The University of the State of New York

The State Education Department
State Review Officer
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No. 20-155

Application of the BOARD OF EDUCATION OF THE WALLKILL 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:
Thomas, Drohan, Waxman, Petigrow & Mayle, LLP, attorneys for petitioner, by Neelanjan Choudhury, Esq.

Gina DeCrescenzo, PC, attorneys for respondents, by Benjamin Brown, 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 respondents' (the parents') daughter for a portion of the 2016-17 school year and for the 2017-18 and 2018-19 school years were not appropriate and which ordered it to fund compensatory education services, as well as independent educational evaluations (IEEs) of the student. The appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local 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 began receiving services through the Early Intervention Program at five months of age, which over time included physical therapy (PT), occupational therapy (OT), special education itinerant teacher (SEIT) services, and speech-language therapy (Parent Ex. SS at p. 1). She has received diagnoses of verbal apraxia, a chromosomal aberration, attention deficit hyperactivity disorder (ADHD), a language disorder, and a developmental coordination disorder (Parent Ex. SS at pp. 1; Dist. Ex. 23 at p. 7).[1] The student has been found eligible for special

[1] Specifically, the chromosomal aberration diagnosis that the student received was "DEL 10Q . . . , an interstitial deletion on the long arm o[f] one of her number 10 chromosomes with Microcephaly and Hypotonia" (see, e.g., Dist. Ex. 1 at p. 1).

education and related services as a student with multiple disabilities (see generally Dist. Exs. 1-19).[2]

The 2015-16 school year was the student's kindergarten year (Dist. Exs. 1 at p. 1; 2 at p. 1; 3 at p. 1; 4 at p. 1). On May 14, 2015 the CSE met to transition the student from the Committee on Preschool Special Education (CPSE) to the CSE (Dist. Ex. 1 at p. 1). The CSE initially recommended the student for a 12:1+1 special class placement for the 2015-16 school year, with related services of two 30-minute sessions of individual OT per week, one 30-minute session of small group OT per week, two 30-minute sessions of individual PT per week, one 30-minute session of individual speech-language therapy per week, and one 30-minute session of small group speech-language therapy per week (id. at p. 12). Additionally, the CSE recommended the student be provided with the support of a 3:1 classroom aide, as well as the special transportation service of a "Small Bus or Vehicle" (id. at pp. 12, 14). During the 2015-16 school year, the CSE convened another four times on October 28, 2015, January 13, 2016, April 8, 2016, and May 6, 2016 due to concerns with the student's behaviors (see Dist. Exs. 2 at p. 1; 3 at p. 1; 4 at p. 1; 5 at p. 1). At the October 2015 CSE meeting, the CSE discussed conducting a functional behavioral assessment (FBA) of the student and determined that the student required a behavioral intervention plan (BIP) (Dist. Ex. 2 at pp. 1, 8).[3] An FBA was conducted on November 2, 2015 and a BIP was developed on December 14, 2015 (see Dist. Exs. 79; 80).[4] At the January 2016 meeting, the CSE modified the ratio on the IEP for the student's aide to 2:1 because the "student require[d] assistance in attending to classroom activities" (Dist. Ex. 3 at p. 12). On April 8, 2016, the CSE added four 30-minutes sessions of counseling services per month to the student's program (Dist. Ex. 4 at p. 13). On May 6, 2016, the CSE changed the student's placement recommendation from a 12:1+1 special class with a 2:1 aide to an 8:1+2 special class with a 1:1 aide at a different district elementary school, with a projected implementation date of May 9, 2016 (Dist. Ex. 5 at pp. 1, 15).[5] Further, the May 2016 CSE added the support of a 1:1 aide for the student on the bus (id. at p. 17).

The CSE convened on June 16, 2016 for its annual review of the student's program and determined that she remained eligible for special education services (Dist. Ex. 6). For the 2016-17 school year (first grade), the CSE recommended that the student attend an 8:1+2 special class placement with related services of one 30-minute session of individual OT per six-day cycle, one 30-minute session of small group OT per six-day cycle, two 30-minute sessions of individual PT per six-day cycle, one 30-minute session of individual speech-language therapy per six-day cycle, one 30-minute session of small group speech-language therapy per six-day cycle, and one 30-minute session of counseling services per six-day cycle (id. at pp. 8-9). Further, the CSE

[2] The student's eligibility for special education as a student with multiple disabilities is not in dispute (see 34 CFR 300.8[c][7]; 8 NYCRR 200.1[z][8]).

[3] The October 2015 CSE modified the student's transportation recommendation to indicate that the student required a harness (Dist. Ex. 2 at p. 14).

[4] There are a total five BIPs in the hearing record dated during the 2015-16 school year (see Dist. Exs. 80; 81; 84; 86; 87). The main function of the student's behavior according to the FBA and BIPs was escape (see generally Dist. Exs. 79; 80; 81; 84; 86; 87).

[5] The student received an in-school suspension on May 4, 2016 for placing another student in a chokehold (Parent Ex. TT at p. 1).

recommended a 1:1 aide to assist the student with attending to classroom activities, as well as 12-month services (id. at pp. 9-10).[6] The CSE also indicated that the student required a BIP and that the FBA team would meet to discuss further action (id. at p. 6).[7] During the 2016-17 school year, the CSE reconvened on November 15, 2016 for a program review and changed the student's speech-language therapy from one individual and one group session per week to two group sessions per week (Dist. Ex. 7 at pp. 1, 2, 9). Subsequently, the parties agreed to amend the student's IEP without a meeting and, on February 15, 2017, the CSE changed the student's 1:1 aide to a 2:1 aide as the "student was making gains in her willingness to participate with more independence in lessons/activities" (Dist. Ex. 8 at p. 1).[8, 9]

On March 16, 2017, the CSE convened to conduct its annual review of the student's program and develop an IEP for the 2017-18 school year (second grade) (Dist. Ex. 9 at p. 1). The CSE meeting information summary indicated that the student had made gains academically and that, while some members of the CSE had reservations, the student's special education teacher was recommending that the student be moved to a 12:1+1 special class in the fall and, likewise, that the parents wanted the student to be challenged by higher expectations that were available in the district's 12:1+1 special class (id. at pp. 1, 2). Thus, for the fall the CSE recommended a 12:1+1 special class with related services of two 30-minute sessions of individual OT per six-day cycle, two 30-minute sessions of individual PT per six-day cycle, two 30-minute sessions of small group speech-language therapy per six-day cycle, and one 30-minute session of individual counseling services per six-day cycle (id. at p. 9).[10] Before transitioning to the 12:1+1 special class setting in

[6] For 12-month services, the June 2016 CSE recommended a 6:1+1 special class at a Board of Cooperative Educational Services (BOCES) program, along with related services of one 30-minute session of individual counseling services per week, two daily 30-minute sessions of individual OT, and two 30-minute sessions of individual PT per week (Dist. Ex. 6 at pp. 9-10).

[7] The June 2016 CSE recommended the student remain at the same district elementary school she began attending in May 2016 (compare Dist. Ex. 6 at p. 1, with Dist. Ex. 5 at p. 1).

[8] The meeting information summary of the February 2017 CSE indicated that the transportation harness would be "used with discretion," which would provide the student with increased independence while maintaining her safety (Dist. Ex. 8 at pp. 1, 11).

[9] A district discipline history report indicated that the student received two disciplinary referrals for "inappropriate behavior" during the 2016-17 school year (Dist. Ex. 92 at p. 1). Both referrals resulted in the parent being called (id.).

[10] The CSE recommended that the student return to the district elementary school she attended for much of the 2015-16 (kindergarten) school year (compare Dist. Ex. 9 at p. 1; with Dist. Exs. 1 at p. 1; 2 at p. 1; 3 at p. 1; 4 at p. 1).

the fall, the CSE recommended 12-month services in a BOCES program and that the student have a 1:1 aide throughout the school day starting July 10, 2017 (id. at p. 10).[11, 12]

During summer 2017, there were instances in which the student became physically aggressive toward bus staff while being transported to and from BOCES (see Dist. Exs. 35-45). By agreement the student's IEP was amended without a CSE meeting on July 26, 2017 to remove the safety harness from the special transportation section of the IEP at the parents' request (Dist. Ex. 10 at pp. 1, 12).[13] The CSE then convened on August 28, 2017 to further discuss the parents' concerns regarding transportation (Dist. Ex. 11 at p. 1).[14] The August 2017 CSE modified the student's IEP to indicate that she should be seated alone on the bus and agreed to move up the student's triennial evaluation (id. at pp. 1, 2, 12).[15] Further, the CSE also modified the student's programming to recommend that she receive counseling in a small group instead of individually (compare Dist. Ex. 11 at p. 10, with Dist. Ex. 9 at p. 9).

From September 2017 to December 6, 2017, the student received approximately 114 behavioral referrals (Dist. Ex. 92 at pp. 1-4; see Dist. Ex. 93).[16]

On September 27, 2017, the district developed a BIP for the student for the 2017-18 school year (see Dist. Ex. 89). The student's problem behaviors were listed as "defiant and disruptive behavior" and their function was determined to be "attention and control" (id. at p. 1).

On October 13, 2017, the CSE reconvened as the student was not doing well in either large or small groups in the 12:1+1 special class and the student's "safety and safety of other students [was] the main objective" (Dist. Ex. 12 at pp. 1-2). The CSE meeting information summary

[11] For 12-month services, the CSE recommended that the student attend an 8:1+1 special class placement in the BOCES program with related services of one 30-minute session of individual counseling services per week, one 30-minute session of individual OT per week, and one 30-minute session of individual PT per week (Dist. Ex. 9 at p. 10).

[12] The CSE continued to recommend the same special transportation services of a 1:1 bus aide, a harness, and a small bus or vehicle (Dist. Ex. 9 at p. 12).

[13] As part of the July 2017 amendment, the CSE also modified the student's IEP to indicate that the student would have a 2:1 aide beginning September 6, 2017 and that the 1:1 aide was for the student's 12-month (summer) program which ran from July 10, 2017 to August 16, 2017 (compare Dist. Ex. 10 at p. 10, with Dist. Ex. 9 at p. 10).

[14] A complaint was made to the State Education Department (SED) regarding the student's transportation during summer 2017 (see Parent Ex. KKK). In a letter dated January 26, 2018, SED listed the complaints made against the bus company and directed the district to investigate the claims (id.).

[15] The IEP indicated that the parent signed consent for the triennial evaluation before leaving the August 2017 CSE meeting (Dist. Ex. 11 at p. 2).

[16] The district discipline history report indicated that student received approximately 123 disciplinary referrals overall from September 2015 through December 6, 2017 (Dist. Ex. 92 at pp. 1-4). All of the disciplinary referrals were for inappropriate behavior or disruptive behavior (id.). For the majority of the referrals, the parent was called; however, the student also received in-school suspension three times, lost recess six times, and received detention six times (id.). In some instances, the disposition was marked as "other," which was not specified (id.).

indicated that an updated FBA was requested and would "be reviewed at a subsequent program meeting" (id. at p. 2).[17] The summary further indicated that the CSE would look into out-of-district placements for the student (id. at pp. 2-3). The IEP provided that, in order to address the student's interfering behaviors, academic expectations were reduced (id. at p. 10). The student's related services were modified, with counseling and speech-language therapy services being changed from small group to individual sessions (compare Dist. Ex. 12 at pp. 2, 13, with Dist. Ex. 11 at p. 10).

The district conducted a triennial evaluation of the student in November 2017 (see Dist. Exs. 20, 21, 22). The student's academic functioning was assessed by her special education teacher on November 6, 2017 (Dist. Ex. 20 at p. 1; see Dist. Ex. 12 at p. 2). The teacher opined the results of the testing should be interpreted with caution as the student "was not always focused and her impulsivity may have impacted her performance" (Dist. Ex. 20 at p. 7). The student's visual motor, fine motor, and sensory processing abilities were assessed by an occupational therapist on November 9, 2017 and her expressive and receptive language skills were assessed by a speech-language pathologist on November 12, 2017 (Dist. Exs. 21; 22).

The CSE reconvened for a program review on November 14, 2017 (Dist. Ex. 13 at p. 1). The CSE meeting information summary indicated that the committee intended to recommend the student for a 6:1+1 special class placement with a 1:1 aide and related services and that packets would be sent out to out-of-district placements visited by the parents and discussed by the CSE (id. at pp. 1-2). The November 2017 IEP stated that academic expectations had been removed from the student's day (id. at p. 11).

The district conducted a PT triennial evaluation on or around December 4, 2017 (Parent Ex. HHHH).

On December 5, 2017, the CSE reconvened to review the results of the student's reevaluation and recommend her for an out-of-district placement (Dist. Ex. 14 at p. 1). The CSE recommended the student attend a 6:1+3 special class at Abilities First, a State-approved nonpublic school, and receive related services of two 30-minute sessions of individual PT per week, one 30-minute session of individual counseling services per week, two 30-minute sessions of individual OT per week, and three 30-minute sessions of individual speech-language therapy per week (id. at pp. 1, 14, 15).[18] The CSE recommended that the student start the program at Abilities First on December 11, 2017 (id. at pp. 1, 14-15).

The student was referred by her neurologist and the district for a neuropsychological evaluation that took place over several days between October and December 2017 (Dist. Ex. 23 at p. 1).[19] In a neuropsychological evaluation report that was completed sometime on or after

[17] Previously, in an email dated September 17, 2017, the parents had requested that the district conduct an FBA of the student (Parent Ex. HH).

[18] The CSE also recommended that the student have "Access to Fidgets" throughout the day and noted that the student used a "chewy" (Dist. Ex. 14 at p. 15).

[19] The evaluation was conducted on October 31, 2017, November 15, 2017, and December 21, 2017 (Dist. Ex. 23 at p. 1).

December 21, 2017, the evaluator characterized the student as "a child with significant cognitive and behavioral needs who w[ould] require a small, structured educational environment tailored to support children with language, as well as social, emotional, and behavioral needs" (id. at p. 7). She opined that the student's "assimilation of skills, cognitive, behavioral, and interpersonal w[ould] require a multi-modal treatment strategy" that included psychopharmacological and psychosocial interventions, as well as intensive educational supports (id.). The evaluator made recommendations for both the classroom and the home (see id. at pp. 7-12).

The CSE convened on January 22, 2018 to review the student's transition to Abilities First (Dist. Ex. 15 at p. 1).[20] According to the CSE meeting information summary, Abilities First reported that the student was making progress toward her goals and, although the student pushed back when academic demands were placed on her, by the end of the day she was getting academic work done (id.). Abilities First requested that an adapted physical education goal be added to the student's IEP, to which the CSE agreed (id. at pp. 1. 17).[21] The parent reported that she was not seeing the same progress that Abilities First reported and was still seeing behaviors at home (id. at p. 2).

