The University of the State of New York

The State Education Department
State Review Officer
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No. 20-018

Application of the BOARD OF EDUCATION OF THE Rhinebeck Central School District for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

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

Stenger Roberts Davis and Diamond, LLP, attorneys for respondent, by Lorraine McGrane, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from a decision of an impartial hearing officer (IHO) which determined that the educational program and services recommended by its Committee on Special Education (CSE) for respondent's (the parent's) son for the 2016-17, 2017-18, and 2018-19 school years were not appropriate. The parent cross-appeals from those portions of the IHO's decision which failed to grant her requested relief and address all of her claims. The appeal must be sustained in part. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The student was adopted from a foreign country at approximately two years of age and upon arrival to the United States received early intervention services including speech-language, occupational therapy (OT) and play therapy, and moved to the district in the middle of his third grade school year (Dist. Exs. 17 at p. 1; 18 at p. 1; 27 at p. 2). The student is eligible for special education and related services as a student with an other health impairment and he has received diagnoses of an attention deficit hyperactivity disorder (ADHD), anxiety disorder, and reactive

attachment disorder (Dist. Exs. 3-10; 24; 27).[1] The student demonstrates average cognitive skills with relative weaknesses in math, handwriting, fluid reasoning, working memory, and long-term retrieval, and behavioral difficulties in the home environment (Dist. Exs. 21 at pp. 1-2; 27 at p. 1; 28 at p. 1).

During the events relevant to this appeal, the student was came under the jurisdiction of the Family Court, the supervision of the county probation and social services departments, and the and for certain periods of time the Family Court placed the student in a nonsecure detention center, a group home (via the county department of social services), and a residential special act school district. Due to the nature of the proceeding, further recitation of the facts will be discussed in detail below.

A. Due Process Complaint Notice

The parent filed a due process complaint on March 20, 2019 (Dist. Ex. 1 at p. 1). The parent asserted that the district denied the student his right to a free appropriate public education (FAPE) for the 2015-16, 2016-17, 2017-18, and 2018-19 school years (id. at p. 7).[2] The parent argued that the district "failed to devise appropriate IEPs for the Student in the least restrictive environment, with appropriate related services and accommodations," which resulted in a denial of FAPE (id. at p. 7). The parent contended that the district's "actions and inactions . . . significantly impeded the student's and his parent's opportunity to participate in the decision-making process" (id. at pp. 7-8).

The parent contended that she was denied her right to meaningfully participate with the May 22, 2018 CSE as she was not invited (Dist. Ex. 1 at pp. 9-10). Moreover, the parent asserted that the March 2019 CSE was predetermined (id. at p. 10). Specifically, the parent pointed to the fact that the student was invited to participate in the March 2019 CSE despite her objections, and that due to his participation she was unable to express her concerns and meaningfully participate (id.). The parent argued that a residential placement was not considered despite the parent informing the CSE that there was a need and that the documentation indicating the student could not return to the public school was not shared with the CSE (id.).[3]

The parent asserted that the district did not fully evaluate the student during the triennial review in 2017 as "the last full comprehensive evaluation in 2014" (Dist. Ex. 1 at pp. 8-9). The parent argued that a psychiatric evaluation was conducted during the 2017-18 school year; however, "this new evaluation and the evaluator's recommendations [we]re not shared with the CSE in the development of the 2017-2018 or 2018-2019 IEPs" (id. at p. 8). Moreover, "the CSE chair decline[d] to review a single evaluation that [the student] has taken" and the CSE did not

[1]The student's eligibility for special education as a student with an other health-impairment is not in dispute (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

[2] I have not recited the parent's claims from the earlier school years in detail because, as further discussed below, they are outside the limited scope of the remaining disputed issues in this appeal.

[3] The parent also raised that the student was discriminated against section 504 of the Rehabilitation Act of 1973 ("section 504") (Dist. Ex. 1 at p. 11).

have the "information to make placement and goal decisions" regarding the student's program for the 2018-19 school year (id.).

The parent argued that the student's IEPs failed "to provide for the use of appropriate special education services to address his disabilities" (Dist. Ex. 1 at p. 8). The student did not receive keyboard training nor did the IEPs "provide specific services to address his school avoidance, test anxiety, [and] organization challenges" (id.). The parent contended that the student required treatment throughout the day (id.). When developing the student's IEP, the parent argued that the district failed to consider her concerns, the results of the most recent evaluations, and the student's academic, developmental, and functional needs (id.).

Additionally, the parent asserted that the district failed to write annual goals that were specific and meaningful (Dist. Ex. 1 at p. 9). According to the parent, the district failed to conduct a functional behavioral assessment (FBA) and/or develop a behavioral intervention plan (BIP) for all of the school years in question to address the student's school avoidance and behavioral issues (id.). The parent alleged that the student had a FBA and BIP in place only during his fifth grade school year (id.). The parent contended that the district otherwise failed to address the student's "challenges regarding school avoidance, focus during class, organization, and completing homework, [the] diagnosis of ADHD and his challenging history with school avoidance, avoidance, attention and work completion" all demonstrated that the student required a BIP in order to receive a FAPE (id.).

As a remedy for the alleged denial of FAPE, the parent requested compensatory education in an amount determined by the IHO, to make up for the educational services the student did not receive as a result of the alleged violations (Dist. Ex. 1 at p. 12). Additionally, the parent requested that the IHO order the district to prospectively tuition for the student for the remainder 2018-19, 2019-20, 2020-21 school years at a private residential school selected by the parent that provides therapeutic treatment for its students (Dist. Ex. 1 at p. 11).

B. Impartial Hearing Officer Decision

On March 29, 2019, the district filed a response to the parents claims and a motion to dismiss the parent's due process complaint notice on numerous grounds, including that some claims were too conclusory to proceed to an impartial hearing and that others were time-barred (Dist. Ex. 2). The parties convened for an impartial hearing on June 19, 2019 (Tr. pp. 1-10). During the impartial hearing, the IHO explained that they had just finished another proceeding involving the same parties and that he intended to clarify the issues in the instant proceeding (Tr. pp. 3-4). In order to distinguish alleged violations from background factual allegations, in the parent's 13-page due process complaint notice, the IHO issued a two page prehearing order dated June 19, 2019 clarifying the disputed fact and legal issues that he understood were to be decided in this proceeding (IHO Ex. 1).[4] The IHO issued an interim decision dated June 24, 2019 addressing the

[4] The IHO provided the parties an opportunity to respond, indicating that "[a]ny issue that was pleaded in the Complaint that is not memorialized in this Prehearing Order may be precluded from being raised at the due process hearing per the discretion of the hearing officer. The parties and their representatives shall be held to the matters agreed upon or ordered. If either party believes that the hearing officer has overlooked or misstated anything in this Order, he/she is directed to advise the hearing officer of the same by June 24, 2019. The concern shall be

district's motion to dismiss (see IHO Ex. 2). In the interim decision, the IHO noted his June 19, 2019 prehearing order clarifying the scope of the claims (IHO Ex. 2 at p. 3; see also IHO Ex. 1).[5] The IHO held that the pre-hearing order "makes the claims clear to the school district, which will, accordingly, be able to defend the claims in this case" and therefore, dismissal is inappropriate (IHO Ex. 2 at p. 3). The IHO held that the parent's claim that the district "denied the Student a FAPE because of a failure to provide an FBA and BIP from June 11, 2018 through the date of reenrollment in or about March, 2019 must be dismissed" (id. at p. 3). The IHO also dismissed the parents claims regarding Section 504 for that time period (id.). Turning to the district's assertion that the parent's claims were barred by the statute of limitations, the IHO determined that the dismissal would be premature at that time (id. at p. 4).

