The University of the State of New York

The State Education Department
State Review Officer
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No. 21-091

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

Appearances:
Gina DeCrescenzo, PC, attorneys for petitioner, by Gina M. DeCrescenzo, Esq.

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

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which held that the district offered the student a FAPE for the 2017-18, 2018-19 and 2019-20 school years, and therefore, denied the parent's request for any relief. 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 Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

During the 2017-18 school year, the student attended kindergarten in a dual language general education program at a district elementary school (Dist. Ex. 16 at p. 1). On October 16, 2017, the district conducted a functional behavioral assessment (FBA) of the student and developed a behavioral intervention plan (BIP) due to the student's "acting out behaviors" (see Dist. Exs. 11, 45). The student demonstrated behaviors such as walking away, verbal/non-verbal refusals, physical aggression of kicking, hitting and biting, and making provoking comments towards others (Dist. Ex. 11 at p. 1).

The parent obtained a private psychological evaluation of the student, which was conducted in October 2017, wherein the private psychologist determined that the student met the criteria for

diagnoses of an opposition defiant disorder (ODD) and an attention deficit hyperactivity disorder (ADHD), combined type (Dist. Ex. 12 at p. 10). In November 2017 the student was referred by the school for an initial evaluation due to concerns regarding the student's behaviors and his "acclimation" to kindergarten (Dist. Ex. 2 at p. 1). The district conducted an educational evaluation (November 24, 2017), a psychiatric evaluation (November 25, 2017), a psychological evaluation (November 27, 2017), and an occupational therapy (OT) evaluation (November 28, 2017) (see Dist. Exs. 16-19). The psychiatrist that conducted the November 2017 psychiatric evaluation found that the student met the criteria for diagnoses of an unspecified disorder of impulse control and an ODD and noted the need to rule out diagnoses of an ADHD and a disruptive mood dysregulation disorder (Dist. Ex. 17 at p. 4).

On November 30, 2017, a CSE met to conduct an initial review (see generally Dist. Ex. 2). The November 2017 CSE found the student eligible for special education as a student with an emotional disturbance (id. at p. 1).[1] In the management needs section of the IEP, the student was described as requiring behavioral "supports throughout the school day" and "coping strategies to stay regulated throughout the day" (id. at pp. 8-9). The November 2017 CSE recommended that the student attend a general education class placement and receive integrated co-teaching (ICT) services for three hours a day (id. at pp. 1, 10). In addition, the November 2017 CSE recommended two 30-minute sessions per month of a social skills group and two 30-minute sessions per month of individual psychological counseling services (id.). The November 2017 CSE also recommended supplementary services and accommodations consisting of the following: visual and verbal cues, pre-teaching of new material, directions clarified, directions repeated, frequent check-ins, modeling of social behaviors, breaks, and a BIP (id. at pp. 10-12). As a support for school personnel on the student's behalf, the November 2017 CSE recommended one 30-minute session per month of psychological consultation services to support the student in class and to help manage his emotions (id. at p. 12).

After the November 2017 CSE meeting, the student gradually transitioned out of the dual language program and into the general education class with ICT services (see Dist. Ex. 20).

A CSE convened on March 28, 2018 to conduct the student's annual review and develop an IEP for the 2018-19 school year (first grade) (see generally Dist. Ex. 4). According to the March 2018 IEP, the student's management needs were such that he required "extreme/hyper-vigilant classroom management" and anticipatory and proactive management to control his outbursts (id. at p. 7). The March 2018 CSE continued to recommend ICT services but increased the duration to four hours per day (compare Dist. Ex. 4 at pp. 1, 10, with Dist. Ex. 2 at pp. 1, 10). The March 2018 CSE continued to recommend two 30-minute sessions per month of a social skills group and two 30-minute sessions per month of individual psychological counseling services and added four one-hour sessions per year of small group parent counseling and training (compare Dist. Ex. 4 at pp. 1, 10, with Dist. Ex. 2 at pp. 1, 10). The March 2018 CSE continued the supplementary services and accommodations set forth in the November 2017 IEP and added

[1] The student's eligibility for special education as a student with an emotional disturbance is not in dispute (see 34 CFR 300.8[c][4]; 8 NYCRR 200.1[zz][4]).

clearly stated expectations and limit setting, home/school communication system, positive behavioral supports, structure and predictable routines, individual 1:1 aide, and adapted physical education (compare Dist. Ex. 4 at pp. 10-12, with Dist. Ex. 2 at pp. 10-12). As supports for school personnel on the student's behalf, the March 2018 CSE continued the recommendation for one 30-minute session per month of psychological consultation services and added a 6-hour behavioral intervention consultation (compare Dist. Ex. 4 at p. 12, with Dist. Ex. 2 at p. 12). Additionally, the CSE recommended extended school year services in the form of one 60-minute session per week of behavior intervention services (id. at pp. 1, 13).[2]

On March 27, 2019, a CSE convened to conduct the student's annual review and develop an IEP for the 2019-20 school year (second grade) (see generally Dist. Ex. 7). In connection with the annual review, the student's BIP was updated on March 13, 2019 (id. at p. 3; see Dist. Ex. 22). In the management needs section of the IEP, the student was described as requiring "ongoing refocusing and redirecting" during the day with one-to-one adult supervision to "ensure his safety" in school (Dist. Ex. 7 at pp. 7-8). The March 2019 CSE continued recommendations from the March 2018 IEP, including the ICT services, social skills group, psychological counseling services, and parent counseling and training (compare Dist. Ex. 7 at pp. 1, 9, with Dist. Ex. 4 at pp. 1, 10). The March 2019 CSE recommended supplementary services and accommodations consisting of refocusing and redirection, positive behavioral supports, clearly stated expectations and limit setting, breaks, BIP, wait time, directions repeated, adapted physical education, frequent check-ins, 1:1 teaching assistant, 1:1 aide during the teaching assistant's lunch, and structure and predictable routines (id. at pp. 10-11). The March 2019 CSE recommended supports for school personnel on the student's behalf as follows: one 45-minute session per year of a team meeting to transition the student from grade levels; one 30-minute session per month of psychological consultation service; six 60-minute sessions per year of behavioral intervention consultation services; and four 60-minute sessions per week of psychological consultation services in the classroom to work with the student and staff on behavior management and the student's emotional regulation (id. at pp. 1, 11-12). Further, the March 2019 CSE again recommended extended school year services of one 60-minute session per week of behavior intervention services (id. at p. 12).[3]

At the CSE's request, a psychiatric re-evaluation of the student was conducted on May 22, 2019 (Dist. Ex. 8 at p. 4; see Dist. Ex. 24). The psychiatrist found that the student met the criteria for diagnoses of an unspecified disorder of impulse control, an ODD, and a disruptive mood dysregulation disorder, and noted the need to rule out a diagnosis of an ADHD (Dist. Ex. 24 at p.

[2] The IEP was twice amended by agreement without a meeting to modify the recommendation for the 1:1 supplementary support personnel assigned to the student. Specifically, on August 14, 2018, the IEP was amended to reflect that the student would have a 1:1 teaching assistant all day (rather than a 1:1 aide) except for the teaching assistant's one-hour lunch, which would be covered by a 1:1 aide (Dist. Ex. 3 at p. 1). On November 1, 2018, the IEP was amended to reflect that the supplementary support personnel assigned to the student throughout the day would be a 1:1 aide (Dist. Ex. 5 at p. 1).

[3] The IEP was amended by agreement without a meeting later that same day to reflect a change of the student's 1:1 supplementary support personnel from an aide to a teaching assistant throughout the day and removed the 1:1 aide during the teaching assistant's lunch (compare Dist. Ex. 6 at pp. 1, 13, with Dist. Ex. 7 at p. 11).

5). The psychiatrist indicated that the student "continue[d] to require a small structured class setting" along with use of a behavior modification program, therapy, as well as medication (id. at p. 5). The psychiatrist reported that "[i]t was possible" with medication and psychotherapy that the student might be able to "engage more appropriately" in the setting he had been attending but opined that, if he continued to struggle despite such interventions, the student might "require a therapeutic school setting" (id. at p. 6).

The CSE reconvened on May 31, 2019 and considered the May 2019 psychiatric re-evaluation, as well as updated information from the teacher, school psychologist, and district's behavior specialist (Dist. Ex. 8 at pp. 1-2). The teacher reported that the student had been leaving the classroom on almost a daily basis since the end of March and the behavior specialist indicated that the student's "[m]ore recent episodes ha[d] been most challenging" (id.). Based on the discussion at the meeting, the CSE recommended that an out of district therapeutic day placement be located for the student (id. at p. 2). The recommended special education program, services, and accommodations remained unchanged from March 2019 IEP (compare Dist. Ex. 8 at pp. 1, 11-14, with Dist. Ex. 7 at pp. 1, 9-12).

At the request of the parent, the district conducted another FBA on June 14, 2019 (see generally Dist. Ex. 25). Thereafter, the BIP was revised on June 18, 2019 (see generally Dist. Ex. 46).

On July 31, 2019, the CSE reconvened to provide an update on the exploration for an out of district therapeutic day placement for the student (Dist. Ex. 9 at p. 1). Since the May 2019 CSE meeting, the parent had visited two Board of Cooperative Educational Services (BOCES) programs and the student had attended a trial at one (id. at p. 2). The parent expressed concern that the student might learn "additional maladaptive behaviors" from other students attending the program and that the programs might lack integration with a school environment (id.). The parent updated the CSE on the student's progress during the summer stating that the student's behaviors in a "faith-based program" had "not been a problem all summer" (id. at p. 1). In addition, the mother stated that the student began taking medication at the end of the 2018-19 school year and was continuing with the regimen (id.). The parent expressed her desire to have the student remain in the district's school while continuing to locate an appropriate therapeutic day program (id. at p. 2). The CSE agreed to place the student to the district but indicated that, if the student's behaviors returned with the intensity with which they presented at the end of the 2018-19 school year, the CSE would reconvene (id.). The July 2019 CSE did not make any changes to the student's program, services, or accommodations (compare Dist. Ex. 9 at pp. 1-2, 11-14, with Dist. Ex. 8 at pp. 1, 11-14).

In a letter to the district dated September 20, 2019, the parent requested that the district fund independent educational evaluations (IEEs) of the student, including an FBA and speech-language, OT, and neuropsychological evaluations based on the parent's disagreement with the district evaluations, which the parent asserted "were not comprehensive and appropriate" (Parent Ex. C).

On September 27, 2019, a CSE meeting was initiated by the district due to "incidents of physical aggression" resulting in "multiple school suspensions" in September 2019 (Dist. Ex. 10

at p. 1). After an update regarding the student's behaviors, the CSE recommended home instruction four hours per day with the same related services as the July 2019 IEP pending an out of district placement in a therapeutic day program (id. at pp. 1-2, 13; compare Dist. Ex. 10 at pp. 1, 13, with Dist. Ex. 9 at pp. 1, 11). The district also discussed an interim program at an intensive day treatment (IDT) if the parent declined the home instruction (Dist. Ex. 10 at p. 2). Immediately following the CSE meeting, an intake was conducted at the IDT and the student began attending the program on October 4, 2019 (see Dist. Ex. 55). The student's last day in the IDT was November 27, 2019, and he transitioned to an out of district therapeutic day treatment program (Dist. Ex. 55 at p. 17).

A. Due Process Complaint Notices

The IHO consolidated three separate due process complaint notices filed by the district and parent (see IHO Ex. III). Each due process complaint notice shall be separately discussed below.[4]

In a due process complaint notice, dated October 8, 2019, the district alleged that its evaluations of the student were appropriate and that the parent's request for IEEs should be denied (Dist. Ex. 54). The district argued that its evaluations (psychological, educational, psychiatric, OT) conducted in fall 2017 as part of the student's initial evaluation were appropriate (id. at p. 2). In addition, the district noted that the FBA and psychiatric evaluation had been updated in spring 2019 (id.). The district offered to update the OT and psychological evaluations (id.). Finally, the district argued that there was "no need" for a speech-language evaluation or a neuropsychological evaluation (id.).

Next, the parent filed a due process complaint notice, dated October 15, 2019, alleging that the district denied the student a free appropriate public education (FAPE) for the 2017-18, 2018-19, and 2019-20 school years (see generally Dist. Ex. 1).

For all three school years, the parent alleged that the district failed to evaluate the student in all areas of suspected disability; the CSEs failed to consider evaluative data available to it; the CSEs recommended inadequate special education, supports, and services; recommended extended school year services were not appropriate; the district failed to implement program modifications and accommodations; and the IEPs failed to include sufficient parent counseling and training (Dist. Ex. 1 at pp. 15-18). The parent argued that neither the October 2017 FBA nor the June 2019 FBA was appropriate, and therefore, the resulting BIPs were inappropriate (id. at p. 17). Further, the parent argued that the district knew the BIP was not appropriate since the student's maladaptive behaviors were increasing but failed to revise the plan (id.).

[4] The hearing record filed with the Office of State Review included several documents that the district referred to as IHO exhibits but which were not originally marked and for which no exhibit list was included with the IHO decision or the record on appeal. After inquiry from the Office of State Review, the district provided a list of IHO exhibits I through V, on which the IHO affixed his signature. However, separate from this list, the hearing record filed with the Office of State Review included one document marked as IHO exhibit I, which is duplicative of the letter (minus the attachments) identified in the district's list as IHO exhibit II (pages one and two). For purposes of this decision, any citations to IHO exhibits will be in reference to the documents on the list submitted by the district and will be cited using the exhibit designations set forth on that list.

The parent also argued that, during 2019-20 school year, the student was in an inappropriate IDT program pending the location of a therapeutic placement and that the district failed to consider the full continuum of services before placing the student in the IDT program (Dist. Ex. 1 at p. 18). Further, the parent argued that, during the 2019-20 school year, the district failed to conduct a manifestation determination review (MDR) despite the disciplinary change in the student's placement and failed to comply with procedural safeguards related to discipline or provide the student with appropriate services during removal (id. at pp. 16-18).

Additionally, the parent argued that the district failed to provide an education in the least restrictive environment (LRE), asserting that if the student was properly supported, he would have been entitled to attend his home school for 2019-20 school year (Dist. Ex. 1 at p. 18). Finally, the parent contended that the district discriminated against the student and failed to provide services pursuant to section 504 of the Rehabilitation Act of 1973 (section 504), 29 U.S.C. § 794(a), and under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 et seq. (id. at p. 1).

The parent sought pendency arguing that the "operative placement" was at the district's school and not the IDT program (Dist. Ex. 1 at p. 19). As relief, the parent sought a finding that district denied student FAPE for the 2017-18, 2018-19, and 2019-20 school years and impeded parent's opportunity to participate in the decision-making progress regarding the provision of a FAPE (id.). The parent requested compensatory education to remedy the deprivation of FAPE for the 2017-18, 2018-19, and 2019-20 school years (id.). The parent requested that an IHO order the CSE develop an appropriate IEP for the 2019-20 school year including an appropriate program, services, and goals (id.). Finally, the parent also requested that the district be required to provide the following IEEs: a neuropsychological evaluation, an FBA and a BIP, a psychiatric evaluation, and an OT evaluation (id.).

In a second due process complaint notice filed by the district on October 21, 2019, the district sought placement of the student in an interim alternative educational setting (IAES) for 45 school days (IHO Ex. II at pp. 26-33). In the due process complaint notice the district detailed the student's "violent, aggressive and non-complaint behavior" from kindergarten through second grade (id. at pp. 29-32). According to the district, as of September 27, 2019, the CSE "concluded that they could not safely continue [the student] at the [district's school] and that the search for a therapeutic day program must continue" (id. at p. 32). As relief, the district sought a determination that maintaining the student at the district's school would result in injury to the student or others, and that the student required placement in an IAES for 45 school days while a therapeutic day treatment program was located (id. at p. 33).[5]

B. Impartial Hearing Officer Decision

An impartial hearing convened on October 24, 2019 and concluded on December 17, 2020, after 13 days of proceedings (Tr. pp. 1-1894).

[5] As a result of the student's placement in an out of district therapeutic day treatment program, this second due process complaint notice filed by the district was withdrawn (Tr. pp. 57-59).

In a decision dated March 10, 2021, the IHO determined that the district offered the student a FAPE for the 2017-18, 2018-19, and 2019-20 school years, and denied the parent's requested relief (IHO Decision at pp. 44-46).

Specifically, the IHO held that the hearing record established that the student's placement in the general education class placement with ICT services was the LRE for this student (IHO Decision at p. 44). He also held that the IEPs "were reasonably calculated to enable the student to receive educational benefits" and "afforded the student an opportunity greater than mere 'trivial advancement'" (id. at pp. 44-45).

