation further requires that a memorandum of law "shall include a table of contents and set forth" the following:

> (1) a concise statement of the case, setting out the facts relevant to the issues submitted for review; and
>
> (2) a statement of the party's arguments, including the party's contentions regarding the decision of the [IHO] and the reasons for them, with each contention set forth separately under an appropriate heading, supported by citations to appropriate legal authority and to the record on appeal.

(8 NYCRR 279.8[d][1]-[2]).

In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or the dismissal of a request for review by an SRO (8 NYCRR 279.8[a]-[b]; 279.13; see T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015], quoting Foman v. Davis, 371 U.S. 178 [1962]).

While I ultimately decline to dismiss the parents' amended request for review or reject the memorandum of law based on the district's contentions relative to their form and content, the district's concerns about the form and content of the parents' pleadings cannot, at this juncture, go unaddressed. As noted, this student's educational program has now been the subject of four previous appeals, three of which were initiated by the parents (see Application of a Student with a Disability, Appeal No. 17-101; Application of the Bd. of Educ., Appeal No. 17-006; Application of a Student with a Disability, Appeal No. 16-060; Application of a Student with a Disability, Appeal No. 16-041). In every appeal initiated by the parents, the district raised concerns about the form and content of the parents' pleadings (see Application of a Student with a Disability, Appeal No. 17-101; Application of a Student with a Disability, Appeal No. 16-060; Application of a Student with a Disability, Appeal No. 16-041).

In the parents' most recent appeal, the Office of State Review rejected the parents' request for review and memorandum of law because the pleadings did not comply with the practice regulations, and the parents filed an amended request for review and memorandum of law (see Application of a Student with a Disability, Appeal No. 17-101). Notwithstanding that the parents' efforts to comply with the practice regulations did not materially alter the clarity or quality of the amended request for review and memorandum of law, the district was able to respond to the allegations raised in the amended request for review in an answer and there was no indication—at that time—that the district suffered any prejudice as a result (see id.; Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040; Application of a Student with a Disability, Appeal No. 15-069; Application of a Student with a Disability, Appeal No. 15-058).

Noting the parents' attempt to comply with the practice regulations and the district's ability to respond to the "far-ranging allegations," the SRO nonetheless cautioned the parents that while a singular failure to comply with the practice requirements of Part 279 may not warrant an SRO

exercising his or her discretion to dismiss a request for review or reject a memorandum of law (8 NYCRR 279.8[a]; 279.13; see Application of a Student with a Disability, Appeal No. 17-101; Application of a Student with a Disability, Appeal No. 16-040), an SRO may be more inclined to do so after a party's repeated failure to comply with the practice requirements (see Application of a Student with a Disability, Appeal No. 17-101; Application of a Student with a Disability, Appeal No. 16-060; see also Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040).

Despite the previous SRO's warning, the parents' pattern of confusing and "far-ranging" pleadings continues in this appeal, and it is precisely this pattern with which the district takes issue. Once again, the Office of State Review rejected the parents' request for review and memorandum of law because the pleadings did not comply with the form requirements in the practice regulations, and the parents received another opportunity to prepare and file amended pleadings (see generally Amended Req. for Rev.). The parents filed an amended request for review and memorandum of law with the Office of State Review, which, at a minimum, more clearly specified the reasons for challenging the IHO's decision and more clearly identified the findings, conclusions, and orders to which exceptions are taken—consistent with the practice regulations (compare Amended Req. for Rev., with 8 NYCRR 279.4[a], and 8 NYCRR 279.8[c][2]-[3]). In addition, the parents' amended request for review sets forth, consistent with the practice regulations, what relief should be granted by the SRO (compare Amended Req. for Rev., with 8 NYCRR 279.4[a], and 8 NYCRR 279.8[c][1]).

While the district argues about the difficulty in responding to the amended request for review—which it characterizes as being written in a "virtually incomprehensible fashion, with poorly articulated issues" and with issues that did not "relate to the hearing issues before the IHO"—the district was able to respond to the allegations raised in the amended request for review in an answer and there is no indication that the district suffered any prejudice as a result (see Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040; Application of a Student with a Disability, Appeal No. 15-069; Application of a Student with a Disability, Appeal No. 15-058).

As a final warning to the parents, it is only out of an abundance of caution that the I have exercised the discretion to find that the minimal improvements made to the parents' amended request for review and memorandum of law should not result in a dismissal of the appeal, as argued by the district. The parents cannot, going forward, continue to expect opportunities to amend pleadings to comply with the practice regulations, as they have been afforded, not only because it genuinely interferes with the district's ability to formulate meaningful responses, but also because it significantly delays the administrative hearing process and the resolution of the parties' disputes. In light of the foregoing, the district's arguments regarding the form and content of the parents' amended request for review and memorandum of law are dismissed.

B. Capacity to Implement the November 2016 and March 2017 IEPs

The parents contend that the IHO's finding that the district was "'ready and willing and able to create'" the 6:1+2 special class placement was not supported by the evidence in the hearing record. In response, the district initially argues that the IHO properly disposed of many of the parents' claims through his application of the doctrine of res judicata. Relatedly, the district asserts

that collateral estoppel bars "all of" the parents' "pending claims"—including that the district could not implement the 6:1+2 special class placement recommendation—because the due process complaint notice should have but did not include an allegation that the district was "'factually incapable'" of implementing the IEP.

Before turning to a discussion of whether the parents are engaging in impermissibly duplicative litigation under the doctrines of res judicata and/or collateral estoppel, it must first be noted that, contrary to the district's assertion, the parents' August 2017 due process complaint notice did include allegations concerning the district's ability to implement the 6:1+2 special class placement at the district elementary school (see IHO Ex. II at pp. 2, 4-7). For example, the parents alleged that they "disagree[d] with the nonexistent 6-2-1 class" at the district elementary school, and further, that—with respect to the student's IEPs dated November 29, 2016; March 9, 2017; June 15, 2017; and July 10, 2017—the 6:1+2 special class placement recommendation at the district elementary school "never" existed, and they "never agreed to any class and/or placement" at the district elementary school (id. at pp. 4-7). In support of these allegations, the parents contended in the August 2017 due process complaint notice that the 6:1+2 special class placement recommendation at the district elementary school remained "on hold" one year later, pointing to the 8:1+3 special class placement recommendation in the student's July 2017 IEP (id. at p. 5). In further support, the parents indicated in the same due process complaint notice that "no physical classroom" existed at the district elementary school within which to house the 6:1+2 special class placement recommendation and that the district did not follow through on its stated intentions to create this classroom or hire a "new psychologist" and a "BCBA" regardless of whether the student attended the 6:1+2 special class placement (id. at pp. 5-6). Thus, while the parents did not use the specific words that the district was "'factually incapable'" of implementing the 6:1+2 special class placement recommended in both the November 2016 IEP and the March 2017 IEP, the parents' August 2017 due process complaint notice argued that the 6:1+2 special class placement did not exist at the district elementary school, which, at a minimum, is reasonably construed as the functional equivalent of the "factually incapable" language.