Following the interim decision, the impartial hearing continued on five additional dates (Tr. pp. 11-883). The IHO rendered a final decision on December 26, 2019 (IHO Decision at p. 16). The IHO held that parent's claims prior to March 21, 2017, which included claims related to the March 15, 2015, October 20, 2015, April 27, 2016 and March 13, 2017 IEPs, were time-barred (id. at p. 8). The IHO found that the parent's argument that she did not know her rights due to the school district's failure to provide procedural safeguards was undermined by evidence that that she received notices (id.). Regarding the parent's contention that information was withheld, the IHO noted that the parent provided "no caselaw in support of the proposition that a parent's lack of knowledge about underlying FAPE claims somehow allows parents to evade restrictions found in the applicable statute of limitations" (id. at pp. 8-9). Consequently, the IHO dismissed "all claims relating to the IEPs created on March 15, 2015, October 20, 2105, April 27, 2016, and March 13, 2017" (id. at p. 9). Further, the IHO found that parents claim regarding the triennial evaluations were time barred (id. at p. 12).[6]

Turning next to the parent's claim regarding the student's behavior that fell within the statute of limitations, the IHO held that "there [was] no convincing evidence that the District proposed or implemented 'numerous specific strategies' to carefully address the Student's behavioral issues, in particular the Student's difficulty with attendance at school" (IHO Decision at p. 10). The IHO noted that no FBA was created after 2015 and the IEPs did not indicate that the student required a BIP (id.). The IHO indicated that the IEPs did not include social-emotional goals and none of them addressed attendance in the student's management needs (id.). As such, the IHO held that the district "implemented virtually no interventions to address the Student's attendance issues" (id.). The IHO found that the record "established that the Student's attendance issues were due to his disabling condition" and that the March 10, 2017 IEP "links the Student's disabling condition to the Student's attendance issues" (id. at p. 11). Based on this, the IHO found that the district "denied the Student by failing to provide the Student with appropriate behavioral

addressed immediately" (IHO Ex. 1 at p. 2).

[5] The IHO also reiterated the claims as described in the interim order (IHO Ex. 2 at p. 1).

[6] Additionally, the IHO also made an alternative finding that there was "nothing in the record to suggest that the failure of the school district to conduct a psychological evaluation or occupational therapy evaluation of the Student in 2017 resulted in any adverse impact on the Student" (IHO Decision at p. 12).

interventions from February, 2018 to present" (id.). Moreover, the IHO found that the parent's other claims regarding the IEPs were dismissed (id. at pp. 11-12).

As a result of the IHO's finding of a denial of FAPE described above, the IHO granted 100 hours of compensatory education for the district's denial of FAPE for 3.5 months of the 2017-18 school year, 3.5 weeks of the 2018-19 school year and for the 2019-20 school year through the date of the decision (IHO Decision at pp. 15-16).[7] The IHO declined to order that the student be placed in the parent's preferred residential placement on a going forward or prospective basis because of a lack of evidence that the proposed placement would be appropriate for the student and the fact that the approved nonpublic school had not accepted the student at the time of the impartial hearing (IHO Decision at p. 14). Consequently, the IHO ordered the CSE to convene within 20 calendar days of the decision to review the student's placement and discuss the possibility of selecting the parent's preferred residential placement (id. at p. 14).[8]

IV. Appeal for State-Level Review

The district appeals.[9] Initially, the district argues that the IHO erred by making findings regarding the 2019-20 school year as that school year was outside the scope of the impartial hearing. The district requests that the IHO's decision for that 2019-20 school year be set aside. Additionally, the district contends that the IHO erred by "making findings as to the appropriateness of the behavioral interventions contained" in the April 11, 2019 IEP and "subsequent CSE meetings held to review the student's 2018-2019 program and services." The district asserts that these CSE recommendations were not challenged in the due process complaint notice and

[7] The IHO noted that the parent did not specify the type or amount of compensatory education she was seeking, and I interpret his decision as holding that there were significant periods of time that other school districts became responsible for providing a FAPE to the student.

[8] Further, the IHO dismissed the claims regarding Section 504 as he found that "there was no reason to believe that the school district was acting in bad faith during the process" or that the district's failure to provide behavioral interventions should be characterized as "deliberate indifference" (IHO Decision at p. 13).

[9] The district was served with a request for review from the parent on February 3, 2020 (which together with correspondence I have directed to be returned to the parents). This was one day before the district sought permission from the undersigned for alternative service of the district's request for review (see Dist. February 4, 2020 Letter). I granted the district's request for alternative service, which for unknown reasons failed to disclose that the district had already been served. The parent was thereafter served with the district's request for review on February 4, 2020 (Dist. Aff. of Service). Under the practice requirements of Part 279 the State regulations, the party that serves the request for review is the petitioner and the party who received the request for review is the respondent (8 NYCRR 279.4[a]; [b]). In this instance, between the district's counsel, who has appeared before this office many times, and his client, the district, they were responsible to know that they should have been the respondent in this proceeding in accordance with the requirements of Part 279. I am disturbed that the district's counsel or his client remain unaware of or lacked the candor to correct the record and instead let the parent reconfigure and refile her request for review as an answer with cross appeal in accordance with my directive. The parent and their counsel should not have been required to refile, but by the time I discovered it, the damage could not be undone, especially in light of the timeframe remaining to address the party's contentions. I appreciate the parent's prompt response and the district's counsel is warned that his clients should improve their processes or communication with him before seeking alternate service from an SRO, which in this case was completely unnecessary.

therefore, were not before the IHO. Again, the district requests that the IHO's decision on this issue be set aside.

Next, the district argues that the "the IHO erred to the extent that he determined that the District owed [the student] a duty of FAPE and that it fell short of meeting its obligations to [the student] during the time periods that he was at [an out-of-district detention center], at an [out-of-district] group home or residentially placed by the Family Court at [the residential special act school district]." Moreover, the district asserts that the IHO erred by finding that the district failed to offer appropriate behavioral support as of February 2018, and asserts that the district took steps to address the student's "attendance and assignment completion issues." The district contends that the student's poor behavior was occurring at home and that it was actively involved in working with agencies that would be able to support the student in the home. The district asserts that there was no need for "additional behavioral supports, certainly at least through the April 11, 2019 CSE meeting" and again noted that the CSE was not challenged by the parent.

The district asserts that the IHO "fashioned an inappropriate and unwarranted remedy" and that the IHO failed to account for the time that the student was outside of the district. The district requests findings that it offered the student "an appropriate educational program during all of the relevant time periods that it was required to do so" and that the relief ordered by the IHO was not supported by the hearing record.

In the answer with cross appeal, the parent agreed with the district that the 2019-20 school year was not subject to review by the IHO as it was not raised in the due process complaint notice. However, the parent asserts that the district "opened the door on the April 11, 2019 CSE meeting despite the parent's objection" because the district brought in "evidence of the meeting and the subsequent IEP as a defense to the previous inappropriate IEP" into the record. Therefore, the parent contends that IHO properly used the meeting information and IEP to support his findings.

The parent argues that "the IHO was correct to include all claims relating to the period that the student was residentially placed" by a court order and the district was incorrect about its duty to provide the student with a FAPE for the 2017-18 school year. The parent contends that the student remained within the district until June 8, 2018 because the district was "ordered to provide for [the student's] educational needs" prior to that time. The parent asserts that the district failed to provide the student with a "functional behavior assessment, behavioral assessment, behavior intervention plans and interventions" which denied the student a FAPE as of March 21, 2017. Moreover, the parent argues the "District failed to defend its position that they provided support and services to address [the student's] school refusal in all years within the timeline."

The parent contends that the IHO erred by not addressing her claim that the March 2019 CSE was predetermined. The parent argues that the CSE prevented her "from expressing her concerns and sharing with the CSE" what she believed the student would need when he came back home. The parent asserts that the special act school district attendees "did not discuss nor did the CSE ask about the behavioral plan they had in place" and that the student's "behavior problems at [special act school district] were not discussed at the meeting" and the parent was unable to discuss them "without concern for retribution from her son."