The IHO held that the evaluations conducted by the district were appropriate (IHO Decision at p. 30). In addition, the IHO afforded more weight to the testimony of the district's witnesses (the psychologists, the Board Certified Behavior Analyst (BCBA), and the psychiatrist) than the parent's expert witness (id. at p. 33). In giving less weight to the testimony of the parent's expert witness, the IHO held that the district appropriately evaluated the student, appropriately considered available evaluative data and complied with the procedures for developing the FBAs and BIPs (id.). The IHO also found that any failure of the CSEs to recommend parent counseling and training did not rise to the level of a denial of a FAPE (id. at p. 39).

In connection with the district's use of the "peace room," the IHO held that the "peace room" was a time out room and was used for the physical safety of the student and others (IHO Decision at p. 34). The IHO also held that the use of restraints was for the safety of the student and others and was appropriate (id.).

In response to the parent's claim regarding the student's discipline for the 2019-20 school year, the IHO held that the student was not suspended for 10 days, and an MDR was not required (IHO Decision at p. 38). The IHO held that the removals of the student were not disciplinary but for safety reasons (id.). The IHO also held that placement in the IDT program was not disciplinary, and the student was only placed there while awaiting placement in a therapeutic day treatment program (id. at p. 40).

Next, the IHO analyzed the parent's claim that the district violated the student's rights under section 504 and the ADA (IHO Decision at pp. 42-43, 45). The IHO held that the hearing record did not contain evidence of exclusion or denial of benefits by reason of the student's disability or support a finding that the student was discriminated against or deprived of a FAPE under section 504 or ADA (id. at pp. 43, 45).

Ultimately, the IHO denied the parent's request for any relief including compensatory education services and IEEs (IHO Decision at p. 46).

IV. Appeal for State-Level Review

The parent appeals. The crux of the parent's appeal is that the district failed to identify and appropriately address the student's behavioral needs for the 2017-18, 2018-19, and 2019-20 school years resulting in a denial of FAPE.

The parent argues that the hearing record establishes multiple procedural violations which together denied the student a FAPE over each of the three school years. The parent argues that the

district failed to consider recommendations from the district's consulting psychiatrist and parent's private psychologist with respect to class composition, related services, and OT services. The parent also contends that the district's failure to conduct FBAs and develop BIPs in accordance with State regulation caused the student to regress in his behaviors due to the district's inappropriate behavioral supports and interventions during each school year at issue. Specifically, the parent argues that the FBAs failed to identify the functions of the student's behaviors and, as a result, the resulting BIPs were flawed. With respect to the BIPs developed for the student, the parent contends that they did not contain "baselines of the frequency, duration, intensity, or latency of [his] behaviors," and that the district did not collect data on the frequency, duration and intensity of interventions utilized pursuant to the BIP in response to the behaviors. The parent asserts that the district's failure to develop an appropriate behavioral plan for the student resulted in repeated removal from his educational programming. The parent further argues that the district denied the parent a meaningful opportunity to participate in the development of the student's IEPs with respect to the student's behavioral needs by failing to provide her with data relevant to his behaviors, including behavioral incident reports.

Relatedly, the parent contends that although the IHO correctly found the "peace room" utilized by the district constituted a "time out" room, he erred by inexplicably condoning its use even though it was ineffective at reducing the student's behavior and violated State regulations governing the use of "time out" rooms. The parent further argues that the use of restraints on the student also did not reduce the student's behaviors and were similarly unlawful.

In terms of the district's use of disciplinary removals for the 2019-20 school year, the parent argues that the student was suspended or removed from his placement for more than 10 days which constituted a change in placement thereby warranting an MDR. The parent contends that the student was compelled to attend the IDT program without an MDR. The parent additionally argues that the district failed to meet its obligation to provide the full continuum of services when it placed the student in a "non-educational" IDT program.

The parent challenges the parent counseling and training offered by the district arguing that for the November 2017 IEP the CSE failed to offer any parent counseling and training, and that, for the 2018-19 and 2019-20 school years, the parent counseling and training offered was not individualized.

Further, the parent argues that the district violated section 504 and the ADA by excluding the student from the classroom, failing to provide appropriate behavioral interventions, and denying the student an equal opportunity to participate with other students.

The parent seeks a finding that district denied the student a FAPE for the 2017-18 and 2018-19 school years, as well as the 2019-20 school year up to November 27, 2019. As of November 27, 2019, according to the parent, the student was placed in an appropriate therapeutic placement. The parent contends that the district failed to prove its evaluations were appropriate, and requests that the district fund the following IEEs: neuropsychological, speech-language, OT, and FBA and BIP. As relief for the alleged denials of FAPE, the parent specifically requests 405 hours of tutoring as compensatory education.

In an answer, the district generally denies the allegations contained in the parent's request for review. Initially, the district contends that the parent failed to comply with the practice regulations with respect to pleadings and specifically that the parent failed to set forth a clear and concise statement of the issues presented for review and the grounds for reversal or modification of the IHO decision. The district also asserts that it was prejudiced by the parent's failure to properly set forth the basis for the appeal in that it was unable to specifically respond to the parent's request for review.

The district argues that the IHO did not err in giving deference to the district's witnesses as the FBAs and BIPs were developed by experienced district staff knowledgeable about the student. The district contends that the FBAs did ascertain the functions of the student's behavior and the BIPs monitored his behaviors. Furthermore, the district made continual efforts to address the student's behaviors.

The district argues that the parent's request for OT services was not included in the due process complaint notice and the parent is not entitled to request OT services on appeal. Additionally, the district argues that the CSEs' recommendations were consistent with available evaluations, the CSEs provided appropriate parent counseling and training, and the parent was not deprived of a meaningful opportunity to participate in the development of the IEPs due to any withholding of information on the part of the district.

Concerning the student's discipline, the district argues that the hearing record established that the student was not suspended for 10 days during the 2019-20 school year, and therefore, an MDR was not required. Further, the district argues that the modification to the student's schedule in kindergarten as well as the recommendation for home instruction or the IDT program were not disciplinary in nature.

Next, the district argues that the parent's claims under section 504 and the ADA are not permitted in this forum and, therefore, should not be addressed.

With respect to the parent's requested relief, the district argues that it offered the student a FAPE for the 2017-18, 2018-19, and 2019-20 school years, and therefore, the parent is not entitled to compensatory educational services. The district also contends that its evaluations were appropriate and the IHO's denial of IEEs should be upheld.

In a reply, the parent responds to the district's answer. The parent argues that the district's procedural arguments and "claims of prejudice are baseless" as the parent made detailed arguments and properly cited to the hearing record throughout her request for review and the district responded thereto. The parent also contends that the district's argument that some of the claims must be dismissed as they were not contained in the due process complaint notice was not specific and the district failed to articulate those items it found objectionable.

Further, the parent argues that the IHO erred when he "overlooked" the district's substantive and procedural IDEA violations based on the parent's purported failure to cite to the hearing record in the parent's closing brief, and as a result improperly shifted the burden of proof to the parent.

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]).[6]

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

VI. Discussion

A. Preliminary Matters

1. Compliance with Practice Regulations

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

[6] 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).

> (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]).

In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or a determination excluding issues from the scope of review on appeal (8 NYCRR 279.8[a]-[b]; 279.13; see Davis v. Carranza, 2021 WL 964820, at *12 [S.D.N.Y. Mar. 15, 2021] [upholding an SRO's conclusions that several claims had been abandoned by the petitioner]; 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]; 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, 181-82 [1962]).

Here, although the parent separately numbers four issues for review (relating to procedural violations, the appropriateness of the district's behavioral programming, violations of section 504 and the ADA, and the denial of requested IEEs), under the heading "Argument," the parent points to several more discrete aspects of the IHO's decision with which she disagrees but does not separately number these more specific issues (i.e., the IHO's findings pertaining to FBAs/BIPs, the peace room, disciplinary removals, and the student's advancement from grade to grade as evidence of appropriate programming). On the other hand, in this section, while the more discrete issues are not separately numbered, the parent is specific in identifying several of the IHO's precise rulings for which she requests review and sets forth citations to the record on appeal including the pages of the IHO decision on which the challenged findings appear. Further, the parent specifically sets forth the relief sought. The district's conclusory allegation that it found it difficult to respond to the request for review is insufficient to warrant a rejection of the parent's request for review, particularly since the district did respond in turn to each of the parent's arguments. Accordingly, I decline to exercise my discretion to reject the request for review. However, to the extent the parent does not specifically request review of discrete issues, such issues will not be discussed, as noted in further detail below.

2. Section 504 of the Rehabilitation Act and ADA Claims

The parent alleges that the IHO erred when he failed to find that the district committed violations of section 504 and engaged in discrimination against the student in violation of the ADA. An SRO lacks jurisdiction to consider a parent's challenge to an IHO's failure or refusal to rule on section 504 or ADA claims, as an SRO's jurisdiction is limited by State law to matters arising under the IDEA and Article 89 of the Education Law (Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Courts have also recognized that the Education Law makes no provision for State-level administrative review of IHO decisions with regard to section 504 (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 & n.17 [E.D.N.Y. 2012] [noting that "[u]nder New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"], aff'd, 513 Fed. App'x 95 [2d Cir. May 12, 2013]; see also F.C. v. New York City Dep't of Educ., 2016 WL 8716232, at *11 [S.D.N.Y. Aug. 5, 2016]). Therefore, I have no jurisdiction to review any portion of the parent's claims regarding violations of section 504 or the ADA, and such claims will not be further addressed.

B. Parent Counseling and Training

As an initial matter, I note the parent has raised issues on appeal that encompass all three school years while also asserting claims that are related to more discrete portions of the time periods at issue. For each of the school years under review, the parent alleges that the district failed to provide adequate parent counseling and training. Specifically, the parent claims that the CSE failed to recommend parent counseling and training in November 2017, and later when parent counseling and training was recommended in the March 2018 IEP and March 2019 IEP, the CSE failed to recommend individualized parent counseling and training.

State regulations require that an IEP indicate the extent to which parent counseling and training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). Parent counseling and training is defined as "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's [IEP]" (8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]). However, the Second Circuit has consistently held that the failure to include parent counseling and training on an IEP does not usually constitute a denial of a FAPE (see L.O. v. New York City Dep't of Educ., 822 F.3d 95, 122-23 [2d Cir. 2016]; M.W. v. New York City Dep't of Educ., 725 F.3d 131, 141-42 [2d Cir. 2013]; R.E., 694 F.3d at 191; see also A.M. v. New York City Dep't of Educ., 845 F.3d 523, 538 [2d Cir. 2017]; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 32 [2d Cir. Mar. 16, 2016]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 39 [2d Cir. Mar. 19, 2015]; but see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 80-82 [2d Cir. 2014]). The Second Circuit explained that, "[t]hough the failure to include parent counseling in the IEP may, in some cases (particularly when aggregated with other violations), result in a denial of a FAPE, in the ordinary case that failure, standing alone, is not sufficient to warrant reimbursement" (R.E., 694 F.3d at 191; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 7 [2d Cir. Jan. 8, 2014]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. Jul. 24, 2013]).

Prior to the referral of the student to the CSE, the parent obtained a private psychological evaluation of the student (October 28, 2017) "to determine his cognitive and socioemotional strengths and weaknesses" (Dist. Ex. 12 at p. 1). In connection with the private psychological evaluation, the private psychologist made a recommendation for "parent training" for the parent to learn strategies to help manage the student's behavior (Tr. pp. 1116, 1137; Dist. Ex. 12 at p. 10). Thereafter, in connection with the initial evaluation, the district obtained a psychiatric evaluation of the student (November 25, 2017) (see Dist. Ex. 17). Based upon the psychiatrist's findings he made several recommendations including that the parents "would benefit from parental guidance in order to assist them with managing" the student's behavior within the home (Tr. p. 879; Dist. Ex. 17 at p. 5). Further, he recommended a parent meeting with the district's school psychologist (Dist. Ex. 17 at p. 5). The psychiatrist noted that at the time the parent was reaching out to the county's family services office for an "evaluation and treatment" of the student (id.). At the hearing, the psychiatrist testified that in making this recommendation he envisioned that the student would obtain psychotherapy and that the therapist would also work with the parent to help "with parenting skills in the home" (Tr. p. 879). The psychiatrist testified that he did not specifically tell the district how the parent training should be delivered but that the "recommendation was related to parent guidance that they would seek through their provider of therapy with [the student] outside of school" (Tr. p. 901). Later, in a psychiatric re-evaluation, the psychiatrist again recommended "parent guidance" to assist with managing the student's behaviors in the home (Dist. Ex. 24 at p. 5).

With regard to the lack of a recommendation for parent counseling and training in the November 2017 IEP, despite recommendations by the private psychologist and district's consulting psychiatrist that the service be provided, the CSE chairperson testified that not everything done on behalf of a student was written on an IEP; specifically, she noted that the district psychologist met regularly with the parent to provide guidance and support (Tr. pp. 196-99; see Dist. Ex. 12 at p. 10; 17 at p. 5). The district psychologist confirmed that she was meeting with the parent, her private social worker and sometimes members of the administration on a weekly basis to support the parent's needs in the home related to the student (Tr. p. 295).[7] The CSE chairperson further testified that, despite her extensive experience, she did not recommend parent training because it was an initial eligibility meeting, and the CSE was putting services into place with the intent, as always, that if it was not enough, the committee members would come back to the table (Tr. pp. 198-99).

Thereafter, for the 2018-19 and 2019-20 school years, the CSEs recommended four 60-minutes sessions of parent counseling and training per year on the student's IEPs (Dist. Exs. 4 at p. 10; 7 at p. 9; 8 at p. 11; 9 at p. 11).

With regard to parent counseling and training in the March 2018 IEP, the school psychologist testified that the district recommended this service to support the parents with strategies ranging from behavior charts to schedules at home, to understanding how the way staff responded to a child's behavior may increase or decrease it (Tr. p. 331). She further testified that staff wanted to educate parents so they could best partner with the school in terms of managing a

[7] As the CSE chairperson's testimony referred to the fact that the psychologist met regularly with the parent during that time leading up to the November 2017 CSE (see Tr. pp. 197, 295), this testimony does not constitute retrospective evidence (see R.E., 694 F.3d at 188).

student's behavior (id.). The CSE chairperson testified that the parents were offered parent counseling and training via a letter sent home announcing workshops that were conducted by the BCBA, the intent of which was to help parents transfer skills that were taught in school to the home environment (Tr. pp. 144-45).

Under the circumstances of this case, the evidence in the hearing record does not support a finding that the omission of parent counseling and training from the November 2017 IEP or the lack of specificity on the IEPs thereafter as to what the recommended parent counseling and training would entail rose to the level of a denial of a FAPE. Accordingly, there is insufficient basis to reverse the IHO's determination on this point (IHO Decision at p. 39).

C. ICT Services, Related Services, Supports/Accommodations to Address Behavioral Needs, and Special Factors – Interfering Behaviors

Before turning to the parent's specific challenges regarding the district's response to the student's behavioral needs 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.

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 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.., 822 F.3d at 113). 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). 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.., 746 F.3d at 80; F.L., 553 Fed. App'x at 6-7; M.W., 725 F.3d at 139-41; R.E., 694 F.3d at 190).

On appeal, the parent argues that the IHO erred by finding that the district appropriately addressed the student's behaviors for the three years in question and that the district's program allowed him to progress from grade to grade and achieve educational benefit. The parent contends that the district's failure to develop an appropriate behavioral plan for the student resulted in behavioral regression and the repeated removal of the student from his educational programming. Specifically, the parent asserts that the FBAs conducted by the district failed to identify the functions of the student's behaviors and, as a result, the resulting BIPs were flawed and did not contain "baselines of the frequency, duration, intensity, or latency of [his] behaviors." With respect to implementation of the BIPs, the parent alleges that the district did not collect data on the frequency, duration and intensity of interventions utilized pursuant to the BIPs in response to the student's behaviors and, accordingly, the BIPs were not revised as needed to allow the student to access his education and obtain benefit therefrom.

As noted above in discussing the parent's compliance with the practice regulations governing appeals to the Office of State Review, some of the parent's allegations on appeal are broadly stated. To the extent the parent has not particularly identified the IHO ruling or failure to rule with respect to a particular IEP, FBA, or BIP (see 8 NYCRR 279.4[a]; 279.8[c][2]), I will not read specific challenges into the parent's broader allegations. For example, although the parent sets forth specific arguments about the October 2017 FBA and BIP and the March 2019 BIP and alleges that the district should have conducted an updated FBA sooner, her claims pertaining to the June 2019 FBA and BIP are limited to the allegation regarding the document's inclusion of baselines. Therefore, except as relevant to the broader discussion, the appropriateness of the June 2019 FBA and BIP will not be discussed with the following exception.