In January and February 2018, staff at Abilities First completed five behavior incident reports related to the student's verbal refusal and disruptive behavior at the school (see Dist. Exs. 99; 114-117).[22] Between March and June 2018, there were an additional nine behavior incident reports filed by Abilities First staff, some involving physical aggression on the part of the student (see Dist. Exs. 102-110).

On March 23, 2018, the CSE convened to review the December 2017 neuropsychological report (Dist. Ex. 16 at p. 1). The CSE continued to recommend a 6:1+3 special class placement for the student and made no changes to the student's program (id. at pp. 2, 19).[23]

The district sent the parent a prior written notice dated April 23, 2018, requesting the parent's consent to further evaluate the student's social/emotional needs by conducting an FBA (Dist. Ex. 68 at p. 1). On May 2, 2018, the parent signed consent for an FBA; the form includes a handwritten note that the FBA was "to be performed by a [Board Certified Behavior Analyst (BCBA)]" (id. at p. 3).

[20] The January 2018 IEP does not list the December 2017 neuropsychological evaluation as an evaluation that was considered by the CSE (see Dist. Ex. 15 at p. 5).

[21] The January 2018 IEP did not indicate that the student would participate in adapted physical education (see Dist. Ex. 15 at pp. 18, 20).

[22] An allegation regarding an act of a staff member at Abilities First towards the student was reported to the police in January 2018, which was investigated, and ultimately deemed unsubstantiated (Dist. Ex. 70 at pp. 4-6; Dist. Ex. 71).

[23] In an excerpt from a communications notebook dated April 17, 2018, the Abilities First teacher informed the parent that the student's class was "very short staffed" that day and "a little out of sorts" (Parent Ex. U). Further, it was reported that the student had been pinched by another student and that during gym the student hit her classmate, who hit her back (id.).

On May 21, 2018, the CSE convened for the student's annual review and recommended that, for the entire 12-month school year including summer 2018, she continue to attend a 6:1+3 special class at Abilities First and receive adapted physical education three times weekly in that setting (Dist. Ex. 17 at pp. 21-22). For related services, the CSE recommended that the student receive two 30-minute sessions of individual PT per week, one 30-minute session of individual counseling services per week, two 30-minute sessions of individual OT per week, and three 30-minute sessions of individual speech-language therapy per week (id.). The CSE also recommended the following program modifications/accommodations: refocusing and redirection, visual schedule, check for understanding, and reteaching of materials (id.). Further, the CSE recommended a once quarterly "team meeting" with the parent and service providers (id.). The May 2018 IEP indicated that the student required positive behavioral strategies; however, it also indicated that the student did not require a BIP because the "positive classroom management plan [was] working to manage [the student's] behaviors" (id. at p. 15). According to the IEP, the CSE discussed a bathroom plan for the student and indicated that it was something the CSE might look at in the future (id.).

Abilities First staff filed two behavior incident reports, dated July 25, 2018, related to the student screaming, cursing, pinching herself, and attempting to undress in the classroom (Dist. Exs. 112, 113).[24]

On December 19, 2018, Abilities First created a BIP for the student (see Dist. Ex. 46). The plan identified several targeted behaviors including attention-seeking behaviors, fabrication, defiance/refusal, and desire for control over the environment (id. at p. 1). The behaviors were characterized as mild with a noted frequency of one to five times per week (id.). Behavior incident reports filed by Abilities First staff indicated that on two occasions in January 2019, the student reported that she was pinched by another student (Dist. Exs. 100-101).

In January 2019, Abilities First sent three letters to the parent, notifying her of staffing shortages in the OT, PT, and speech-language therapy departments (Parent Exs. CCC; DDD; EEE). In or around the beginning of January 2019, the State Education Department (SED) requested information from Abilities First regarding its staffing (see Parent Ex. QQ at pp. 3, 8). In a response dated January 7, 2019, the Abilities First principal indicated that the school was actively interviewing and recruiting and that every child was receiving some, if not all, of their related services (id. at p. 8). The principal further indicated that missed sessions would be made up if possible (id.). The principal explained that classroom coverage was provided by the school's behavior team members, nurse, and adapted physical education teacher, and that therapists pushed-in to the classrooms when necessary (id.). In addition, staff was reassigned based on attendance patterns (id.). In subsequent emails to SED, the chief executive officer (CEO) of Abilities First provided additional information regarding classroom staffing, noting that as of January 18, 2019 that all classes were down one staff member but the school was "using behavior specialists, [a] PE teacher, and anyone else available as needed" (id. at p. 3). Additionally, the CEO provided a spreadsheet of the attendance and staffing ratios for six Abilities First classes (id. at pp. 6-7).

[24] Excerpts from the student's communication notebook show that, during summer 2018 at Abilities First, the parent expressed concern regarding the student's hygiene at school, loudness of the class, and the behavior of the other students in the room (Parent Exs. BB; CC; LL; MM; NN). An October 2018 notebook entry suggested that the student's classroom only had two permanent aides at that time (Parent Ex. DD).

According to the district director of pupil personnel services (PPS director), on or about January 14, 2019, the parent contacted the district to express concerns regarding audio recordings that she had obtained of the student's classroom at Abilities First (Tr. pp. 85-86; see Parent Exs. D-H). The parent alleged and the PPS director confirmed that the audio recordings appeared to show the verbal abuse of students by Abilities First staff members (Tr. pp. 85-89).

On January 25, 2019 the CSE convened for a program review due to concerns that the student's class at Abilities First did not have the staff to meet the ratio listed on the student's IEP (Dist. Ex. 18 at p. 2). The CSE discussed whether any additional supports needed to be added to the student's IEP due to Abilities First's staffing issues (id.). The student's mother reported that the student was giving her a difficult time getting on the bus to attend school, while Abilities First stated that they had not seen the student frustrated or anxious (id.). The CSE offered home instruction; however, the parent declined as she felt the daily routine of school was necessary for the student (id.). The CSE and the parent agreed to send out referrals for a new placement (id.).[25]

The CSE reconvened on February 19, 2019 and recommended the student receive home instruction due to the parent's concerns about Abilities First (Dist. Ex. 19 at p. 1). The parent agreed to home instruction, requesting two hours per day; however, the CSE recommended one hour per day plus related services (id. at pp. 1-2). According to the meeting information summary, the district updated the parent on the BOCES referrals, and the parent advised CSE members that she had reached out to one private school and mentioned the name of a second private school, Blooming Grove (id.). District members of the CSE indicated that they were not familiar with Blooming Grove but they would look into it to see if it should be considered (id.). The meeting information summary indicated that the parent requested additional testing but that she agreed to hold off until the student was in a school-based program (id.).[26]

In a letter from the district PPS director dated March 1, 2019, the district informed the parent that it had secured a tutor to provide the student with academic tutoring while on home instruction (Dist. Ex. 28 at p. 2). Further, the PPS director indicated that the district had received the parents' request for independent evaluations (IEEs) and he was enclosing the district's policy and procedures regarding IEEs (id.). The PPS director indicated that the district "wishe[d] to conduct the assistive technology assessment" and would contact the parent to set up that evaluation, after which, if the parent disagreed with the evaluation, she could seek an IEE (id.). The PPS director denied the parent's request for a neuropsychological evaluation, noting that one had already been conducted in December 2017 and a new one did not need to be completed at that time (id.). Regarding the parent's request for an FBA, the PPS director indicated that in order to get a clear understanding about the parent's concerns regarding the student's behavior, the district wanted to discuss the request further at the next CSE meeting (id.). In a letter dated March 13,

[25] On February 5, 2019, the district sent a referral form to Orange-Ulster BOCES (Dist. Ex. 24 at p. 2). The referral indicated that the student had "progressed well in a private placement and was ready" for a less restrictive environment (id. at p. 3). On February 14, 2019, the district sent a referral form to Rockland BOCES (Dist. Ex. 25 at pp. 2-3).

[26] Due to scheduling conflicts, the parent rejected the initial tutor secured by the district to provide the student with home instruction (see Dist. Exs. 26; 27).

2019, the district indicated that the parent's requested evaluators for IEEs in OT, PT and speech-language therapy "far exceeded" the prevailing rates in the area (Dist. Ex. 29 at p. 2).

In a letter dated March 19, 2019, the district PPS director acknowledged that the district received a March 15, 2019 correspondence from the parents, which the district indicated would serve as the parents' 10-day notice of their intent to unilaterally place the student (Dist. Ex. 30 at p. 2).

The IEEs in OT, PT and speech-language therapy were conducted between March and May 2019 (see Parent Ex. Dist. Exs. 74; 75; 76).[27]

A. Due Process Complaint Notice

In a due process complaint notice dated April 9, 2019, the parents alleged that the district failed to provide and/or offer the student a FAPE for that portion of the 2016-17 after April 10, 2017, as well as for the 2017-18 and 2018-19 school years (IHO Ex. I at pp. 3, 16).[28]

Specifically, the parents asserted that the district failed to conduct sufficient evaluations of the student and, in particular, argued that the district conducted "cursory evaluations" in the areas of speech-language, PT, and OT and failed to conduct an assistive technology evaluation (IHO Ex. I at p. 14). As for the student's IEPs, the parents contended that the annual goals were vague and did not address all of the student's needs or sufficiently relate to her present levels of performance (id. at p. 15). The parents also alleged that the district failed to conduct an FBA or develop an adequate BIP for the student and used negative interventions to address the student's behaviors in contravention of State regulation (id. at pp. 14-15). As to the substantive adequacy of the student's IEPs, the parents alleged that the CSEs recommended "inadequate special education, supports, and services" and that, as a result, the IEPs were not reasonably calculated to enable the student to make progress appropriate in light of her circumstances (id. at p. 16). The parents also asserted that the CSEs failed to recommend "any scientifically proven methodology or strategy to address the student's unique educational needs" (id. at p. 15).

Next, the parents alleged that the district failed to implement the student's IEPs and BIPs (IHO Ex. I at pp. 14, 15). In particular, the parents asserted that the district failed to provide safe and appropriate transportation, provided instruction or services at less than mandated ratios or frequencies and durations, used inappropriate discipline that disrupted the provision of instruction and services, provided an "egregiously unsafe and abusive" program, failed to provide basic academic instruction, and failed to adequately measure the student's progress towards annual goals (id. at p. 14).

[27] The OT IEE and speech-language IEE were both conducted in March 2019 (see Dist. Exs. 74; 75). The PT IEE was conducted over three days in April and May 2019 (see Dist. Ex. 76). In addition, a mental health and behavioral-specific forensic evaluation was conducted over five days in April and May 2019 (see Parent Ex. MMM).

[28] The parents further alleged violations of the American with Disabilities Act (ADA), 42 U.S.C. § 12101 et seq., and section 504 of the Rehabilitation Act of 1973 (section 504), 29 U.S.C. § 794(a) (IHO Ex. I at pp. 1, 13-14, 16).

For relief, the parents sought compensatory education for the period of April 10, 2017 through March 31, 2019 (IHO Ex. I at pp. 3, 17). Specifically, the parents sought compensatory "forensic psychology services," "1:1 academic instruction," group social skills therapy, play therapy, psychological counseling, PT, OT, speech-language therapy, "consultative services" from a BCBA, and parent counseling and training (id. at pp. 17-18). The parents also requested reimbursement for the costs of their "transportation mileage to transport [the student] to and from school due to the District's failure to provide adequate transportation" (id. at p. 17). In addition, the parents requested that the district be required to reimburse them for the costs of the student's tuition at Blooming Grove Academy for the period of April 1, 2019 through June 30, 2019 and provide or fund round-trip transportation for the student (id. at pp. 3, 18).

The parents also asserted that they requested IEEs at public expense in the areas of assistive technology, speech-language therapy, PT, and OT, as well as an independent FBA, but that the district neither authorized the IEEs nor commenced a due process complaint notice to defend its evaluations (IHO Ex. I at pp. 15-16). Therefore, the parents requested that the district be required to fund the requested IEEs (id. at pp. 16, 17).

B. Impartial Hearing Officer Decision

An impartial hearing convened on October 11, 2019, and concluded on June 9, 2020, after seven days of proceedings (see Tr. pp. 1-1093).[29] During the impartial hearing, the district agreed to reimburse the parents for the costs of the student's tuition at Blooming Grove Academy for the period of April 1, 2019 through June 30, 2019 as well as for the 2019-20 school year, along with transportation costs (see Tr. pp. 146, 269-71; IHO Decision at p. 6).

In a decision dated August 15, 2020, the IHO found that the district failed to offer the student a FAPE for that portion of the 2016-17 school year after April 10, 2017, as well as for the 2017-18 and 2018-19 school years (see IHO Decision at pp. 30, 31, 36).

Specific to the period from April 2017 to June 2017, the IHO determined that the district did not meet its burden to show that it provided the student a FAPE (IHO Decision at p. 30). In so finding, the IHO noted that the June 2016 IEP stated that the "FBA team" would meet to discuss the student's behavior difficulties, that the November 2015 FBA was the last FBA conducted, and that the hearing record did not include evidence regarding how the student's behaviors were addressed or whether an FBA was ever updated during the 2016-17 school year (id. at pp. 30-31).

Turning to the placement recommendation for the 2017-18 school year, the IHO found that the March 2017 CSE recommended a less supportive 12:1+1 special class program for the student despite the concerns stated by CSE members (IHO Decision at p. 31). The IHO held that this move was "premature[]" (id. at p. 36).

Regarding the 2017-18 and 2018-19 school years, the IHO noted that, despite escalations in the student's behaviors and indications that several CSEs "from June 2016 through February 2019" believed the FBA team should meet, the district failed to conduct an FBA or conduct any other evaluation to understand the student's behaviors (IHO Decision at pp. 31-33, 36). As for a

[29] In addition, the IHO held a prehearing conference with the parties on May 14, 2019 (see May 14, 2019 Tr. pp. 1-9).

BIP, the IHO noted that the district developed one in September 2017 but that it "did not appear to address the Student's deficits as her behaviors continued to increase in frequency and intensity" and no updated BIP was developed thereafter until December 2018 (id. at pp. 31-32, 33). The IHO noted testimony that the BIPs included in the hearing record were anecdotal, failed to include baselines or procedures for collecting data or monitoring progress, and did not conform with "evidence based" or "accepted behavior analysis practices" (id. at pp. 33-34). Moreover, the IHO noted that, according to the May 2018 IEP, the CSE determined that no BIP was warranted despite evidence of the student's interfering behaviors in the classroom between February and May 2018 (id. at p. 33). The IHO held that, although the student's IEPs from June 2016 through February 2019 "consistently discussed the student's problem behaviors, [they] did not adequately address them" (id.). The IHO found that the evidence showed that student could not work on her annual goals or make meaningful progress due to her behaviors (id. at pp. 31-32, 36).