Finally, the parent argues that the IHO provided insufficient relief. The parent asserts that the IHO determined that the district denied the student a FAPE beginning in February 2018; however, the parent contends that FAPE was denied as of March 21, 2017, the time after which the statute of limitations would not bar the parent's claim. The parent asserts that the IHO provide[ed] no real explanation of what happened to March 21, 2017- the last day of school in June of 2017 and September 5, 2017-March 31, 2018." The parent argues that the IHO fashioned his remedy from an "inaccurate timeline" and request appropriate compensatory education to "bring [the student] to where he would have been if he had received FAPE." Additionally, the parent contends that the student requires an appropriate placement and asserts that the residential school she identified is the only school on the State-approved list to which student "could be accepted that will provide him with education while he gets treatment for his reactive attachment disorder." In addition, the parent asserts she needs assistance getting the student to intake appointments for an educational placement (such as the nonpublic residential placement she seeks).

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 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]).[10]

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were

[10] 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).

appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. Preliminary Matters

1. Scope of Review

As an initial matter, it is necessary to identify which of the parties' arguments are properly before me on appeal. State regulations governing practice before the Office of State Review require that the parties set forth in their pleadings "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 further specify that "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][2], [4]; see 8 NYCRR 279.4[a]).

First, I note that neither party appealed the IHO's determination regarding which claims were precluded by the statute of limitations or the IHO's dismissal of all of the parent's IEP-related claims other than those related to behavioral interventions (see IHO Decision at pp. 8-9, 11-12).[11] Therefore, the IHO's determinations on these issues have become final and binding on both parties and they will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

2. Scope of Impartial Hearing

The parties both agree on and disagree to varying extents over whether the IHO should have ruled on certain issues during the impartial hearing and the extent to which the IHO should have relied on certain facts in light of his ultimate determinations. Turning first to a point of

[11] The parent in her memorandum of law filed with her answer and cross-appeal asserts that the IHO erred by not finding the IEPs were deficient in addressing the student's "fine motor, reading and math skill deficit" (Parent Mem. of Law at pp. 25-26). Also, the parent argues that the IHO was incorrect in his decision that the district's failure to evaluate was "without substantive harm" (id. at pp. 26-27). It has long been held that a party is required to set forth the challenges to the IHO's decision in their pleading and that a memorandum of law is not a substitute for a pleading (see 8 NYCRR 279.4, 279.6; see, e.g., Application of a Student with a Disability, Appeal No. 19-021; Application of the Bd. of Educ., Appeal No. 16-080). These claims were not raised in the answer and cross-appeal and therefore are not properly raised.

agreement between the parties, both the district and the parent the parent agree that the IHO erred in addressing the 2019-20 school year because it was not raised by the due process compliant notice (Answer at p. 8). The IHO used the June 19, 2019 prehearing order as an effective tool for clarifying the issues number of the precise fact and legal issues to be resolved in the hearing process—it can be a highly effective procedure— and I urge the IHO to continue using this hearing management strategy. However, the parties are correct in their allegations of error because, in this instance IHO acknowledged June 19 2019 pre-hearing order and in his June 24, 2019 interim decision that that issues in dispute were limited to the 2018-19 and previous school years, but then in his final decision the IHO deviated from his own prehearing order defining the issues without providing the parties adequate notice and an opportunity to before he rendered findings on the 2019-20 school year (see generally IHO Exs. 1; 2). Therefore, the IHO finding that the student was denied a FAPE from the start of the 2019-20 school year to the date of his decision must be vacated as it was outside the scope of the impartial hearing.

The parties also argue over the extent to which the IHO should have relied on an April 2019 IEP in his final decision, which was a new IEP that post-dated the parent's due process complaint notice (see Dist. Exs 1; 11). During the impartial hearing, the parent objected to the district entering the April 2019 IEP into the evidence because it was outside the scope of the hearing (Tr. p. 82). The district argued that the April IEP was relevant to 1) the relief being sought by the parent in the form of residential placement because the district had decided after the due process complaint notice was filed to seek residential placement for the student, and 2) that there was a claim in the parent's due process complaint notice regarding the parent's ability to participate in the March 2019 CSE meeting, and the resulting IEP, (which was developed several weeks after the CSE meeting and due process complaint notice was filed) was relevant to the extent that it addressed the parent's concerns that she was denied meaningful participation in the creation of her son's IEP (Tr. pp. 82-84; Dist. Exs. 1 at p.10; 11). The IHO admitted the April IEP into evidence because it was relevant to the relief sought by the parent (Tr. p. 84). However, I note that the parent's due process complaint notice addressed the March 2019 CSE meeting, but the parent was not in a position to address any substantive defects in the April 2019 IEP at the time the due process complaint notice was filed and the district was attempting to address the limited claims in the parents complaint with respect to the March 2019 CSE meeting rather than the substantive adequacy of the student's revised programming in April 2019 in this proceeding. Within this unique context, I find expanding the proceeding into events that postdated the due process complaint notice and the chain of events that flowed from the student's return from the court-ordered residential setting were outside the scope of this proceeding, and the IHO was within his authority to give some consideration to the document as it related to the issue of how the March 2019 CSE meeting was conducted as well as the parent's request for relief in the form of a residential placement, and the undersigned will consider to that extent as further described below.

Significantly, in its motion to dismiss, the district argued that the student had been placed, among other places, in a residential special act school district and no longer attended the district (Dist. Ex. 2). In his June 24, 2019 interim decision, the IHO noted that the parent had admitted that the student was no longer enrolled at the district as of June 11, 2018 until he returned in March 2019 and that the parent's claim that the district "denied the Student a FAPE because of a failure to provide an FBA and BIP from June 11, 2018 through the date of reenrollment in or about March, 2019 must be dismissed" (IHO Ex. 2 at p. 3 [emphasis added]). However, in his final decision, the IHO inconsistently ruled that due to its failure to address the student's behavioral needs, the

district denied the student a FAPE as of February 2018 (IHO Decision at pp. 10-11). The IHO's ruling was error because, without any explanation or notice to the parties, he reached and decided an issue in his final decision that was direct contradiction of his interim decision dismissing the parents claim during that that time period. Furthermore, the parties did not challenge any of the IHO's interim decisions. Consequently, this aspect of the IHO's final decision must be reversed.

In addition, the IHO's final decision was vague in that he failed to specify the dates within each school year for which he was finding the denial of FAPE. Instead, the IHO held that the student was denied a FAPE for 3.5 months of the 2017-18 school year and 3.5 weeks of the 2018-19 school year (IHO Decision at pp. 15-16); however, as will be discussed in detail below, it is unclear when the denial of FAPE for each school year began or stopped based on the IHO's decision and reasoning. The IHO's final decision did not specify whether the student was denied a FAPE for the periods of time that he was 1) attending the district school, 2) at the detention center, 2) placed in the out-of-district group home, or 4) in the out-of-district residential placement or some combination thereof. Given the conflict between the IHO's interim dismissing certain claims and final decision, the additional lack of specificity by the IHO in his final decision leads me to the conclusion that it must be reversed.

I have conducted a full and independent review of the record regarding the parties remaining claims. The issues on review are limited to whether the programming created for the student by the district subsequent to March 21, 2017, the point in time at which the IHO found the parent's prior claims were time-barred, provided the student with appropriate behavioral interventions. I will also address the parties' disputes over whether the decisions of the March 2019 CSE were the result of impermissible predetermination and whether the IHO fashioned an appropriate remedy.[12]

B. Relevant Facts Prior to March 21, 2017

Although the statute of limitations precludes any claims that accrued prior to March 21, 2017, some information and events prior to and including the March 13, 2017 CSE meeting are relevant as background when addressing the timely claims by the parent accruing after March 21, 2017. Accordingly, I will discuss that information to provide the context for addressing the remaining issues.