Review of the October 2017, March 2019, and June 2019 BIPs supports the parent's contention that the BIPs do not contain baselines of the frequency duration, intensity, or latency of the behaviors (see Dist. Exs. 22; 45; 46). However, a review of the FBAs related to these BIPs shows that, as per State regulation, the FBAs included baselines of the frequency of the student's behavior, although did not include baselines related to the duration, intensity or latency of the student's behaviors (Dist. Ex. 11 at p. 2; 25 at p. 3; 8 NYCRR 200.22[a][3]). Nevertheless, taking into account the following discussion of the services, interventions, and plans developed for the student, to the extent this omission constitutes a procedural violation, the evidence in the hearing record does not support a finding that it impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

Turning to the parent's more specific arguments on appeal, each IEP, FBA, and BIP challenged by the parent will be addressed in turn below. The parent's claims relating to the district's suspension or removal of the student and use of the "peace room" and restraints as behavioral interventions will be given separate treatment below.

1. October 2017 FBA and BIP

The parent argues that the IHO erred in concluding that the FBAs and BIPs developed by the district were appropriate. Specific to the October 2017 FBA, the parent argues the document was based on insufficient data and information about the student and failed to identify the function of the student's behavior. Regarding the October 2017 BIP, in addition to the general assertions discussed above (regarding the inclusion of baselines of frequency, duration, intensity, or latency of behaviors), the parent alleges that the plan did not reflect the FBA's hypotheses as to the function of the student's behaviors and did not sufficiently describe the functions or behaviors so that the individual implementing the BIP could identify them.

As noted above, in October 2017 the district conducted an FBA prior to CSE's determination in November 2017 that the student was eligible for special education (see Dist. Exs. 2 at p. 1; 11 at p. 1). The FBA indicated that the student was referred for assessment by building staff due to "acting out" behaviors (Dist. Ex. 11 at p. 1). As part of the FBA, data were collected over five days in October 2017 on the targeted behaviors of verbal refusal, non-vocal refusal,

physical behavior, and making provoking comments towards others (id.).[8] During the data collection period 75 instances of acting out behavior were recorded, which reflected an average of 15 times per day (id.). According to the FBA, 41.3 percent of the behaviors occurred in the presence of demands, 20 percent occurred when access or continued access was denied, 21.3 percent occurred when no demands were placed on the student or in the presence of behaviors directed toward staff or peers, and 17.3 percent occurred when the student was engaged by staff or a peer (id. at pp. 1-2). Based on this data, the school psychologist hypothesized that the student's challenging behaviors occurred primarily in response to demands being placed (id. at p. 2) She noted that the demands might be presented in the form of a demand to perform a non-preferred task, transition, etc., or a general verbal directive in the classroom or school (id.). According to the school psychologist, in addition to engaging in challenging behavior to escape or avoid a demand, the student demonstrated difficulty in all school situations or environments, even when no demands were placed on him (id.). The school psychologist recommended that a formal BIP be generated due to the frequency and intensity of the student's inappropriate behavior and the level at which it interfered with the student's learning (id.). The district's behavior specialist testified that, while the school psychologist prepared the FBA, he assisted her by helping identify challenging behaviors and providing the psychologist with data collection systems, and some data analysis (Tr. pp. 476-77).

Subsequent to the conducting the October 2017 FBA, the school psychologist developed a BIP for the student (Tr. p. 291; Dist. Ex. 45 at pp. 1, 5). The district behavior specialist testified that he provided the school psychologist with feedback when the student's BIP was in its draft form (Tr. p. 484).

A review of the October 2017 BIP indicates that the hypothesized functions of the student's behaviors were escape/avoidance (from demands and discontinued access to preferred activities/items) and attention seeking (both positive or negative attention) (Dist. Ex. 45 at p. 1). The BIP initially categorized and leveled the student's behavior by intensity (id.). The first level, regulated, was when the student was on task, compliant, engaged and responsive to directions; the second level, moderate intensity interfering behavior, was when the student was walking away, verbally disagreeing or ignoring demands placed by the teacher, or falling to the floor; and the third level, high intensity interfering behavior, was when the student exhibited screaming, cursing, running, biting, hitting, kicking, destroyed property, or engaged in high level intensity verbal protests (id.). The BIP indicated that categorizing the student's behavior by intensity was designed to provide those working with the student clear and early indicators of when changes in the student's behavior occur (id.). The IEP stated that intervening at early levels was likely to yield greater success in behavior de-escalation due to increased receptiveness of staff support and also likely to help the student recognize changes in his behavior more independently and learn to use tools to successfully support de-escalation (id.).

The BIP identified a lengthy list of antecedent interventions to be provided for the student (Dist. Ex. 45 at p. 2). The district behavior specialist testified that the BIP was front loaded with

[8] The FBA stated that the frequency data was only collected during the time the student was in the classroom and did not include periods of the day where the student refused to be in the class, was in the peace room or was sent home early and therefore constituted an underestimate of the frequency that these behaviors occurred (Dist. Ex. 11 at p. 1).

a lot of antecedent interventions, proactive strategies to set the student up for success, so that he got the support that he needed to remove some of the triggers and make things more predictable for him (Tr. pp. 480-81). First, the BIP indicated that the student would have a shortened day and a gradual introduction of time to his school day because his behaviors indicated that the length of his school day and the demands of a daily schedule were beyond his ability to maintain regulation (Dist. Ex. 45 at p. 2). Second, the BIP provided for implementation of a visual reinforcement system to provide the student with frequent feedback on his performance and behavior while keeping him motivated (id.). Third, the BIP included the implementation of a reinforcement system to promote appropriate behavior at school (differential reinforcement of alternative behavior) (id. at p. 3).

The BIP also identified the replacement behaviors that the student was expected to learn to replace his inappropriate behaviors including complying with teacher directives both to engage in tasks and, when instructed to discontinue a preferred activity, transitioning successfully throughout the day, utilizing coping tools when needed, and functionally communicating his needs by employing appropriate behaviors such as using communication cards, vocalizing his needs or identifying a need or want (Dist. Ex. 45 at pp. 3-4).

With regard to the recommended consequences to address the student's challenging behavior, the BIP outlined the extinction procedure to be used when the student was given a demand and engaged in challenging behavior to escape or avoid the demand (Dist. Ex. 45 at p. 4). The BIP indicated that, initially, if the student protested a demand and it was within his ability, the demand should be placed again (id.). If it was something he required assistance with, the BIP stated the student would be prompted to verbalize or use a help me card/visual/sign for support (id.). If the student complied, he would be provided with reinforcement for changing his behavior and completing his work, however, if his behavior continued to escalate, he would be referred to his communication visuals and/or coping tools to use for de-escalation (id.). According to the plan, if the student was able to utilize them and then comply, he would be reinforced for adjusting his behavior and completing his work (id.). However, the BIP indicated that, if the student's behavior continued to escalate to a point where he became physical, removal from the environment might be required to a safe location, close by, where the student would be the given opportunity to de-escalate (id.). The BIP stated that removal would be executed by trained staff, utilizing a team approach (id.). Once the student had deescalated, the plan called for the demand to be presented again and for the student to be provided with necessary supports to increase the likelihood of compliance (id.). In addition, the BIP indicated that once the student complied with the demand he should be provided with a low level of reinforcement/acknowledgement and reintroduction to the classroom when the team determined the student was ready (id.).

The October 2017 BIP included a similar break down of the steps required to address the student's attention seeking behaviors (Dist. Ex. 45 at pp. 4-5). Additionally, the BIP stated that if "physical intervention [wa]s required at any point it [wa]s important to document and debrief with the team" (id. at p. 5). The BIP outlined a recommended data collection procedure that included taking data on the intensity of the student's behavior across set intervals of the school day (id.).

The parent challenges the appropriateness of the district's FBAs and BIPs through the testimony of their expert witness (see Tr. pp. 1165-1538). With regard to the October 2017 FBA and BIP, the expert witness questioned why the district conducted only one classroom observation

of the student and why the observation was conducted by a psychology intern (Tr. pp. 1189-90, 1225-26). She testified that she was confused as to why the school psychologist or behavior specialist did not conduct multiple observations of the student (Tr. pp. 1225-26). She also noted that the observation took place after the district completed its FBA and developed a BIP for the student (Tr. pp. 1225-26; see Dist. Ex. 14).

Contrary to the expert witnesses concerns about the development of the BIP, the hearing record shows that the October 2017 BIP was developed by the district doctoral level school psychologist, who was also a licensed clinical psychologist, and the district behavior specialist, who was a certified school psychologist, certified special education teacher, certified BCBA and a licensed behavior analyst (Tr. pp. 274-75, 288, 457-58). The behavior specialist was also certified by the Crisis Prevention Institute as an instructor in nonviolent crisis intervention (Tr. p. 457). The school psychologist testified that her background and training included conducting FBAs and developing BIPs and her doctoral program included coursework related to behavior modification, data collection, and the type of data to collect to understand the function of a specific behavior (Tr. pp. 286-87). She stated that she met the student in or around the second week of kindergarten when the student's behavior in his dual-language class escalated and his teachers needed support to regulate him (Tr. p. 277; Dist. Ex. 48 at p. 1). The behavior specialist was also involved in the effort to deescalate the student (Tr. pp. 280-83). The school psychologist testified that, from the second week of school onward, behavior incidents involving the student were "quite frequent" and she was called "quite often" to support the staff, sometimes several times per day (Tr. p. 283-84). According to the school psychologist, because of the behaviors that staff were noticing, the district decided to conduct an FBA in order to understand some of the functions of student's behavior and to provide the teachers with a specific plan to support the student so that he could access learning (Tr. pp. 287-88). The school psychologist reported that she completed FBAs and BIPs on a regular basis sometimes on her own and sometimes in consultation with the behavior specialist (Tr. p. 287). She noted that the student was a "unique case" in that his behaviors seemed to occur out of nowhere and were unpredictable (Tr. p. 290). As part of developing the initial FBA for the student, the school psychologist testified that she included the teachers in her weekly consultation with the behavior specialist and they started making a list of behaviors the student exhibited so they could develop a data sheet (Tr. p. 288). She reported that staff used a topography trigger data sheet where they listed the student's behaviors and possible functions of the behaviors and then collected data throughout the day to determine what function the behaviors might serve, the student's response to different types of demands, and whether behaviors occurred at specific times during the day (Tr. p. 289). Contrary to assertions made by the parent's expert witness, the October 2017 FBA indicated that district staff observed the student on five days in October, specifically to collect data on his behavior in the classroom setting (see Dist. Ex. 11 at p. 1). In addition, the hearing record shows that the school psychologist and behavior specialist were already working with the student at that time (Tr. pp. 277-84; Dist. Ex. 48 at pp. 1-2, 9-10).

With respect to the November 14, 2017, classroom observation conducted by a psychology intern, the resultant report indicated that it was completed as part of the CSE's initial evaluation of the student, not an FBA, and that it would be used in conjunction with teacher and parent reports and standardized assessments to help determine the most appropriate academic supports for the

student in the classroom (Dist. Ex. 14).[9] Furthermore, in addition to being signed by the psychology intern, the classroom observation report was signed by the school psychologist who conducted the FBA of the student and developed his BIP (id.).

Based on testimony by their expert witness, the parent also alleges that the school psychologist conducted no interviews, reviewed no records, and did not complete a home visit as part of the FBAs (Req. for Rev. at p. 4; see Tr. pp. 1187, 1450). However, review of the October 2017 FBA indicates that "[q]ualitative data was collected from the parent and teacher to get a complete picture of [the student's] behavior in school and at home," that the student's mother completed a parent questionnaire, and that a description of the student's behavior at home as reported by the mother was included in the FBA (Dist. Ex. 11 at pp. 1, 2). In addition, the student's mother testified that, with regard to information that she provided to the school psychologist about the student's behavior at home, she completed a survey and had conversations with the school psychologist as well (Tr. p. 1636).

With regard to the October 2017 FBA the parents further allege that the district psychologist never determined the function of the student's behavior, but rather indicated that the student's behaviors occurred all the time (Tr. p. 291; Request for Review at p. 4). As discussed above in detail, the October 2017 FBA identified the function of the student's behavior, as the hypothesis statement indicated that the student's challenging behaviors occurred primarily in response to demands being placed on him either in the form of a demand of a non-preferred task, transition, etc., or a general verbal directive in the class or school, in order to escape or avoid the demand (Dist. Ex. 11 at p. 2). However, the behavior also occurred in the absence of demands (id.). While the parent's expert contended that the school psychologist simply testified that the student's behaviors "occurred all the time," the school psychologist testified that most of the student's behaviors occurred in response to demands begin placed on him, albeit acknowledging that "a large amount of behaviors" occurred in the absence of demands or "out of the blue" (Tr. p. 364; see Tr. pp. 290-91). While the identified functions of the student's behavior, taken together, were broad, the FBA sufficiently identified hypotheses for behaviors such that the resultant behavior plan could be crafted to target identified functions with intervention strategies.

Overall, the FBA was appropriately based on multiple sources of data including from direct observation of the student (8 NYCRR 200.22[a][2]), and, with the exceptions noted above, the October 2017 FBA and BIP were based on included the requisite components pursuant to State regulations, including identifying functions of the student's behavior (8 NYCRR 200.22[a][3]; [b][4]). Accordingly, the parent's arguments on appeal regarding the October 2017 FBA and BIP

[9] With regard to testimony by the parents' expert that she counted five problem behaviors during the 30-minute classroom observation completed by the intern and that the BIP estimated only five behaviors of concern "per day," and was therefore "a gross underestimation" of the frequency of the student's behaviors, the expert witness misrepresented the frequency of the student's behaviors identified by the district (Tr. pp. 1190, 1227). A review of baseline data from the October 2017 FBA indicates that the student's acting out behaviors were recorded a total of 75 times or an average of 15 times per day and not five times (Dist. Ex. 11 at pp. 1, 2). Furthermore contrary to the expert's testimony that, as a result of the frequency of the student's behaviors, the schedule of reinforcement should have been more frequent rather than at the end of a teaching period (Tr. pp. 1191, 1127-28), the October 2017 BIP indicates that the student was to be provided with differential reinforcement of alternative behavior (DRA), frequent but variable reinforcement throughout the day for engagement in positive behaviors such as compliance, being on task, sitting quietly and following general rules (Dist. Ex. 45 at p. 3).

offer insufficient basis to modify the IHO's determination that the FBAs conducted and BIPs developed by the district did not contribute to a denial of a FAPE to the student.

2. November 2017 IEP

The parent argues that the IHO erred in finding that the district appropriately considered available evaluative data in crafting the student's program. To support her claim that the November 2017 CSE failed to consider the evaluations available to it, the parent points to the recommendations in the October 2017 private psychological evaluation, as well as the November 2017 psychiatric evaluation, and the November 2017 OT evaluation, and argues that the CSE's recommendations, including ICT services (and without a recommendation for OT services), were at odds with the evaluative information.

The student entered kindergarten in September 2017 and soon after was referred to the CSE due to behavioral challenges (Dist. Ex. 16 at p. 1). The student underwent a private psychological evaluation in October 2017 (Dist. Ex. 12). As part of the student's initial evaluation, the district completed a social history, conducted psychological, educational, and OT evaluations in November 2017, and obtained a psychiatric evaluation of the student, as well as a classroom observation of the student conducted by a school psychology intern (Dist. Exs. 12; 13; 14; 17; 18; 19).

The psychologist who conducted the October 2017 private psychological evaluation recommended that the student be referred to the CSE to determine his eligibility for an IEP (Dist. Ex. 12 at p. 10). In addition, the evaluator recommended that the student be provided with a 1:1 paraprofessional on a daily basis to assist with managing his negative behaviors, as well as one session per week of individual counseling that focused on teaching the student to self-regulate and appropriately express his emotions, and one session per week of group counseling that focused on teaching the student how to socialize with his peers in an appropriate manner (id.). The evaluator also recommended that the student receive one session per week of individual psychotherapy and a psychiatric evaluation to determine whether he required medication (id.). In addition, the evaluator recommended specific strategies to address the student's behavior including teaching the student relaxation techniques to use when he became frustrated; encouraging the student to express his emotions in a positive age appropriate manner; providing the student with a choice between two tasks when given assignments; providing the student with break cards to be used throughout the day as needed when he was unable to follow directives; use of a visual timer to show the student how much time he had for his break; use of a token economy both in school and at home; providing the student with frequent rewards for complying with demands; assigning the student a daily classroom job, and providing the parent with a daily report card to assess his behavior (id. at pp. 10-11).