Second, the district's argument is further belied by the fact that the IHO specifically addressed this issue in his decision (see IHO Decision at pp. 19-20), which decision the district asserts should be upheld in its entirely. Notably, the IHO determined that while the recommended 6:1+2 special class placement "did not exist in September 2016 or in January 2017" at the district elementary school, the hearing record demonstrated that the district was "reading and willing and able to create the class in the event the parents agreed to enroll the student in the proposed program" (id. at pp. 19-20). Consequently, the IHO found that, contrary to the parents' contentions, the nonexistence of the 6:1+2 special class placement did not result in a determination that the district failed to offer the student a FAPE (id. at p. 20). Having determined that the parents did raise the issue in the August 2017 due process complaint notice and that the IHO rendered a finding on that issue in the decision, the IHO's determination on the issue of the district's ability to implement the 6:1+2 special class placement at the district elementary school is reviewable on the merits unless it is otherwise barred by the principles of res judicata or collateral estoppel. As explained more fully below, however, neither applies in this case.

1. Res Judicata

The doctrine of res judicata (or claim preclusion) "precludes parties from relitigating issues that were or could have been raised in a prior proceeding" (K.B. v. Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *4 [S.D.N.Y. Jan. 13, 2012]; Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *6 [N.D.N.Y. Dec. 19, 2006]). Res judicata applies when: "(1) the prior proceeding involved an adjudication on the merits; (2) the prior proceeding involved the same parties or those in privity with the parties; and (3) the claims alleged in the subsequent action were, or could have been, raised in the prior proceeding" (K.B., 2012 WL 234392, at *4; see Grenon, 2006 WL 3751450, at *6).[26] Claims that could have been raised are described as those that "emerge from the same 'nucleus of operative fact' as any claim actually asserted" in the prior adjudication (Malcolm v. Honeoye Falls Lima Cent. Sch. Dist., 517 F. App'x 11, 12 [2d Cir. 2013]).

Here, even assuming for the sake of argument that the district established the first two elements of the res judicata principles, the district cannot establish that its ability to implement the 6:1+2 special class placement at the district elementary school—as it relates to the November 2016 IEP and the March 2017 IEP—was raised, or could have been raised, in the prior proceeding about the 2016-17 school year for two reasons. First, the impartial hearing for the prior proceeding before IHO 1—which dealt solely with deficiencies related to the June 2016 IEP and CSE meetings—concluded on October 25, 2016, before the development of both the November 2016 IEP and the March 2017 IEP (see Application of the Bd. of Educ., Appeal No. 17-006). The closest that the parents come to a claim related to "prospective/factually incapable of implementation" claim before IHO 1 was their allegation in their the final due process complaint notice that the 6:1+2 special class did not exist, that they lacked a class profile and could not assess the staff qualifications (see Application of the Bd. of Educ., Appeal No. 17-006), but that falls short of an actual claim that the district was "incapable of implementing" a 6:1+2 special class. As to whether the parents should nevertheless be barred under res judicata because they could and should have brought a claim that the district was "incapable of implementing" a 6:1+2 special class in the proceeding before IHO 1, that proposition also fails. Assuming, for the sake of argument, that some facts available to the parents at the time of the first proceeding (i.e. the non-existence of the class) are part of the same nucleus of operative fact that underlies their claim in this proceeding, the key facts that form the basis for a viable "factually incapable" claim were not known to the parents at the time of the first proceeding.[27] For instance, in September 2016 the school psychologist explained that the June 2016 CSE informed the parents that the district would create a classroom, that it was going to "happen," regardless of whether the student attended the district or not; however, the school psychologist conceded that by September 2016 the facts had changed

[26] It has been noted in IDEA jurisprudence that "[a]lthough courts were initially hesitant to use res judicata in the administrative setting, the doctrine has consistently been applied to administrative hearings that reach a final judgment on the merits" (Theodore v. D.C., 772 F. Supp. 2d 287, 293 [D.D.C. 2011]).

[27] My findings in this case are based upon fairly narrow circumstances and should not be broadly interpreted as holding that every "factually incapable" claim would automatically survive a res judicata defense in a subsequent proceeding involving the same school year. For instance, the mere nonexistence of the 6:1+2 class in August 2016 would not have been sufficient to overcome the could-have-been-raised aspects of the res judicata doctrine if that had been the essence of the nucleus of operative facts; however, the nucleus in this case centers on changed facts and circumstances that occurred after August 2016.

in that it had not been created after all (see Dist. Ex. 61 at pp. 395-97), explaining that part of the district's reasoning for not creating it was because the student did not attend the district (Dist. Ex. 61 at pp. 397-98) and, additionally, that there was no need for a 6:1+2 class because certain students from BOCES did not return to the district as anticipated that were needed to populate the classroom (Dist. Ex. 61 at pp. 397-98). While "newly discovered evidence normally does not prevent the application of res judicata," this rule is not applied if "it could not have been discovered with due diligence'" (Theodore v. D.C., 772 F. Supp. 2d 287, 294 [D.D.C. 2011] [internal citations omitted]). When the parents filed their last due process complaint before IHO 1, any claim that the district was incapable of adhering to its plan to create a 6:1+2 special class was speculative at best; however, new evidence that was not discoverable by the parents at time the first proceeding was filed created a different nucleus of operative fact that is the basis of their claim in this second proceeding.[28]

Second, it is apparent that over time the newly discovered facts by the parents obtained while the first proceeding was pending came into the hearing record before IHO 1. However, there is no requirement under the IDEA which mandated the parents to seek permission to amend their then-pending due process complaint notices to raise their factually incapable of implementation claims related to the November 2016 IEP and March 2017 IEPs during the course of the impartial hearing before IHO 1 (and certainly not in a limited remand before IHO 1), and the district does not point to any rule to the contrary. In view of the forgoing, the doctrine of res judicata does not preclude the parents from pursing their "factually incapable of implementation" claim as it relates to the 6:1+2 special class placement recommendation in the November 2016 IEP or the March 2017 IEP.

2. Collateral Estoppel

Next, while initially noting that the district makes nothing more than a bald assertion that collateral estoppel must preclude any challenge to the district's ability to implement the 6:1+2 special class placement at the district elementary school, at first glance, it gains a bit more traction than barring the claim under res judicata. This is especially true because the parents did raise the same issue—the district's ability to implement the 6:1+2 special class placement at the district elementary school during the 2016-17 school year—in a previous administrative proceeding (see Application of the Bd. of Educ., Appeal No. 17-006). However, upon closer examination, this argument, too, must fail.

The doctrine of collateral estoppel "precludes parties from litigating a legal or factual issue already decided in an earlier proceeding" (Grenon, 2006 WL 3751450, at *6 [internal quotations omitted]). To establish that a claim is collaterally estopped, a party must show that:

> (1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to litigate the issue; and

[28] "In determining whether the same nucleus of facts is at issue, 'the court should consider whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations of business understanding or usage'" (Theodore, 772 F. Supp. 2d at 294 [internal citations omitted]).

> (4) the resolution of the issue was necessary to support a valid and final judgment on the merits

(Grenon, 2006 WL 3751450, at *6 [internal quotations omitted]; see Perez v. Danbury Hosp., 347 F.3d 419, 426 [2d Cir. 2003]; Boguslavsky v. Kaplan, 159 F.3d 715, 720 [2d Cir. 1998]).