During the 2014-15 school year (fifth grade) while attending a district elementary school, the student began exhibiting school refusal, tardiness, and homework completion issues, prompting the district to conduct an FBA and develop a BIP in January 2015 (Parent Ex. W at pp.

[12] The parties did not challenge the IHO's findings regarding section 504 and it is noted that an SRO's jurisdiction is limited by State law to matters arising under the IDEA and Article 89 of the Education Law, and thus no permissible challenges under that statue may be heard in this forum (Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Courts have also recognized that the Education Law makes no provision for State-level administrative review of IHO decisions with regard to section 504 (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 & n.17 [E.D.N.Y. 2012] [noting that "[u]nder New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"], aff'd, 513 Fed. App'x 95 [2d Cir. Mar. 12, 2013]; see also F.C. v. New York City Dep't of Educ., 2016 WL 8716232, at *11 [S.D.N.Y. Aug. 5, 2016]).

6-7; Dist. Exs. 22; 23; see Dist. Ex. 3 at p. 1). Subsequently, the student's attendance improved significantly as a result of the district BIP (Tr. pp. 476-78; Dist. Ex. 4 at p. 1). When in school, personnel reported that the student was capable cognitively and academically, that he actively attended in class with minimal distraction, that his behavior was "very compliant," and his emotional functioning was "adequate" (Dist. Exs. 4 at p. 1; 13 at pp. 1, 4). In contrast, at home, the parent reported that she had little control over the student, and that "when pressed" his emotional level of arousal and inappropriate behaviors escalated, at times to the point of police intervention (Tr. pp. 350-53; Dist. Ex. 4 at p. 1). According to the parent, during that time she attempted a home-based crisis intervention program, private counseling services, and medication management with the student (Tr. pp. 342-53; Dist. Exs. 4 at p. 1; see Dist. Ex. 25 at p. 3).

On March 15, 2015, a CSE convened to develop the student's IEP for the 2015-16 school year (sixth grade), his first year at the district's middle school (Dist. Ex. 4; see Dist. Ex. 3 at p. 1).[13] The meeting information summary noted that the student had had a "tough year," and that his reactive attachment issues with the parent had impacted his rate of progress, but that the student's daily attendance had improved to nearly 100 percent as a result of the district's behavior plan developed in winter 2015 (id. at pp. 1-2). For the upcoming school year, the CSE recommended a 10-month program consisting of one 41-minute special class "learning center" period per day, one 30-minute session per week of individual counseling, and thirty 30-minute small group OT sessions per year (id. at pp. 1, 10, 12). In addition, the CSE recommended a variety of supplementary aids and services, program modifications and accommodations including refocusing and redirection, use of a computer, teacher assistant support in content classes, and study guides for all classes (id. at p. 11). Further, the March 2015 CSE determined that the student required strategies, including positive interventions, supports and other strategies to address behaviors that impede the student's learning, a BIP, testing accommodations, and consultation with a special education teacher and school social worker as needed (id. at pp. 9, 12-13).[14]

During the first quarter of the 2015-16 school year, the student continued to struggle with absences and arriving to school late, which the parent reported was due to "stress and emotional reactions toward attending school" (Dist. Ex. 14 at p. 2). To ease his transition to the middle school, the district exempted the student from a 10-week course in order to provide him with 1:1 support from a special education teacher to assist him with missed work and encourage his attendance (Tr. pp. 487-489; Parent Ex. W at p. 3; Dist. Ex. 14 at p. 2). According to the special education teacher, the student's attendance improved greatly as the year progressed (Dist. Ex. 6 at pp. 8-9).

On April 27, 2016, the CSE convened to develop the student's IEP for the 2016-17 school year (seventh grade) (Dist. Ex. 6). The April 2016 CSE noted that the student's promotion to

[13] While the March 2015 meeting was conducted by a subcommittee of the CSE—or CSE subcommittee—the meeting and its committee, as well as any subsequent CSE subcommittee meetings held, will be referred to simply as a CSE meeting for ease of reference.

[14] The hearing record contains an October 20, 2015 IEP "Amendment-Agreement No Meeting" stating that the parent requested that OT services be removed from the student's IEP (Dist. Ex. 5 at pp. 1, 11).

seventh grade was in jeopardy at that point in the school year (id. at p. 1).[15] The parent reported that the student lacked confidence and took out his frustrations at home, and that the student had reported to her that he did not have friends, although she observed that he tended to seek out older peers (id. at p. 9). The student's special education teacher noted that the student was receiving services outside of school to address his extreme anxiety; and that his anxiety had impacted his attendance (id.). For the 2017-18 10-month school year, the April 2016 CSE recommended that the student receive one 41-minute 10:1+1 special class "learning center" period per day and thirty 30-minute sessions of individual counseling yearly (id. at pp. 1, 12-13). In addition, the CSE recommended a variety of supplementary aids and services, program modifications and accommodations including refocusing and redirection, use of a calculator, agenda book, monitoring of amount of homework nightly, as well as study guides for all classes (id. at pp. 12-13). Further, the April 2016 CSE determined that the student required strategies, including positive interventions, supports and other strategies to address behaviors that impeded the student's learning, a BIP, testing accommodations, and consultation with a special education teacher and school social worker as needed (id. at pp. 10, 12-13).[16]

The student attended the district's middle school for seventh grade during the 2016-17 school year (see Dist. Ex. 15 at pp. 1-6). During the first two quarters of the school year, the student received generally failing academic subject grades in language arts (66, 56), math (61, 50), and social studies (52, 60), with passing grades in science (76, 70) (Dist. Ex. 26 at p. 1-2). The parent stated that during seventh grade the student had difficulty with homework completion and attending some of his classes (see Tr. pp. 384, 386-87, 389-90; Parent Ex. E). According to the IEP annual goal progress report, prior to the March 2017 CSE meeting the student was progressing satisfactorily toward his study skills, reading, writing, mathematics, and social/emotional/behavior IEP goals (id. at pp. 1-6).

On March 13, 2017 the CSE convened for the student's annual review and to develop an IEP for the 2017-18 school year (eighth grade) (Dist. Ex. 7). The student attended the meeting, and reported that his year was going better than last year (id. at p. 1). The parent informed the CSE that the student was still "having difficulty in math but, overall, she ha[d] seen incredible improvement in [the student's] willingness to come to school" (id.). The CSE considered teacher input, parent reporting, classroom performance and then-current evaluation results in making its recommendations for the student for the 2017-18 school year (id. at pp. 1-2). The student's teacher reported that while the student was often absent in the morning, struggled in classes, and did not complete assignments, he actively participated in class, was great in discussions, worked well in collaborative groups with peers, worked well with teachers, and sought extra help during study

[15] The parent testified that the student "didn't do well" in sixth grade in that "[h]e was failing several classes" but that in the end "he just squeaked through" to seventh grade (Tr. pp. 383-84; see Parent Ex. D).

[16] In July 2016 the parent completed a social history in which she indicated that "several police reports" had been filed regarding the student's aggressive (verbal and physical) behavior and property damage; however, that no serious injuries occurred or charges were made (Dist. Ex. 25 at pp. 1, 3; see Parent Ex. GG). Further, the parent reported that the student put his fist through the wall, tried to bully her into buying things, damaged the family car, showed a lack of respect and responsibility, and wanted the parent home at all times but was abusive to her (id. at p. 3). In addition, the parent noted that she had not found any discipline that really worked for the student, that discipline made him more angry and aggressive, and that special services including extra 1:1 help were "crucial" for him (id. at pp. 3, 5).

hall (id. at pp. 1, 7). His special education teacher reported that the student had started advocating for himself and raised his hand in class for clarification (id. at p. 1). The CSE reviewed recent behavior rating scale results that indicated the student was "in the clinically significant range for learning problems and somatization," and was "at risk in several other areas" (id.).