The psychiatrist who evaluated the student in November 2017 opined that the student required a small, structured class setting and continued implementation of his behavior plan (Dist. Ex. 17 at p. 5). In contrast to the student's participation in a dual-language classroom with two different teachers and two different classroom settings, the psychiatrist recommended that the student be placed with a "single teacher" so that his routines would be more predictable (id.). During the impartial hearing, the psychiatrist testified that the student's placement in a general education classroom with ICT services was consistent with his thinking regarding the student's

needs in that he was "referring to the fact that [the student] was moving from two different classroom settings from day-to-day as opposed to the idea of having one teacher in the classroom" (Tr. pp. 846-47). He continued to explain "when you have more than one teacher in the classroom, it provides additional support" (Tr. p. 847). The psychiatrist also recommended the student receive individual therapy to help him with anger management and low frustration tolerance (Dist. Ex. 17 at p. 5). Although the psychiatrist's report did not indicate whether this was to be provided in school or privately, the psychiatrist testified that it was meant as a recommendation for private therapy outside of school (see Tr. pp. 847-48, 894).

Neither the district's November 2017 OT evaluation report nor the district's November 2017 initial psychological evaluation report included recommendations for the student's placement or services, rather both indicated that recommendations would be determined subsequently after review by the CSE (see Dist. Exs. 18 at p. 7; 19 at p. 7). However, the district's psychological report included examples of interventions and educational strategies to help the student decrease his aggression, improve his low frustration tolerance, and improve his attentional abilities (Dist. Ex. 18 at pp. 6-7).

The CSE convened for the student's initial eligibility meeting on November 30, 2017 (Dist. Ex. 2 at p. 1). The CSE found the student eligible for special education as a student with an emotional disturbance and recommended that he receive three hours per day of ICT services, two 30-minute sessions per month of social skills group, and two 30-minute sessions per month of individual psychological counseling services (id. at pp. 1, 10). In addition, with regard to supports for school personnel on behalf of the student, the CSE recommended a once monthly, 30-minute psychological consultation to be provided to the teacher by the school psychologist (Tr. pp. 319-20; Dist. Ex. 2 at p. 12). The CSE recommended the continuation of a BIP that had been developed for the student (Dist. Ex. 2 at pp. 8-9). The CSE detailed the student's management needs and also recommended program modifications that included providing the student with visual and verbal cues, pre-teaching of new material/previewing of the student's day, a predictable routine, directions clarified and repeated, frequent check-ins, providing the student with of models of positive social behavior, a BIP, and coping strategies and breaks to self-regulate and return to the activity presented (id. at pp. 9, 10-11). Although the November 2017 IEP reflected information gleaned from the Winnie Dunn School Companion Sensory Profile 2 that the student had much more difficulty than others in the "Avoiding/Avoider" quadrant and in the '"Behavioral"' section, the CSE did not recommended OT services for the student (see id. at p. 8).[10]

According to the November 2017 CSE meeting information summary and testimony by the CSE chairperson, the student was initially referred to the CSE due to staff concerns regarding the student's behavior and his ability to acclimate to the school environment (Tr. pp. 110-11; Dist. Ex. 2 at p. 1). The meeting summary noted that school staff was greatly concerned over instances in which the student had engaged in behaviors that potentially posed a danger to himself or others and was also concerned with the student's elopement (Dist. Ex. 2 at p. 1). The November 2017 IEP meeting information summary noted that the parent's private psychological evaluation did not

[10] The comments in the CSE meeting information summary incorrectly state the student's scores on portions of the Miller Function and Participations Scale (M-FUN) from the OT evaluation, however they are correctly represented and consistent with the OT evaluation on page eight of the IEP (compare Dist. Ex. 2 at p. 2, 8; with Dist. Ex. 19 at pp. 3, 4-5).

indicate cognitive or academic concerns but that the evaluator diagnosed the student with ODD and ADHD and, among other things, recommended the student receive both individual and group counseling as well as a psychiatric evaluation to determine whether medication was needed (Dist. Ex. 2 at p. 1; see Dist. Ex. 12 at pp. 2, 5, 10). The meeting summary also reflected the findings of the district's consulting psychiatrist, who evaluated the student and diagnosed him with an unspecified disorder of impulse control, ODD, and possible mood dysregulation disorder, and in his summary and recommendations indicated that "strong consideration should be given to a trial of medication in order to assess if it can be helpful in reducing [the student's] acting out behaviors" (Dist. Ex. 2 at p. 2; see Dist. Ex. 17 at p. 4).[11] The CSE chairperson testified that it was "unusual" for a five year old to need a psychiatric evaluation but in this case the district felt it was imperative because the student's behaviors were very concerning, very intense, and seemed to be escalating to the point that they were interfering with his ability to access instruction (Tr. p. 122). She explained that the district "needed to get some kind of insight" (id.). The CSE chairperson further testified that the results of the psychiatric evaluation were consistent with the results of the private psychological evaluation and some of the information the district knew through other staff (Tr. pp. 121-25; 181).

The November 2017 meeting information summary indicated that the special education teacher shared the results of her educational assessment of the student with the CSE, describing the student as "very articulate and capable academically" (Dist. Ex. 2 at p. 2; see Dist. Ex. 16). However, she indicated that during the testing the student was only able to maintain attention for five to ten minutes, required opportunities for a great deal of movement, and required a high level of verbal prompting in order to stay engaged in the task and maintain focus, and noted instances when the student was unwilling to comply with the demands of a task, describing that at one point he threw a computer mouse instead of verbalizing what he wanted (Dist. Ex. 2 at p. 2).

The student's regular education teacher reported that the student struggled to form relationships with classmates and had difficulty staying regulated in class and that, as a result, he missed "a good deal of instruction" (Dist. Ex. 2 at p. 2). In addition, she reported that the student demonstrated resistance and attempted to negotiate his preference with the teacher, even when given choices (id.). The student's second regular education teacher described him as lacking patience and perseverance and noted the student would, at times, shy away from the easiest tasks and was resistant to expressing his thinking (id.). She questioned whether the student knew how to break down his thinking in order to demonstrate acquired knowledge (id.).

The November 2017 CSE chairperson testified that, collectively, the evaluations showed that the student was very cognitively capable and had good academic skills and superior reasoning ability but had a need to be in control of what he did and who he did it with (Tr. p. 128). She indicated that, if the student was not given that control, he resisted quite intensely both verbally and behaviorally and when asked to comply with something he did not want to do, he engaged in making threats and conducted himself in ways unsafe for himself and whoever he was with (id.). The chairperson recalled that the CSE reviewed all of the assessments at the CSE meeting and determined that the educational classification of emotional disturbance best described the barriers to the student's learning based on his interactions with peers and the high intensity level of

[11] The psychiatrist suggested that a diagnosis of ADHD needed to be ruled out (Dist. Ex. 17 at p. 4).

aggression he displayed when frustrated or did not want to comply (Tr. p. 130). She further testified that, in determining how the student's needs would be supported, the CSE considered a number of things including the recommendations made in the private evaluation and the psychiatric evaluation and that, when the district put them all together, it believed that an ICT environment was the best match to support the student (Tr. pp. 130-31). By way of explanation, she indicated that there would be two teachers in the classroom as well as a kindergarten aide and the ICT setting would provide for small group work and allow for monitoring of the student's BIP (Tr. p. 131). When questioned as to how an ICT class with 20 students comported with the small class setting recommended by the district consulting psychiatrist, the CSE chairperson opined that, although the size of the ICT class was similar to the size a general education class, the staffing was completely different (Tr. pp. 182-83). She explained that, because there were three adults in the classroom or approximately seven students to an adult, this "equated to a small class environment (Tr. pp. 183-84). The CSE chairperson opined that the general education kindergarten teacher was a highly-structured veteran teacher with whom the student would do very well (Tr. pp. 131, 184). When asked why the CSE did not follow the district consulting psychiatrist's recommendation that the student be placed with a "single teacher," the CSE chairperson testified that that the student was coming from an environment where he had rotating teachers and that the CSE placed him in an environment where there were "consistent adults and dedicated teachers" (Tr. p. 185). She indicated that the student would always be with the regular education teacher who was the main teacher and noted that the support the special education teacher provided was not solely, full time for the student (Tr. p. 187).

Testimony by the district psychologist was consistent with that of the CSE chairperson with regard to the discussions that took place during the November 2017 CSE meeting as they related to the student's classification as a student with an emotional disturbance, his difficulty with transitions in the dual-language program, and the CSE's reasoning behind its recommendation for an ICT class (Tr. pp. 314-16).

With regard to the CSE's recommendation for two social skills group and two individual counseling sessions per month, I note initially that the district's psychological evaluation did not include specific service recommendations and while the district's psychiatric evaluation recommended individual therapy it did not include a recommendation for the frequency of therapy (see Dist. Exs. 17 at p. 5; 18 at pp. 6-7). In contrast, the parent's private psychological evaluation recommended one individual and one group counseling session per week at school (Dist. Ex. 12 at p. 10). Testimony by the district psychologist indicated that the CSE recommended the student's participation in a social skills group, which she taught, to address the student's needs related to engaging in cooperative play, taking the perspective of others, and negotiating and asking for things in an appropriate manner (Tr. p. 318). According to the district psychologist, the CSE determined that the student required a social skills group based on data culled from observations during assessments and in the classroom, as well as anecdotal reports and data complied as part of the FBA (Tr. p. 318). She indicated that the CSE recommended the student for individual counseling services due to his inability to regulate his emotions and understand the consequences of his actions (Tr. pp. 318-19). The district psychologist testified that she would also provide the psychological consultation listed under supports for school personnel on behalf of the student (Tr. p. 319). She described the consultation as a support for both the classroom teacher and the student, and explained that if she was working with the student during individual counseling on helping him to identify emotions and make good choices, she could then help the teachers use the same

language she used with the student to transfer the skills to the bigger classroom setting, with consistency (Tr. p. 320).

The CSE chairperson defended the district's recommendation for two counseling sessions per month, despite the student's aggressive and destructive behavior, by stating that the CSE had added other types of support including two social work groups per month aimed at addressing the student's interactions with peers, especially his provocative behavior (Tr. pp. 190, 194). She indicated that the CSE also recommended one 30-minute psychological consultation per month which she described as working with the adults who were working with the student and also structuring the environment on the student's behalf (Tr. pp. 194-95). The November 2017 IEP indicated that the purpose of the psychological consultation was "[t]o support the student in the classroom [to] manage his emotions" (Dist. Ex. 2 at p. 12).

The district psychologist also testified about the program modifications and accommodations included in the November 2017 IEP, indicating that the purpose of these was to reflect the specific things the student needed in the classroom setting in order to be successful (Tr. pp. 320-21; see Dist. Ex. 2 at pp. 11-12).

With regard to the recommendation in the private psychological evaluation for a 1:1 paraprofessional to help manage the student's behaviors, the CSE chairperson indicated that at the time of the November 2017 CSE meeting the CSE did not recommend a 1:1 paraprofessional for the student but recommended an environment where there were three adults in the classroom (Tr. p. 199).

The CSE chairperson recalled discussing that the CSE needed to be mindful of the student's history of difficulty with transitions in the dual-language program, and explained that the district developed a transition plan to gradually transition the student from the dual language program to the ICT classroom (Tr. pp. 131-32, 133-34; see Dist. Ex. 20). In accordance with the transition plan, the student began his day in the dual-language class and would transfer to the ICT class for specials (Tr. p. 134). The plan gradually increased the student's time in the ICT class by 30 minutes each week and provided for regular team collaboration to monitor the transition and the student's behavior and progress (Tr. pp. 134-35; Dist. Ex. 20 at p. 3). The CSE chairperson testified that the transition plan was successfully implemented in that staff started to see some decrease in the frequency of behaviors when the student got into the ICT environment (Tr. p. 135). The CSE chairperson also testified that the only objection raised to the student's IEP for the 2017-18 school year was by his father, who indicated that learning a second language was important to the family and expressed concern that the student would have to leave the dual-language program in order to receive support (Tr. p. 137).

Contrary to the parent's argument that the CSE did not consider the evaluative information before it in developing the student's IEP, review of the hearing record shows that the CSE weighed the recommendations set forth in the evaluations and made program and services recommendations aligned with the information available to it regarding the student's needs. During the impartial hearing, the district witnesses offered "cogent and responsive explanation[s]" for the CSE's recommendations and demonstrated that the November 2017 IEP was reasonably calculated to enable the student to make progress in light of his circumstances (Endrew F., 137 S. Ct. at 1002).

3. March 2018 IEP

Regarding the March 2018 IEP, the parent argues that the information before the CSE demonstrated that the student had been unsuccessful in the district program recommended in the November 2017 IEP and that, therefore, the similar recommendations of the March 2018 CSE were inappropriate.

A student's progress under a prior IEP is a relevant area of inquiry for purposes of determining whether an IEP has been appropriately developed, particularly if the parents express concern with respect to the student's rate of progress (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66-67 [2d Cir. June 24, 2013]; Adrianne D. v. Lakeland Cent. Sch. Dist., 686 F.Supp.2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, *14-*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," at p. 18, Office of Special Educ. Mem. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). The fact that a student has not made progress under a particular IEP does not automatically render that IEP inappropriate, nor does the fact that an IEP offered in a subsequent school year which is the same or similar to a prior IEP render it inappropriate, provided it is based upon consideration of the student's current needs at the time the IEP is formulated (see Thompson R2–J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153-54 [10th Cir.2008]; Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 530 [3d Cir. 1995]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *10 [S.D.N.Y. Dec. 8, 2011]; D. D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *12 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80 [2d Cir. Dec. 26, 2012]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 650 [S.D.N.Y. 2011]). Conversely, "if a student had failed to make any progress under an IEP in one year," at least one court has been "hard pressed" to understand how the subsequent year's IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch. Dist., 62 F.3d at 534 [noting, however, that the two IEPs at issue in the case were not identical]).

The CSE convened on March 28, 2018 for the student's annual review and to develop the student's IEP for the 2018-19 school year (first grade) (Dist. Ex. 4 at p. 1). In developing the student's IEP for the 2018-19 school year the March 2018 CSE had new information available for its consideration, namely a March 16, 2018 teacher report, a March 16, 2018 special education teacher annual report, and a March 22, 2018 counseling progress summary (id. at p. 3).[12]

The CSE continued to find the student eligible for special education as a student with an emotional disturbance and recommended that his ICT services be increased from three to four hours per day (Dist. Ex. 4 at p. 10). In addition, the CSE recommended that the student receive two 30-minute sessions per month of social skills group and two 30-minute sessions per month of individual psychological counseling services (id.). The CSE also recommended that parent counseling and training be provided in a small group four times per year for one hour (id.). In terms of supports for school personnel on behalf of the student, the CSE recommended one 30-minute session per month of psychological consultation to support the student with social and

[12] Neither the counseling progress summary nor the special education teacher annual report were included in the hearing record.

emotional needs within the classroom and one six-hour session per year of behavioral intervention consultation for the team to support the student and the team (id. at p. 12). The March 2018 IEP reflected the student's eligibility for extended school year services and the CSE's recommendation for one, one-hour session per week of individual behavior intervention services for the summer (2018) (id.at p.13).

The March 2018 IEP included information regarding the student's management needs taken from a March 2018 classroom teacher report (compare Dist. Ex. 4 at pp. 7-8, with Dist. Ex. 21 at p. 2). The IEP indicated that the student needed "extreme/hypervigilant" classroom management, "[a]nticipatory/[p]roactive" classroom management in order to avoid physical and verbal outbursts, and reactive management daily in all settings (Dist. Ex. 4 at p. 7). The IEP stated that the student was a willing partner in all of the necessary behavior changing approaches but that, after nine weeks, he remained dependent on external management procedures to modify his difficult behaviors (id. at pp. 7-8). The IEP identified the student's behaviors that continued to require intervention including noncompliance, verbal antagonism, running away, damaging materials, physical violence, and verbal aggression, and indicated that examples of these behaviors were detailed in formal and informal reports spanning the time the student had been in the ICT classroom (id. at p. 8). The IEP indicated that the student had shown "some progress with learning techniques designed to mediate his behaviors" but that the student's slow progress indicated that "additional time [was] required for [the student] to integrate changes long term" (id.). To address the student's management needs, the March 2018 recommended continuation of the modifications and accommodations found in his November 2017 IEP and in addition recommended that the student be provided with a full time 1:1 aide, clearly stated expectations and limit setting, a home/school communication system, structure and routine, and adapted physical education (id. at pp. 8, 12).