Again, even assuming for the sake of argument that the district established the first element of collateral estoppel (identity of issue), the district cannot establish the second or fourth elements because IHO 1 did not issue a determination about the district's ability to implement the 6:1+2 special class placement at the district elementary school in the prior proceeding with respect to that recommendation in the June 2016 IEP (see Dist. Ex. 1 at pp. 5-9; see also Application of the Bd. of Educ., Appeal No. 17-006 [finding that the June 2016 IEP and absence of an updated BIP resulted in the district's failure to offer the student a FAPE for the 2016-17 school year and remanding the matter to IHO 1 to consider appropriate relief]). As to the fourth element, even if the SRO's footnote—which the district appears to point to as support for its collateral estoppel argument—could be construed as a "resolution of the issue" as opposed to dicta, the SRO's decision relied upon other grounds to conclude that the district failed to offer the student a FAPE for the 2016-17 school year and remanded the matter back to IHO 1 for further proceedings (see Application of the Bd. of Educ., Appeal No. 17-006 n.26; Answer ¶¶ 24, 24[f]). The footnote discusses the Second Circuit's legal standard for a prospective implementation claim and testimonial information that might be relevant to such a claim and stops there— the SRO did not render a finding sufficient for collateral estoppel purposes as to whether the district was factually capable of implementing the IEP, and appears instead to point back the rule that the sufficiency of the program offered by a public school district is usually determined on the basis of the IEP itself (id.). Consequently, the district cannot establish the fourth element of collateral estoppel because the SRO's resolution of the implementation issue was not "necessary to support a valid and final judgment on the merits" (see Grenon, 2006 WL 3751450, at *6; Application of the Bd. of Educ., Appeal No. 17-006). In addition, and as explained more fully below, while the SRO may have touched on the "prospective implementation" issue at that time (owing in no small part to changing facts and circumstances in the district as the litigation before IHO 1 progressed), the SRO's minor notation of the parents' factual assertions in their answer to the district's appeal in Application of the Bd. of Educ., Appeal No. 17-006, which case addressed the challenges to a completely different IEP than the ones identified in this case, weighs against baring the issue under the doctrine of collateral estoppel (see Application of the Bd. of Educ., Appeal No. 17-006 n.26).

3. Assigned Public School Site—6:1+2 Special Class Placement

Turning to the merits of the parents' contention, the evidence in the hearing record supports a finding that the district was factually incapable of implementing the 6:1+2 special class placement at the district's elementary school as recommended in the student's November 2016 and March 2017 IEPs.

Generally, the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). However, the Second Circuit has held that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 245 [2d Cir. 2015];

see Y.F. v. New York City Dep't of Educ., 659 Fed. App'x 3, 5 [2d Cir. 2016]; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. 2016]; B.P. v. New York City Dep't of Educ., 634 Fed. App'x 845, 847-49 [2d Cir. 2015]). Such challenges must be "tethered" to actual mandates in the student's IEP (see Y.F., 659 Fed. App'x at 5). In order for such challenges to be based on more than speculation, a parent must allege that the school is "factually incapable" of implementing the IEP (K.C. v. New York City Dep't of Educ., 2015 WL 1808602, at *12 [S.D.N.Y. Apr. 9, 2015]; see also Z.C. v. New York City Dep't of Educ., 2016 WL 7410783, at *9 [S.D.N.Y. Nov. 28, 2016]; L.B. v. New York City Dep't of Educ., 2016 WL 5404654, at *25 [S.D.N.Y. Sept. 27, 2016]; G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at *15 [S.D.N.Y. Sept. 19, 2016]; M.T. v. New York City Dep't of Educ., 2016 WL 1267794, at *14 [S.D.N.Y. Mar. 29, 2016]), based on something more than the parent's speculative "personal belief" that the assigned public school site was not appropriate (K.F. v. New York City Dep't of Educ., 2016 WL 3981370, at *13 [S.D.N.Y. Mar. 31, 2016]; Q.W.H. v. New York City Dep't of Educ., 2016 WL 916422, at *9 [S.D.N.Y. Mar. 7, 2016]; N.K. v. New York City Dep't of Educ., 2016 WL 590234, at *7 [S.D.N.Y. Feb. 11, 2016]).

As previously noted, the IHO found that while the recommended 6:1+2 special class placement "did not exist in September 2016 or in January 2017" at the district elementary school, the hearing record demonstrated that the district was "reading and willing and able to create the class in the event the parents agreed to enroll the student in the proposed program" and therefore, the district did not fail to offer the student a FAPE on this basis (IHO Decision at pp. 19-20). If the parents only made unsupported allegations that the district would not carry through on its representations that it was creating a 6:1+2 special class, the appeal of the IHO's determination on this point might have been disposed of a mere speculation. However, upon closer examination, however, in reaching this conclusion the IHO for whatever reason failed to grapple with contrary evidence in the hearing record that does not support the district's case. For example, when discussing the existence of the 6:1+2 special class placement in the "Findings of Fact," the IHO initially noted that the special class "did not exist at the beginning [of] the 2016-2017 school [year] and was not created until the end of the 2016-2017 school year because the parents refused to send the student to the proposed class and because the [d]istrict did not have a sufficient amount of other students who required such a placement" (IHO Decision at p. 5 [citing testimony by the school psychologist]). However, the school psychologist later testified that at the time of the November 2016 CSE subcommittee meeting, the 6:1+2 special class placement recommended in the November 2016 IEP did not exist and the district elementary school had "no empty classroom at that time" for the proposed class (compare Tr. pp. 149-55, with Dist. Ex. 4 at pp. 1, 11-12). She further testified that if the district "had to create a classroom, we would have found the space which [was] what [the district] did by the end of the school year" (Tr. p. 155 [emphasis added]). Moreover, the school psychologist testified that the parents continued to ask about the 6:1+2 special class placement at the November 2016 CSE subcommittee meeting and that "we all were aware it wasn't in existence and that . . . if [the parents] were willing to send [the student], we would as a district have to employ another teacher and create a classroom" (Tr. pp. 154-55). The IHO did not engage this testimony in reaching his conclusion (see IHO Decision at pp. 8-9, 19-20).

Next, the IHO indicated in the "Findings of Fact" that the district "confirmed that the class would have been available immediately" (IHO Decision at pp. 8-9 [citing testimony by the school psychologist and the assistant superintendent]). However, the testimonial evidence cited by the

IHO related to questions asked about the district's ability to implement the 6:1+2 special class placement at the start of the 2016-17 school year in September 2016—and not at all related to the district's ability to implement the 6:1+2 special class placement as recommended in the November 2016 IEP or the March 2017 IEP (see IHO Decision at pp. 8-9; Tr. pp. 92, 191, 354, 363, 390).

The IHO's determination also lacks discussion of evidence in the hearing record that the district had no discernable plan to hire "another teacher"—as the school psychologist testified would have been necessary in order to create the 6:1+2 special class placement recommended in the November 2016 IEP (see Tr. pp. 154-55). Rather, a review of the June 22, 2016 Board of Education meeting minutes entered into evidence reflects that the district, having suffered "two budget defeats," "[was] required to adopt a contingency budget to pay for the costs of ordinary contingent expenses for the 2016-2017 school year"—and the Board voted in favor of adopting the contingency budget (Parent Ex. K[14] at pp. 1, 3). In addition, the June 22, 2016 Board of Education meeting minutes reflected that the appointment of an individual—certified as both a school psychologist and a BCBA—for a period beginning July 11, 2016 through July 10, 2020, had been "TABLED" (id. at pp. 1, 4; see also Parent Exs. J at p. 3; K[6] at p. 2; K[10] at p. 9; K[15] at p. 1; K[19] at pp. 1-2; K[21] at pp. 1-2; K[22] at pp. 1-2, 4) from which an inference may be drawn that district was more likely to encounter struggles in implementing the November 2016 and subsequent IEPs.