For the 2017-18 10-month school year, the March 2017 CSE recommended that the student receive one 41-minute period per day of resource room services, two 41-minute periods per day of direct consultant teacher services in English and math classes, two 41-minute periods of indirect consultant teacher services in science and social study classes, and twenty 30-minute individual counseling sessions (Dist. Ex. 7 at pp. 1, 10-11). In addition, the CSE recommended a variety of supplementary aids and services, program modifications and accommodations including use of a calculator, agenda book, monitoring of homework and modify when necessary, study guides for all classes, and use of a computer (id. at pp. 11-12). Further, the CSE recommended testing accommodations and consultation with a special education teacher and school social worker if necessary (id. at pp. 12-13). Based on the available information at the time, the CSE developed an annual goal to improve the student's ability to use coping skills when expressing negative emotions at school, and determined that the student was not demonstrating behaviors in school that required a BIP or strategies, including positive interventions, supports and other strategies to address behaviors that impeded the student's learning (id. at pp. 9-10). In light of the events described above, I will turn the parent's allegations of error by the IHO.

C. 2016-17 School Year subsequent to March 21, 2017

Here, as determined by the IHO, the question of whether the March 13, 2017 IEP was appropriate to provide the student with a FAPE is beyond the statute of limitations. However, the parent asserts in her cross-appeal that the remedy fashioned by the IHO was "based upon an inaccurate timeline," and argues that the IHO should have found that the district denied the student a FAPE as of March 21, 2017 "onward" for its failure to appropriately address the student's behavioral issues (see Answer at pp. 1, 10). To the extent that the parent's claim is an attempt to reach issues that resulted from the IEP in effect on March 21, 2017, that would undermine the statute of limitations holding and I find that strategy is impermissible. However, I will examine if the circumstances required the district to modify the students IEP after March 21, 2017 due to inadequate behavioral supports.

The director testified that at the time of the March 2017 CSE meeting her understanding of the student was that behaviorally "he was able to make friends, he got on well with his teachers, followed rules and expectations in the classroom and was generally a pleasant student" (Tr. p. 137). When the parent was asked whether the student's in-school behavior in seventh grade was "always good," she responded that one of his teachers had expressed concern about the student's attendance, and refusal to stay for extra help (Tr. pp. 390-92). The hearing record reflects that from March 21, 2017 to the end of the 2016-17 school year the student was absent three days (Parent Ex. W at p. 2). Further, the June 2017 IEP annual goals progress report indicated that the student had achieved one goal, and was progressing satisfactorily towards most others (see Dist. Ex. 15 at pp. 1-6). Specifically, for study skills, the progress report indicated that in June 2017, the student "had his best quarter for work effort and completion" and he completed 95 percent of his work in language arts and 92 percent of homework in science, demonstrating that he was "very

capable" (id. at p. 2).[17] The progress report indicated that the student achieved his reading goals and progressed satisfactorily towards his goals in math and writing (id. at pp. 3-5). Through April 2017, the student reportedly was making satisfactory progress toward his social/emotional annual goal related to the appropriate use of coping strategies (id. at p. 6). The student passed his classes for the year with the exception of language arts and math, and he successfully completed an online math course during summer 2017 in order to be promoted to eighth grade (Tr. pp. 392-95; Parent Ex. E). Therefore, although the student may have struggled academically during the 2016-17 school year, the hearing record demonstrates that subsequent to March 21, 2017 the student's behavioral needs in school were being addressed pursuant to the IEP in effect at the time and the student was attending school.

D. 2017-18 School Year

The parent testified that in August 2017 the student "was in crisis" and she had to call the police due to a domestic incident, after which a PINS petition was filed (Tr. pp. 396-97, 602).[18] She further testified that later that month the student was arrested for stealing property in the community which according to the parent, "activated" probation, and the student began meeting with a probation officer weekly in early October 2017 (Tr. pp. 396-97, 608-10). At the time of his first probation appointment, the student's attendance at school became "sporadic," and the parent testified that "October was when [the student] really stopped attending school and so actually the problem got worse rather than better after the probation was initiated" by the authorities (Tr. pp. 399-400). As of November 27, 2017, the student had been out of school for approximately 25 school days since September 19, 2017 (Parent Ex. W at p. 2). By letter dated November 27, 2017, the county Office of Probation notified the parent that the district had filed a PINS complaint regarding the student's "truancy" (Parent Exs. JJ; KK). The parent testified that among other things, the probation officer offered resources and supports to get the student to school; however, those attempts were unsuccessful and, according to the parent, the student was referred to the Family Court system (Tr. pp. 610-11). A November 28, 2017 Family Court order released the student under supervision and indicated that the student was required to report to probation one time weekly, comply with school attendance, and follow counseling and therapy recommendations (Parent Ex. CC at pp. 1-2).

On November 30, 2017, a CSE convened for a manifestation determination review to consider if the student's truancy was a result of his disability (Parent Ex. B at p. 1). The meeting information worksheet indicated that the student had been absent for 19 consecutive days and had close to 30 unverified absences since September 19, 2017 (Parent Ex. KKK at p. 1). The parent participated in the meeting by telephone and reported that the student refused to attend school and when pressed, pretended to be asleep or did not answer the door (Parent Ex. B at p. 1). Further, the parent reported that the student's feelings about school were impacting his behavior, but this was not the "root cause" as the student had "willfully decided not to go to school" (Parent Ex. KKK at p. 1). Reports about the student's in-school behavior indicated that he was engaged, compliant,

[17] The June 2017 IEP annual goal progress report indicated that the student only completed 50 percent of his math homework due to absences (Dist. Ex. 15 at p. 2).

[18] PINS refers to a "Person in Need of Supervision" (see Parent Ex. JJ). The parent testified that she was not notified of the PINS petition (Tr. pp. 396-97).

polite and respectful, lacked a disciplinary record, and that although capable of doing so, was reluctant to work independently (Parent Exs. B at p. 1; KKK at pp. 3-4). The CSE also reviewed the behavioral supports the student had received including counseling and accommodations (Parent Exs. B at p. 1; KKK at p. 3). Based on recent evaluations, teacher input, parent reporting and committee discussion, the CSE determined that the student's truancy was not a manifestation of his disability (Parent Ex. B at p. 1). The parent raised the question of an appropriate re-entry plan for when the student resumed school, and the CSE chairperson suggested that a psychiatric evaluation be conducted to provide the committee with additional information (id.).

According to attendance records, from October 17, 2017 to February 1, 2018, the student did not attend school (Parent Ex. W at pp. 1-2; see Parent Ex. F at p. 2).

The CSE reconvened on February 1, 2018 at the parent's request (Dist. Ex. 8 at p. 1). The parent reported that the student would begin to work with a case manager from an outside agency three times per week through March 2018, at which point the student would return to court (id.).[19] To support the student's return to school, along with the existing recommendations in the March 2017 IEP, the February 2018 CSE recommended a modified school day of periods one through four, 1:1 tutoring for the class missed due to the modified schedule, door to door transportation, a psychiatric evaluation, as well as a reentry meeting with the student (Dist. Ex. 8 at pp. 1, 12-13; see Dist. Ex. 7 at pp. 1, 11-13).[20] The CSE determined and the parent agreed that if the student's reentry to school was not successful, then the CSE would consider a more restrictive environment (Dist. Ex. 8 at p. 1).[21] On February 6, 2018 the district began "moving forward" with out-of-district referrals for the student to day programs (Parent Ex. OO). The student did not appear to attend school during February 2018 (see Parent Ex. W at p. 1).