According to the March 2018 CSE meeting information summary, the student's regular education teacher indicated that, when compliant, the student made significant progress (Dist. Ex. 4 at p. 1). The student met kindergarten benchmarks, was reading above kindergarten level, completed all math concepts at the kindergarten level, and could write in sentences with punctuation and accurate spelling (id.). The teacher reported that the student benefitted from personalized grouping instruction as, when grouped with those who could challenge his academic ability, he became resistant and engaged in inappropriate behavioral responses (id.).

The meeting information summary indicated that, according to the school psychologist, the student's reactions to challenges came from a place of vulnerability and high standards for himself (Dist. Ex. 4 at p. 2). His maladaptive responses impeded his ability to engage in group instruction (id.). The psychologist reported that the student responded to a high degree of structure and consistent expectations (id.). She further reported that the student's triggers included transitions within the classroom and changes of location and schedule, that the student was a potential elopement risk during transitions, and that he benefitted from notification and previewing (id.). According to the meeting information summary, the psychologist indicated that the student would argue if engaged in dialogue about expectations but would stop if the adult did not negotiate and noted that behavioral incidents often occurred when a substitute was in the classroom (id.). The school psychologist indicated that the student responded best to the school principal and his regular education teacher and that the team was working on generalizing the transfer of power to other people and situations (id.). With regard to the student's participation in group counseling sessions,

the school psychologist indicated that the student did well during sessions and had shown improvement in taking turns and negotiating (id.). As memorialized in the meeting summary, the school psychologist indicated that an emotional toolbox had been developed for the student and that the goal was for the student to select a tool that would help him deal with his varied emotions such as anger, sadness, or frustration (id.).

The school psychologist testified that the March 2018 CSE reviewed the student's progress overall and that the student was doing much better with the supports in place but continued to have challenges (Tr. p. 326). She testified that when the student was regulated he demonstrated very good academic skills and that teachers were working really hard on maintaining that regulation so they could continue to "access" the student (Tr. pp. 326-27). However, she noted that transitions were difficult for the student and he always needed to be in the proximity of an adult due to the risk of elopement and unsafe behaviors (id.). The March 2018 IEP meeting information summary indicated that the school psychologist reported at the CSE meeting that the student had "made good progress across the board since starting special education services" (Dist. Ex. 4 at p. 1). In testimony the school psychologist clarified that "across the board" meant "overall within his day" (Tr. p. 327). She indicated that prior to his referral to the CSE she had to be called on several occasions to assist in the classroom but that, overall, the student's ability to participate in the classroom had "increased a lot" (id.). She further testified that the student's behaviors had not disappeared but were better managed and he was able to access his education and socialize with his peers (Tr. p. 328).

With respect to comments made at the CSE meeting, the student's mother recalled that the school psychologist reported "[j]ust that [the student] made good progress" and that she was sure the psychologist must have talked about the areas in which the student had made good progress (Tr. p. 1701). The parent also testified in response to the comment, that the student was responding better to his regular education ICT teacher, that he had a good connection with her, and that when he was with her, he had a better ability to regulate sometimes, although not across the board (Tr. p. 1701). The March 2018 meeting information summary reflected comments by the student's mother that the student seemed less frustrated and had voiced that he was making an effort to improve his school behaviors (Dist. Ex. 4 at p. 2). The student's mother indicated that she was aware that the student had preferred adults and did not transfer his willingness to listen to all adults (id.). According to the meeting summary, the student's father commented that he also "s[aw] a difference in [the student's] ability to consider the alternatives of his behavior" and noted the student was "increasingly mindful" (id.).

The CSE chairperson recalled that everyone on the CSE including the parents acknowledged some slow, notable gains despite continued concerns about the student's dysregulation, elopement, and physical aggression (Tr. pp. 138-39). She stated that "pretty much everybody said they felt [the student] was seemingly less frustrated and generally more accessible" (Tr. p. 139).

The school psychologist testified that the CSE increased the student's ICT services from three to four hours a day because the student's behaviors occurred across the day in all academic areas so he needed support in terms of behavior and emotional regulation throughout the school day (Tr. p. 330). She testified that students were in the classroom four of the six hours of the school day (id.). Testimony by the CSE chairperson indicated that the increase in ICT services

from three to four hours would allow staff to insert more small group work into the student's day and would give the special education teacher more dedicated time with the behavior plan as staff continued to consult with the psychologists, to try to make sure they were reacting in real time for the student (Tr. pp. 141-42).

The school psychologist testified that the CSE recommended the student for a social skills group because he still needed to learn how to appropriately interact with others, negotiation and perspective taking were very difficult for the student, and he exhibited some lack of empathy (Tr. p. 330; see Tr. pp. 142-43). She testified that the CSE recommended that the student receive individual psychological counseling services because although staff had developed a toolbox of strategies with the student that he could use to regulate himself, he was not able to access those tools "in the moment" (Tr. pp. 330-31). The school psychologist testified that the 30-minute monthly psychological consultation services on behalf of the student consisted of going into the classroom and teaching a program called Zones of Regulation to the whole class so that both the teachers and students were using the same language throughout the day, which assisted the student in transferring skills from the individual setting to the classroom (Tr. pp. 333-34).[13] The CSE chairperson provided a similar description of the service (Tr. p. 143).

The school psychologist explained that the six hours of behavior consultation services recommended by the CSE consisted of the behavior intervention specialist consulting on a regular basis with teachers and staff to troubleshoot specific things that came up with regard to the student's behavior and implementation of the behavior plan (Tr. p. 335).[14] The CSE chairperson testified that the behavior intervention specialist would meet with the team several times a year to see how the BIP was working and whether revisions were needed based on what was going on in the classroom, and to observe and to provide insights of the student in order to build the capacity of the staff (Tr. p. 144).

The March 2018 IEP meeting information summary indicated that, due to the student's risk of elopement and low frequency/high intensity outbursts, staff felt strongly that the student needed the support of a 1:1 aide for safety reasons (Dist. Ex. 4 at p. 2). In this regard, the school psychologist indicated that the frequency of the student's behaviors was less because the teachers were using the supports and the antecedent interventions but that the student would run away both on the playground and in the school building unless in close proximity to an adult (Tr. pp. 328-29). The school psychologist testified that the recommendation for the 1:1 aide was to support consistent implementation of the BIP and to address elopement, the student's safety, and the safety of the other students in the class (Tr. p. 336). The CSE chairperson testified that the 1:1 aide was added because, although the frequency of the student's behaviors had lessened, staff was still concerned about the intensity and that, as the academic content began to "ramp up," the student's

[13] The school psychologist testified that the Zones of Regulation program was used to teach students about what their body looks like and what feelings they may have and what strategies they can use (Tr. p. 334).

[14] The frequency of this service is reflected on the March 2018 IEP as one six hour session per year, however, it appears this is a typographical error as the description of the service by the school psychologist as being provided on a regular basis does not match the once per year frequency indicated on the IEP (compare Dist. Ex. 4 at p. 12, with Tr. p. 335). The same service is reflected in the student's March 2019 IEP with a frequency of six one-hour sessions per year (compare Dist. Ex. 4 at p. 12, with Dist. Ex. 7 at p. 11).

concern over approaching things he viewed as difficult would be well supported by a dedicated individual working with him in the classroom (Tr. pp. 145-46).

The CSE chairperson testified that she believed the recommended program for the student's second grade 2018-19 school year was a good match for the student's needs because the district always tried to keep students in the least restrictive environment and the student was an academically talented student who, when regulated, did quite well (Tr. p. 150). She testified that the CSE increased the level of support and continued with what CSE members, at that point, felt had begun to work (Tr. pp. 150-51).

Based on the foregoing, the evidence in the hearing record demonstrates that the March 2018 CSE had information before it about the student's progress during the 2017-18 school year as well as his struggles and appropriately maintained the core programming recommended in the November 2017 IEP with additional supports in response to student's demonstrated needs.

4. March 2019 BIP

The parent argues that, prior to updating the student's BIP in March 2019, the CSE should have conducted an FBA.[15] In addition, the parent argues that the March 2019 BIP contained the same elements from the October 2017 BIP, which were not working. The parent asserts that the March 2019 BIP included data collection procedures and reinforcement systems that were not scientifically valid.

According to the district behavior specialist, the school psychologist was the author of the March 13, 2019 revised BIP and he assisted her in assessing which aspects of the student's BIP were being implemented and which were still appropriate, and together they modified the BIP to meet the student's needs at that time (Tr. p. 510). The behavior specialist testified that they modified proactive strategies in the student's BIP that they determined were not required or that were not effective or appropriate (id.). He noted that they did not conduct an FBA and therefore did not change the functions of the behaviors, as they would need data to support that (Tr. p. 511).

A review of the revised March 2019 plan shows that the student's behaviors identified as level two, moderate intensity interfering behaviors, were changed slightly (compare Dist. Ex. 45 at p. 1, with Dist. Ex. 22 at p. 1). While the level two behaviors in the previous plan included walking away, verbally disagreeing with demands placed by the teacher, ignoring demands, and falling to the floor, the level two behaviors in the new plan included walking away from the teacher, increased verbal protests ("I'm out of here, Move out of the way, leave me alone"), and ignoring demands (compare Dist. Ex. 22 at p. 1, with Dist. Ex. 45 at p. 1). With regard to level three behaviors, the March 2019 BIP continued to include biting, hitting, kicking and destroying property: defined running as running away from the group (elopement); and eliminated screaming,

[15] It is unclear whether the October 2017 BIP was revised prior to March 2019. The hearing record contains a BIP described as being revised on March 13, 2019, however, in another spot the document also bears the date June 21, 2018 (Dist. Ex. 22 at p. 1). While the hearing record does not contain a separate BIP dated June 21, 2018, there is evidence that the student's October 2017 BIP was rewritten at some point near the end of the student's 2017-18 kindergarten year (Dist. Ex. 38 at pp. 25, 28). Specifically, behavior incident review forms dated May 8, 2018 and June 6, 2018 indicated that the student's BIP was "being rewritten to better reflect protocols and planning around [the student]" (id. at pp. 25, 28).

cursing, and high level intensity verbal protests (compare Dist. Ex. 22 at p. 1, with Dist. Ex. 45 at p. 1).

The antecedent interventions in the March 2019 BIP no longer included a plan for the student's systematic transition from a shortened day to a full day schedule, as found in the October 2017 BIP (compare Dist. Ex. 22 at p. 2, with Dist. Ex. 45 at p. 2). In addition, the description of the reinforcement system no longer included the use of a visual daily schedule, visual reinforcement schedule, first-then visuals, or a self-monitoring tool (Dist. Ex. 22 at p. 2). The BIP was modified to indicate that transitional warnings should be provided with cues before transitions, and in a subtle way so that extra attention was not drawn to the student (compare Dist. Ex. 22 at p. 2, with Dist. Ex. 45 at p. 3).

The revised BIP was modified with respect to consequences related to escape and avoidance behaviors (compare Dist. Ex. 45 at p. 4, with Dist. Ex. 22 at p. 3). The new plan indicated that in response to non-compliance to a demand, instead of referring the student to his communication visuals or coping tools to use to de-escalate, the instruction/command would be repeated a second time, the student would be given an opportunity to comply, wait time would be provided before repeating the command again, and the command would not be repeated more than three times (compare Dist. Ex. 22 at p. 3, with Dist. Ex. 45 at p. 4). The revised plan included an additional step prior to removal of the student from the classroom which indicated that if the student did not comply after the third attempt, removal of a privilege or a consequence would be verbally stated without engaging in any form of negotiation, using only a clear concise command (Dist. Ex. 22 at p. 3).

The revised BIP also reflected modifications to the procedure for addressing the student's attention-seeking behaviors. In addition to providing minimal attention to the student, the BIP suggested that staff praise the positive behavior of other students, as an example (Dist. Ex. 22 at p. 3). Also, where the October 2017 BIP stated that if the student's behavior escalated to an unsafe level, staff was to direct him to a location within the classroom to minimize the effect of his behavior on others, the revised BIP called for staff to direct the student to a separate location where he could self-regulate (compare Dist. Ex. 22 at p. 3, with Dist. Ex. 45 at p. 4). The revised BIP also indicated that, if the student requested a break, especially during specials, he would be provided with a time limit and supervised at all times (Dist. Ex. 22 at p. 4).

The parent argues that the BIP should not have been amended absent a new FBA; however, State regulation specifically contemplates that a student's BIP be reviewed at least annually by the CSE and does not specifically require that an FBA be conducted prior to a BIP being revised (8 NYCRR 200.22[b][2]). Moreover, even if the lack of a new FBA was a procedural violation, here, by March 2019, the CSE had several sources of information about the student's behaviors and those behaviors were addressed in the student's BIP, as well as in the March 2019 IEP. Therefore, in this instance, the fact that the district did not to conduct an FBA before revising the student's BIP does not contribute to a finding that the district denied the student a FAPE.

The parent's expert testified that the March 2019 BIP was insufficiently specific; however, as with the October 2017 BIP, the evidence in the hearing record shows that the document sufficiently identified the student's behaviors, the intervention strategies to be used to prevent the occurrence of the behavior, alternative and adaptive behaviors, as well as consequences for the

targeted inappropriate behaviors (8 NYCRR 200.22[b][4]). Further, the recommended procedure for collecting data was carried over unchanged from the October 2017 BIP (compare Dist. Ex. 22 at p. 4, with Dist. Ex. 45 at p. 5) and remained appropriate. Accordingly, the evidence in the hearing record does not support the parent's allegation that the March 2019 BIP was inappropriate.

5. Intervening Events

The hearing record contains three IEPs that were developed toward the end of the 2018-19 school year. The CSE initially convened to develop the student's program for second grade (2019-20 school year) on March 27, 2019 and recommended a program similar to the March 2018 IEP with an implementation date of July 1, 2019 (compare Dist. Ex. 7, with Dist. Ex. 4). The March 2019 IEP was superseded as a result of the July 2019 IEP (see Dist. Ex. 9), which became the operative IEP for the 2019-20 school year until the CSE convened again on September 27, 2019 (M.P. v. Carmel Cent. Sch. Dist., 2016 WL 379765, at *5 [S.D.N.Y. Jan. 29, 2016] [concluding that a later-developed IEP was the operative IEP, even though it was developed after the parent's placement decision but before the due process complaint notice]; McCallion v. Mamaroneck Union Free Sch. Dist., 2013 WL 237846, at *8 [S.D.N.Y. Jan. 22, 2013] [finding the later developed IEP to be "the operative IEP"]; see also M.C., 2018 WL 4997516, at *25 n.3 [finding the later developed IEP to be operative even though it was developed during the first weeks of school]; Application of the Dep't of Educ., Appeal No. 12-215).[16] Accordingly, only the recommendations included in the operative July and September 2019 IEPs are relevant in examining the district's offer of a FAPE to the student for the 2019-20 school year and the March 2019 IEP will not be further discussed.[17]

However, before turning to the July 2019 IEP, it is necessary to briefly discuss the May 2019 IEP, which unlike the March 2019 IEP, was an IEP with service implementation dates within the 2018-19 school year (see Dist. Ex. 8 at pp. 1, 11-13).[18] The hearing record reflects that there was a significant spike in the student's behavior after the March 2019 CSE meeting, following the student's returned from an April vacation out of State (Tr. pp. 430-31, 498-99; Dist. Ex. 24 at p. 2). The intensity and frequency of his behaviors increased including verbal aggression, such as threats to staff and harming himself and others, that was "disturbing" (Tr. p. 499; see Tr. p. 500-02, 520; Dist. Ex 24 at p. 2; see Dist. Ex. 39 at pp. 29, 31-32). The district obtained a psychiatric

[16] The March 2019 IEP may have been operative for the period of July 1 through the date of the July 31, 2019 CSE meeting (see Parent Ex. 7 at pp. 1, 12); however, as the parent has not particularized a challenge to the recommended extended school year services for the student for summer 2019, it is unnecessary to address the March 2019 CSE's recommendations.

[17] The degree to which the July 2019 IEP is challenged by the parent is separately addressed below.

[18] On the cover of the May 2019 IEP, a "Projected IEP Start Date" is listed as June 19, 2019 with a "Projected IEP End Date" of June 26, 2019 (Dist. Ex. 8 at p. 1). The program and service implementation dates appear to have been carried over from the March 2018 IEP (compare Dist. Ex. 8 at pp. 11-13, with Dist. Ex. 4 at pp. 10-12).

reevaluation of the student, which resulted in a report dated May 22, 2019 (Dist. Ex. 24). On May 31, 2019 the CSE convened for a requested review (Dist. Ex. 8 at p. 1).