As for implementation of the student's IEPs at Abilities First after the CSE recommended that placement in December 2017, the IHO noted that no one from the school testified regarding what the student was provided, with the exception of evidence about speech-language therapy delivered in fall 2018 (IHO Decision at pp. 32, 36). The IHO found that the hearing record included evidence regarding staffing shortages at Abilities First which affected the classroom ratios and the delivery of related services (id. at pp. 34-35). The IHO also cited the audio recordings of the classroom over five days, noting that "[b]esides being short staffed, the amount of personal conversations versus actual teaching was alarming, but the way the teacher and one (maybe more) staff members spoke to the students in the classroom, or around the students in the classroom was abhorrent" (id. at pp. 35-36). The IHO held that the implementation failures at Abilities First were "material to the denial of FAPE" (id. at pp. 34-35). According to the IHO, the student's lack of progress towards achieving her annual goals during the 2017-18 and 2018-19 school years were related to the implementation failures (id. at p. 35).

Turning to relief, the IHO placed responsibility for any lack of evidence about the number of hours of instruction or services missed by the student with the district and indicated that she would "defer to the related services providers experienced in their fields" to calculate an award of compensatory education (IHO Decision at p. 38). Accordingly, the IHO ordered the district to provide the student with compensatory education in the following amounts by certified and/or licensed providers of the parents' choosing: 902 hours of academic services by a behavior analyst or special education teacher; 250 hours of BCBA supervision services; 255 hours of OT; 102 hours of PT; and 156 hours of speech-language therapy (id. at pp. 38-40, 42).

As for the IEEs, the IHO noted the parents' request for additional evaluations at the February 2019 CSE meeting, a March 2019 letter from the district which referenced the parents' request for IEEs and the district's intention to complete an assistive technology evaluation, reference to letters from the parents to the district in March 2019 identifying their preferred evaluators for the OT, PT, and speech-language therapy IEEs, and a response letter from the district stating that the rates of the parents' preferred evaluators exceeded the prevailing rates in the county (IHO Decision at pp. 40-41). The IHO noted that the district did not initiate an impartial hearing in order to contest the rates of the parents' proposed evaluators, which the IHO determined was the district's "only recourse" if it wished to deny the parents' request for IEEs (id. at p. 41). Accordingly, the IHO ordered the district to fund an independent FBA by a BCBA and an assistive technology IEE to be completed by evaluators of the parents' choosing at market rates and to

reimburse the parents for the costs of speech-language therapy, OT, and PT IEEs, which the parents already obtained (id. at pp. 41-42).

IV. Appeal for State-Level Review

The district appeals and asserts that the IHO erred in finding that the district failed to offer the student a FAPE for that portion of the 2016-17 school year after April 10, 2017, as well as for the 2017-18 and 2018-19 school years.

Relevant to the entire time period at issue, the district asserts that the IHO erred in finding that the district failed to address the student's behavioral needs. The district argues that the IHO failed to take into account that the district conducted an FBA in 2015, which was revised in 2016, developed eight BIPs over time, and set forth a significant amount of information in the IEPs regarding the student's behaviors. The district asserts that the programs the student attended during the relevant times, at both the district public school and Abilities First, had behavioral strategies in place and that the student's behaviors improved at Abilities First, such that a less supportive placement was suggested as of January 2019.[30] Regarding the lack of updated FBAs, the district argues that the IHO's determination was contrary to the recent decision of the Second Circuit Court of Appeals in D.S. v. Trumbull Board of Education, 975 F.3d 152 (2d Cir. 2020). The district argues that, in D.S., the Second Circuit held that an FBA is only mandatory where a long-term suspension of the student is sought.

As for the March 2017 CSE's recommendation to transition the student to a 12:1+1 special class beginning in the 2017-18 school year, the district argues that the IHO erred in finding the recommendation was premature. The district asserts that the IHO ignored evidence that the parents and the student's special education teacher acknowledged the student's gains during the 2016-17 school such that a recommendation for a less supportive environment for the 2017-18 school year was warranted. In addition, the district contends that the IHO failed to take into account the district's prompt response to the student's difficulties in the 12:1+1 special class program when it convened the CSE in October 2017 and began the search for an out-of-district nonpublic school placement, resulting in the student's placement at Abilities First in December 2017.

Regarding compensatory education, the district argues that the IHO's award was not supported by the evidence in the hearing record, as the parents' experts "never provided an opinion as to what a reasonable rate of progress would have been for [the student]." In addition, the district asserts that the IHO should not have relied on the testimony of the experts as they did not know how many sessions of related services the student had missed at Abilities First and their opinion regarding an appropriate compensatory education award was based on speculation. Further, the district argues that the IHO failed to take into account the student's progress while attending Abilities First.

As for IEEs, the district argues that it never denied the parents' request for OT and PT IEEs and that the IHO erred in finding that the district waived its right to contest the reasonableness of the rates of the parents' proposed evaluators by not filing a due process complaint notice. The district also asserts that the parents failed to request that the district conduct a comprehensive

[30] The district also asserts that it implemented behavioral interventions documented in the student's IEPs.

reevaluation of the student prior to requesting IEEs, which the district asserts is required pursuant to the Second Circuit's decision in D.S. The district also asserts that D.S. precluded the IHO's order for an independent FBA.

Based on the foregoing, the district requests that that those portions of the IHO's decision, which found that it failed to provide the student with a FAPE and ordered compensatory education and funding for IEEs, be reversed.

In an answer, the parents respond to the district's arguments and argue that the IHO's decision should be upheld in its entirety. The parents assert that the district appeals only some of the bases for the IHO's decision and "ignores the most serious problems with its educational program." Namely, the parents indicate that the district did not grapple with their allegations or the IHO's findings about the serious problems at Abilities First, including abuse and maltreatment, lack of academic curriculum, and failure to implement the student's IEP. In addition, the parents argue that the district's request for review fails to comply with State regulations governing appeals to the Office of State Review. The parents also object to the district's reliance on the Second Circuit's decision in D.S. to appeal the IHO's determinations, arguing that the district waived such arguments by failing to raise them before the IHO.

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]).[31]

[31] 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).

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: Compliance with Practice Regulations and Scope of Review

The parents argue that the district's request for review does not comply with the State regulation that requires the request for review to number and set forth separately the issues that the petitioner intends to raise for review. As such, the parents argue that the district's appeal should be dismissed.

State regulation requires that a request for review "identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding" (8 NYCRR 279.4[a]). Further, section 279.8 of the State regulations requires that a request for review shall set forth:

> (1) the specific relief sought in the underlying action or proceeding;
>
> (2) a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review; and
>
> (3) citations to the record on appeal, and identification of the relevant page number(s) in the hearing decision, hearing transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number

(8 NYCRR 279.8[c][1]-[3]). The regulation further states 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][4]).

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

In its request for review, after devoting approximately ten paragraphs to summarizing the "background" of the matter, including some of the IHO's findings and the district's objections thereto (see Req. for Rev. at pp. 1-4), the district sets forth the heading "reasons for challenging the IHO's decision, findings, conclusion and orders (or the absence thereof) to which exception are taken" (see Req. for Rev. at p. 4). Under this heading, the district sets forth one paragraph with

twelve subparagraphs (lettered "a" through "k"), which specify several findings of the IHO with which the district takes exception (i.e., in subparagraph "b," the district sets forth objections to the IHO's finding that March 2017 CSE's recommendation for a 12:1+1 special class was premature; in subparagraphs "c," "d," "f," and "h" the district alleges that the IHO failed to take into consideration evidence relating to the district's information about and responses to the student's behavioral needs; in subparagraph "i," the district asserts that the IHO erred in relying on the testimony of the parents' experts to determine a compensatory education award; and in subparagraph "j," the district argues that the IHO erred in holding that the district waived its right to contest the reasonableness of the rates charged by the parents' preferred evaluators for IEEs), as well as allegations that do not refer to findings of the IHO but could arguably be deemed arguments in further support of allegations of error set forth in other subparagraphs (i.e., in subparagraph "a," the district argues that the hearing record does not have sufficient evidence upon which to base an award of compensatory education; in subparagraph "c," the district notes evidence that the parents' education consultant congratulated the district for the student's progress at Abilities First; and in subparagraph "k," the district asserts that the parents failed to request a comprehensive re-evaluation from the district before seeking IEEs) (see id. at pp. 4-7). Generally, the district's request for review does allege specific findings of the IHO with which the district takes exception. Further, the parents were able to respond to the district's allegations that are contained within the request for review and have not suffered undue prejudice to the extent that outright dismissal is warranted. As such, I decline to dismiss the district's request for review on the grounds that it fails to comply with the practice requirements of Part 279.

While dismissal of the district's request for review is not warranted in this instance, the scope of review shall be limited to the numbered issues in the request for review that clearly indicate the precise rulings of the IHO of which the district seeks review. As such, review of the IHO's decision and the district's request for review reveals that the district has not appealed the IHO's findings regarding implementation of the student's program at Abilities First, which findings were adverse to the district. The IHO found that the evidence in the hearing record did not support a finding that the student's IEPs were adequately implemented at Abilities First after December 2017, citing the lack of testimony regarding what the student was provided, the evidence about staffing shortages, the audio recordings of the classroom, and the student's lack of progress towards achieving her goals (IHO Decision at pp. 32, 34-36). The IHO determined that the implementation failures "were material to the denial of FAPE" (id. at pp. 34-35). Regarding implementation, the district generally argues that it "successfully implemented behavior interventions documented in the IEP"; however, the district does not specify which IEP or time period it was referring to or which finding of the IHO this allegation was intended to counter and includes no citations to the hearing record or the IHO's decision (Req. for Rev. at p. 6 [subparagraph "g"]). In addition, the district asserts that the IHO erred in relying on the testimony of the parents' experts "inasmuch as these evaluators did not know how many sessions may have been missed at Abilities First" (id. at pp. 6-7 [subparagraph "i"]); however, this allegation was specific to the IHO's award of compensatory education and was not directed at the IHO's underlying determination that the evidence did not establish that the student's IEPs were implemented (see also id. at p. 3 [paragraph 9]). Finally, the district asserts generally that "by January 2019, the parents' education consultant congratulated the District for the progress the student had made up until that point for 2019 while at Ability First and . . . sought a less restrictive placement" (id. at p. 5 [subparagraph "c"]). However, the district does not state the import of this factual allegation or otherwise allege that the IHO erred in finding that the student failed to make meaningful progress towards achieving

her annual goals while attending Abilities First or in finding that such lack of progress "bolster[ed]" the finding relating to the implementation failures (IHO Decision at p. 35). The request for review includes no allegation specific to the IHO's findings that the district failed to present sufficient evidence of what the student received at Abilities First, or her findings about the evidence of staffing shortages, the import of the audio recordings, or the student's lack of progress towards achieving her annual goals.

Accordingly, the district has failed to clearly appeal the IHO's determination that it failed to meet its burden to show that the student's IEPs were adequately implemented at Abilities First (see M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]). Therefore, these findings have become final and binding on the parties and will not be further discussed (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]). Given this final and binding determination, which, on its own, is sufficient to support the IHO's determination that the district failed to provide the student with a FAPE during that time that the student attended Abilities First, I find it is unnecessary in this instance to address the district's appeal of the IHO's findings pertaining to the district's failure to sufficiently evaluate or plan to address the student's behavioral needs during the 2017-18 school year beginning in December 2017 through the 2018-19 school year.[32]

B. Special Factors—Interfering Behaviors

Before turning to the district's specific challenges in this matter, it is necessary to set forth the applicable legal provisions relating to a district's responsibility to address a student's interfering behaviors and discuss the district's argument that a recent decision from the Second Circuit Court of Appeals established that it did not have a legal obligation to conduct an FBA of the student.

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

[32] For that time period from February through March 2019, after the student left Abilities First but prior to the student's enrollment at Blooming Grove, the CSE recommended that the student receive home instruction (see Dist. Ex. 19 at p. 1). It is unclear the extent to which the IHO considered this different programming or the district's implementation thereof as part of her determination that the district failed to offer or provide the student a FAPE for the entirety of the 2018-19 school year. However, on appeal, the district has not specifically taken issue with the fact that the IHO's finding and award of compensatory education encompassed this time frame (see IHO Decision at p. 39 [finding recommended compensatory academic services appropriate, in part, given the February 2019 CSE's recommendation of only one hour per day of tutoring and the delay in the implementation of that tutoring]). Absent a specific appeal, I decline to step in and formulate arguments on the district's behalf as that is not my role as an SRO. Accordingly, I will not disturb the IHO's determination that the district failed to offer the student a FAPE for the entirety of the 2018-19 school year.

upon an FBA (8 NYCRR 200.4[d][3][i]; 200.22[a], [b]). Additionally, a district is required to conduct an FBA in an initial evaluation for students who engage in behaviors that impede their learning or that of other students (8 NYCRR 200.4[b][1][v]).

State regulation defines an FBA as the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and

> include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it

(8 NYCRR 200.1[r]). According to State regulations, an FBA shall be based on multiple sources of data including, but not limited to, "information obtained from direct observation of the student, information from the student, the student's teacher(s) and/or related service provider(s), a review of available data and information from the student' record and other sources including any relevant information provided by the student's parent" (8 NYCRR 200.22[a][2]). An FBA must also be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]).

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

With respect to a BIP, State regulation requires that the BIP shall identify: (i**)** the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . . ; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR 200.22[b][4]). However, neither the IDEA nor its implementing regulations require that the elements of a student's BIP be set forth in the student's IEP ("Student Needs Related to Special Factors," at p. 16, Office of Special Educ. [April 2011], available at http://www.p12.nysed.gov/specialed/ formsnotices/IEP/training/QA-411.pdf). However, once a

student's BIP is developed and implemented, "such plan shall be reviewed at least annually by the CSE or CPSE" (8 NYCRR 200.22[b][2]).

As with the failure to conduct an FBA, the district's failure to develop a BIP in conformity with State regulations does not, in and of itself, automatically render the IEP deficient, as the IEP must be closely examined to determine whether it otherwise addressed the student's interfering behaviors (see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 80 [2d Cir. 2014]; F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 6-7 [2d Cir. Jan. 8, 2014]; M.W. v. New York City Dep't of Educ., 725 F.3d 131, 139-41 [2d Cir. 2013]; R.E., 694 F.3d at 190).

These standards shall be applied below when I address the sufficiency of the district's response to the student's interfering behaviors. Before turning to those facts however, I will address the district's argument regarding the Second Circuit's decision in D.S. v. Trumbull Board of Education, 975 F.3d 152 (2d Cir. 2020), namely that the Court determined that an FBA is not an evaluation and that an FBA is only mandatory in a disciplinary situation (see Dist. Mem. of Law at p. 19). First, the characterization of the assessment as an evaluation or something less than an evaluation is not determinative of the question of whether the district sufficiently assessed the student's behavior needs.[33] This is particularly so where the CSEs have repeatedly determined that the student requires a BIP (see Dist. Exs. 2 at p. 8; 3 at p. 8; 4 at p. 8; 5 at p. 10; 6 at p. 6; 7 at p. 7; 8 at p. 7; 9 at p. 7; 10 at p. 7; 11 at p. 7; 12 at p. 10; 13 at p. 11; 14 at p. 12; 15 at p. 12; 16 at p. 14), and State regulation provides that a BIP is based upon an FBA (8 NYCRR 200.1[mmm]).