Moreover, the parents visited the 6:1+2 special class created at the district at the end of the 2016-17 school year—and the school psychologist testified that the district created the space for the 6:1+2 special class by placing a "divider" in an already existing 8:1+2 special class—which was located in a "big classroom"—and for the 2017-18 school year, the 6:1+2 special class existed separately in its own classroom in a different "hallway" from the 8:1+2 special class (Tr. pp. 157-58). Part of the reason for establishing the classroom was due to the district receiving "more students," which led to the necessity for creating another classroom (Tr. p. 158).

Based upon the foregoing, the evidence in the hearing record does not support the IHO's finding that the district was ready, willing, and able to implement the November 2016 IEP or the March 2017 IEP. Instead, the evidence in the hearing record demonstrates that by November 2016 when the CSE subcommittee recommended the 6:1+2 special class placement at the district elementary school, the parents' arguments about the existence of the 6:1+2 special class placement were based on more than their own speculative beliefs (see K.F., 2016 WL 3981370, at *13). In addition, the hearing record fails to contain any evidence that the district's ability to implement the 6:1+2 special class placement in November 2016 changed—that is, that the district hired another teacher, that more students enrolled in the district to populate the classroom, or that the district had the physical space to create the classroom—by the time the March 2017 CSE subcommittee recommended a 6:1+2 special class placement at the district elementary school (see generally Tr. pp. 1-639; Parent Exs. A-K; M-S; V-Z; AA-MM; PP; RR; TT-VV; Dist. Exs. 1-44; 46-69; IHO Exs. I-V[B]). Instead, the hearing record reveals that by June 2017, the district had a 6:1+2 special class placement at the district elementary school (see Tr. pp. 154-57; Parent Ex. JJ at p. 1 [inviting

the parents to visit the 6:1+2 special class placement in an email dated June 7, 2017]).[29] Consequently, the evidence in the hearing record supports a finding that the district was factually incapable of implementing the November 2016 IEP and the March 2017 IEP, and as a result, the district failed to offer the student a FAPE under the November 2016 IEP and the March 2017 IEP.

C. Pendency

The parents continue to argue on appeal that the district failed to properly implement the student's pendency services, they disagree with the IHO's finding that the student was safe at the district, and they assert that the student did not receive any educational services since January 2017 because the district refused to provide pendency services in the student's home. In response, the district generally denies these allegations and argues that, consistent with the IHO's decision, the district was not obligated to either modify or revise an already enhanced pendency program. Upon review, the evidence in the hearing record does not warrant disturbing the IHO's findings.

The IDEA and the New York State Education Law require that a student remain in his or her then-current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see T.M., 752 F.3d at 170-71; Mackey v. Bd. of Educ. of the Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]); M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered to the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (T.M., 752 F.3d at 170-71; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade

[29] Although the assistant superintendent testified that the district had the 6:1+2 special class placement in place at the district elementary school by "March or April 2017" (Tr. pp. 356-57), no other evidence in the hearing record corroborates this testimony (see generally Tr. pp. 1-639; Parent Exs. A-K; M-S; V-Z; AA-MM; PP; RR; TT-VV; Dist. Exs. 1-44; 46-69; IHO Exs. I-V[B]).

level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then-current educational placement (Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71 [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]; Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). Furthermore, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753, 756), and that "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers" (T.M., 752 F.3d at 171). However, if there is an agreement between the parties on the student's educational placement during the due process proceedings, it need not be reduced to a new IEP, and the agreement can supersede the prior unchallenged IEP as the student's then-current educational placement (see Bd. of Educ. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; Evans, 921 F. Supp. at 1189 n.3; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 86 F. Supp. 2d 354, 366 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2d Cir. 2002]; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Moreover, a prior unappealed IHO decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440, at *23; Letter to Hampden, 49 IDELR 197 [OSEP 2007]).

Although the hearing record does not include an interim order on pendency describing the student's pendency services, the evidence in the hearing record reveals that, consistent with the principles outlined above, the parties agreed to the student's educational placement during the due process proceedings before IHO 1 (see generally Tr. pp. 1-639; Parent Exs. A-K; M-S; V-Z; AA-MM; PP; RR; TT-VV; Dist. Exs. 1-44; 46-69; IHO Exs. I-V[B]). Here, the inquiry into identifying the student's then-current placement for purposes of pendency began when the district—in a letter to the parents dated August 31, 2016—declined to provide the student with a "full-day" home-based program as demanded by the parents' advocate, but offered to provide the student with either the "program recommended by the CSE" or a "pendency program" (see Parent Ex. S at p. 2). While the hearing record does not include any documentary evidence that the parents selected the pendency program option, the evidence in the hearing record does reflect that the student began attending the district elementary school on September 7, 2016, and moreover, that the district began providing the student with pendency services on that day (see Parent Ex. V at pp. 2-3; Dist. Exs. 16 at p. 1; 65 at pp. 32-39, 116-20, 185-89; 66 at pp. 263-65; see generally Tr. pp. 1-639; Parent Exs. A-K; M-S; V-Z; AA-MM; PP; RR; TT-VV; Dist. Exs. 1-44; 46-69; IHO Exs. I-V[B]). Notably, the district provided the parents with a written description of the student's pendency services in a letter dated September 15, 2016, within which the district also noted that the student had been receiving these services since the "second day of school" (see Parent Ex. V at pp. 2-3). Thus, based upon the parents' decision to enroll the student in the district elementary school for

pendency services, an inference can be drawn that the parties reached an agreement about the student's then-current educational placement for purposes of pendency.

Having reached that agreement—and regardless of the parents' repeated requests beginning in August 2016 and continuing through, at least, March 2017, seeking to unilaterally modify or change the location where the student received his pendency services to the parents' home—the district was not obligated, legally or otherwise, to alter or modify the student's already agreed-upon pendency services. Absent such agreement by the district to modify the pendency services, the parents' only alternative to the automatic stay put provision under the IDEA was to seek traditional injunctive relief from a court of competent jurisdiction to modify the student's stay-put rights (see Bd. of Educ. of Albuquerque Pub. Schs. v. Maez, 2017 WL 3610546, at *3 [D.N.M. Jan. 18, 2017] [noting that a "party seeking such an injunction bears the burden of demonstrating the entitlement to such relief under the standards generally governing requests for preliminary injunctive relief "], quoting Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 302 [4th Cir. 2003]). Furthermore, while the pendency provision of the IDEA does not preclude the judiciary from "grant[ing] such relief as the court determines is appropriate," including traditional injunctive relief, the parents cite to no statutory or regulatory authority, or caselaw, permitting an administrative hearing officer to modify a student's placement during the pendency of an impartial hearing absent a decision on the merits that the parents' request for a change in placement is appropriate (20 U.S.C. § 1415[i][2][C][ii]; see 20 U.S.C. § 1415[j]; 34 CFR 300.518[a], [d]; 8 NYCRR 200.5[m]).[30]

Therefore, consistent with the IHO's decision, the evidence in the hearing record does not support the parents' request for compensatory educational services or any other relief to cover the time period the student did not receive pendency services: approximately January 13, 2017 through May 15 or May 16, 2017, when the parents reenrolled the student in his pendency program at the district middle school (see Parent Ex. Z at pp. 25-27; Dist. Exs. 5 at p. 6; 47 at p. 2; 52-53).