The meeting summary indicated that based on reports, observations and the discussion at the meeting, the CSE recommended that a search commence to locate an out of district placement for the student in an approved therapeutic placement (Dist. Ex. 8 at p. 2). On appeal, the parent has not articulated a particularized challenge to the May 2019 IEP and the parent ultimately agreed with the outcome of the search for a therapeutic placement that was initiated as of the May 2019 CSE meeting. Accordingly, it is unnecessary to further discuss the May 2019 CSE or the resultant IEP.

The district behavior specialist completed an updated FBA on the student on June 14, 2019 (Tr. pp. 523-24,1757; Dist. Ex. 25 at p. 1). The June 2019 FBA, completed by the district behavioral specialist, indicated that in order to support the hypothesis formulated based on the direct observation data taken, the student's first grade ICT teachers completed the Motivation Assessment Scale, which generated a relative ranking of the functions of the student's behavior according to sensory, escape, attention and tangible functions (Dist. Ex 25 at p. 2). In addition, the FBA indicated that the student's current special education ICT teacher was interviewed by the behavior specialist and provided feedback on the student's challenging behavior, and the student's mother completed a functional assessment questionnaire related to the student's behavior at home (Dist. Ex. 25 at p. 2).[19] Additional data sources for the June 2019 FBA included a May 2019 psychiatric evaluation completed by the district's consulting psychiatrist that provided additional information on the student's behavior and history and recent behavior incident reports documenting the student's behavior episodes at school (Dist. Ex. 25 at p. 2; see Tr. pp. 525-26). Thereafter, the district's behavior specialist developed a BIP dated June 18, 2019 (see Dist. Ex. 46). With the exception discussed above, on appeal, the parent makes no specific allegations with respect to the June 2019 FBA or BIP and in fact, the parent's expert witness testified that the June 2019 BIP was appropriate (Tr. p. 1466). Accordingly, the June 2019 FBA and BIP will not be further discussed.

6. July 2019 IEP

Similar to the May 2019 IEP, on appeal, the parent has not particularized a challenge to the July 2019 IEP. Applying a generous reading to the parent's request for review, the only challenge that might plausibly be stated is related to the student's alleged lack of progress. The parent asserts that the IHO erred in citing the student's advancement from grade to grade as evidence of appropriate programming given the student's behavioral regression. As noted above, a student's progress under a prior IEP is a relevant area of inquiry for purposes of determining whether an IEP has been appropriately developed (see, .e.g., H.C., 528 Fed. App'x at 66-67). Here, it is undisputed that the student's behaviors had worsened towards the end of the 2018-19 school year and the CSE was pursuing a therapeutic placement for the student.

On July 31, 2019 the CSE reconvened to update the status of the out of district program search for the student (Dist. Ex. 9 at p. 1). According to the CSE meeting information summary,

[19] The student's special education ICT teacher at this time was a substitute for the initial special education teacher who was out on maternity leave (Tr. p. 526).

the parent reported that she had visited two programs and the student had attended a trial at one of them; she expressed concern that the student would learn additional maladaptive behaviors in the out of district programs (id. at p. 2; see Tr. pp. 219-20). In addition, she expressed concern regarding the lack of integration of the programs into a school environment (Dist. Ex. 9 at p. 2). The meeting summary noted that, as reported by the parent, the student had attended a faith-based program over the summer and his behavior had not been a problem (id. at p. 1). The parent further reported that the student had begun taking medication approximately two weeks before the end of the s 2018-19 school year and continued to do so (id.). She advised the CSE that she was actively trying to get the student into a CBT program and parent-child interactive therapy but was on a waiting list and, in response, the school psychologist provided the parent with additional potential agencies (id.). According to the meeting information summary, the parent expressed her willingness to look programs that were more integrated into schools, but if there were none available she wanted the student to try to stay in the district school (id. at p. 2; see Tr. p. 220).

The testimony of the assistant superintendent for student support services was consistent with the CSE meeting summary with regards to what the parent expressed at the meeting (compare Dist. Ex. 9 at pp. 1-2, with Tr. pp. 163-65, 219-20, 223). She testified that the CSE agreed to allow the student to return to the district general education class with ICT services in an effort to work with a parent that they had worked closely with and had collaborated with for over two years (Tr. pp. 166, 220, 221). The chairperson testified that she respected that the parent was trying to do everything she could to help the student stay in an integrated environment and believed it was a fair compromise to allow the student back while the parent continued to look for programs that might better meet the student's needs (Tr. p. 167). However, she further testified that she definitely remembered saying that if the student's behavior rose to the level it was earlier in the year, the district would have to continue with the out of district placement recommendation (Tr. p. 165).

Testimony by the district school psychologist was consistent with the CSE chairperson's and indicated that, based on the parent's report that the student had begun taking medication at the end of the 2018-19 school year, that his behavior improved during the last few days of school, that he improved his ability to regulate himself all summer, and that the parent was working to get the student into parent and child and CBT therapy, the CSE ultimately agreed to allow the student "another try" to return to the district general education class placement with ICT services (Tr. pp. 351, 354-56).

Thus, to the extent the parent's appeal could be interpreted as challenging the July 2019 CSE's recommendation for a program similar to that which the student attended during the 2018-19 school year, such a challenge is without merit. That is, the CSE was aware of the increase in the student's behaviors by the end of the 2018-19 school year and was seeking an alternative placement for the student but, based on information shared by the parent, continued similar recommendations. While the parent's expressed preference did not relieve the district of its obligation to ensure that the student's special education program and related services aligned with the student's needs (Blackmon v. Springfield R-XII Sch. Dist., 198 F.3d 648, 657-58 [8th Cir. 1999] [noting that although the district's obligation "to permit parental participation in the development of a child's educational plan should not be trivialized . . . , the IDEA does not require

school districts simply to accede to parents' demands"]; cf. Loretta P. v. Bd. of Educ., 2007 WL 1012511, at *6 [W.D.N.Y. Mar. 30, 2007] [observing that no party claimed "that the [d]istrict's acquiescence to the parents' request for home instruction was compatible with the IDEA or [the student's] right to an IEP which satisfied the [d]istrict's obligation to provide a [FAPE]"]), here, the July 2019 CSE based its recommendations, not only on the parent's stated preference, but also on information relating to the student's needs as shared by the parent. Based on the foregoing, despite the student's deteriorating behaviors towards the end of the 2018-19 school year, the evidence supports a finding that the July 2019 CSE's recommendations were reasonably calculated to enable the student to make progress taking into account the information shared by the parent.

7. Progress Monitoring and Documentation Related to Behaviors

In addition to challenging the FBAs, BIPs, and IEPs developed for the student, the parent also maintains that the district did not collect data on the frequency, duration, and intensity of the behavioral interventions and, therefore, did not document the results of progress monitoring as mandated by State regulations (8 NYCRR 200.22[b][5]). Further, the parent asserts that the hearing record does not support the IHO's conclusion that the district provided behavior incident reports and other behavioral records to the parent.

Both the October 2017 and the revised March 2019 BIPs included a data collection procedure where it was recommended that data be taken across specific intervals of the student's day based on the three levels of intensity of the student's behavior that were defined on page one of each of the BIPs (Dist. Ex. 22 at p. 4; 45 at p. 5). Instructions for how to properly score and record the data were provided noting that this method of taking the data would provide the team with a clear visual of how the student performed across his day (Dist. Ex. 22 at p. 4; 45 at p. 5). The BIPs also indicated that the data should be analyzed on a regular basis to determine the effectiveness of the interventions plan (Dist. Ex. 22 at p. 4; 45 at p. 5).

The behavior incident review forms that were filled out each time the student required restraint or removal from the classroom reflected information regarding the start and end time of each episode, or the duration of the incident, and could be used to determine the frequency of the incidents by counting the number of behavior incident reviews that were written (see Dist. Exs. 38; 39; 40). In addition to behavior incident review forms documenting incidents that required removal from the classroom for the 2018-19 school year (Dist. Ex. 39), the hearing record includes antecedent-behavior-consequence (ABC) data recorded for the period of time from September 2018 through February 14, 2019 (see Dist. Ex. 47). Beginning on or around February 25, 2019 through June 12, 2019, the district switched to using daily checklists that primarily documented each class period when the student was able to keep his hands to himself, use kind words, and complete his work (id. at pp. 16-67). The checklist also indicated those instances in which the student was not successful and included a narrative explaining what happened at that time (id.).

The parent's expert testified that it was not appropriate for the district staff to record frequency of behaviors using ABC analysis and that, after February 2019, the checklists provided inadequate information (see Tr. pp. 1188-89, 1216, 1249-52, 1409-10, 1498-99). However, in light of the combination of records in the hearing record, the district sufficiently satisfied its obligation to engage in progress monitoring as required by State regulation. The parent's allegation that the district was not aware of increases in behaviors as a result of its inaccurate data collection

is belied by several sources of information summarized above in which the district described the student's behaviors over time.

With respect to the parent's receipt of the reports, as the district notes, the parent did not raise an issue in her due process complaint notice regarding the district's provision of such documentation to the parent (see Dist. Ex. 1). Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). The IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[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 18, 2014]).

Here, the district did not agree to the expand the scope of the impartial hearing and the parent did not seek permission from the IHO to amend her due process complaint notice. In the section of the decision devoted to summarizing the "background" of this matter, the IHO noted summarily that "Incident reports, Behavior Incident Reviews, a student behavior contract, and other behavioral records were provided to Parent" (IHO Decision at p. 7); however, given the structure of the decision, it does not appear that the IHO weighed this discrete finding in his determination that the district offered the student a FAPE for the school years at issue. Given the lack of an allegation in the due process complaint notice relating to this issue, I decline to fault the district for failing to offer evidence at the impartial hearing regarding its delivery to the parent of specific records.[20] Based on the foregoing, I decline to review the IHO's statement regarding the district's provision to the parent of records.

D. September 2019 IEP and Discipline

The parent argues that, during the 2019-20 school year, the student was suspended or removed from his placement for more than 10 days, triggering the district's obligation to conduct an MDR. The parent further alleges that the IHO erred in excusing district removals of the student based on safety, rather than discipline (see IHO Decision at p. 39).

Relevant to a review of the events leading up to and just after the September 2019 CSE are the procedures under the IDEA by which school officials may to effect a disciplinary change in placement of a student with a disability (20 U.S.C. § 1415[k]; Educ. Law §§ 3214[3][g]; 4404[1], [4][b]; 34 CFR 300.530-; 8 NYCRR Part 201). A disciplinary change in placement means a "suspension or removal from a student's current educational placement that is either: (1) for more

[20] There was testimony from the parent that she received behavior charts, albeit not on a daily basis (see Tr. p. 1567).

than 10 consecutive school days; or (2) for a period of 10 consecutive days or less if the student is subjected to a series of suspensions or removals that constitute a pattern because they cumulate to more than 10 school days in a school year" (8 NYCRR 201.2[e]; see 20 U.S.C. § 1415[k][1][B]; 34 CFR 300.530[b][2]; [c]; 300.536[a]). If a district is considering a disciplinary change in placement for a student with a disability, the district must conduct a manifestation determination review (MDR) meeting "within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct" (20 U.S.C. § 1415[k][1][E][i]; 34 CFR 300.530[e][1]; 8 NYCRR 201.4[a]). The manifestation team must review all relevant information in the student's file including the student's IEP, any teacher observations, and any relevant information provided by the parents to determine if: "(1) the conduct in question was caused by or had a direct and substantial relationship to the student's disability; or (2) the conduct in question was the direct result of the school district's failure to implement the IEP" (8 NYCRR 201.4[c]; see 20 U.S.C. § 1415[k][1][E][i][1],[2]; 34 CFR 300.530[e][1][i][ii]). If the result of the MDR is a determination that the student's behavior was not a manifestation of his or her disability, "the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner in which they would be applied to children without disabilities" (20 U.S.C. § 1415[k][1][C]; 34 CFR 300.530[c]; see Educ. Law § 3214[3][g][vi]; 8 NYCRR 201.7[d]). However, if the result of an MDR is a determination that the student's behavior was a manifestation of his or her disability, the CSE is required to conduct an FBA and implement a BIP or, if the student already has a BIP, review the BIP and modify it as necessary to address the behavior (20 U.S.C. § 1415[k][1][F][i]-[ii]; 34 CFR 300.530[f][1][i]-[ii]; 8 NYCRR 201.3). Except under "special circumstances," the district must also return the student to the placement from which he or she was removed or suspended, unless agreed otherwise by the parent and district as part of the modification of the BIP (20 U.S.C. § 1415[k][1][F][iii]; Educ. Law § 3214[3][g][3][viii]; 34 CFR 300.530[f][2]; 8 NYCRR 201.4[d][2][ii]).[21]

An IAES is "a temporary educational placement, other than the student's current placement at the time the behavior precipitating the IAES placement occurred" (8 NYCRR 201.2[k]). As part of a disciplinary proceeding, a superintendent may remove a student with a disability to an IAES if the student's conduct involved serious bodily injury, weapons, illegal drugs or controlled substances (20 U.S.C. § 1415[k][1][G][i]-[iii]; 34 CFR 300.530[g]; 8 NYCRR 201.7[e]). Additionally, if a district requests an expedited hearing, an IHO may order a placement to an IAES even if the student is not subject to a disciplinary proceeding if the IHO determines "that maintaining the current placement of the student is substantially likely to result in injury to the student or to others" (8 NYCRR 201.8[a], [c]; see 20 U.S.C. § 1415[k][3][A]-[B]; Educ. Law § 3214[3][g][3][vii]; 34 CFR 300.532[c]; 8 NYCRR 201.11). An MDR meeting must be conducted within 10 school days after a superintendent or IHO decides to place a student in an IAES (see 8 NYCRR 201.4[a][1]-[2]). A student who is placed in an IAES shall "continue to receive educational services so as to enable that student to continue to participate in the general education curriculum . . . and to progress toward meeting the goals set out in the student's IEP" (8 NYCRR 201.2[k][1]; see 20 U.S.C. § 1415[k][1][D][i]; 34 CFR 300.530[d][1][i]; 8 NYCRR 201.10[d]).

[21] A district and parents may agree to a change in the student's placement (20 U.S.C. § 1415[k][1][F][iii]; 34 CFR 300.530[f][2]; 8 NYCRR 201.4[d][2][ii]).

The hearing record demonstrates that in September 2019, the student was suspended for a total of 7.5 school days (Tr. pp. 449, 756-57, 765; Dist. Exs. 32-34, 56). The student's mother confirmed on cross-examination that the total days suspended for the 2019-20 was not 10 days (Tr. p. 1772). The 7.5 days of suspensions did not warrant the district conducting an MDR under the requirements set forth above.[22]

On September 27, 2019, the CSE reconvened for a meeting initiated by the district due to incidents of physical aggression by the student in the school environment that had resulted in multiple school suspensions so far that school year (Dist. Ex. 10 at p. 1). The CSE recommended four hours per day of home instruction pending out of district placement in a therapeutic day program (id.; see Tr. p. 1019).

The September 2019 IEP meeting information summary reflected comments by the behavior specialist that the student's behaviors at the start of the 2019-20 school year were as challenging and similar to the high escalations in behavior from the past spring (Dist. Ex. 10 at p. 1). He indicated that staff had scaled back on academic demands because when imposed the student exhibited physically aggressive behaviors that were a safety risk to himself and others (id.). The behavior specialist reported that the student's behaviors escalated even when low level demands were made, that when allowed to engage in preferred nonacademic activities the student's behaviors were somewhat under control but his aggressive behaviors could be unpredictable, and that the student was unable to access the curriculum (id.). He further reported that safety was a "huge concern" (id. at p. 2). The meeting information summary also reflected comments by the assistant principal that the student was not making academic progress as he was unable to access the curriculum when demands were imposed (id.). The assistant principal reported that the student demonstrated the fight or flight response and, despite intervention, staff were not able to successfully help the student regulate his emotions (id.). She added that it was the student's perception that the adults were the cause of what was happening and that the student was not able to understand the connection to his own actions (id.). In addition to the above, the meeting information summary included comments by the school psychologist who indicated the student needed to be in control and his inability to relinquish control to others was a significant obstacle to his participation in all activities (id.). The out of district coordinator indicated that there were students who despite intervention were unable to be successful in the general education setting in a larger school building due to variables in that setting, and that outcomes varied due to individual student's needs (id.). According to the meeting information summary, the out of district coordinator stressed that the end goal of an out of district placement was always to prepare the student to ultimately return to the district when ready (id.). Comments from the student's then-current special education teacher indicated that he was unable to ascertain whether the student had made any academic progress because the student's behavior interfered with assessment (id.). The meeting information summary indicated that the CSE discussed an IDT as a potential interim program for the student instead of four hours per day of home instruction (id. at pp. 1-2). The IDT was described in the hearing record as a general education placement where the student could

[22] Nor did any suspensions or removals of the student during the 2017-18 or 2018-19 school years.

receive "therapeutic intervention" while an out-of-district placement was sought (Tr. p. 1013; Dist. Ex. 23).