As for the district's argument about an FBA being required only in the disciplinary context, the district cites the following language from the Court's decision in D.S.: "Only where a child is seriously disciplined for behavior that is a manifestation of their disability is a school required to conduct an FBA and implement or review the child's BIP" (975 F.3d at 164, citing 20 U.S.C. § 1415[k][1][E]–[F]). The statutory provision cited by the Court provides that an FBA "shall" be conducted where a determination is made that conduct was the manifestation of a student's disability (20 U.S.C. § 1415[k][1][F]). However, the Court in D.S. was reviewing a dispute between a parent and school district that arose in Connecticut and it's State policies did not have before it New York's extensive regulatory provisions that address district's responsibility in instances where students with disabilities present with interfering behaviors (see 975 F.3d at 156). State regulation in New York provides that an FBA may be warranted in a broader set of circumstances than required by the IDEA, including, as noted above, as part of an initial evaluation for students who engage in behaviors that impede their learning or that of other students or when a CSE determines that a student requires a BIP (8 NYCRR 200.4[b][1][v]; [d][3][i]; 200.22[a], [b]). Accordingly, any observation of the Court in D.S. regarding the limited circumstances under which the federal statute requires an FBA would not absolve the district of its responsibilities to conduct an FBA of the student if required by New York. In other words, the district's argument that an FBA is not required speaks only to the threshold requirements of the IDEA, but the district's argument fails because it ignores the more arduous FBA requirements imposed on school districts by the State of New York that exceed the IDEA's mandates.

[33] The Second Circuit's decision, including the idea that an FBA is not an evaluation, is discussed further below in relation to the IEE issue.

C. April to June 2017—Interfering Behaviors

Presumably taking into consideration the two-year statute of limitations applicable to claims arising under the IDEA (see 20 U.S.C. § 1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 34 CFR 300.507[a][2], 300.511[e]; 8 NYCRR 200.5[j][1][i]), in their April 10, 2019 due process complaint notice, the parents confined their allegations of a denial of a FAPE during the 2016-17 school year to that portion of the school year after April 10, 2017 (see IHO Ex. I at p. 16). As of April 2017, the last FBA that the district conducted was from November 2015 (see Dist. Ex. 79) and the last dated BIP was updated in April 2016 (April 2016 BIP) (see Dist. Ex. 87).[34] In addition, as of April 10, 2017, the student's operative IEP in effect was the February 2017 IEP (see Dist. Ex. 8). As these documents were developed on dates outside the scope of the relevant time frame, the sufficiency or the appropriateness of the assessments or recommendations therein are not directly at issue. Instead the relevant question is whether, at some point after April 10, 2017, the student exhibited needs or behaviors that should have alerted the district to the fact that a substantial change in circumstances had occurred with respect to the student such that new assessments or recommendations (beyond those set forth in the November 2015 FBA, April 2016 BIP, and February 2017 IEP) were warranted. In addition, the CSE met on March 16, 2017 to create the student's program for the 2017-18 school year (see Dist. Ex. 9 at p. 1). Although the recommendations made by the March 2017 CSE were not implemented during the final two months of the 2016-17 school year, and indeed the parent's due process complaint only raised claims starting on or after April 10, 2017, the description of the student from the March 2017 IEP is relevant insofar as it provides the backdrop for how the student was doing in the later portion of the 2016-17 school year, which is relevant to examining the student's progress leading into the limited timeframe of the 2016-17 school year at issue in this matter. Therefore, the student's present levels of performance as described in the March 2017 IEP are also summarized below.

The November 2015 FBA indicated that it was based on "[c]lassroom ABC data sheets" filled out since September 15, 2015 and parent input (Dist. Ex. 79 at p. 1). The FBA identified the student's problem behavior as "escape from activities (leaving table, carpet, line)" (id.). The FBA indicated that the behavior occurred daily, was severe in intensity, and occurred an average of 35 minutes per day (id.). As antecedents, the FBA identified waiting, placement of demands, and lack of adult attention (id. at p. 2). Adult attention was identified as a reinforcing consequence (id.). The FBA indicated that following classroom routines was an appropriate replacement behavior that would meet the same function as the problem behavior (id.). As reinforcers, the FBA listed several of the student's preferred activities (id.).

At the starting point of the parent's claims, the operative BIP in effect at the time had been developed previously on November 16, 2015 and progress monitoring had been conducted on

[34] There is also an undated BIP in the hearing record, which according to the district's exhibit list was intended for the student's first grade year (see Dist. Ex. 78). Given that the BIP referenced a 2:1 aide (see Dist. Ex. 78 at p. 1), it likely was developed after the February 2017 IEP, which recommended a change from a 1:1 aide to a 2:1 aide (compare Dist. Ex. 7 at p. 9, with Dist. Ex. 8 at p. 9). While the hearing record is unclear, it may be that the undated BIP was the document that the special education teacher referenced in a June 2017 e-mail, described below (see Parent Ex. FF). In any event, given the lack of evidence in the hearing record regarding the timing or use of the undated BIP, it will not be relied upon to evaluate whether the district recommend sufficient supports to address the student's behavioral needs at the end of the 2016-17 school year.

December 21, 2015, February 1, 2016, February 29, 2016, and April 11, 2016, on which dates, adjustments had been made to the BIP (see Dist. Ex. 87). The BIP identified "escape" as the student's problem behavior (id. at p. 1). For preventative strategies, the BIP listed the shared aid, the "POGS system," cuing the student to the schedule, stars and stickers as part of classroom management, increased physical activity breaks every 45 minutes, breathing exercises and bursts in between activities, help with transition after lunch such as through music, and beginning the day at 9:00 in a particular teacher's room (id. at pp. 1-2). For behavior teaching strategies, the BIP listed "[r]ed/green cards" to help self-monitoring, a bag on the student's chair filled with items the student could use during "wait time," "a stop sign icon for 'wait' time," an iPod from home to filter out environmental stimuli, and an individual schedule with picture icons (id.). For consequence strategies, the BIP listed continued use of "POGS" and provision of specific feedback from all adults in the room (id. at p. 1). Pages entitled "Additional Positive Interventions/Changes to BIP" were appended to the end of the BIP (id. at pp. 4-7). The additions were made on four separate dates and generally consisted of observations of preferred reinforcers, descriptions of problem behaviors, notes about interventions (i.e., variations or effectiveness) and data collection, and reports of progress or lack thereof (id.).

For progress monitoring, the BIP listed the frequency, intensity (taking into account "significant aide time"), and approximate duration per day of the problem behavior as of specific dates (Dist. Ex. 87 at p. 3). As of November 16, 2015, the escape behavior had been observed to occur at a mild to moderate intensity, at a duration of 20 minutes per day (id.). As of December 21, 2015, the intensity was reported as moderate and the duration had increased to 29 minutes per day (id.). As of January 2016, the intensity was reported as severe with a duration of 54 minutes per day (id.). As of February 29, 2016, the description of the problem behavior was expanded to "[b]iting, wandering, hitting, [and] pinching to earn [e]scape" (id.). The intensity was described as moderate and the duration was 27 minutes per day (id.). As of April 11, 2016, the intensity was described as "[s]ignificant" with a duration of 104 minutes per day (id.); however, according to the November 2016 meeting information summary, at the end of the 2015-16 school year, the student's escape behavior had been for an average proximity of 15.8 minutes per day, which increased to 27 minutes per day during the first two months of the 2016-17 school year (Dist. Ex. 7 at p. 2).

The present levels of performance in the February 2017 IEP reflected information provided by the special education teacher that the student needed to work on compliance with tasks (Dist. Ex. 8 at p. 5). The teacher reported that the student was social with adults and peers but was self-directed and became "upset" if a situation did "not play out according to her plan" (id.). The teacher indicated that the student would, at times, yell, hit, kick, bite, spit, leave activities, push, flop to the floor, tip chairs, or lay on tables (id.). The teacher stated that the student needed "an FBA/BIP to meet her behavior needs," as well as 1:1 attention and reinforcement in group settings (id.). According to the IEP, the teacher noted that the student did not respond to adults telling her no and that an adult's attempts to correct her often escalated the behaviors (id.). The teacher also reported that the student would engage in impulsive and hurtful touching of peers and adults, at times for the purpose of "gain[ing] control of a situation or with malicious intent" (id.). The teacher stated that the student needed "to work on accepting no from adults and peers, keeping her hands to herself, and reducing her aggression and non-compliant behavior throughout the school day" (id.). The IEP reported that the student's mother expressed that she hoped the student could move to an integrated setting and that she wanted to focus on reducing the student's behaviors in the

classroom (id.). Information from the student's related services providers reflected that the student's progress was impacted by her inconsistent participation (id. at pp. 4, 6).

Relevant to addressing the student's behaviors, the February 2017 IEP recommended an 8:1+2 special class, a 2:1 aide, "positive, animated attention," and tasks broken down with praise or reward after each step (Dist. Ex. 8 at pp. 6, 9). According to the meeting information summary, the CSE recommended the 2:1 aide because the student was "making gains in her willingness to participate with more independence in lessons/activities" (id. at p. 1).[35] The IEP indicated that, at the time, the student was using a visual schedule and a visual reinforcer board and participating in the classroom "token economy system" (id. at p. 6). The IEP stated that the student needed a BIP and that an "FBA team [wa]s going to meet to discuss further actions" (id. at p. 7).[36] Annual goals in the IEP addressed the student's "escape motivated behaviors," transitioning between tasks, compliance with teacher directives and classroom rules, and negative and physically aggressive behaviors (id. at p. 8). For transportation, the February 2017 CSE recommended a small bus, a 1:1 bus aide, and use of a harness (id. at p. 11).[37] It appears that the CSE intended that the February 2017 IEP would be effective from March 17, 2017 through June 23, 2017 (id. at p. 1). The meeting information summary indicated that the harness would be "used with discretion" and would allow the student "to increase her independence, but also maintain safety when needed" (id. at p. 1).

When the CSE met to continue planning for the following school year, the present levels of performance in the March 2017 IEP indicated that at the time the student was still having difficulty focusing and maintaining her attention; however, the special education teacher reported that, at that time, the student had "a variety of independent tasks in the independent work center that she c[ould] perform on her own" and had "increased her time and attention to academic tasks this year" (Dist. Ex. 9 at p. 5). The special education teacher also indicated that the student had "made tremendous growth in the classroom since" the prior school year as her "aggressions and

[35] The IEP reflected the CSE's recommendation for a 2:1 aide; however, within the section of the IEP devoted to describing the students' management needs, the IEP stated that the student required a 1:1 aide (compare Dist. Ex. 8 at p. 9, with Dist. Ex. 8 at p. 6).

[36] The October 2015 IEP developed just prior to the November 2015 FBA and every IEP developed thereafter through and including the August 2017 IEP, set forth the notation that an "FBA team [wa]s going to meet to discuss further actions" (Dist. Exs. 2 at p. 8; 3 at p. 8; 4 at p. 8; 5 at p. 10; 6 at p. 6; 7 at p. 7; 8 at p. 7; 9 at p. 7; 10 at p. 7; 11 at p. 7). As discussed further below, the October 2017 IEP included a more detailed notation regarding the FBA team's actions, which was continued in several IEPs thereafter (see Dist. Exs. 12 at p. 10; 13 at p. 11; 14 at p. 12; 15 at p. 12; 16 at p. 14), until the May 2018 IEP, when the CSE determined that the student did not require a BIP (see Dist. Ex. 17 at p. 15; see also Dist. Exs. 18 at p. 15; 19 at p. 16).

[37] While the recommendation of the harness is not directly at issue in this appeal and thus will not be the subject of finding against the district in this proceeding, I note that the use of a harness to address a student's behavior by limiting her movement is a mechanical restraint that is considered an aversive intervention which has been explicitly banned by State regulation over a decade ago (see 8 NYCRR 19.5[b][2][iv]; 200.22[e]; see also "Student Needs Related to Special Factors," at pp. 16-17, Office of Special Educ. [April 2011], available at http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf; "Behavioral Interventions," Attachment, at p. 2, VESID Mem. [Sept. 2009], available at http://www.p12.nysed.gov/specialed/publications/policy/BI-909.pdf). At this point, a mechanical restraint should not be found on the IEP of any student in this State and, if it has not already done so, I strongly urge the members of the Board of Education to examine the policies and practices within the district as they relate to the State's ban on aversive interventions.

noncompliant behaviors [we]re . . . at a minimum" (id. at p. 6). According to the special education teacher, the student fluctuated throughout course of school year but had 1:1 adult time built into her schedule to ensure she got the attention that she craved (id.). Further, the social worker reported that the student's "incidences of being physically aggressive" toward her had "been very minimal" and that her compliance with activities and directives was "on an upward trend," noting that the student was able to participate in an activity in a counseling session for about 15 minutes (id. at p. 5). However, the social worker also indicated that the student still pushed limits and would say "no" and refuse to move from her position when the counseling session was over (id. at p. 6). The social worker opined that it "sometimes appear[ed] that she sabotage[d] herself when she d[id] well" (id. at p. 6). In regard to the student's related services, the occupational therapist indicated that the student was making progress toward her goals but that her progress was impacted by her behaviors (id.). The physical therapist indicated that student had difficulty making progress due to inconsistent participation but stated that, when she participated, she did well during sessions (id.). The physical therapist also noted that recently the student was working harder when challenged with less resistance (id.). The speech-language therapist indicated that the student made slow but steady progress (id. at p. 4). Although the student's episodes of self-directed and defiant behaviors continued to impact therapy, the speech-language therapist noted that the student was "able to participate with her peers for longer periods of time with moderate assistance in small therapy group " (id.). The speech-language therapist did note that it remained unclear if the student's inconsistencies in her speech-language skills were "due to behavior or true weakness" (id.).

Based on the information set forth in the March 2017 IEP, the evidence in the hearing record shows that leading into the relevant timeframe of April to June 2017, the student was showing improvement in her behaviors. Following the March 2017 IEP meeting, there is no documentation in the hearing record indicating that the student was exhibiting any increase in problem behaviors during April, May, or June 2017 that would have triggered the district's obligation to conduct a new FBA, update the BIP, or otherwise revisit the student's programming to address new or different behavioral concerns.

A June 6, 2017 email between the parent and the special education teacher indicated that the teacher provided an updated BIP and shared strategies that had worked for the student during the 2016-17 school year with the FBA team at the school that the student would be attending for the 2017-18 school year (Parent Ex. FF at p. 1).[38] Also, those same emails reflected that the special education teacher took the student to what would be her new classroom and that the student did well during the visit (id. at p. 2).