A psychiatric evaluation of the student was conducted on February 23, 2018 (Dist. Ex. 27 pp. 1-2). Following a review of the student's records and interviews with the parent and student, the psychiatrist concluded that the student appeared "unable to maintain a consistent nocturnal sleep pattern and ha[d] refused to cooperate or accept limits," in addition to demonstrating mood dysregulation/anxiety and property destruction (id. at p. 3). The psychiatrist noted that the student did "not appear willing or able to maintain regular school attendance at this time but may benefit from a more structured program" (id.).

[19] The parent indicated that the Family Court had offered the student a "preventative program run via [the special act school district]" (Dist. Ex. 27 at p. 1).

[20] According to the parent, although discussed during the November 2017 CSE meeting, the psychiatric evaluation did not occur prior to the February 1, 2018 CSE meeting because the student "did not participate" (Dist. Ex. 8 at p. 1; see Parent Ex. B at p. 1).

[21] The district's director of special services (director) testified that a case manager from the outside agency went into the home and worked on creating systems in the home to encourage the student's school attendance (Tr. p. 190). The case manager was trying to incentivize returning to school (Tr. pp. 190-91). The director acknowledged that this was not very effective, as the case manager's efforts were "not as successful as we would have liked" with the student (Tr. p. 191).

On February 27, 2018, by order of the Family Court the student was remanded to a non-secure detention center for 30 days for failure to adhere to probation conditions (Parent Ex. DD at pp. 1-5). The court ordered the district to send educational curriculum and materials "necessary to continue" the student's education to the detention center (id. at p. 4). According to the parent, at the end of the 30 days the student was released from the non-secure detention center to his home for a one-month trial, during which he was to attend the district's middle school (Tr. pp. 424, 559-62, 616-18).[22]

The parent further testified that although initially the student attended school, as his late-April 2018 court date approached he stopped going to school and exhibited other "unsafe, reckless behavior" (Tr. pp. 424-25, 618-19). On April 24, 2018 the student was placed in the custody of the county Department of Community and Family Services (DCFS), and the parent testified that the Family Court judge ordered the student back to the non-secure detention center for approximately two weeks while awaiting a residential placement (Tr. pp. 425-27, 618-19; Dist. Ex. 2 at p. 17).[23] Following the student's release from the non-secure detention center, DCFS directed placement of the student in an out-of-district group home, during which time the student was transported to and attended the district's middle school "on a regular basis" (Tr. pp. 197-99, 564-65, 618-20; see Dist. Ex. 2 at p. 18).

On May 22, 2018, the CSE convened to develop the student's IEP for the 2018-19 school year (ninth grade) (Dist. Ex. 9).[24] The CSE discussed that since returning to the district's school, the student was getting to class on time, and completing schoolwork with prompting and encouragement (id. at p. 1). After discussing the student's potential retention in eighth grade, and the supports the student required in the upcoming year, the CSE recommended that as a ninth grade student he would receive two 41-minute periods per day of resource room services and twenty 30-minute individual counseling sessions per year (id. at pp. 1, 11). In addition, the CSE recommended a variety of supplementary aids and services, program modifications, and accommodations including use of a calculator, study guides, a computer and agenda book, monitoring of homework and modification when necessary, and testing accommodations (id. at pp. 11-13).

The hearing record shows that on or about May 31, 2018 the student ran away from the group home, was found a week later, and that on June 8, 2018 DCFS placed the student in a residential facility in another school district; on June 11, 2018 he was enrolled in that district's junior/senior high school (Tr. pp. 203-04, 621-22; Dist. Ex. 2 at p. 19). The director testified that the district was no longer involved with the student once he was placed at the residential facility,

[22] The student was evaluated on April 11, 2018 at which time the parent provided ratings of the student's behavior (Parent Exs. Z; AA at pp. 1-3). The parent indicated that the student "often" or "very often" disagreed with adults, lost his temper, actively denied or refused to go along with adults' requests or rules, blamed others, and was easily annoyed by others, angry or resentful, and spiteful (Parent Ex. Z at pp. 1-2).

[23] At times in the hearing record the acronym "DSS" is used in place of DCFS (see e.g. Tr. pp. 200, 215).

[24] According to the meeting information summary, the May 2018 CSE attempted to reach the parent prior to the meeting to no avail (Dist. Ex. 9 at p. 1). The summary also indicated that the student declined to attend the meeting (id.).

because it was located in a different school district that had its own CSE (Tr. p. 204). The student remained at the out-of-district residential facility for the remainder of the 2017-18 school year (see Tr. pp. 440-42; Dist. Ex. 2 at pp. 9, 13, 16).

The IDEA requires that a district review and revise, as appropriate, a student's IEP in light of, among other things, any lack of expected progress toward annual goals, information provided by a student's parents, the student's needs, or other matters (20 U.S.C. § 1414[d][4][A][ii]; 34 CFR 300.324[b][1][ii]; see also Educ. Law § 4402[2]; 8 NYCRR 200.4[f]). In some instances, a student's chronic absenteeism may prompt a district to consider whether such behavior is a manifestation of the student's disability and, if so, to revisit the appropriateness of the student's current program (see Springfield Sch. Comm. v Doe, 623 F. Supp. 2d 150, 159-61 [D. Mass. 2009] [finding that the district had an affirmative duty to respond to a student's excessive absenteeism by considering whether the truancy was related to a student's disability and, if it was, addressing it through the IEP]; but see L.O. v New York City Dep't of Educ., 94 F. Supp. 3d 530, 569 n.17 [S.D.N.Y. 2015] [declining to decide whether or not improper handling of absenteeism could result in the denial of a FAPE but acknowledging school personnel's repeated efforts to arrange for the student's return to school]). Here, the district addressed the student's truancy in one manner outside of the special education process by filing a PINS petition, but the district also complied with the special education procedures envisioned under the IDEA as well by holding a manifestation determination meeting to ascertain whether the student's nonattendance issues were related to his disability. The CSE concluded that the student's school avoidance was not related to his disability (Parent's Ex. B at p. 1).

Notably, the parent did not challenge the district's determination that the student's truancy was not a manifestation of his disability in this proceeding (and there is some evidence that she agreed with the determination). Consequently, the parent's contention that the district deprived the student of a FAPE by failing to address the student's school avoidance behavior through behavioral supports recommended in an IEP when his attendance decline in fall 2017 is misplaced. Instead, the district appeared to be working in conjunction with the other public agencies involved in supporting the student. In conjunction with the Family Court's attempts to improve the student's school attendance, the February 2018 IEP provided various supports for when the student did attend school including a modified school day, 1:1 instructional support, consultation with the special education teacher and social worker, and various accommodations, which contrary to the IHO's determination, appeared to be appropriate to meet his needs during the brief period of time he attended the district's middle school during the remainder of the 2017-18 school year, prior to

his placement at a residential setting, and did not result in a denial of a FAPE (compare Dist. Ex. 8 at p. 13, with Tr. pp. 198-99; Parent Ex. W at pp. 1-2; Dist. Ex. 9 at p. 1). [25, 26]

E. 2018-19 School Year

On September 27, 2018, the residential special act school district conducted a psychoeducational evaluation of the student and on October 14, 2018 convened a CSE meeting and developed an IEP (Parent Ex. C; Dist. Ex. 28). At the time of the CSE meeting, the student was described as a hard worker who appropriately interacted with peers and who needed direct

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[25] A person over five and under twenty-one years of age who has not received a high school diploma is entitled to attend the public schools maintained in the district in which such person resides without the payment of tuition (Educ. Law § 3202[1]). However, State laws and regulations also include a number of special provisions that address, among other things, the educational rights of children who are in a variety of institutional settings, or have been placed in a residential setting by a social services district, State agency, or family court (see Educ. Law § 3202[4]-[8]). In these special cases, the programmatic and fiscal responsibilities of school districts are statutorily defined.