Consistent with the meeting summary, the assistant superintendent for student support services, who chaired the September 2019 CSE meeting, indicated that when the student returned to the district in September 2019 things did not go well (Tr. pp. 167, 168-69). She testified that the student's behaviors were out of control from day one (Tr. p. 218). She described several significant behavioral events where the student violated the code of conduct, elopement issues, instances in which the student physically grabbed his teacher, and an instance in which he made a violent threat to a teacher (Tr. p. 168). She testified that staff were finding that anytime they put a demand on the student he started to act out and would need to be removed from the room (id.). The CSE chairperson further testified that at the meeting everyone was very concerned, staff felt like they could no longer keep the student safe, felt that other students were unable to access their education because of the student's behaviors, and that the student needed a smaller more structured environment with continuous therapeutic support that could help him regulate his behavior and emotions (Tr. p. 169). Testimony by the student's second grade special education teacher also indicated that at the start of the school year the student exhibited some violent behaviors and made threats against staff and students (Tr. pp. 1043-44).

The district behavior specialist indicated that the student had significant behavior incidents beginning on the first day of second grade and that it was "reminiscent of a lot of the struggles and challenges he was experiencing the previous school year" (Tr. p. 535). The behavior specialist described the same incidents reported by the student's ICT teacher as well as an incident that took place in the cafeteria where the student was not complying and engaged in unsafe behavior (Tr. p. 536). He further reported an incident where the student used objects as weapons toward a staff member and opined that there was a lot to be concerned about from the beginning of the school year (id.). He stated that he was involved in responding to some of the incidents as he was called in to help deescalate, to help keep the student safe, and to support the team (Tr. p. 537).

Testimony by the out of district coordinator indicated that at the start of second grade she was receiving feedback that things were not going very well and that the student was exhibiting aggressive behaviors again (Tr. p. 1009). The school psychologist also testified that the student exhibited unsafe behaviors from the first days of school in second grade (Tr. p. 357). She identified the unsafe behaviors as kicking adults, climbing on furniture, cursing, running away, threatening a staff member, and making threats of self-harm (Tr. pp. 356-57).

Testimony by the out of district coordinator indicated that the decision for the student to attend the IDT as opposed to home instruction was made by the parents (Tr. p. 1035). However, according to the testimony of the parent and the assistant principal, the option of home instruction for the student was not viable for the parent given her work schedule and the parent tried to return the student to the school that he had been attending prior to the September 2019 CSE meeting but was informed that the student did not have a placement there and that the parent leaving him there would be reported as abandonment (Tr. pp. 942-44, 946, 1592-94). The parent testified that she

enrolled the student in the IDT program because she felt that she did not have another option (Tr. pp. 1592-93).

Prior to the placement of the student in the IDT, the district did not request an expedited hearing to obtain an IHO decision to place the student in an IAES (see Tr. pp. 950-51). In a letter to the parent dated October 2, 2019, the district informed the parent that, if she initiated an impartial hearing and sought pendency at the district school the student had been attending prior to the September 2019 CSE meeting, it would "consider its options at that time," including seeking an expedited hearing to have the student placed in an IAES, which could include "either home instruction or IDT, based upon the fact that maintaining [the student] in his prior placement . . . [wa]s substantially likely to result in injury to [the student] or others" (Dist. Ex. 36). The parent filed a due process complaint notice on October 15, 2019, which sought pendency (Dist. Ex. 1). Thereafter, on October 21, 2019, the district sought placement of the student in an IAES for 45 school days (IHO Ex. II at pp. 26-33) but withdrew this request once the student was place in the therapeutic day program (see Tr. pp. 57-59). The student remained in the IDT program until November 27, 2019 when he began attending a therapeutic day program (see Dist. Ex. 55 at p. 17).

Here, the IDT met the definition of an IAES (8 NYCRR 201.2[k]) and the district was required to seek an IHO determination if it was of the view that maintaining the student's placement in the program and placement he attended prior to the September 2019 CSE meeting was likely to result in injury to the student or to others (see 8 NYCRR 201.8[a], [c]). Had such a decision been obtained, the district would thereafter have been required to conduct an MDR (see 8 NYCRR 201.4[a][2]). The district may not unilaterally remove a student with a disability from his placement because it believes the student poses a safety risk (see Honig v. Doe, 484 U.S. 305, 321 [1988] [noting "Congress' unquestioned desire to wrest from school officials their former unilateral authority to determine the placement of emotionally disturbed children."]; Patrick v. Success Academy Charter Schs., Inc., 354 F Supp 3d 185, 232-33 & n.57 [E.D.N.Y. 2018] [observing that "in some circumstances, a school could be required to allow a disabled student who did not inflict 'serious bodily injury,' but is a 'continuing danger,' to return to school, or else risk being held liable under the IDEA for improperly keeping the student out of school"]).

Having not followed the procedures for obtaining the student's placement in an IAES, the CSE also did not formally recommend the IDT program on the student's IEP, noting only in meeting comments that it was an alternative; instead, the CSE recommended home instruction (see Dist. Ex. 10 at pp. 1-2, 13). Accordingly, the district cannot defend the student's placement in the IDT as an IEAS or as an offer of a FAPE, and the IHO erred in finding that the district's placement of the student in the IDT was procedurally or substantively appropriate.

E. Behavioral Interventions

1. "Peace Room"

On appeal, the parent claims that the IHO correctly determined that the "peace room" met the definition of a time out room under State regulations, however, argues that the IHO "inexplicably condoned its use" (Req. for Rev. at p. 5; see IHO Decision at p. 34).

According to State regulation, "a time out room is an area for a student to safely deescalate, regain control and prepare to meet expectations to return to his or her education program" (8 NYCRR 200.22[c]). Time out rooms "are to be used in conjunction with a [BIP] in which a student is removed to a supervised area in order to facilitate self-control or to remove a student from a potentially dangerous situation" in order to "teach and reinforce alternative appropriate behaviors," except that a time out room may also be used as an emergency intervention in "unanticipated situations that pose an immediate concern for the physical safety of a student or others" (8 NYCRR 200.22[c], [c][3]; see "Policy and Guidance on the Use of Time Out Rooms," Field Mem. [Apr. 1994], available at http://www.p12.nysed.gov/specialed/publications/policy/_timeout.pdf). In addition, a student's IEP must "specify when a [BIP] includes the use of a time out room for a student with a disability, including the maximum amount of time a student will need to be in a time out room as a behavioral consequence as determined on an individual basis in consideration of the student's age and individual needs" (8 NYCRR 200.22[c][2]). All schools that use a time out room for behavior management are required to develop and implement policies and procedures related to the use of the time out room (8 NYCRR 200.22[c][1]). State regulation also imposes requirements that schools "document the use of the time out room, including information to monitor the effectiveness of the use of the time out room to decrease specified behaviors" (8 NYCRR 200.22[c][8]). Further, before implementing a BIP "that will incorporate the use of a time out room," districts must afford parents "the opportunity to see the physical space that will be used as a time out room" and provide the parent with a copy of the school's policy related to time out rooms (8 NYCRR 200.22[c][4]).[23]

Here, the "peace room" was described by the district staff as a room with "sensory tools" such as "fidgets, cushions, weighted blankets" for students to use to "regulate" (Tr. pp. 282, 604). The district behavior specialist further described that the "peace room" had cushions on parts of the walls with "rugs, with slipcovers over the lights, sensory tools, [and a] kid garage," and was used as "a way for kids to sort of regulate and de-escalate" and "regain emotional control" (Tr. pp. 502-03, 604). He further testified that the "peace room [was] not meant to be punitive" but, instead, was "meant to be supportive and . . . to be just a resource for our kids" (Tr. pp. 503, 600, 608, 611). According to the behavior specialist, there was always an adult in the "peace room" with the student and the room was "never locked (Tr. pp. 605-06).

The district behavior specialist maintained that the peace room was not a time-out room but, instead, was used for multiple purposes and further attempted to distinguish the peace room as a "proactive support to help prevent further de-escalation of behavior" rather than a consequence (see Tr. p. 541, 610-11). He indicated that "on many occasions [the student] requested to go there" but on other occasions he was brought there "as a consequence" when "he was either dangerous to himself and the rest of the group or he was in a situation where he was just highly volatile" (Tr. pp. 611-13). Here, while the district's intentions were well-meaning, the use of the peace room for multiple purposes and in response to varying precipitating factors was itself problematic as the room ultimately might have come to reinforce the student's escape/avoidance behaviors. Further, the district could not choose to focus on the occasions when the room was used in managing behaviors that were less escalated to minimize the district's use of the peace room as a time out

[23] State regulations also include specific requirements relating to the physical structure and features of a time out room (8 NYCRR 200.22[c][5]-[7]).

room and, as a result, avoid the requirements set forth in State regulation pertaining to time out rooms. Based upon the foregoing, the hearing record supports the IHO's finding that the "peace room" was a time out room as defined in State regulation (see 8 NYCRR 200.22[c]).[24]

The district policy included as evidence in the hearing record defined a time out room (Parent Ex. N at p. 1). The policy described that a time out room would only be "used in conjunction with a behavioral intervention plan, as part [of] the student's IEP" (id.). The policy further directed that the district director of special education would be responsible for the "development and implementation of regulations covering the use of a time out room" (id.). The hearing record did not contain any district regulations for the use of the "peace room." Lacking from the district's policy were specifics required by State regulation, such as prohibitions on placing a student in a locked room or a room in which the student cannot be continuously observed; circumstances under which the time out room may be used; limitations on the duration of time for which the time out room may be used; data collection to monitor the effectiveness of the use of the time out room; information that would be provided to parents; and staff training on the policies and procedures related to the use of the time out room (8 NYCRR 200.22[c][1][i]-[vi]). The district behavior specialist testified that the district did not have a "specific policy" regarding how long a student could be placed in the peace room and, instead, the behavior specialist and the district assistant principal indicated that the appropriate length of time was evaluated on "a case-to-case basis" (Tr. pp. 606-07, 777).[25]

The parent testified that she first learned about the "peace room" from her son when he told her he was in that room during a particular day in first grade (Tr. pp. 1599, 1646-47). She further testified that the first time she saw the "peace room" was when she picked up the student early from school one day and he was in the "peace room" (Tr. pp. 624, 1599-1600). However, it was not something she was informed about "in advance" by the school and was not provided written notice of the district's intent to use the "peace room" with the student (Tr. pp. 1600-01, 1649). According to the parent, although she received copies of the student's BIPs, the use of the "peace room" was not discussed at any CSE meeting (Tr. pp. 1601, 1648, 1736-37). Contrary to the parent's testimony, the district behavior specialist testified that the CSE did review the BIPs with the parent and that the parent was aware of the "peace room" (Tr. p. 621). However, on cross-examination the parent testified that "the discussion was that they would inform me when he was

[24] Moreover, on appeal, the district has not challenged the IHO's determination on this point.

[25] While New York State does not identify a specific maximum amount of time a student can be removed to a time out room, regulations of other states are illustrative with respect to an average appropriate duration. Other states limit removal to a time out room to " one (1) minute per each year of age of the child" (Tenn. Comp. R. & Regs. 0520-12-01-.09[5][j][2]); 5 minutes for preschool students, 15 minutes for "lower elementary" students, and 20 minutes for "middle/upper elementary" students (Ark. Admin. Code 005.18.20-20.04[6][1]); 45 minutes (Ala. Admin. Code 290-3-1-.02[1][f][1][vi]), or "not . . . for longer than is therapeutically necessary, which shall not be for more than 30 minutes after [the student] ceases presenting the specific behavior for which isolated time out was imposed" (23 Ill. Admin. Code 1.285[e][1]). Similarly, the New York State Office for People with Developmental Disabilities (OPWDD) provides that, in "all residential facilities certified or operated by OPWDD," "[t]he maximum duration of time a person can be placed in a time-out room shall not exceed one continuous hour" (14 NYCRR 633.16[a][1]; [j][3][iv][c]; see also Vt. Admin. Code 12-3-508:700 [providing that the duration of a time out in residential treatment programs "is limited to the amount of time it takes the child/youth to compose him/herself "]).

taken there or removed from class" but she did not recall the "peace room" being a part of any BIP (Tr. pp. 1647-48).

In contravention of State regulation, the student's IEPs do not reference the use of the time out room or the maximum amount of time the student would need to be in the room as a behavioral consequence (see generally Dist. Exs. 2-10; see also 8 NYCRR 200.22[c][2]). Although the BIPs do contemplate the student's removal from the classroom if his behavior escalated to physical aggression, they do not specifically reference or describe the peace room or specify the maximum amount of time the student could be removed to the peace room (see generally Dist. Exs. 22, 45-46). The BIPs did not specify anything else about the location to which the student would be removed, or whether and by whom the student would be supervised while removed from the classroom (see Dist. Exs. 22, 45-46). The district did, however, document the use of the peace room, including the dates of the student's removal from the classroom to the peace room, the duration of the removal and the behavior which precipitated his removal (see Dist. Exs. 39-40, 47).

During the student's kindergarten year, there is no evidence in the hearing record that the student was removed to the "peace room" however, the student was removed from the classroom and to an administrator's office on three separate occasions (Dist. Exs. 38 at p. 5; 48 at pp. 1, 3). The behaviors that precipitated the removals were climbing on furniture, kicking and punching staff and students, running away, and yelling and screaming profanities (Dist. Ex. 48 at pp. 1, 3).

The district began using the "peace room" with the student during the 2018-19 school year (first grade) (see Dist. Exs. 39, 47). The hearing record includes behavior incident reviews and student ABC data analysis from September 28, 2018 through to June 13, 2019, which indicated that he was removed to the "peace room" approximately 69 times with the length of time varying from five minutes to almost a full school day and some days the student was removed to the "peace room" on more than one occasion during a particular day (id.). The reasons for the student's removals to the "peace room" varied and included throwing a chair, kicking and hitting the teacher/aide, running outside of the school building, and throwing items in the classroom and at others (Dist. Ex. 39 at pp. 1, 8, 10, 24-25, 29, 31, 35, 37, 39, 41, 45, 47, 53, 57, 59). Each time the student was removed to the "peace room" a behavior incident review report was completed detailing the incident (see generally Dist. Ex. 39). However, missing from some of the descriptions in the incident reports was the use of the extinction procedures outlined in the student's October 2017 BIP prior to his removal (id.; see Dist. Ex. 45 at pp. 4-5). For example, the October 17, 2018 incident report indicated that the student became upset and started throwing items, he was transported to the "peace room;" but the report did not identify any extinction procedures used prior to the student's removal (Dist. Ex. 39 at p. 7). On another occasion, the student fell to the floor and was instructed to get up and when he did not respond to the directive he was "helped up" and escorted to the "peace room"; the incident report does not reflect whether any other extinction procedures as described in the BIP were implemented (id. at p. 31). On April 25, 2019, the student repeatedly took items from his backpack and refused to stop, he was directed to the "peace room" (id. at p. 33). Documentation of the use of the "peace room" without description of prior interventions continued for the remainder of the student's first grade year (see Dist. Exs. 39 at pp. 37, 39, 45, 62, 64, 66, 68; 47 at pp. 8, 15, 26, 29, 31, 38, 44, 50, 54, 57-58, 67).

The use of the peace room continued during second grade (2019-20 school year) wherein the student was removed approximately seven times before he was suspended on September 25,

2019, and ultimately attended the IDT on October 4, 2019 (see Dist. Exs. 34, 40, 55). The basis for the removals were climbing on furniture, punching and hitting staff, using a screwdriver and pointer as weapons, and biting staff (Dist. Ex. 40 at pp. 1, 4, 11, 16-17, 20-21). Based upon the information contained in the behavior incident review reports, it did not appear that district staff followed the procedures set forth in the June 2019 BIP prior to removal to the "peace room" (see generally Dist. Ex. 40).[26]

The district behavior specialist testified that the student used the "peace room a lot" (Tr. p. 504). He testified that although the peace room "may not have worked on eliminating problem behavior, it was a safer option" for the student (Tr. p. 603). Further, he testified that the peace room was effective in deescalating in situations but that it was not "effective in decreasing his behavior for permanent behavior change" (Tr. p. 616). The district behavior specialist testified that there was no data taken to demonstrate the effectiveness of the use of the peace room with the student as required by State regulation (Tr. pp. 613-15, 618; see 8 NYCRR 200.22[c][8]). Under these circumstances, the district should have determined if the use of the time out room was itself becoming a reinforcer of the behaviors sought to be reduced through the BIP.