Further, a progress report from the end of the 2016-17 school year demonstrate that the student achieved all of her social/emotional and behavioral goals, as well as a math goal, daily living skills goal, and one motor skills goal (see Parent Ex. ZZ at pp. 2, 4-5, 7). The progress report indicated that the student did not achieve her reading goal and that it was unclear if she did not know her sight words or whether her behavior interfered with her willingness to display her knowledge (id. at p. 2). Regarding her speaking and listening goals, although she did not achieve

[38] As noted above, it is unclear whether the updated BIP to which the special education teacher referred was the undated BIP (referenced in the district's exhibit list as the first grade BIP) included in the hearing record (see Parent Ex. FF at p. 1; Dist. Ex. 78).

them, it was noted that the student made steady gains with her turn taking skills and worked better in a small group; however, according to the progress report, it was unclear if her inconsistencies were due to behaviors rather than weakness (id. at p. 3). For speech-language goals, the progress report indicated that the student made gains in her ability to limit interruptions and stay on topic with moderate assistance and made good gains with her ability to discuss objects, their functions, and similarities (id.).[39]

Overall, while the IHO took particular issue with the district's failure to conduct an updated FBA or BIP during this time frame (see IHO Decision at p. 30), but at most this would amount to a procedural violation, and the hearing record as a whole demonstrates that any such violation did not result in a denial of a FAPE. That is, based on the above discussion, the evidence in the hearing record supports a finding that for the approximate two-month period from April to June 2017, the district had in place an IEP with behavioral supports incorporated therein, as well as an FBA and a BIP even if it was somewhat outdated in light of the student's improved behaviors at that point in time. Given evidence of the student's progress leading up to and during the relevant timeframe, there is no indication in the hearing record that the district's failure to update the FBA or BIP between April 10, 2017 and the end of the 2016-17school year impeded the student's right to a FAPE or caused a deprivation of educational benefits (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

D. 2017-18 School Year

1. March 2017 CSE—12:1+1 Special Class

Turning next to the 2017-18 school year, the district contends that the IHO erred by finding the March 2017 CSE's recommendation for a less supportive setting (i.e., a move from an 8:1+2 special class to a 12:1+1 special class) was premature and argues that the hearing record supports a finding that the recommendation was appropriate given the student's progress.

Before turning to the merits of the district's appeal, it is necessary to examine whether the IHO went beyond the scope of the impartial hearing in making a determination regarding the March 2017 CSE's recommendations. Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (see 20 U.S.C. § 1415[b][7][A]; 34 CFR 300.507[a]-[b]; 300.508[a]; 8 NYCRR 200.5[j][1]). Under the IDEA and its implementing regulations, the party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i]; 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June

[39] Regarding the student's progress in her motor skills goals, other than indicating that the student achieved the goal to descend stairs step-over-step, the progress reports does not provide as much description regarding the student's progress toward her goals as was provided for the other goals (see Parent Ex. ZZ at pp. 5-7).

18, 2014]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *8-*9 [S.D.N.Y. Aug. 5, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *9 [S.D.N.Y. Mar. 28, 2013]; S.M. v. Taconic Hills Cent. Sch. Dist., 2013 WL 773098, at *4 [N.D.N.Y. Feb. 28, 2013], aff'd, 553 Fed. App'x 65 [2d Cir. Jan. 30, 2014]; DiRocco v. Bd. of Educ. of Beacon City Sch. Dist., 2013 WL 25959, at *23 [S.D.N.Y. Jan. 2, 2013]).

Here, as noted above, the parents confined their allegations of a denial of a FAPE to the time period after April 10, 2017 (see IHO Ex. I at p. 16). As the March 2017 CSE convened prior to April 10, 2017, the CSE's determinations when designing the IEP were not encompassed within the allegations in the April 2019 due process complaint notice. Further, the district did not agree to expand the scope of the impartial hearing and parents did not seek the IHO's permission to amend the due process complaint notice.

Further, to the extent the Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H., 685 F.3d at 250-51; see also Bd. of Educ. of Mamaroneck Union Free Sch. Dist. v. A.D., 739 Fed. App'x 79, 80 [2d Cir. Oct. 12, 2018]; B.M., 569 Fed. App'x at 59; J.G. v. Brewster Cent. Sch. Dist., 2018 WL 749010, at *10 [S.D.N.Y. Feb. 7, 2018], appeal dismissed [2d Cir. Aug. 16, 2018]), here, at most, the district raised questions about the March 2017 CSE's recommendation of a 12:1+1 special class for background purposes. The district's attorney specifically indicated during the opening statement that the district's position was "that anything prior to April 10, 2017 [wa]s time barred" but that information regarding facts leading up to that time were useful for "background, [but] not as a means of putting it at issue and making it a part of the district's case" (Tr. pp. 16-17). On direct examination, the district's attorney did ask the district PPS director about the discussion at the March 2017 CSE regarding the student's progress during the 2016-17 school year and the recommendation for a 12:1+1 special class (Tr. pp. 65-68); however, this line of inquiry without more would not support a finding that the district through the questioning of its witnesses "open[] the door" to an unpled IEP claim under the holding of M.H. (685 F.3d at 250-51).

Accordingly, the IHO erred in sua sponte reaching the question of the appropriateness of the March 2017 CSE's recommendation for a 12:1+1 special class. Out of an abundance of caution, below I will explain in the alternative why the IHO erred, essentially assuming for the sake of argument that the issue had been properly raised before the IHO and was not time-barred as the district argued. Factually speaking, the evidence in the hearing record does not support the IHO's conclusion that the recommendation was inappropriate when viewed prospectively at the time it was made. As discussed in detail above, the student was making progress during the 2016-17 school year in the 8:1+2 special class program. The student had achieved all of her social/emotional and behavioral goals (Parent Ex. ZZ at p. 4-5). Further, the record as discussed in detail above demonstrates she was making progress academically.

The March 2017 CSE recommended a 12:1+1 special class with a 1:1 aide and related services (Dist. Ex. 9 at pp. 9-10). In the meeting information summary, the CSE acknowledged that some committee members had concerns about moving the student to the less supportive special class given her "inconsistenc[ies]" and noted that there could be "challenges" with the transition, but indicated that, "overall," the CSE believed the student would be "better able to

handle changes and transitions at th[at] point in the school year" (id. at p. 2). The district PPS director also acknowledged that there were some members of the CSE who agreed the student was making "great gains" but wanted to see more gains before moving the student to the 12:1+1 special class setting (Tr. pp. 67-68). According to the March 2017 CSE meeting information summary, the parents were in agreement with the recommendation for a 12:1+1 special class as they wanted the student to be challenged academically (Dist. Ex. 9 at p. 2; see also Tr. p. 68).

To bolster the IHO's determination, the parents point to the fact that the student was "subjected to constant school discipline for allegedly noncompliant and disruptive behaviors" (Parent Mem. of Law at p. 12). However, evidence of how the student fared in the recommended 12:1+1 special class may not be relied upon to evaluate the appropriateness of the March 2017 CSE's recommendations as that approach fails to view the matter through a prospective lens and, at the risk of using a time-worn analogy, it is merely engaging in impermissible Monday-morning quarterbacking (see C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [finding that "a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events . . . that seek to alter the information available to the CSE"]; J.M. v New York City Dep't of Educ., 2013 WL 5951436, at *18-*19 [S.D.N.Y. Nov. 7, 2013] [holding that a progress report created subsequent to the CSE meeting may not be used to challenge the appropriateness of the IEP]; F.O. v New York City Dep't of Educ., 976 F. Supp. 2d 499, 513 [S.D.N.Y. 2013] [refusing to consider a subsequent school year IEP as additional evidence because it was not in existence at the time the IEP in question was developed]; J.R. v. Bd. of Educ. of City of Rye Sch. Dist., 345 F. Supp. 2d 386, 395 [S.D.N.Y. 2004] [explaining that the placement determination is "necessarily prospective in nature; we therefore must not engage in Monday-morning quarterbacking guided by our knowledge of [the student's] subsequent progress]).

Based on the foregoing, given the evidence regarding the student's progress in the 8:1+2 special class (with a 2:1 aide) during the 2016-17 school year and the discussions and opinions of members of the March 2017 CSE—including the parent's support for the change to a 12:1+1 class in the fall, the hearing record does not support the IHO's determination that the CSE prematurely recommended that the student attend a 12:1+1 special class placement (with a 1:1 aide). With that said, while evidence regarding how the student fared under the March 2017 IEP may not be relied upon to evaluate the CSE's March 2017 recommendations, that evidence becomes relevant to reviewing the CSEs subsequent determinations and whether the district met its obligations to the student thereafter, and it is to that evidence that I now turn.

2. July to December 2017—Interfering Behaviors

Pursuant to the March 2017 IEP, during the summer portion of the 2017-18 school year (the extended school year), the student transitioned to an 8:1+1 special class located in a BOCES program (see Dist. Ex. 9 at p. 10). The evidence in the hearing record demonstrates that in July 2017 there were multiple incidents involving the student on the bus to and from BOCES (see Dist. Exs. 35-45). Bus incident reports filed at the time indicated that the student was verbally and physically aggressive toward both other students and the bus aides (see Dist. Exs. 35-45).[40] The

[40] One incident report indicated that the student was hitting her own head against the bus window; when asked to stop she responded by hitting the bus monitor and spitting on her (Dist. Ex. 39).

PPS director testified that there was an incident on July 18, 2017 in which an employee of the bus company reportedly entered the bus and tightened the student's harness so tight that it scared and hurt her (Tr. pp. 124, 543-44; Dist. Exs. 41; 42; 43). The incident was investigated by the district, which determined that that the harness was not tightened too tightly (Tr. pp. 544-45). The PPS director also testified that the parent felt that the harness used during transportation was an antecedent to the student becoming agitated, and frustrated and misbehaving (Tr. p. 124). In response to the harness incident and the parent's concerns, the student's IEP was amended, without a meeting, on July 26, 2017 to remove the harness from the special transportation recommendations (Dist. Ex. 10 at p. 1, 12). In addition, without explanation, the July 2017 amendment to the IEP also modified the previously recommended full-time 1:1 aide to a 2:1 aide effective September 6, 2017 (compare Dist. Ex. 9 at p. 10, with Dist. Ex. 10 at p. 10).

On August 28, 2017, the CSE reconvened to more fully address the parent's concerns regarding transportation (Dist. Exs. 11 at p. 1; 52). CSE meeting notes include the handwritten notation "deescalating strategies"; however, there is no indication to what the notation referred (Dist. Ex. 61 at p. 2). The IEP itself did not include any new information regarding the student's behavior (compare Dist. Ex. 9 at pp. 3-7 with Dist. Ex. 11 at pp. 3-7).[41] The August 2017 CSE modified the delivery of the student's counseling services from an individual to a small group setting (Dist. Exs. 9 at p. 9; 11 at p. 10).

The hearing record shows that during fall 2017, the student received approximately 114 disciplinary referrals (Dist. Exs. 92; 93). By email dated September 17, 2017, the parent requested a new FBA noting that she received three behavioral referrals indicating that the student was spitting, hitting, and scratching, and on one occasion said "I'm going to kill you" (Parent Ex. HH; see Dist. Ex. 93 at pp. 2, 3, 5). The parent noted that the student had some unresolved anxiety over returning her old elementary school and that the staff has been unable to identify the antecedent to the student's behavior (Parent Ex. HH). Further, the parent reported that she had expressed concern to district staff regarding the CSE's decision not to have an aide from the student's former school transition with her (id.). The parent opined that having "the right staff with a child like [the student wa]s an integral part of her success" and the district did a disservice to the student by not having someone who understood her and how to handle her behaviors transition with her, at least on a temporary basis (id.). The hearing record does not indicate when or if the district responded to the parent's request for an FBA. In an email to the director of special education, dated September 19, 2017, the parent reported that she had received seven new referrals the day before (Parent Ex. GG). The parent told the special education director that she did not want her to think that she was giving up on the student's new placement "after just a couple of weeks" and that she wanted the new placement to be successful (id.). The parent opined that the student was capable, and she wanted the student in the least restrictive environment in her home school district (id.). The parent stated that she believed it was possible with the right supports (id.). In response, the director of special

[41] The only change made to the present levels of performance in the August 2017 IEP was to note that the student needed to be seated by herself and would not share a seat with an adult or peers while being transported on the bus (Dist. Ex. 11 at p. 5).

education advised the parent to not "be discouraged by the referrals" as they were "building documentation and communication for" the parent (id.).[42]

On September 27, 2017, the district developed a BIP for the student (Dist. Ex. 89). The BIP identified the student's problem behavior as "defiant and disruptive behavior," the function of which was "attention and control"; the desired replacement behavior was "safe behavior with some attempts at academic work" (id. at p. 1). The BIP indicated that the baseline frequency for incidents of defiant behavior was severe (26 physical and 4 verbal incidents per day) and throughout the day (id. at p. 3). In addition, the frequency of unsafe-to-self and disruptive behaviors was also characterized as severe (7 incidents per day and 12 incidents per day, respectively) and noted to occur throughout the day (id.). The BIP included preventative strategies such as offering the student alternative seating and space; offering a cool down corner as a break; providing the student with a choice of activities when appropriate; using a class management system; proximity; redirection; planned ignoring; praise; surprise recess; sour spray, Mentos, and free play reinforcers; PAWS tickets; a "go to bag" of quiet and tactile activities; and a fidget spinner (id. at pp. 1-2).[43] The BIP also listed behavior teaching strategies of: use of a visual smiley face chart, counseling goals focused on identifying appropriate behavior throughout the school through modeling and videos, review of expectations with an adult for each activity, and use of if-then statements as a reminder to reaffirm expectations (id.). In addition, the BIP included consequence strategies that described the use of a smiley face chart to earn reinforcers, the use of a staff member as an intermittent reinforcer, a notation that the plan was divided between a.m. and p.m., use of a "do the right thing" picture to reinforce expectations and accountability, use of a home/school communication notebook and referrals, referrals for physically aggressive behavior or body fluids, and allowing the student to take a two minute break when needed (id.). With regard to toileting, the BIP indicated that the student's bathroom usage would be limited to the accessible stall in the primary bathroom and one adult would stand in the stall doorway with their back to the student and the other would bring the student's reinforcer chart (id. at p. 3). According to the BIP, expectations would be reviewed with the student prior to leaving the room and the student would be reminded of reinforcer choices (id.). With respect to drinking, the BIP indicated that all of the student's drinks would be from a sports bottle with adult supervision, as the student was frequently distracted by running water and drinking fountains (id.). The September 2017 BIP indicated that if the student was physically aggressive her hands and feet would be held by an adult with

[42] The hearing record contains several excerpts from the student's communication book from September 2017 (see Parent Exs. N; O; P). The parents' entries indicated that they were concerned with the student's toileting issues (Parent Exs. N; O). The student's teacher indicated that someone would be in the bathroom with the student, but that what happened in the stall was the student's business; however, the teacher did inform the parents when the student had a bowel movement so the parents could check the student (Parent Exs. N; O). All three entries from the student's teacher indicated that the student had disruptive behaviors at some point during the day (Parent Exs. N; O; P). On September 22, 2017, the teacher reported that the student had spit, hit, and pinched the staff (Parent Ex. P).