VII. Relief

A. IEE

On this point, the parents assert that they disagree with the IHO's finding that the OT evaluation, speech-language evaluation, and the Brigance were "adequate and appropriate." The parents further assert that the district's evaluations of the student failed to "identify his real IQ." In addition, the parents assert that the IHO improperly denied their request for an IEE and the right to present evidence in support of the requested IEE. The district argues to uphold the IHO's findings.

[30] The only provision in the administrative processes for temporarily changing a child's educational placement are the alterative educational setting provisions which are time limited to 10 day modifications by school personnel and 45-days modifications by IHOs; however, the parties have not indicated that these provisions apply at all to the circumstances in this proceeding (see 20 USC § 1415[k][1], [3]) and the alterative educational setting provisions do not effectuate a change in the operation of the stay put provision invoked in this case, but have their own special exceptions to address placement during appeals (see 20 USC § 1415[j], [k][4]).

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 (see 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 at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (see 8 NYCRR 200.4[b][4]; see also 34 CFR 300.303[b][1]-[2]). Pursuant to State regulation, a reevaluation of a student with a disability must be conducted by a multidisciplinary team or group that includes at least one teacher or specialist with knowledge in the area of the student's disability (see 8 NYCRR 200.4[b][4]). The reevaluation "shall be sufficient to determine the student's individual needs, educational progress and achievement, the student's ability to participate in instructional programs in regular education and the student's continuing eligibility for special education" (8 NYCRR 200.4[b][4]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things, the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services' needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B., 2012 WL 234392, at *5 [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]). Informal guidance from the United States Department of Education's Office of Special Education Programs indicates that if a parent disagrees with an evaluation because a child was not assessed in a particular area, the parent has the right to request an IEE to assess the child in that area (Letter to Baus, 65 IDELR 81 [OSEP 2015]) If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either ensure that an IEE is provided at public expense or initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]). If a

school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). However, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]).

While it is undisputed that the parents disagreed with the district's evaluations, upon review, the weight of the evidence in the hearing record supports the IHO's determination that the district's evaluations of the student—as explained below—were appropriate and therefore, the parents are not entitled to an IEE at district expense. As previously noted, the parents executed their consent to allow the district to proceed with the student's mandatory three-year reevaluations on March 29, 2017, after receiving a letter from the district that identified the individuals who would be conducting the student's evaluations (see Dist. Exs. 37-38). Having received the parents' consent, the evidence in the hearing record reveals that in April and May 2017, the district completed a speech-language evaluation, a psychological evaluation, an OT evaluation, and an education evaluation (see generally Dist. Exs. 48-51).

With regard to the April 2017 speech-language evaluation, the evaluator—a speech-language pathologist—administered the Receptive One Word Picture Vocabulary Test, Fourth Edition (ROWPVT-4) and the Expressive One Word Picture Vocabulary Test, Fourth Edition (EWOPVT-4) to the student to assess, respectively, his receptive and expressive vocabulary (see Dist. Ex. 48 at pp. 1-2; see also Tr. pp. 210-11). According to the evaluation report, the ROWPVT-4 was described as a "norm-referenced test that provide[d] a reliable measure of English receptive vocabulary [by] utilizing a picture matching paradigm," which required the student to select "one of four color pictures that matche[d] a spoken word" (id. at p. 2). In addition, the evaluation report noted that the "test items [were] presented in a developmental sequence, starting with the easiest concepts and progressing in difficulty" (id.).

As for the EWOPVT-4, the April 2017 speech-language evaluation report described this assessment as a "norm-referenced test that provide[d] a reliable measure of English expressive vocabulary, [by] utilizing a picture naming paradigm" (Dist. Ex. 48 at p. 2). To administer this assessment, the student was "asked to name (in one word) the objects, actions and concepts pic[tu]red in colored illustrations" (id.). Similar to the ROWPVT-4, the "test items [in the EWOPVT-4 were] presented in a developmental sequence, starting with the easiest concepts and progressing in difficulty" (id.). In this case, the evaluator indicated that the student's scores on both the ROWPVT-4 and the EWOPVT-4 reflected "below average vocabulary skills" (id. at pp. 1-2).

In addition to reporting the student's scores on the ROWPVT-4 and the EWOPVT-4 in the evaluation report, the evaluator also summarized her observations of the student's spontaneous use of language, as well as other behaviors, prior to initiating formal testing (see Dist. Ex. 48 at p. 1). Here, the evaluator noted an attempt to administer another assessment to the student—namely the Clinical Evaluation of Language Fundamentals, Fourth Edition (CELF-4)—following the completion of the "vocabulary assessments, for more indepth [sic] evaluation of [the student's] language skills" (id.). The evaluator reported, however, that "it appeared that [the student] did not comprehend the directions or was not able to complete the tasks," noting further that the student "responded incorrectly or did not respond at all to the training prompts" (id.).

At the impartial hearing, the evaluator who conducted the student's speech-language evaluation testified that she had worked with the student from February 2016 through January 2017 by delivering "language therapy" to him (compare Dist. Ex. 48 at p. 2, with Tr. pp. 209-12). After briefly describing the student's language skills, she testified about the April 2017 speech-language evaluation (see Tr. pp. 212-20; see generally Dist. Ex. 48). In particular, the evaluator explained the purpose of the evaluation and in "selecting the instruments" used to assess the student, indicating that she "wanted to find out what his level was of his skills, what he kn[ew], [and] what he could demonstrate he kn[ew] with the testing" (Tr. pp. 214-15). Specifically, the evaluator testified that she selected the ROWPVT-4 and the EOWPVT-4 to administer to the student (see Tr. p. 215). In addition, the evaluator testified about her attempt to administer the CELF-4 to the student, which assessed "more advanced skills" than the ROWPVT-4 and the EOWPVT-4, but explained that the assessment could not be completed because the student could not "perform the tasks on the CELF-4" (Tr. pp. 215-18).

When asked about the student's performance on the ROWPVT-4, which fell within the "first percentile," the evaluator testified that that meant the student "did as well as or better than one percent of the population" (Tr. p. 219; see Dist. Ex. 48 at p. 1). With respect to the EOWPVT-4, the evaluator acknowledged that the student's performance fell scores "lower than the first percentile," meaning that the student did not "perform as well as any of the group or less than the one percent" (Tr. pp. 219-20; see Dist. Ex. 48 at p. 1). The evaluator also testified that the student's evaluation results were "pretty consistent" with her observations of the student's functioning in the area of speech-language and were consistent with "information [she] received from other staff members as to what [the student's] functioning was in the area of speech-language" (Tr. pp. 220-21). In summary, the evaluator testified that, through the speech-language evaluation, she wanted to "get a good picture of [the student's] skills," and the assessments administered to the student accomplished that goal (Tr. p. 221). She further testified that no other assessments were needed to "fully assess [the student] in the area of speech-language" (id.). Finally, the evaluator testified that, in her opinion, the April 2017 speech-language evaluation conducted as part of the student's mandatory three-year reevaluation was "appropriate" (Tr. pp. 221-22).