Residential foster care supervised by OCFS includes "care provided a child in a foster family free home or boarding home, group home, agency boarding home, child-care institution, health-care facility or any combination thereof" (18 NYCRR 441.2[k]; see 18 NYCRR 441.1). A foster family free home means care provided to a child by a family member other than "the child's parent, stepparent, grandparents, brother, sister, uncle, aunt or legal guardian" (18 NYCRR 441.2[j]). A "foster family boarding home," an "agency boarding home" and a "group home" are defined as a person's or family's "residence" or "a family-type home," with the two former authorized to care for not more than six children and the lattermost authorized to care for between seven and twelve children (with exceptions to these maximum numbers of children in the case of siblings) (18 NYCRR 441.2[h]-[i]; 443.1[j]; see Soc. Servs. Law § 371[16]-[17]).[25] Children placed in a foster family, agency boarding home, or group home must be admitted to the public school district in which the family, agency boarding, or group home is geographically located (Educ. Law § 3202[4]; McMahon v. Amityville Union Free Sch. Dist., 48 A.D.2d 106 [2d Dep't 1975]; Education Responsibilities for School-Age Children in Residential Care," at pp. 27-28).

Both child welfare agencies and the Family Court may place children in child care institutions, which are residential facilities serving 13 or more children licensed by the Office of Children and Family Services (OCFS) (Educ. Law § 4001[2]; 18 NYCRR 441.2[f]; see Soc. Servs. Law §§ 398, 460). In keeping with the IDEA, Article 81 of the Education Law guarantees a FAPE to all disabled children ages five through twenty-one placed in child care institutions (Educ. Law § 4002[1]; see 8 NYCRR 200.11[b]). A child care institution may maintain its own schools, in which case it must appoint a CSE that performs the requisite CSE duties (Educ. Law § 4002[3]; 8 NYCRR 116.6[a]).

[26] In 1996, the State Office of Special Education issued a guidance regarding the responsibilities for the education of school-age children in residential care, which was reprinted in 2000 ("Education Responsibilities for School-Age Children in Residential Care," Office for Special Educ. Servs. [Feb. 1996, reprinted Jan. 2000], available at http://www.p12.nysed.gov/specialed/publications/EducResponsSchoolAgeResidence.pdf). The guidance offers charts to identify programmatic and fiscal responsibilities of facilities, districts of location, and districts of residence and/or origin, varying based on the State agency which licensed or certified the facility in which the student was residentially placed ("Education Responsibilities for School-Age Children in Residential Care"). However, due to the passage of time, many of such State agencies have merged or been renamed and many of the laws or regulations cited have been amended or repealed. For example, since the guidance was originally published in 1997, the State Department of Social Services was renamed the Department of Family Assistance and divided into the Office of Temporary and Disability Assistance and OCFS (Chap. 436 of the Laws of 1997 § 122). In addition, as part of the same reorganization, OCFS assumed all of the functions of the Division for Youth (id. § 123). Accordingly, while it is a useful resource, the information contained therein should be viewed in light of more recent developments in the law.

support in language arts and math to reinforce and clarify his skills (Parent Ex. C at pp. 2-3). The CSE recommended an 8:1+2 special class placement and various program modifications/ accommodations and determined that the student did not require a BIP (id. at pp. 4-6).

On March 7, 2019, the CSE convened for a "transition meeting" in anticipation of the student's discharge from the residential special act school district and return home on March 15, 2019 (Tr. p. 442; Dist. Ex. 10 at p. 1). The meeting information summary reflected discussion about the student's then-current school performance, which indicated that he was a respectful "model student" who avoided conflict, took feedback well, and completed his work (Dist. Ex. 10 at p. 1). After discussing options including placement in an out-of-district "[b]ridge" program, the CSE determined that the student would return to the district and receive two 41-minute periods per day of resource room services; twenty-five 30-minute individual counseling sessions per year, 10 of which would occur during the remainder of the 2018-19 school year; and two 60-minute sessions per month of individual parent counseling and training at home (id. at pp. 1, 11). The CSE also agreed to conduct an FBA and an assistive technology evaluation (id. at p. 2).[27]

On appeal the parent argues that the IHO erred in not addressing her claim that the March 2019 CSE's recommendations were predetermined (Answer at pp. 9-10).[28] The district asserts that it did not deny the student a FAPE at any time during the 2018-19 school year.

With regard to predetermination, the consideration of possible recommendations for a student prior to a CSE meeting is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (T.P., 554 F.3d at 253; A.P. v. New York City Dep't of Educ., 2015 WL 4597545, at *8-*9 [S.D.N.Y. July 30, 2015]; see 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). The key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *10-*11 [E.D.N.Y. Sept. 2, 2011], aff'd 506 Fed. App'x 80 [2d Cir. Dec. 26, 2012]; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [E.D.N.Y. 2009], aff'd, 366 Fed. App'x 239 [2d Cir. Feb. 18, 2010]). Districts may "'prepare reports and come with pre[-]formed opinions regarding the best course of action for the child as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions'" (DiRocco v. Bd. of Educ. of Beacon City Sch. Dist., 2013 WL 25959, at *18 [S.D.N.Y. Jan. 2, 2013] [alternation in the original], quoting M.M. v. New York City Dept. of Educ. Region 9 (Dist. 2), 583 F. Supp. 2d 498, 506; [S.D.N.Y. 2008]; see B.K., 12 F. Supp. 3d at

[27] Although post-dating the claims in this proceeding, the record shows that on or about March 18, 2019 the student began attending an out-of-district 8:1+2 special class program in a small secondary school as a "pendency placement" (Tr. pp. 213-14, 223, 469-70). On April 11, 2019 the CSE reconvened to discuss the student's performance at that program and based on his transition thus far, recommended that he continue his placement there (Dist. Ex. 11 at p. 1). Subsequently, the student stopped attending the pendency placement and on May 22, 2019 the CSE reconvened and recommended "that a search be conducted for a state-approved therapeutic residential program" for the student (Tr. pp. 224-27, 637-38).

[28] Although not specified in the request for review, given the parent's claim on appeal that she was prevented from expressing her concerns and sharing her opinions regarding the student's needs with the CSE because the student was in attendance, it appears this claim is related to the March 7, 2019 CSE meeting (compare Answer at pp. 9-10, with Dist. Ex. 10 at p. 1; see Tr. p. 15). The parent also pressed her right to parental participation, but within the discussion of predetermination is the focus on the parent's opportunity to participate in the CSE meeting.

358-59 [holding that "active and meaningful" parent participation undermines a claim of predetermination]).

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see T.F. v. New York City Dep't of Educ., 2015 WL 5610769, at *5 [S.D.N.Y. Sept. 23, 2015]; A.P., 2015 WL 4597545 at *8, *10; E.F., 2013 WL 4495676 at *17 [stating that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation"]; Sch. for Language & Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]). When determining whether a district complied with the IDEA's procedural requirements, the inquiry focuses on whether the parents "had an adequate opportunity to participate in the development" of their child's IEP (Cerra, 427 F.3d at 192).

"[T]he IDEA only requires that the parents have an opportunity to participate in the drafting process'" (D.D-S., 2011 WL 3919040, at *11 [E.D.N.Y. Sept. 2, 2011], quoting A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208, 216 [D. Conn. 2006]; see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [noting that the IDEA gives parents the right to participate in the development of their child's IEP, not a veto power over those aspects of the IEP with which they do not agree]).