[43] The notation of using a "sour spray" in a BIP is once again troubling as the staff in the district seem to be unaware of the prohibitions in State policy. As noted above, State regulation prohibits use of aversive interventions as a consequence for behavior (see 8 NYCRR 200.22[e]). Aversive interventions include "any form of noxious, painful or intrusive spray, inhalant or tastes" (8 NYCRR 19.5[b][2][ii]; see also "Behavioral Interventions," Attachment, at p. 2, VESID Mem. [Sept. 2009], available at http://www.p12.nysed.gov/specialed/publications/policy/BI-909.pdf).

directives for "quiet" hands or feet and then the adult would let go (id. at p. 4). This would be repeated until the physical aggression stopped (id.).

Progress monitoring conducted on October 12, 2017 indicated that the student's behaviors continued to be severe and occur throughout the day (Dist. Ex. 89 at p. 3). All of the interfering behaviors targeted by the district during this time period increased in frequency (id.). Specifically, the student's physically defiant behaviors increased from 26 to 43 per day, defiant verbal behaviors from 4 to 11 per day, unsafe-to-self behaviors from 7 to 11 per day, and disruptive behaviors from 12 to 34 per day (id.). Notes added to the BIP on October 12, 2017 indicated that the classroom team was attempting to incorporate breaks into the student's schedule; however, she was not consistently responding to imposed breaks, self-imposed breaks, or a timer to return from breaks (id. at p. 4).

The PPS director acknowledged that the student began to exhibit "behavioral issues around transportation and behavioral issues in the classroom" at the commencement of second grade in the less supportive 12:1+1 special class setting (Tr. p. 69). He testified that the CSE met on October 13, 2017 to revisit the student's supports and placement and at that time the committee decided to investigate and send packets to out-of-district programs to see if they could meet the student's needs (Tr. pp. 69-70).

Consistent with the testimony of the PPS director, the CSE convened on October 13, 2017 to review the student's program (Dist. Ex. 12). According to the meeting information summary, the special education teacher reported that the student was self-directed, sometime chose not to participate in class activities, was "not doing well in larger group activities" and was "not successful in a small group of 2" (id. at p. 2). The IEP noted that the student's safety and the safety of other students was the main objective and indicated that the student was allowed to take breaks from academics (id.). The IEP noted that the student had a bag of preferred items to take with her when she left the classroom, which she could safely use; however, the bag did not always work (id.). The meeting information summary stated that, according to the student's physical therapist, the student was hitting, spitting, and bolting which all interfered with her therapy sessions; notably, the physical therapist indicated that she had been providing services to the student since kindergarten and had tried several behavioral strategies (id.). Safety was a concern for the therapist who reported that the student experienced about six minutes of productive time during a 30-minute session, as she was self-directed the rest of the session (id.). Further, the meeting information summary noted that during physical education, the exit doors were constantly watched because the student would run out (id.). As for OT, the summary indicated that the student attended sessions with her 1:1aide and, although each activity was broken up with breaks, the student at times refused to participate (id.). The summary noted that, although the student was supposed to be seen in a group, she had been receiving individual counseling and the IEP would be changed to reflect the level of service that was working (id.). The successful counseling sessions did not translate to the classroom (id.). With regard to speech-language therapy, the meeting information summary indicated that the recommendation for services was changed from two small group to two individual sessions per week (id.). The summary explained that speech-language therapy sessions were structured so that the student was working for a preferred activity and the intense structured program had been working (id.). The student received intensive support (her therapist and aide working with her at the same time) (id.) According to the meeting information summary, the parents provided an update on the student's neurological visit and reported that the student would be put on a low dose of medication to address focusing issues (id.). The student's neurologist

recommended that a neuropsychologist assess the student due to her tics, attending concerns, and school-reported behaviors (id.). As reflected in the meeting summary, the district agreed to pay for the psychological part of a neuropsychological evaluation and noted that the "committee fe[lt] strongly that additional testing would be helpful to determine the neurological impact on behavior" (id.).

The district intervention specialist expressed concern about the "intense cycles" that the student went through each day (Dist. Ex. 12 at p. 2). The summary stated that the student's BIP had been reviewed with regard to attention and control, in addition to the avoidant and escaping behaviors that had occurred (id.). It further stated that an updated FBA was requested at that time and would be reviewed at a subsequent program review (id.). The meeting summary indicated that the student had been most successful in therapy sessions with a strict work/reward system (id.). According to the meeting information summary, the school psychologist suggested that the student's then-current placement with larger and smaller groups might not be meeting the student's needs (id.). The summary stated that the district was working with the student to address her unsafe and avoidant behaviors (id.). The summary also indicated that the district would look into out-of-district placements for the student (id. at pp. 2-3). The meeting information summary listed the name of four schools; the PPS director explained that packets were sent to the four schools on the list and the parent must have gone to visit them (Tr. pp 206-07; see Tr. pp 378-86; Parent Ex. AAA).

The present level of performance in the October 2017 IEP were updated to indicate that the speech-language pathologist was "utilizing an ABA-type approach" with the student and that she "respond[ed] well to the prescribed structure and visual schedule" (Dist. Ex. 12 at p. 7). The IEP was further revised to reflect that the student's toileting skills were inconsistent and the student's bathroom behavior was not always appropriate (id. at p. 8). As detailed in the IEP, the special education teacher reported that the student could be non-complaint and self-directed and, although she was provided with warnings before transitions and choices of activities, these strategies were not consistently met with success (id.). The updated present levels of performance indicated that the student could be aggressive toward peers and adults (id.). Moreover, the special factors section of the IEP noted that "[t]he team ha[d] met twice since September" and the student had an individualized plan (id. at p. 10). The IEP explained that the student was presented with choices about work completion and, when she had difficulty, she was given time to make an appropriate choice (id.). Staff would count backwards from 5 or use a timer, which was beneficial at times however, not consistently (id.). The IEP indicated that the student's schedule was broken down into small chucks and she could earn "a reward of choice after each activity if she earn[ed] 3/4 happy faces"; other behavior strategies employed were: praising good choices, providing a warning prior to transitions, reviewing expectations prior to a transition/activity, providing reminders of consequences and preferred activities, planned ignoring, and offering a surprise recess (id.). Further, the IEP indicated that the student's academic expectations had been reduced (id.).[44]

[44] According to meeting notes from the October 2017 CSE meeting, the student's teacher reported that academic expectations were reduced for the student and, as long as she was being safe, the student was allowed some choice (Dist. Ex. 63 at p. 2). The PPS director did not recall having a conversation with the chairperson of the student's October 2017 CSE meeting about whether or not it was appropriate to reduce all academic expectations (Tr. pp. 194-95). In addition, he could also not recall why academic expectations were reduced for the student (Tr. p.

As a result of the October 2017 CSE discussion, the district modified the student's related services by changing the student's counseling and speech-language therapy from group to individual sessions (Dist. Ex. 12 at p. 13). A handwritten note on the October 2017 CSE meeting notes stated that a safety plan should be developed for the student since it was mentioned during the CSE meeting and that a draft should be ready for the next meeting (see Dist. Ex. 47). There is no documentation or testimony regarding whether a safety plan was ever developed or what discussion was had during the October 2017 CSE meeting regarding a safety plan.[45, 46]

The CSE convened again on November 14, 2017 (Dist. Ex. 13). According to the meeting information summary, the CSE discussed the placements visited by the parent (Dist. Ex. 13 at p. 2). While the CSE continued to recommend a 12:1+1 special class placement for the student through December 8, 2017, it also determined that the student should transition to a 6:1+1 special class placement (id. at p. 2). The CSE identified two schools to which to send referral packets (id.). The November 2017 IEP noted that the student's "academic expectations [were] removed from her day," and, although, the student was always presented with an opportunity to participate, she often chose not to (id. at p. 11). The CSE reconvened again on December 5, 2017 and recommended that the student attend a 6:1+3 special class at Abilities First with related services beginning on December 11, 2017 (Dist. Ex. 14 at pp. 1, 14).[47]

Taking into account the foregoing evidence of the regression in the student's interfering behaviors, the district's failure to conduct an FBA of the student is problematic, particularly given the student's increasing behaviors and the parents' request for an FBA in September 2017 and again during the October 2017 CSE meeting (see Parent Ex. HH; Dist. Ex. 12 at p. 2). The district PPS director acknowledged that an FBA was a "necessary component" to developing a BIP (Tr. p. 162). The November 2015 FBA, summarized above, was the last FBA conducted by the district (see Dist. Ex. 75). Although the district developed a BIP for the student at the beginning of the 2017-18 school year, it lacked the type of information that an updated FBA could have provided, especially since the student's environment had changed. A private BCBA-D (Board Certified Behavior Analyst – Doctoral), who reviewed the student's BIPs and testified for the parent, opined that when attempting to address a student's interfering behaviors it is critical the process begin with an FBA, which "provides the basis for any planned intervention" as it first identities antecedents and contexts that generate behaviors, then provides the baseline for which the effectiveness of any

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[45] The notebook entries for October 2017 demonstrate that the student was resisting schoolwork, eloping from the school building, and having toileting accidents (Parent Exs. Q; R; S).

[46] Following the October 2017 CSE meeting, the student's teacher completed a Motivation Activity Scale and a setting events checklist, which provided additional information regarding the function of the student's behavior and possible antecedents (Dist. Exs. 90; 91).

[47] The IEPs created for the student for the 2017-18 school year included three social/emotional/behavioral goals; two of the goals were held over from the 2016-17 school year (compare Dist. Ex. 8 at p. 8 with Dist. Ex. 9 at p. 8; see also Dist. Exs. 7 at p. 8; 10 at p. 8; 11 at p. 8). Although the criteria for mastery differed from 2016-17 to 2017-18, it is unclear why the district recommended the same goals, in light of the fact that the student was reported to have achieved both of these goals at the end of the 2016-17 school year (Parent Ex. ZZ at pp. 4-5).

future intervention is judged (Parent Ex. LLLL at p. 5).[48] The BCBA-D explained that FBAs and BIPs were "interrelated and fundamentally dependent on one another" and that, because of the relationship of behavior to the environment, an FBA produced in one environment would no longer be valid if a student moved to another environment (id.). She opined that the behavioral supports provided to the student by the district and Abilities First "were inappropriate and ineffective" because the BIPs were not based on an appropriate or any FBA, and also found that the BIPs did not conform to accepted behavior analysis practices (id. at pp. 6-8). The BCBA-D stated that the November 2015 FBA was out of date by April 2017 and the evaluation was "extremely cursory" (id. at p. 7).

With regard to the district's September 2017 BIP, the BCBA-D testified that the student's interfering behaviors were not operationally defined in the BIP (Parent Ex. LLLL at p. 9). In addition, she stated that the interventions recommended in the BIP were all forms of attention and likely to reinforce the student's behaviors since the BIP hypothesis identified the function of the student's behaviors as attention and control (id.). Moreover, the BCBA-D explained that the intervention of planned ignoring conflicted with the other recommended interventions (id.). She opined that the September 2017 BIP was not a coherent plan, rather a list of "conflictual interventions with no strategy for implementing them" (id.). The BCBA-D reported that there was no basis or explanation to support the surprise recess or intermittent access to a preferred adult as viable reinforcers because research in ABA indicated that the award had to be immediate and predictable in order to establish the relationship between a specific behavior and its consequence (id. at p. 10). Moreover, the BCBA-D noted that "[d]isturbingly," the use of restraint (holding the student's hands and feet) was not justified "due to the lack of an appropriate FBA and the failure to first try effective positive interventions" (id.). She indicated that "parental approval for the use of restraints was apparently never obtained"(id.). Finally, the BCBA-D opined that "throughout the day" was not an acceptable means of describing behavior since duration was meant to account for the actual length of time that behaviors occurred (id.).

To the extent that the district's failure to conduct an FBA constituted a procedural violation that may have resulted in inadequacies in the district's responses to the student's behaviors, the August 2017 IEP, September 2017 BIP, October 2017 IEP, and November 2017 IEP all reflect the district's progressive response to the student's behaviors over time, including attempts to adjust the student's programming and planning for an out-of-district school placement for the student. Indeed, if this was the only problem, the overall planning and programming might have been enough to support a determination that the district's failure to conduct a FBA, while a serious procedural violation, did not rise to the level of a denial of a FAPE, but the district's approach to the student's academics in the October 2017 IEP and, more seriously, in the November 2017 IEP tipped the scales decidedly in favor of the parent (see Dist. Exs. 12 at p. 10; 13 at p. 11). That is, while the district was no doubt faced with the very challenging task of determining how to provide the student with academic instruction given the severity of her behaviors, the November 2017 CSE's decision to remove all academic demands from the student's programming went too far and resulted in a denial of a FAPE to the student. Had the district conducted the FBA, it may have come to understand the student's behaviors better and been better poised to recommend positive behavioral supports and services to address the student's behavior so that she could still try to benefit from the academic curriculum even if it included modified expectations for the rate of

[48] The affidavit of the BCBA-D as filed by the district with the hearing record on appeal is missing page 15.

academic progress. But eliminating academic expectations altogether did not constitute a viable IEP for this student. Accordingly, the evidence in the hearing record supports a finding that, as of November 2017, the district denied the student a FAPE. As noted above, the IHO's determinations about the district's failure to implement the student's IEPs as of December 2017 when the student began attending Abilities First were unappealed and therefore final and binding. Therefore, I now turn to review the question of relief to remedy the district's failure to offer or provide the student a FAPE from November 2017 through March 2019 which is a smaller window of time than the one considered by the IHO when fashioning relief.

E. Compensatory Education

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education relief may be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014] [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; see also Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2008]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Likewise, SROs have awarded compensatory services to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. of City Sch. Dist. of Buffalo v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

Here, for the reasons described above, the evidence in the hearing record demonstrates that the district denied the student a FAPE for approximately seven months out of the 2017-18 school

year and the entirety of the 2018-19 school year.[49] In calculating an award of compensatory education, the IHO "defer[red] to the related services providers experienced in their fields, especially since there was no evidence to the contrary" (IHO Decision at p. 38 [internal citations omitted]). Accordingly, the IHO ordered the amount of compensatory education recommended by the parents' experts (specifically, the BCBA-D, occupational therapist, physical therapist, and speech-language pathologist) (id. at pp. 38-40; see also Parent Exs. IIII; JJJJ; KKKK; LLLL).