On cross-examination, when asked about the speech-language evaluation she administered to the student, the evaluator testified that an "IQ score" could not be obtained through a speech-language evaluation (Tr. pp. 222-23). She also testified that the student's "vocabulary," in general, and his "verbal expression" score could have been "affected by the fact that [the student] [did not] read at grade level" (Tr. pp. 223-24).

Next, a school psychologist, who was also credentialed as a BCBA, completed a psychological evaluation of the student in April 2017 to "assess the appropriateness of continued services" for the student (Dist. Ex. 49 at p. 1). To accomplish this task, the school psychologist administered the Wechsler Intelligence Scale for Children—Fifth Edition (WISC-V) to the student, as well as the Adaptive Behavior Assessment System, Third Edition (ABAS-3), Parent

Form (id. at p. 2).[31] Within the "Behavioral/Testing Observations" section of the evaluation report, the school psychologist described the student's performance on approximately nine core subtests of the WISC-V and noted what was required by the student—or the instructions provided to the student—for each subtest (id. at pp. 2-4).

Next, the school psychologist turned to "Test Interpretations" (Dist. Ex. 49 at pp. 5-7). With respect to the student's cognitive functioning, the evaluation report described the WISC-V as a "standardized, individual intelligence test that assessed verbal and nonverbal reasoning abilities, short-term memory, as well as the ability to perform tasks with speed and accuracy" (id. at p. 5). In addition, the report reflected that the WISC-V provided "subtests and composite scores that represent[ed] intellectual functioning in specific cognitive domains, as well as a composite score that represent[ed] general intellectual ability (i.e., Full Scale IQ)" (id.). Here, the school psychologist reported that, overall, the student "received a Full Scale IQ score of 42," which fell within the "extremely low range of functioning" and below the first percentile "compared to same-aged peers" (id. at pp. 4-5).[32]

According to the April 2017 psychological report, the "Verbal Comprehension Index" measured the "ability to access and apply acquired word knowledge," noting further that "[a]ll items on this subtest required a verbal response" (Dist. Ex. 49 at p. 5). The "Visual Spatial Index" measured the "ability to evaluate visual details and to understand visual spatial relationships to construct geometric designs from a model" (id. at p. 6). The "Fluid Reasoning Index" measured the "ability to detect the underlying conceptual relationship among visual objects and to use reasoning to identify and apply rules" (id.). The "Working Memory Index" measured the "ability to register, maintain, and manipulate visual and auditory information in conscious awareness," noting additionally that "[t]hese tasks involved attention, concentration, mental control, and reasoning" (id.). The student's composite scores on all four scales fell within the "Extremely Low" range (id. at pp. 4-6). While noting that the student's "results when compared with previous assessments were lower than those previously obtained," the school psychologist explained that it was "not likely" that the student had "lost skills" (id. at p. 6). Rather, the school psychologist noted in the evaluation report that the "current assessment scores were obtained with an updated version of the previous cognitive assessment," "[u]pdated norms have occurred," and since the student was "older, there were more expectations presented" in the current testing (id.). The school psychologist also explained in the evaluation report that the student's "current assessment scores"

[31] The April 2017 psychological evaluation report included the student's composite scores from a March 2014 administration of the Wechsler Intelligence Scale for Children—Fourth Edition (WISC-IV) and the Adaptive Behavior Assessment System, Second Edition (ABAS-2) (see Dist. Ex. 49 at pp. 1-2). At that time, the evaluator did not obtain the student's full-scale IQ through the administration of the WISC-IV; additionally, the student's performance on both assessments in 2014 fell within the "extremely low range" or "low average" range (id.).

[32] When asked about the result the student received as his full-scale IQ at the impartial hearing, the parents testified that, while not "expert[s]," they thought the score equated to "severely retarded" and they did not think it was "accurate" (Tr. p. 567; see Tr. pp. 573-74). The parents further testified that they understood that an IQ could be obtained through "[Q]EEG brain mapping" (Tr. pp. 572-73; see Tr. pp. 601-03). Upon cross-examination, when asked how an IQ was derived, the parents understood that "IQ" reflected one's "intelligence level," but were unsure how it was calculated other than stating that it reflected the consideration of how much reading, writing, and mathematics a person could do (see Tr. pp. 599-600).

represented progress because the student could "participate and complete all areas assessed" (id.). At that time, the school psychologist opined that the student's "scores appear[ed] to be an underestimate of his skills as his attention to task varied and his receptive and expressive skill deficits limited his scoring opportunities on certain subtests" (id.).

Next, the April 2017 psychological evaluation report turned to the results of the administration of the ABAS-3 (see Dist. Ex. 49 at pp. 6-7).[33] The ABAS-3, described as a "norm-referenced measure used to assess adaptive behaviors in individuals from birth to 89 years of age," was administered "with the [student's] father while the examiner" tested the student (id. at p. 6). According to the "parent form of the ABAS-3," the student's scores for "General Adaptive Composite," the "Conceptual Composite" (including the areas of "communication, functional academics, and self-direction"), the "Social Composite" (including "social and leisure skills"), and the "Practical Composite" (including the areas of "community use, home/school living, health and safety, and self-care"), all fell within the "Extremely Low" range (id. at pp. 5-7). When compared to his scores from previous assessments, the school psychologist noted that the student "has maintained his skills in adaptive areas measured" (id. at p. 7).[34]

In May 2017, the district conducted an OT evaluation as part of the mandatory three-year reevaluation (see Dist. Ex. 50 at p. 1). As part of the OT evaluation, the evaluator—a licensed occupational therapist with a "specialty certification in sensory integration"—selected the following tools to assess the student: "Sensory Profile-2," "Visual Motor Integration (VMI)," and "Functional Task Observations" (id.; Tr. pp. 303-04). After presenting information in the May 2017 OT evaluation report about sensory processing, vestibular receptors, proprioceptive receptors, and tactile receptors, the evaluator reviewed the results of the Sensory Profile-2 questionnaire completed by the student's mother (see Dist. Ex. 50 at pp. 1-2). Initially, the evaluation report reflected that the Sensory Profile-2 questionnaire "measure[d] a child's sensory experiences based on caregiver judgment" and thereafter, the evaluator explained the scoring categories connected to the assessment (id. at p. 2). Next, the evaluator described the student's performance and scoring in the following areas: "Auditory processing," "Visual processing," "Oral sensory processing," "Conduct associated with sensory processing," "Attention responses associated with sensory processing," "Touch processing," "Movement processing," "Social/emotional responses associated with sensory processing," and "Body position processing" (id.). In summarizing the findings of the Sensory Profile-2, the evaluator indicated that the student sought "sensory input at a greater frequency, duration, or intensity" than others, and he engaged in "[s]ensory avoiding," meaning he "mov[ed] away from ordinary sensory input" (id.). In addition, the May 2017 OT evaluation report further indicated the "student notice[d] and [was] bothered by sensory input at a higher rate than others" and that he "misse[d] sensory input" (id. at p. 3).

[33] In the chart listing the student's scores for the ABAS-3, it appears that the school psychologist mistakenly referred to the assessment administered in April 2017 as the "ABAS-2" instead of the ABAS-3, as reported under "Current Assessments Used" section of the evaluation report (compare Dist. Ex. 49 at p. 6, with Dist. Ex. 49 at pp. 2, 6-7).