Generally, a district is not required to consider placing a student in a nonpublic school if it believes that the student can be satisfactorily educated in the public schools (W.S. v. Rye City Sch. Dist., 454 F.Supp. 2d 134, 148-49 [S.D.N.Y. 2006]). "If it appears that the district is not in a position to provide those services in the public school setting, then (and only then) must it place the child (at public expense) in a private school that can provide those services. But if the district can supply the needed services, then the public school is the preferred venue for educating the child. Nothing in the IDEA compels the school district to look for private school options if the CSE, having identified the services needed by the child, concludes that those services can be provided in the public school . . . IDEA views private school as a last resort" (W.S., 454 F.Supp.2d at 148; see R.H. v. Plano Indep. Sch. Dist., 607 F.3d 1003, 1014-15 [5th Cir. 2010] [noting that under the IDEA, "removal to a private school placement [is] the exception, not the default. The statute was designed primarily to bring disabled students into the public educational system and ensure them a free appropriate public education"] [emphasis in original]; see also 8 NYCRR 200.6[j][1][iii] [State funding for private schools is only available if the CSE determines that the student cannot be appropriately educated in a public facility]; T.G. v. New York City Dep't of Educ., 2013 WL 5178300, at *19-*20 [S.D.N.Y. Sept. 16, 2013]; S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 363 [S.D.N.Y. 2009]).

Turning to the parent's predetermination claim, the hearing record demonstrates that the March 2019 CSE recommendations were not predetermined and that the district was prepared to offer the student an appropriate program had he returned to the district, which he did not.

The director testified that in approximately February 2019 the parent and DCFS began communicating with her about the student's upcoming discharge from the residential special act school district (Tr. pp. 205-208). Prior to the March 2019 CSE meeting DCFS staff indicated to the director that the student was doing "extremely well" at the residential special act school district and "that they had received positive feedback" (Tr. pp. 205-06). Specifically, the director testified that the school counselor, educational director and a clinician from the residential special act school district communicated to her that the student was doing so well that "they removed psychological counseling from his IEP" and that he continued to receive counseling in the residential setting (Tr. p. 207). Additionally, staff from the residential special act school district communicated to the director that the student "was a role model in the residential setting," and "certainly a role model in school" (id.). The director testified that prior to the March 2019 CSE meeting she had received and reviewed a psychological evaluation report, report cards, the student's out-of-district IEP, and information and letters from the student's "providers" upon which the IEP was based (Tr. pp. 208-11; see Parent Ex. O at p. 1; Dist. Ex. 10 at p. 3).

Participants at the March 2019 CSE meeting included the director who served as the CSE chairperson, a principal, a school psychologist, a regular education teacher, a special education teacher, a clinical social worker from the out-of-district facility, a case manager, the parent, the student, and both the parent's and the district's attorneys (Dist. Ex. 1 at p. 10). Meeting information indicated that the CSE discussed the student's strengths and the discontinuation of school-based counseling due to the student's strong in-school performance (id.). Following that discussion, the meeting minutes reflect that the district discussed three placement options (id. at pp. 1-2). First, in response to the parent's request that the CSE consider a residential placement for the student, the director asked a representative from the county to speak about community-based services (Tr. p. 212). Second, the CSE considered the option that the student return to the district in a general education program with resource room and counseling services, which the director indicated was what the case manager had suggested and the student desired (Tr. p. 212; Dist. Ex. 10 at p. 1). Last, the CSE considered an out-of-district 8:1+2 "Bridge program for the remainder of the year while [the student's] home life transitions, and consider return to the district in September" (Parent Ex. O at p. 1; Dist. Ex. 10 at p. 1). The director testified that there were some "pretty vocal concerns" expressed during the discussion about the three potential placements, and that she reviewed a letter, report card, and heard the teacher's report about the progress the student had made at the residential special act school district (Tr. p. 216; see Dist. Ex. 10 at p. 1). According to the meeting minutes and the director's testimony, given the reports that the student had done "extremely well" in the residential special act school district, it appeared that recommending a residential facility or day program would be a "step back" for the student, because he had "put all that work and effort in to achieve a goal and the goal was to return to [the district's] [h]igh [s]chool" (Tr. pp. 216-17; Dist. Ex. 10 at p. 1). The meeting information summary reflected that staff from the residential special act school district "expressed great concern" about the "more restrictive option" because the student had "been working toward a return to [the] district and to remain in an 8:1:2 . . . would be a "'disservice"' (Dist. Ex. 10 at p. 2). Although prior to the meeting the director thought that the student was not ready to return to the district and that "he might need to spend the rest of the year in a special class program," "the feedback was so resoundingly positive" and "the

concern what might happen should he go to a more supportive environment that was too restrictive for him at that time was certainly considered" (Tr. pp. 221-22). According to the meeting information summary, based on the student's then-current IEP, report cards, current functioning, previous evaluations and file review as well as parent, teacher, student and counselor input the committee recommended that [the student] return in district and attend [the district's] high school with resource room, counseling and parent counseling and training" (id. at pp. 2, 11; see Tr. pp. 217-18).[29]

To the extent on appeal the parent asserts that the CSE's recommendations were predetermined because she was unable to express her concerns about the student due to his presence at the meeting, the director testified that from seventh grade on the student had been invited to attend the meetings as it was "important that he engage in his post-secondary and secondary programming" (Tr. p. 215). Additionally, the hearing record shows that the student went under the custody of DCFS on April 24, 2018, and the director testified that at the time of the March 2019 CSE meeting the student was still under the custody of the DCFS, and that department took the position that the student should attend the meeting, as did staff from the residential special act school district and the student's attorney (Tr. pp. 215-16; Dist. Ex. 2 at pp. 8, 16). Therefore, the district was not in a position to casually dismiss the requests of the public authorities regarding the student's attendance who were functioning as the student's then-current custodians and had been placed by the Family Court in charge of the student's welfare.

Moreover, to the extent that the parent disagreed with the CSE's determinations and recommendations, mere disagreement with the meeting's outcome, where the district demonstrably kept the requisite open mind and the parent was afforded an opportunity to attend and participate in the CSE process, is insufficient to show that a district has not complied with the IDEA's procedural requirements to include the parent in the decision making process. Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see T.F. v. New York City Dep't of Educ., 2015 WL 5610769, at *5 [S.D.N.Y. Sept. 23, 2015]; A.P. v. New York City Dep't of Educ., 2015 WL 4597545 at *8, *10; E.F., 2013 WL 4495676 at *17 [stating that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation"]; Sch. for Language & Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]). When determining whether a district complied with the IDEA's procedural requirements, the inquiry focuses on whether the parents "had an adequate opportunity to participate in the development" of their child's IEP (Cerra, 427 F.3d at 192).

As discussed above, the hearing record reflects that the March 2019 CSE proceeded with the requisite open mind and discussed various options prior to determining an appropriate placement for the student subsequent to his discharge from the residential special act school

[29] The CSE also discussed and agreed to the parent's request that the student undergo an assistive technology evaluation and an FBA (Dist. Ex. 10 at p. 2).

district, which was based upon multiple sources of information including input from the student himself (Dist. Ex. 10 at pp. 1-3). Although the parent felt that the student's presence at the meeting inhibited her ability to express herself fully and also disagreed with the CSE's ultimate placement decision, the hearing record does not support a finding that the district predetermined the student's placement or deprived the parent of her right to participate in the CSE process.

VII. Conclusion

As described in detail above, review of the hearing record supports a finding that the district offered the student a FAPE during the portions of the timeframe from March 21, 2017 through the end of the 2018-19 school year that the district was responsible for the student's education. Consequently, the IHO's order of 100 hours of compensatory education is must be reversed. However, I agree with the IHO's directive for the parties to reconvene due to the nature of the student's struggles and periods of success. The parties should comply with the IHO's order and determine whether a residential or other setting is appropriate for the student.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the decision of the IHO dated December 26, 2019 is modified by reversing those portions which determined that the district denied the student a FAPE during the 2017-18 or 2018-19 school years and ordered the district to provide the student with 100 hours of compensatory education; and

IT IS FURTHER ORDERED that the portion of the decision of the IHO dated December 26, 2019 that determined the district denied the student a FAPE for the 2019-20 school year is vacated.

Dated: **Albany, New York**
March 7, 2020

JUSTYN P. BATES
STATE REVIEW OFFICER