Initially, the district was the party that carried the burden of production and persuasion at the impartial hearing (Educ. Law § 4404[1][c]; see M.M. v. New York City Dep't of Educ., 2017 WL 1194685, at *4 [S.D.N.Y. Mar. 30, 2017] [noting the SRO's finding that the district had the burden of proof on the issue of compensatory education]). Here, the district failed to address its burdens, as required under the due process procedures set forth in New York State law, by describing its views, based on a fact-specific inquiry set forth in an evidentiary record, regarding an appropriate compensatory education remedy that would most reasonably and efficiently place the student in the position that he would have been but for the denial of a FAPE (E. Lyme, 790 F.3d at 457; Reid, 401 F.3d at 524). As such, the district's arguments that the student was not entitled to compensatory education because the parent failed to offer evidence regarding "what a reasonable rate of progress would have been" for the student or regarding how many related services sessions the student missed are without merit (see Req. for Rev. at pp. 4, 6-7).[50] It was the district's burden to present such evidence at the impartial hearing. Therefore, the following discussion will focus on the district's argument that the evidence in the hearing record demonstrated that the student made "significant progress" during the period of time for which compensatory education was ordered (see Req. for Rev. at pp. 3, 5).[51]

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[49] While the denial of FAPE spans from November 2017 through the end of the 2018-19 school year, the compensatory education award will address that time period from November 2017 through March 2019 before the student began attending Blooming Grove, the costs of which the district agreed to pay (Tr. p. 146; Dist. Ex. 30 at p. 1).

[50] The district also argues that the IHO erred by "fail[ing] to recognize that the session notes from September through January 2019 confirm that related services were provided more than 85% of the time" (Req. for Rev. at p. 3). The sessions notes for OT, PT, and speech-language therapy do reflect logs for a majority of the student's related services sessions from September 1, 2018 through January 30, 2019 (see Parent Ex. VV; WW; YY). The records for counseling are less clear and appear to be missing several weeks of logs (see Parent Ex. WW). Letters from Abilities First to parents regarding staffing shortages for delivering OT, PT, and speech-language therapy services were sent in mid- to late-January 2019 (see Parent Exs. CCC; DDD; EEE). In addition, there were staffing shortages related to the teacher and aides assigned to the student's classroom (see Parent Ex. QQ). The hearing record as a whole calls into question any claim that the percentage of services delivered during those four months could be generalized to reflect the state of things for the entire time the student attended Abilities First. As the parents note, Abilities First was served with a subpoena, but did not produce related services records for any other time period (see Answer at p. 5) and the district did not offer the records despite being the party with the burden of production. Even assuming that the student received a majority of her related services sessions from September 2018 through January 2019, I would not find that the IHO erred in awarding compensatory education services to cover that time period absent evidence of the implementation of the student's services for the remainder of the time that the student attended Abilities First. This is particularly so given testimony from the parents' experts indicating that "based on scientific research about the need for consistency of services to support habit development and retention of skills," the services the student received at Abilities First were unlikely to be effective, given the numerous missed sessions (Parent Ex. JJJJ at p. 16; see Parent Ex. KKKK at pp. 8-9).

[51] The district also summarily alleges that the experts' opinions were speculative; however, as discussed herein,

The evidence in the hearing record regarding compensatory education was solely from the parents' experts. The parents' experts offered testimony by affidavit reflecting that they did not believe that the student received the recommended services while at Abilities First (see Parent Exs. IIII at p. 12; JJJJ at pp. 15, 16; KKKK at pp. 8-9). In addition, the experts opined that the student had made minimal progress from April 2017 through March 2019 (Parent Exs. IIII at pp. 15-17; JJJJ at pp. 8-11, 16; KKKK at pp. 1, 7-8; LLLL at pp. 11-13). While the district argues that, to the contrary, the student made progress at Abilities First (see Req. for Rev. at p. 5), the evidence the district cites to support this allegation is insufficient to rebut the conclusions drawn by the parents' experts from their evaluations of the student and reviews of the student's educational records.

Specifically, the occupational therapist, who conducted the OT IEE of the student in March 2019 offered testimony by affidavit indicating that the student made minimal progress from April 2017 through March 2019 (Parent Ex. IIII at pp. 1, 15-17; see Dist. Ex. 74). The occupational therapist compared the results of the district's November 2017 OT triennial evaluation and the observations made in the April 2018 OT annual report to the results of his evaluation of the student in March 2019 (Parent Ex. IIII at pp. 1, 15-16; see Dist. Exs. 21; 74; 96).[52] In addition, the occupational therapist reviewed the student's January 2018, June 2018, and February 2019 annual goal progress reports, focusing on the June 2018 report (Parent Ex. IIII at pp. 15, 16; see Dist. Exs. 56; 118; 119). In addition to noting that the student had not achieved goals in the areas of writing and drawing geometric shapes, the occupational therapist also indicated that many areas of need were not addressed or worked on, including toileting skills (Parent Ex. IIII at p. 17; see Dist. Ex. 118 at pp. 4, 11). The occupational therapist stated that he "viewed [the student's] deficits as being definitely capable of improvement, based on her cognitive ability and [his] observation that she certainly ha[d] the motivation to engage with services" (Parent Ex. IIII at p. 9).

The physical therapist, who conducted the PT IEE of the student in April and May 2019, compared the results of her evaluation of the student to two PT reports completed by the district in March 2017 and December 2017 and concluded that the student had "at best stagnated and at worst regressed, in terms of her school-related physical functioning, between March, 2017 and May, 2019" (Parent Ex. JJJJ at pp. 1, 8-11, 16; see Parent Exs. GGGG; HHHH; Dist. Ex. 76). Regarding the district's March 2017 PT report, the physical therapist noted that the qualitative observations of the student therein were consistent with the student's functional limitations at the

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the experts relied on several sources of information and explained the basis for their opinions (see generally Parent Exs. IIII; JJJJ; KKKK; LLLL). In its memorandum of law, the district also argues that the information from the IEEs about which the occupational therapist, physical therapist, and speech-language pathologist relied was over a year old and that their IEEs did not rely on data obtained in the school setting; however, the IEEs were conducted between March and May 2019, at the end of the period of time for which compensatory education was sought, and were based on several sources of information including standardized testing and a review of the student's educational records, and, therefore, were appropriate sources of information for the experts to rely upon to make a recommendation for compensatory education award (see Dist. Exs. 74; 75; 76).

[52] The occupational therapist compared the results of the district's November 2017 administration of the Wide Range Assessment of Visual Motor Abilities (WRAVMA) and his March 2019 administration of the Beery-Buktenica Developmental Test of Visual Motor Integration (Beery VMI), the Motor-Free Visual Perception Test-Revised (MVPT- Revised), and the Evaluation Tool of Children's Handwriting (ETCH) (Parent Ex. IIII at pp. 15-16; compare Dist. Ex. 21, with Dist. Ex. 74). The occupational therapist acknowledged that the district's November 2017 OT evaluation was "sparse" but indicated that the standardized assessments he administered in March 2019 similarly measured the student's visual-motor skills (Parent Ex. IIII at p. 16).

time of her observations in April and May 2019, except that, unlike a description in the March 2017 report that the student was physically strong, the physical therapist found that weakness in the student's core strength was an area that "substantially affect[ed] [her] endurance and posture, and consequently her attention, focus, and behavior" (Parent Ex. JJJJ at pp. 9, 10; see Parent Exs. GGGG at pp. 1-2; Dist. Ex. 76 at p. 13). The physical therapist also compared the results of the district's December 2017 administration of the Test of Gross Motor Development-2 (TGMD-2) to her April 2019 administration of the Bruininks-Oseretsky Test of Motor Proficiency-2nd Edition (BOT2), Gross Motor Subtests, and concluded that the results demonstrated "no evidence of improvement in overall gross motor abilities" (Parent Ex. JJJJ at p. 10; see Parent Ex. HHHH at pp. 1-2; Dist. Ex. 76 at pp. 1, 8-9). In addition, the physical therapist reviewed the student's January 2018, June 2018, and February 2019 annual goal progress reports, and noted that "numerous of the [PT] goals were not met" and, for those that had been deemed achieved, "it [wa]s apparent that meaningful progress was not actually made" (Parent Ex. JJJJ at pp. 12-13; see Dist. Exs. 56; 118; 119).

The speech-language pathologist, who conducted the March 2019 speech-language IEE of the student, compared the results of her evaluation of the student to a November 2017 speech-language evaluation conducted by the district in November 2017 and concluded that there was "objective evidence of lack of progress over the April 10, 2017 to March 31, 2019 time period" (Parent Ex. KKKK at pp. 1, 7-8; see Dist. Exs. 22; 75).[53] She indicated that, in the areas tested, the student's standardized test scores were "comparable" (Parent Ex. KKKK at p. 8; see Dist. Exs. 22 at pp. 1-2; 75 at p. 15).[54]

Finally, a BCBA-D conducted a review of the student's records, interviewed the student's mother, and conducted an observation of the student at Blooming Grove in February 2020 (Parent Ex. LLLL at pp. 1, 3-4). The BCBA-D opined that, not only did the student not make progress from April 2017 to March 2019, but when she attended Abilities First between December 2017 and February 2019, "behavioral regression occurred" (id. at pp. 11-12). The BCBA-D cited the student's June 2018 annual goals progress report, excerpts from IEPs, and behavior incident forms to demonstrate the student's lack of progress (id. at pp. 12-13; see Dist. Exs. 19 at pp. 12-13, 20; 99-117; 118). She further opined that due to the lack of behavioral support, the student did not receive any meaningful education from April 2017 through March 31, 2019 (Parent Ex. LLLL at at p. 20).

Turning to the district's argument about the student's progress, the district points to the audio recording of the January 2019 CSE meeting, at which the parents' educational consultant "congratulated the District for the progress the student had made up until that point for 2019 while at Abilities First" (Req. for Rev. at p. 5, citing Parent Ex. A). While the educational consultant made a remark that "it sound[ed] . . . like" the student had made academic progress, there is no

[53] The speech-language pathologist also opined that the district's November 2017 speech-language evaluation of the student was "not sufficient to adequately identify her speech-language related needs" (Parent Ex. KKKK at p. 7).

[54] By way of example, the speech-language pathologist compared the results of the district's administration of the Clinical Evaluation of Language Fundamentals - Fifth Edition (CELF-5) and her administration of the Listening Comprehension Test 3 (specifically, the Vocabulary and Semantics subtest) and the Word Test 3 (Parent Ex. KKKK at p. 8; see Dist. Exs. 22 at pp. 1-2; 75 at p. 15).

indication in the hearing record on what information she based this opinion (see Parent Ex. A). The district cites no other evidence of the student's progress during the relevant timeframe to rebut the opinions of the parents' experts regarding the student's lack of progress. Instead, in its memorandum of law, the district points to the student's borderline cognitive functioning and history of behavioral issues since the 2015-16 school year to argue that "any award for compensatory services should have taken into account that where [the student] should have been but for any perceived denial of FAPE is not where a typically developing peer would have been" (Dist. Mem. of Law at p. 26). However, there is no indication that the experts who made recommendations regarding compensatory education failed to take into account the student's potential.[55]

Based on the foregoing, the evidence in the hearing record does not support the district's allegation that the IHO erred in ordering compensatory education given the student's progress. The district has not otherwise pointed to any evidence to support a different compensatory education award or to convincingly counter the IHO's reliance on the parents' experts to formulate the award or the underlying basis for the experts' recommendations. Accordingly, I decline to disturb the IHO's discretionary award, except that I will reduce the amount of services awarded proportionate to that period of time where, contrary to the determinations of the IHO, I have found that the district offered the student a FAPE. The IHO awarded 255 hours of compensatory OT services, 102 hours of compensatory PT services, 156 hours of compensatory speech-language therapy services, 902 hours of compensatory academic services by a BCBA and/or Licensed Behavior Analyst (LBA) or a certified special education teacher, and 250 hours of supervision services provided by a BCBA and/or LBA, which at the parents' option could instead be used as compensatory academic services (IHO Decision at p. 42). Given the determination herein that the district offered the student a FAPE from April to November 2017, I will reduce the IHO's award proportionately. Therefore, the IHO's award is modified as follows: the district shall provide the student with a bank of 185 hours of compensatory OT services, 74 hours of compensatory PT services, 113 hours of compensatory speech-language therapy services, 654 hours of 1:1 compensatory academic services, and 181 hours of supervision services, which at the parents' option could instead be used as compensatory academic services. Those aspects of the IHO's award relating to the maximum rate for such services, the qualifications of the providers, and the duration of time during which the bank would be available shall not be disturbed.

F. Independent Educational Evaluations

Turning to the district's appeal relating to the IEEs, the IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified

[55] Finally, in its memorandum of law, the district references (without citation) an observation in the BCBA-D's affidavit testimony that the student's behaviors had been remediated since she began attending Blooming Grove (Dist. Mem. of Law at p. 27; see Parent Ex. LLLL at p. 19). Even assuming that the hearing record supported a finding that the student's behaviors came under control once she attended Blooming Grove, this, on its own, would not support a finding that the student was at the place where she would have been but for the district's denial of a FAPE in terms of her academic needs or her related services needs such that an award of compensatory education would not be warranted. The district points to no other evidence in the hearing record to support its argument in this regard.

examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]). Guidance from the United States Department of Education's Office of Special Education Programs (OSEP) indicates that if a parent disagrees with an evaluation because a child was not assessed in a particular area, "the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs" (Letter to Baus, 65 IDELR 81 [OSEP 2015]; see Letter to Carroll, 68 IDELR 279 [OSEP 2016]). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either (1) ensure that an IEE is provided at public expense; or (2) initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). Additionally, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]).

When a parent requests an IEE, the district must provide the parent with a list of independent evaluators from whom the parent can obtain an IEE, as well as the district's criteria applicable to IEEs should the parents wish to obtain evaluations from individuals who are not on the list (Educ. Law § 4402[3]; 34 CFR 300.502[a][2]; [e]; 8 NYCRR 200.5[g][1][i], [ii]; see Letter to Parker, 41 IDELR 155 [OSEP 2004]). The criteria under which the publicly-funded IEE is obtained, including the location of the evaluation and the qualifications of the independent evaluator, must be the same as the criteria that the public agency uses when it initiates an evaluation (34 CFR 300.502[e][1]; 8 NYCRR 200.5[g][1][ii]; see Letter to Anonymous, 103 LRP 22731 [OSEP 2002]). If the district has a policy regarding reimbursement rates for IEEs, it may apply such policy to the amounts it reimburses the parent for the private evaluations (34 CFR 300.502[e][1]; see Individual Educational Evaluation, 71 Fed. Reg. 46689-90 [Aug. 14, 2006]). The district may also establish maximum allowable charges for specific tests to avoid unreasonable charges for IEEs (see Letter to Anonymous, 103 LRP 22731 [OSEP 2002]). When enforcing reasonable cost containment criteria, the district must allow parents the opportunity to demonstrate that "unique circumstances" justify an IEE that does not fall within the district's cost criteria (id.; Individual Educational Evaluation, 71 Fed. Reg. 46689-90 [Aug. 14, 2006]).