[34] The school psychologist/BCBA who conducted the April 2017 psychological evaluation of the student did not testify at the impartial hearing (see generally Tr. pp. 1-639).

Finally, the evaluator reported "Clinical Observations" of the student based upon the "information gained from the Ayres Sensory Integration Clinical Observation" (Dist. Ex. 50 at p. 3). Thereafter, the evaluator indicated that "[s]tandardized testing [was] not appropriate" for the student and thus, the student's performance, as "described below," reflected an "informed clinical opinion" (i.e., "poor" and "below average" performances) (id. at pp. 3-4).

At the impartial hearing, the occupational therapist who conducted the student's May 2017 OT evaluation testified about how she selected the "tools" used to conduct the evaluation (compare Dist. Ex. 50 at p. 4, with Tr. pp. 301, 305-06; see generally Dist. Ex. 50). The occupational therapist testified that she "always cho[se] a sensory profile of some sort so [she] could get a sensory history" (Tr. pp. 305-06). In addition, she testified that she selected a test to assess the student's "visual motor abilities, and although standardized testing [was] not appropriate, [she] still use[d] the testing to compare him to what his skills should be" (Tr. p. 306). And finally, the occupational therapist testified that she "always d[id] reflex testing, ocular motor testing so [she] c[ould] see what the [student's] foundational skills [were]" (id.). After describing the student's performance on testing, the occupational therapist testified that the student had "numerous needs in the area of sensory processing, ocular motor skills, muscle tone movement, patterns, visual motor skills, visual perception and fine motor skills" (Tr. pp. 307-09).

In May 2017, a district special education teacher (special education teacher) conducted an education evaluation of the student (see Dist. Ex. 51 at pp. 1-2; see also Tr. pp. 247-49; compare Dist. Ex. 51 at p. 2, with Tr. pp. 246-47). As an evaluation tool, the special education teacher administered the "Brigance Comprehensive Inventory of Basic Skills II (Standardized)" (Brigance) to the student to assess approximately 17 areas of readiness skills (see Dist. Ex. 51 at p. 1). The evaluation report described the student's performance in these areas (id. at pp. 1-2). According to the May 2017 education evaluation report, the special education teacher selected the Brigance "to get an overall picture of [the student's] academic progress/skills" (id. at p. 2).

At the impartial hearing, the special education teacher testified that in preparation for conducting the education evaluation as part of the student's mandatory three-year reevaluation, she "read his previous evaluation" (Tr. pp. 249-50). She also testified that in preparation for the evaluation, she met with the student's related services' providers, as well as his "current tutor," and these individuals provided her with information that "helped [her] plan" how to "approach testing" the student (Tr. p. 250). Having learned that the student "function[ed] at the readiness level working on letters and sounds and pre-readiness skills for math," the special education teacher testified that that information helped her in selecting what "instruments" she would use to assess the student (id.). As a result, the special education teacher testified that she chose the Brigance "because it ha[d] a section that work[ed] on readiness skills and assess[ed] readiness skills" and it could be used with students in the first through sixth grades (Tr. p. 251). She further testified that through her previous "research," she discovered "where [the student's] levels were" and that based upon this information, the Brigance "g[a]ve [her] the most accurate picture of [the student's] strengths and weaknesses" (id.).

Next, the special education teacher testified about the administration of the Brigance to the student, describing the student's performance on tasks and reiterating the information included in the May 2017 education evaluation report (compare Tr. pp. 252-55, with Dist. Ex. 51 at pp. 1-2). In addition, the special education teacher testified that the "purpose" of the education evaluation

as part of the mandatory three-year reevaluation was to get an "idea of where the child [was] functioning academically" (Tr. p. 256). She further testified that the May 2017 education evaluation that she conducted accomplished this goal and provided a "reliable accurate picture" consistent with the information she learned from the student's "therapists and tutors" (Tr. pp. 256-57). In her opinion, the May 2017 education evaluation was an "appropriate educational evaluation" for the student (Tr. p. 257).

Upon cross-examination, the special education teacher testified about what, if any, "phonics skills" the student demonstrated during the education evaluation, what letters of the alphabet he identified, and his mathematics skills (Tr. pp. 257-59). She also testified that the student did not "read any sight words," and that the evaluation instrument used with the student did not include the use of "action cards" (Tr. pp. 259-60). The special education teacher also testified that the education evaluation did not assess the student's "reading comprehension" skills because the student "did not demonstrate the ability to read any words for the test" (Tr. p. 260). In addition, the special education teacher acknowledged that the education evaluation did not assess the student's "oral comprehension" skills because "[i]t was not part of the test that [she] was giving" to the student (Tr. pp. 260-61). When asked if the education evaluation administered could determine the student's "IQ," the special education teacher testified that "[t]hat's not part of the education evaluation" (Tr. pp. 263-64).

Based upon the foregoing, the evidence in the hearing record reflects that the district conducted the student's reevaluation by a multidisciplinary team that included an April 2017 speech-language evaluation completed by a speech-language pathologist, an April 2017 psychological evaluation completed by a school psychologist who was also credentialed as a BCBA, a May 2017 OT evaluation completed by a licensed occupational therapist, and a May 2017 education evaluation completed by a special education teacher (see generally Tr. pp. 210-11; 247-49; 303-04; Dist. Exs. 48-51). Consistent with federal and State regulations, the hearing record also reflects that the evaluators used a "variety of assessment tools and strategies" to gather functional, developmental, and academic information about the student, including information provided by the parents, to assist in determining, among other things the content of the student's IEP (34 CFR 300.304[b][1][ii]; 8 NYCRR 200.4[b][1]). Here, the assessment tools—comprised of norm-referenced and standardized assessments, when appropriate—provided information about the student's communication skills, vocabulary, and receptive and expressive language skills; his cognitive functioning (which included the student's full-scale IQ) and adaptive behavior skills; his sensory processing skills, ocular motor skills, muscle tone and movement patterns, and fine motor skills; and his readiness skills in the several areas (i.e., recognizing colors and letters, reciting the alphabet, reading numbers, etc.) (see Dist. Exs. 48 at pp. 1-2; 49 at pp. 2-7; 50 at pp. 1-4; 51 at pp. 1-2). While the parents continue to press the argument that the district's evaluations were not adequate because the assessments did not "identify [the student's] real IQ," the hearing record fails to contain any evidence to support this assertion, other than the parents' own belief that the full-scale IQ obtained through the WISC-IV was not "accurate" and that the student's IQ could be obtained through "[Q]EEG brain mapping" (Tr. pp. 567, 599-600; see Tr. pp. 572-74, 601-03). This evidence, alone, is not sufficient—given the weight of the evidence already described—to overturn the IHO's findings that the district's evaluations of the student were appropriate and that the parents were not entitled to an IEE at district expense.

B. Compensatory Educational Services

Given the conclusion that the district failed to offer the student a FAPE based upon its inability to implement the 6:1+2 special class placement recommended in the November 2016 and March 2017 IEPs, the next inquiry focuses on what relief, if any, the student may be entitled to as a remedy. While the parents seek an unspecified amount of compensatory educational services for "ABA, special education tutoring, and outside social activities" in the amended request for review, the hearing record supports such an award as described herein.

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147, 151 [N.D.N.Y. 1997]). 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]), 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]; 8 NYCRR 100.9[e], 200.1[zz]; see 34 CFR 300.102[a][1], [a][3][ii]). The Second Circuit has held that compensatory education may be awarded to students who are ineligible for services under the IDEA by reason of age or graduation only if the district committed a gross violation of the IDEA which resulted in the denial of, or exclusion from, educational services for a substantial period of time (see E. Lyme, 790 F.3d at 456 n.15; French v. New York State Dep't of Educ., 476 Fed. App'x 468, 471 [2d Cir. 2011]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2, 113 n.6 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69, 75-76 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071, 1078-79 [2d Cir. 1988], aff'd on reconsideration sub nom. Burr v. Sobol, 888 F.2d 258 [2d Cir. 1989]; Cosgrove v. Bd. of Educ. of Niskayuna Cent. Sch. Dist., 175 F. Supp. 2d 375, 387 [N.D.N.Y. 2001]).

Compensatory education relief may also be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014] [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; see also E. Lyme, 790 F.3d at 456; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Likewise, SROs have awarded compensatory 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. of City Sch. Dist. of Buffalo 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]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; 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"]).

In order to fashion a compensatory educational services award in this case, it is necessary to first determine—as IHO 1 was required to determine at the impartial hearing on remand—the period of time attributable to the district's failure to offer the student a FAPE (see Application of a Student with a Disability, Appeal No. 17-101). The evidence in the hearing record establishes that the November 2016 IEP was expected to be implemented from November 29, 2016 through June 23, 2017 (Dist. Ex. 4 at p. 1). However, at the impartial hearing on remand before IHO 1, it was determined that, based upon the district's failure to offer the student a FAPE under the June 2016 IEP, the FAPE deprivation encompassed a seven-month time period: July and August 2016 (summer 2016), and September 2016 through January 27, 2017 (the date the updated BIP was created) (see Application of a Student with a Disability, Appeal No. 17-101). In addition, IHO 1 crafted a compensatory educational services award, later upheld by an SRO, as remedy for the district's failure to offer the student a FAPE for this seven-month time period, which overlaps a portion of the time when the November 2016 IEP would be implemented: to wit, November 29, 2016 through January 27, 2017 (compare Application of a Student with a Disability, Appeal No. 17-101, with Dist. Ex. 4 at p. 1). Because the November 2016 IEP implementation dates overlaps a portion of the time period attributed to the FAPE deprivation associated with the June 2016 IEP—that is, November 29, 2016 through January 27, 2017—it would unfairly punish the district to calculate and order an additional award of compensatory educational services to cover this same period of time based, now, upon the district's failure to offer the student a FAPE under the November 2016 IEP (see C.W. v Rose Tree Media Sch. Dist., 395 Fed. App'x 824, 828 [3d Cir. Sept. 27, 2010] [noting that "[t]he purpose of compensatory education is not to punish school districts for failing to follow the established procedures for providing a [FAPE], but to compensate students with disabilities who have not received an appropriate education."]). Therefore, initially with respect to the November 2016 IEP, any award of compensatory educational services should cover the time period from January 28, 2017, through June 23, 2017 (the last day for implementation of the November 2016 IEP).

Another factor for consideration in fashioning relief is the FAPE deprivation attributable to the March 2017 IEP—which was expected to be implemented from March 9, 2017, through June 23, 2017—and which, therefore, creates another period of overlap, but in this instance, the overlap arises as a result of the implementation dates of the November 2016 IEP and the March 2017 IEP (compare Dist. Ex. 4 at p. 1, with Dist. Ex. 5 at p. 1). Given that the implementation of the subsequently developed March 2017 IEP was expected to begin on March 9, 2017, it

necessarily follows that the implementation of the November 2016 IEP was shortened from June 23, 2017 to March 8, 2017—owing to the first day the March 2017 IEP was to be implemented in place of the November 2016 IEP (compare Dist. Ex. 4 at p. 1, with Dist. Ex. 5 a t p. 1). As such, any compensatory educational services award related to the November 2016 IEP covers the time period from January 28, 2017 through March 8, 2017; similarly, any compensatory educational services award related to the March 2017 IEP covers the time period from March 9, 2017 through June 23, 2017. Based upon the foregoing analysis, the student is entitled to compensatory educational services for a total of five months (January 28, 2017 through June 23, 2017).

To calculate the actual award of compensatory educational services for this five-month period, the hearing record offers little, if any, evidence to guide this analysis (see generally Tr. pp. 1-639; Parent Exs. A-K; M-S; V-Z; AA-MM; PP; RR; TT-VV; Dist. Exs. 1-44; 46-69; IHO Exs. I-V[B]). In this instance, however, IHO 1's previous award of compensatory educational services for the district's failure to offer the student a FAPE for the first seven months of the 2016-17 school year—upheld by an SRO—offers at least some basis upon which to calculate the present relief (see Application of the Student with a Disability, Appeal No. 17-101). At the impartial hearing on remand, IHO 1 awarded the student compensatory educational services comprised of "'150 hours of services, to be provided by both a special education teacher and a well credentialed, professional behavioral support consultant with experience in working with students with autism"' (id.; see Parent Ex. TT at p. 9).[35] Thus, on a per month basis, IHO 1's award equated to approximately 21 hours per month of compensatory educational services to be delivered to the student (150 hours divided by 7 months). Equitably, therefore, the district is ordered to provide the student with an additional 105 hours of services (21 hours per month for 5 months), to be provided by both a special education teacher and a well credentialed, professional behavioral support consultant with experience in working with students with autism, for its failure to offer the student a FAPE from January 28, 2017 through June 23, 2017.

VIII. Conclusion

Having determined that the evidence in the hearing record establishes that the district failed to offer the student a FAPE in the LRE for the 2016-17 school year under the November 2016 IEP and the March 2017 IEP for the time period from January 28, 2017 through June 23, 2017, and that the student is entitled to an award of 105 hours of compensatory educational services as a remedy for the district's failure to offer the student a FAPE for that portion of the 2016-17 school year, the necessary inquiry is at an end. Finally, I have reviewed the parties' remaining contentions and find them to be without merit.

[35] The compensatory educational services awarded by IHO 1 took into consideration the progress the student made as a result of the pendency services he received at the district from September 2016 through January 2017 (see Application of a Student with a Disability, Appeal No. 17-101). Inferring that the student would have continued to make similar progress under his pendency services had the parents not removed him from the district between January 13, 2017 through May 15 or 16, 2017, leads to the conclusion that a similar award of compensatory educational services—that is, approximately 21 hours per month—would be sufficient to serve the purpose of an award of compensatory educational services, which aims 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 E.M., 758 F.3d at 451; Newington, 546 F.3d at 123).

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated January 10, 2018, is modified by reversing that portion of the decision within which the IHO found that the district offered the student a FAPE from January 2017 through May 2017; and,

IT IS FURTHER ORDERED that, as relief for its failure to offer the student a FAPE for that portion of the 2016-17 school year from January 28, 2017 through June 23, 2017, the district is shall provide the student with compensatory educational services consisting of 105 hours of services, which must be provided by both a special education teacher and a BCBA who is a well credentialed, professional behavioral support consultant with experience in working with students with autism; and,

IT IS FURTHER ORDERED that the district shall, unless the parties otherwise agree provide the student with the compensatory educational services described above by April 30, 2019.

Dated: **Albany, New York**
March 23, 2018

JUSTYN P. BATES
STATE REVIEW OFFICER