The district last conducted a triennial evaluation of the student in October and November 2017, which evaluation included academic testing, an OT evaluation, a speech-language evaluation, and a PT evaluation (see Dist. Exs. 20; 21; 22; Parent Exs. GGGG; HHHH).[56] In

[56] The hearing record does not include an FBA of the student more recent than the November 2015 FBA (see Dist. Ex. 79).

addition, based on a recommendation from the student's neurologist, a private neuropsychological evaluation was conducted in December 2017 (see Dist. Exs. 12 at p. 2; 23).[57]

According to the meeting information summary, during the February 2019 CSE meeting, the parents requested "additional testing" of the student, but stated a willingness to "hold off until [the student] [wa]s in a school based program" (Dist. Ex. 19 at p. 2). However, the testimony of the district PPS director reflects that the parents later expressed that they "wanted to go forward" and obtain IEEs of the student (Tr. pp. 105-06, 107).

In a letter to the parents dated March 1, 2019, the PPS director acknowledged the parents' request for IEEs (Dist. Ex. 28 at p. 2). The PPS director indicated that an independent neuropsychological evaluation of the student had been conducted in December 2017 and that the parents' "dissatisfaction" with such evaluation "d[id] not entitle [them]to request and receive an additional independent evaluation" (id.). The PPS director further stated that the district wished to first conduct the assistive technology evaluation and stated that, if the parents were not in agreement with the district's assistive technology evaluation, they could then request an IEE (id.). As for an FBA, the PPS director stated that the district would "like to discuss this further at [the] next [CSE] meeting" for the student (id.). Finally, the PPS director included documentation with the letter regarding the district's IEE policies as well as a list of evaluators from whom the parent could obtain IEEs in the areas of OT, PT, and speech-language therapy (id. at pp. 2, 4-8).

According to the district's IEE policy, once parent(s) requested IEEs in writing, the district could "conduct additional testing before agreeing to an IEE" if the area of need was "one that ha[d] thoroughly been investigated by the evaluation already completed," after which the parent(s) could be granted an IEE if their disagreement persisted (Dist. Ex. 28 at p. 5). The policy further indicated that, once the district approved a request for an IEE, parent(s) could select an evaluator with "a current license or certification" (id.). The policy set forth maximum reimbursement rates for IEEs for "evaluators with required credentials" (id. at p. 4). The policy stated that "[a]bsent exceptional circumstances the District w[ould] not pay more than the [listed] rates" (id. at p. 4).

In a letter to the parents dated March 13, 2019, the PPS director acknowledged correspondence from the parents dated March 8 and March 13, 2019 regarding the evaluators that the parents had chosen to conduct the IEEs in the areas of OT, PT, and speech-language therapy (Dist. Ex. 29 at p. 2).[58] The PPS director indicated that the rates charged by the parents' preferred evaluators "far exceed the prevailing rates in Orange or Ulster County" and requested that the parents contact him to "discuss this and attempt to negotiate a suitable compromise on the cost of the requested evaluations" (id.). However, the PPS director also stated that he had his "office manager reach out to the [parents' preferred] evaluators . . . to begin contracting with them" (id.).

Between March and May 2019, the parents obtained IEEs in PT, OT, and speech-language therapy (see Dist. Exs. 74; 75; 76). The parents brought their due process complaint notice seeking IEEs at public expense in April 2019 (see IHO Ex. I at pp. 1, 15-16, 17). A CSE that convened on

[57] According to the October 2017 CSE meeting information summary, the district agreed to pay for the psychological part of a neuropsychological evaluation (Dist. Ex. 12 at p. 2).

[58] The hearing record does not include copies of the referenced correspondence from the parents.

June 25, 2019 considered the OT, PT, and speech-language therapy IEEs (see Tr. pp. 109-10; Dist. Ex. 77 at p. 2).

The district relies on the recent Second Circuit decision in D.S. to argue that the parents were required to request that the district conduct a comprehensive evaluation of the student before seeking IEEs and that the parents may not obtain an independent FBA as an IEE. With regard to the former proposition, review of the Second Circuit's decision in D.S. does not support the district's interpretation. The Court discussed the idea of a comprehensive evaluation or re-evaluation of a student forming the basis of an IEE request, as opposed to a single assessment (i.e., an FBA), but did not go so far as to hold that a parent is obligated to request that a district conduct a full re-evaluation of the student in order to seek IEEs (see D.S., 975 F.3d at 162-68; see also T.P. v. Bryan County Sch. Dist., 792 F.3d 1284, 1291 n.13 [11th Cir. 2015] [discussing the awkwardness of referring to individual assessments as IEEs when "evaluation" is used in the IDEA to refer to the entire process of determining a student's needs]). To the contrary, the Court held that parents may base a request for an IEE on the last full evaluation conducted by the district (D.S., 975 F.3d at 169-70 ["Because the only evaluations that trigger a parent's right to an IEE at public expense are the initial evaluation and triennial reevaluations discussed in Section 1414 of the Act, a parent's right to an IEE at public expense ripens each time a new evaluation is conducted. The time within which a parent must express their disagreement with an evaluation and request an IEE depends on how frequently the child is evaluated."]). The only reference the Court made to parents requesting a comprehensive evaluation was in the circumstance (distinguishable from the present matter) wherein a district conducts an "intermediary limited assessment" since its last comprehensive evaluation and the parent feels a more comprehensive evaluation was appropriate; in those circumstances, the Court opined that the parent may request that the district conduct a more comprehensive evaluation rather than seek a comprehensive IEE based on disagreement with the intermediary limited assessment (D.S., 975 F3d at 171).

Here, as noted above, the student was last evaluated in 2017 and, as of the date of the parents' request for an IEE, the district had not reevaluated the student on a comprehensive or limited basis. Accordingly, the parents could request an IEE based on their disagreement with the district's 2017 evaluation of the student without requesting that the district first pursue a re-evaluation.[59] On appeal, the district does not attempt to defend its 2017 evaluation of the student in order to avoid funding the requested IEEs. Further, on appeal, the district does not outline a specific objection to the parents' request for an assistive technology evaluation.[60] As for the

[59] In the March 1, 2019 letter to the parents responding to their request for IEEs, the PPS director raised the December 2017 neuropsychological evaluation as foreclosing any further neuropsychological IEE (Dist. Ex. 28 at p. 2). In their due process complaint notice, the parents did not seek an order from the IHO requiring the district to fund a neuropsychological IEE and appear to have abandoned that request (see IHO Ex. I at pp. 15-16, 17).

[60] In the March 2, 2019 letter to the parents responding to their requests for IEEs, the PPS director stated that the district wished to first conduct the assistive technology evaluation (Dist. Ex. 28 at p. 2). However, this was not an appropriate response to the parents' request for an assistive technology IEE. OSEP has indicated that "it would be inconsistent with the provisions of 34 CFR § 300.502 to allow the public agency to conduct an assessment in an area that was not part of the initial evaluation or reevaluation before either granting the parents' request for an IEE at public expense or filing a due process complaint to show that its evaluation was appropriate" (Letter to Carroll, 68 IDELR 279 [OSEP 2016]). Along the same lines, there is also questionable language in the district's IEE policy referring to the district's opportunity to evaluate a student after a parent's request for an IEE (see Dist. Ex. 28 at p. 5 [stating that: "[i]f the area of question or concern is one that has thoroughly been investigated by

district's argument about an FBA, although the Court in D.S. indicated that a parent's disagreement with a district FBA, on its own, could not form the basis of a request for a comprehensive IEE, the Court's holding does not represent the proposition that a parent cannot obtain an independent FBA as part of a request for a comprehensive IEE based on a disagreement with a district triennial evaluation; to the contrary, in D.S., the parents' request for a comprehensive IEE, including an assessment of the student's behavior, was remanded to the district court for further consideration (975 F.3d at 162-68, 171).

Specific to the OT, PT, and speech-language IEEs, which the district purportedly approved but refused to fund at the rates charged by the parents' providers (see Req. for Rev. at p. 7), the district argues that the IHO erred in finding that it was required to initiate a due process complaint notice to challenge the rates for the evaluations sought by the parents. However, State regulation concerning IEEs provides that, if a parent requests an IEE, the district must either ensure the IEE is provided at public expense "or file a due process complaint notice to request a hearing to show that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria" (8 NYCRR 200.5[g][1][iv] [emphasis added]; see 34 CFR 300.502[b][2][1]-[ii]).[61]

To be sure, not much time passed between the parents' correspondence with the district about the IEEs (including the parents' disclosure of the rates of the preferred evaluators) in or around March 2019 (see Dist. Exs. 28 at p. 2; 29 at p. 2) and the parents' April 9, 2019 due process complaint notice (see IHO Ex. I).[62] Thus, as the parents requested the IEEs within their due

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the evaluation already completed, the District may conduct additional testing before agreeing to an IEE"]).

[61] The language in the federal regulation is slightly different than the State regulation in that it states that the district must either file a due process complaint notice to show its evaluation is appropriate or "[e]nsure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria" (34 CFR 300.502[b][2][1]-[ii]). Thus, contrary to the more specific language in State regulation, the federal regulation could be interpreted more broadly to permit the district to challenge the IEEs' compliance with district criteria in an impartial hearing without specifying that it must be the district that initiates the hearing for that purpose (compare 34 CFR 300.502[b][2][1]-[ii], with 8 NYCRR 200.5[g][1][iv]]). The district court decision that the district relies on applies this broader reading (see C.P. v. Clifton Bd. of Educ., 2020 WL 4530031, at *9 [D.N.J. Aug. 6, 2020]); however, the United States Department of Education's Office of Special Education Programs (OSEP) has not applied the same interpretation, instead indicating that:

> If the total cost of the IEE exceeds the maximum allowable costs and the school district believes that there is no justification for the excess cost, the school district cannot in its sole judgment determine that it will pay only the maximum allowable cost and no further. The public agency must, without unnecessary delay, initiate a hearing to demonstrate that the evaluation obtained by the parent did not meet the agency's cost criteria and that unique circumstances of the child do not justify an IEE at a rate that is higher than normally allowed.

(Letter to Anonymous, 103 LRP 22731 [OSEP 2002] [emphasis added]). In light of the more specific language in the State regulation, it is not necessary to further opine about these different understandings of the federal regulation.

[62] Federal and State regulations provide that districts must act "without unreasonable delay" (34 CFR 300.502[b][2]; 8 NYCRR 200.5 [g][1][iv]).

process complaint notice, to require the district to initiate its own impartial hearing in order to show its evaluations were appropriate or to challenge the IEEs' consistency with district cost criteria may be an outcome that elevates form over substance (see Seth B. v. Oreans Parish Sch. Bd., 810 F.3d 961, 970 [5th Cir. 2016]; P.R. v Woodmore Local Sch. Dist., 256 Fed. App'x 751, 755 [6th Cir. 2007]; cf. D.S., 975 F.3d at 169 n.11). In any event, putting aside the question of waiver, during the impartial hearing initiated by the parents, the district failed to meet its burden to show unique circumstances did not justify the IEEs obtained by the parents at the higher rates (see Educ. Law § 4404[1][c] [placing the burden of proof on the school district during an impartial hearing, except for a parent's burden to prove the appropriateness of a unilateral placement]).[63] The PPS director testified regarding the procedure by which the district developed its cost criteria (see Tr. p. 502) and it is undisputed that the costs of the IEEs procured by the parents exceeded the district's criteria (compare Dist. Ex. 28 at p. 4, with Parent Exs. IIII at p. 18; JJJJ at p. 18; KKKK at pp. 9-10);[64] however, the district did not present evidence or argument indicating that the student's circumstances did not justify the higher rates. Instead, in its post-hearing brief to the IHO, the district focused on the evaluators' purported failures to establish the consistency of their rates with those in the community, rather than establishing that evaluators that charged no higher than the rates set by the district could have sufficiently evaluated the student given the student's circumstances (see Dist. Post-Hr'g Brief at p. 17). As such the district failed to meet its burden.

Based on the foregoing, there is insufficient basis in the hearing record to disturb the IHO's decision granting the parents' request for reimbursement of speech-language, OT, and PT IEEs and funding of an assistive technology IEE and an independent FBA.

VII. Conclusion

The evidence in the hearing record shows that, contrary to the IHO's determinations, the district offered the student a FAPE from April 10, 2017 to approximately November 16, 2017. However, based on the district's failures to address the student's interfering behaviors and the IHO's final and binding determinations relating to the implementation of the student's IEPs at Abilities First, the district is found to have denied the student a FAPE from approximately November 17, 2017 through the end of the 2018-19 school year. Based on the foregoing, the awarded compensatory education award has been modified proportionately. In addition, the evidence in the hearing record supports the IHO's order requiring the district to fund IEEs.

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[63] A school district must not restrict the providers of IEEs to a set list, and must give parents the opportunity to show that circumstances require choosing an evaluator who does not meet school district criteria (Letter to Parker, 41 IDELR 155 [OSEP 2004]; Letter to Anonymous, 103 LRP 22731 [OSEP 2002]). Here, while the district did reach out to the parent and indicate a desire to negotiate a compromise on the cost (see Dist. Ex. 29 at p. 2), neither the policy nor the correspondence from the district sets forth a procedure or a means by which the parents were expected to show that the circumstances of the student warranted the parents' choice of evaluators at the rates stated (see Dist. Exs. 28 at p. 4; 29 at p. 2). If the parents failed to avail themselves of such opportunity or made such a showing but the district disagreed, it still would have been incumbent upon the district to either grant the IEEs as requested or pursue the impartial hearing and show that the student's circumstances did not warrant the IEEs by the parents' preferred evaluators at the higher costs.

[64] During the impartial hearing, the parents disputed the reasonableness of the district's cost criteria and offered evidence to demonstrate the prevailing rates for independent OT, PT, and speech-language therapy evaluations (see Parent Post-Hr'g Brief at pp. 10-11; see also Parent Exs. NNN-QQQ).

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED

IT IS ORDERED that the IHO's decision, dated August 15, 2020, is modified by reversing that portion which found that the district failed to offer the student a FAPE from April 10, 2017 through approximately November 16, 2017;

IT IS FURTHER ORDERED that the IHO's decision, dated August 15, 2020, is modified by vacating the amount of compensatory education services awarded;

IT IS FURTHER ORDERED that the district shall be required to fund 185 hours of compensatory OT services, 74 hours of compensatory PT services, 113 hours of compensatory speech-language therapy services, 654 hours of 1:1 compensatory academic services, and 181 hours of supervision services (provided that the supervision services may at the parents' option instead be used as compensatory academic services) to be delivered by providers of the parents' choosing at rates and with qualifications as specified in the IHO's decision.

Dated: **Albany, New York**
November 18, 2020

JUSTYN P. BATES
STATE REVIEW OFFICER