In this case, it is concerning, not only that the district failed to identify a maximum duration for which the student could be kept in the peace room but that, in practice, the duration was subject to a high degree of variability, and in some instances it was used for extended periods of time. Moreover, the hearing record supports a finding that the student was removed to the "peace room" for a variety of behaviors and in some instances the removal occurred prior to attempts to utilize the "extinction measures" required by the BIP.

In addition to the regulatory requirement that schools monitor the effectiveness of the use of a time out room with respect to decreasing the incidence of specific behaviors, longstanding guidance from the State Education Department provides that although "[t]he amount of time a student will need to be in a time out room will vary with the student's age, individual needs and behavior management plan[, c]areful monitoring of the amount of time a student is in a time out room is required to insure that a time out room is not being used to the detriment of a student's educational program" ("Policy and Guidelines on the Use of Time Out Rooms," at p. 3). Here, while the district did track the frequency and duration of the student's removals to the peace room, there is little evidence that the district assessed the impact of the student's frequent removals from the classroom on his overall educational program or ability to access the curriculum. For the foregoing reasons, the hearing record supports a finding that the district failed to follow regulatory requirements related to the use of time out rooms during the 2017-18, 2018-19 and 2019-20 school

[26] The June 2019 BIP the hypothesized functions of his behaviors were identified as access denied to preferred items or actions, escape/avoidance, and control (Dist. Ex. 46 at p. 1). As compared to the prior BIPs (October 2017 and March 2019), the June 2019 BIP focused on the student using "a more appropriate method of communication" when the student sought access to a preferred item or activity or engaged in an escape behavior (id. at pp. 5-6). The June 2019 BIP also focused on the use of a "monitoring chart" for purposes of deescalating when the student was denied access to a preferred item or activity, or an escape behavior occurred (id.). However, if these other procedures were not effective and the student's behaviors rose to a level that was unsafe for him and others, the team would determine how to proceed which could involve moving the student "to a quieter and less stimulating location to de-escalate" (id. at pp. 5-6).

years and that its use of a time out room to manage the student's behaviors resulted in lost educational time and a denial of a FAPE to the student.

2. Physical Restraints

The parent argues on appeal that the use of restraints is a "last resort" and the BIP should have indicated that the student would only be restrained when "absolutely necessary" (Req. for Rev. at p. 5). The parent further argues that the use of the restraints "were not calculated to reduce [the student's] behaviors" (id.).

State regulations authorize the use of physical restraints in emergency situations where alternative procedures not involving the use of physical force cannot reasonably be used (see 8 NYCRR 19.5[a][3]; 200.22[d][2][i]). "Emergency" is defined in the regulation as a situation requiring "immediate intervention" (8 NYCRR 200.22[d]). Emergency interventions may not be used as a punishment or substitute for "systemic behavioral interventions that are designed to change, replace, modify or eliminate a targeted behavior" (8 NYCRR 200.22[d][2][ii]). Staff must be trained in safe restraint procedures and the school must document the use of emergency interventions for each student and notify the parent (8 NYCRR 200.22[d][3]-[4]). Documentation shall include, among other things, the location of the incident, the name of those involved, a description of the incident and intervention used, a statement as to whether the student has a current BIP, and details of any injuries sustained by the student or others as a result of the incident (8 NYCRR 200.22[d][4]).

The district policy on the use of physical restraints generally follows the requirements set forth in State regulation (compare Parent Ex. N at p. 1, with 8 NYCRR 200.22[d]). The district behavior specialist testified that the use of restraints was an "emergency intervention" used as a "last resort" with respect to the student (Tr. p. 581). The restraints used with the student were typically "a two-person escort" or "children's control position" where a person would stand behind the student "and control [his] arms . . . and support [him] in de-escalation" (Tr. p. 583). The district behavior specialist also testified that he trained staff in the use of restraints and anyone who was trained could restrain the student (Tr. pp. 458, 461, 582, 628, 631-34).

The October 2017 and March 2019 BIPs stated that "[i]f physical intervention [wa]s required at any point, it [wa]s important to document and debrief" the team (Dist. Exs. 22 at p. 4; 45 at p. 5). This same language was not contained in the June 2019 BIP but instead the June 2019 BIP stated that, when the student's behavior escalated to a point that was unsafe for him or others, "the team, who [we]re trained in Nonviolent Crisis Intervention" would determine "how to proceed to ensure the safety of the student and others" (Dist. Ex. 46 at pp. 5-6).

During the 2017-18 school year, the district staff documented that restraints were used on the student seven times, which included a child's control position, two-arm hold, blocking restraint, and/or soft arm restraint (see Dist. Ex. 38 at pp. 1-2, 3-4, 17-25). For example, on one occasion the student was repeatedly punching and kicking the teacher and attempted to bite her when the teacher administered the child's control position (id. at pp. 1-2). Similar incidents also occurred on different occasions during the remainder of the 2017-18 school year (id. at pp. 3-4, 17-25).

For the 2018-19 school year, district staff documented the use of restraints on the student 16 times, which included child's control position, seated restraints, and two arm holds (see Dist. Ex. 39). Restraints were used when he was unsafe during a lockdown drill, biting, kicking and hitting staff, swinging telephone cord at staff, and throwing items in the classroom (Dist. Exs. 39 at pp. 23, 43, 45, 49, 57, 72-73; 47 at p. 64). During the 2019-20 school year, district staff documented the use of restraints on the student three times including a two-arm hold and child's control position for behaviors similar to the prior school years (Dist. Ex. 40 at pp. 4, 21).

Here, the parent does not allege that the occasions on which district staff used restraints were not emergency situations or that the district staff could reasonably have used alternative procedures not involving the use of physical force. Rather, the parent's allegations relating to the use of restraints on the student are largely related to the appropriateness of the student's BIPs in that the parent points to the use of restraints as evidence that the BIPs were ineffective.[27] For example, the parent alleges that a valid BIP "might have reduced, rather than increased, the need for restraints" and opines that a more frequent reinforcement schedule may have prevented the need for emergency interventions (Parent Mem. of Law at pp. 13-14). However, as set forth above, the evidence in the hearing record supports a finding that the BIPs developed for the student were appropriate and the parent's arguments that modifications to the BIPs may have avoided restraints are speculative and without support in the hearing record. Based on the foregoing, there is insufficient basis in the hearing record to modify the IHO's determination that the district's use of restraints on the student was appropriate (IHO Decision at p. 34).

F. Relief

1. Compensatory Education

As relief, the parent requests "approximately 405 hours of tutoring" as compensatory education to redress the deprivation of FAPE from the beginning of the 2017-18 school year and continuing through to November 27, 2019 (Req. for Rev. at pp. 8-9). Additionally, in the parent's memorandum of law, she requests an unspecified amount of parent counseling and training, and an unspecified number of behavioral services (Parent Mem. of Law at p. 27).

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]). 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]; Newington, 546 F.3d at 123; see also Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015]; 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

27 The parent also argues that she was never given notice that the district would use restraints or asked to approve of the use of restraints on the student; however, as the use of physical restraints are required to be on an emergency basis only, State regulation does not require districts to provide parents with notice before a restraint is utilized. Nor do State regulations require a student's IEP to reference the use of restraints.

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"]).

The parent's request for 405.3 hours of compensatory education was based on the student being removed from the classroom for "57.8 hours" (Parent Mem. of Law at pp. 26-27). In addition, the parent calculated that the student was suspended for 9 days during kindergarten and first grade and for 7.5 days during second grade and attended the IDT for 37 school days (id.). The parent requested hour-for-hour compensatory education for these periods of time (id.). At the impartial hearing, the parent's expert witness testified that the student missed educational time while in the "peace room" or other locations and he needs to make up for the "lost educational and instructional time" (Tr. p. 1296). She further testified that the student could be provided tutoring outside of school to make up for the lost educational time (id.).

During the impartial hearing, the district failed to put in contrary evidence regarding an appropriate compensatory education award and only argued that it offered the student a FAPE for the years in question and that, therefore, the parent was not entitled to any relief (see generally IHO Ex. VIII). The district had ample opportunity to present alternative arguments to the parent's calculation of lost educational time as 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).

Given the district's failure to meet its burden of production or persuasion on the issue of compensatory education services, the calculations put forth by the parent are unrebutted.

However, since the determination therein that the district denied the student a FAPE is solely based upon the district's improper use of the "peace room" and improper removal of the student to the IDT, the compensatory education award shall be limited to the portion of the award sought by the parent related to these violations and not based upon the suspensions of the student. The parent's calculation of 57.8 hours as the number of hours that the student was removed from the classroom is generally consistent with records documenting the time the student spent in the peace room (compare IHO Ex. VII at pp. 28-29, with Dist. Exs. 39-40, 47). Therefore, I will award the 57.8 hours. As for the IDT, although the district failed to follow appropriate procedures to remove the student to the IDT, the evidence in the hearing record shows that, while attending the IDT, the student worked on goals, received behavioral and therapeutic interventions, and made progress (see Dist. Ex. 55). A request for compensatory education "should be denied when the deficiencies suffered have already been mitigated" (N. Kingston Sch. Comm. v. Justine R., 2014 WL 8108411, at *9 [D.R.I. Jun. 27, 2014], adopted at, 2015 WL 1137588 [D.R.I. Mar. 12, 2015] see Phillips v. Dist. of Columbia, 932 F. Supp. 2d 42, 50 & n.4 [D.D.C. 2013] [collecting authority for the proposition that an award of compensatory education is not mandatory in cases where a denial of a FAPE is established]). Therefore, the student is not entitled to an hour-for-hour award for those school days he attended the IDT. Rather, as an equitable award, I will order the district to provide one hour per day of instruction for the number of days that the student attended the IDT (i.e., 37 hours). The parent also requested an unspecified amount of behavioral services. As discussed above, with the exception of its failures to follow requirements relating to placing the student in the IAES and using a time out room, the district delivered significant and appropriate behavior interventions to the student during the school years at issue. Therefore, I decline to order compensatory behavioral services. However, as the student's primary area of need is behavioral, I will order that the compensatory tutoring services awarded be provided by either a special education teacher or a BCBA.

Based on the foregoing, the district shall be required to provide the student with compensatory tutoring in the amount of 94.8 hours to be provided by either a district special education teacher or the district's BCBA unless the parties otherwise agree. Because the parent's claims relating to the district's provision of parent counseling and training have not contributed to the determination that the district failed to offer the student a FAPE, the parent's request for compensatory parent counseling and training is denied.

2. Independent Educational Evaluations

The parent argues that the IHO erred by finding that the district evaluations of the student were appropriate and declining to award the parent the IEEs she had requested. Specifically, the parent contends that the district failed to offer any testimony concerning its 2017 OT evaluation of the student, the hearing record established that the FBAs conducted were "manifestly inappropriate," the district failed to prove that its 2017 psychological evaluation was appropriately comprehensive and negated the need for a neuropsychological evaluation, and the district also did not prove that a speech-language evaluation of the student was unnecessary.

In determining whether the IHO erred in finding that the district's initial evaluation of the student was appropriate, it is helpful to view the district's evaluation in light of the relevant regulations. Pursuant to federal and State procedures for determining a student's eligibility and educational needs, a "[CSE] and other qualified individuals must draw upon information from a

variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the student's physical condition, social or cultural background, and adaptive behavior" (8 NYCRR 200.4[c][1]; see 34 CFR 300.306[c][i]). To accomplish this task, a district is required, in part, to conduct an initial evaluation of the student referred to the CSE (see 20 U.S.C. § 1414[a][1][B]-[C]; 34 CFR 300.301, 300.306; 8 NYCRR 200.4[a]-[b]).

Under federal and State regulation, a school district is responsible to conduct a "full and individual initial evaluation" before the initial provision of special education and related services to a student with a disability (34 CFR 300.301[a]; see 8 NYCRR 200.5[b][1]). Under federal regulation, an evaluation must assess the student "in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities" (34 CFR 300.304[c][4] [emphasis added]). Under State regulation, an initial evaluation must include at least:

> (i) a physical examination . . . ;
>
> (ii) an individual psychological evaluation, except when a school psychologist determines after an assessment of a school-age student . . . that further evaluation is unnecessary;
>
> (iii) a social history;
>
> (iv) an observation of the student in the student's learning environment (including the regular classroom setting). . . ; and
>
> (v) other appropriate assessments or evaluations, including an FBA for a student whose behavior impedes his or her learning or that of others, as necessary to ascertain the physical, mental, behavioral and emotional factors which contribute to the suspected disabilities.

(8 NYCRR 200.4[b][1]).[28] A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]).

Federal and State evaluation procedures require that any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things, the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii] 8 NYCRR 200.4[b][1]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or

[28] Federal requirements do not prescribe specific types of assessments that must be conducted as part of an initial evaluation except that a classroom observation is a federal requirement for students with specific learning disabilities. The terms psychological evaluation, social history, and FBA are not defined in federal law or regulation.

developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services' needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

In addition, the IDEA provides parents with a number of procedural safeguards. Among them is the "right . . . to obtain an independent educational evaluation of the child," which in turn means "an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question" (34 CFR 300.502[a][1], [3][i]; see 8 NYCRR 200.1[z]). 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 River 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 that was sought for additional information]). 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 the district will not be required to provide it at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]; see A.H. v. Colonial Sch. Dist., 2019 WL 3021232, at *3 [3d Cir. July 10, 2019]). 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]). An IEE must use the same criteria as the public agency's criteria (Seth B. v. Orleans Par. Sch. Bd., 810 F.3d 961, 973–79 [5th Cir. 2016]).

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). In accordance with this burden, the district bears the burden of showing that its evaluation of the student was appropriate in order to prevail in its challenge to the parents' requests for IEEs at public expense.

In a September 20, 2019 letter, the parent requested the following IEEs: speech-language, OT, FBA, and neuropsychological (Parent Ex. C). The September 2019 letter stated that the "request [wa]s based on the school evaluations, which were not comprehensive and appropriate" (id.). In response to the parent's request for IEEs, the district offered to conduct an updated psychological evaluation and OT evaluation if the parent withdrew her September 2019 IEE request (Tr. pp. 1832-33; Dist. Ex. 53). The district's assistant superintendent for student support services further stated that the FBA would be updated once a therapeutic placement was identified for the student (see Dist. Ex. 35). In further response to the parent's IEE request, on October 8, 2019, the district filed a due process complaint notice requesting a determination that the district's evaluations were appropriate, and therefore, the district should not be required to fund any IEEs (see Dist. Ex. 54).

In the parent's October 2017 due process complaint notice the parent requested IEEs (neuropsychological, FBA, psychiatric, and OT) "to secure appropriate assessments of [the student's] needs in all areas of suspected disability" (Dist. Ex. 1 at p. 19). In the request for review, the parent continues to seek the following IEEs: neuropsychological, speech-language, OT, and FBA (Req. for Rev. at p. 9) on the basis that the IHO erred in finding that the district's initial evaluation of the student was appropriate.

The parent testified that during the March 2019 CSE meeting she expressed disagreement with the educational evaluation conducted by the district, however, the specifics of the disagreement were not articulated by the parent (Tr. pp. 1848-49, 1854-55). Ultimately, the parent testified that she wanted "outside experts" to evaluate her son because the district did not have expertise in dealing with a student like her son (Tr. p. 1852). She testified that the November 2017 OT evaluation conducted by the district discovered "sensory issues" but the district failed to address those deficiencies (Tr. p. 1833). At the parent's request an updated FBA was conducted in June 2019 and the parent stated that she expressed her disagreement with the FBA with the district (Tr. pp. 1836-37). When asked when she expressed her concerns about the district's evaluations, the parent testified that when she sent the letter in September 2019 requesting IEEs that she was objecting to the prior evaluations conducted by the district, apparently referencing the initial evaluation of the student by the district prior to the November 2017 CSE meeting (Tr. pp. 1837-41, 1847).

With respect to the October 2017 FBA, as discussed in detail above, I have determined that the hearing record supports a finding that the district's FBA was largely conducted in accordance with State procedural requirements and, to the extent there were minor deviations from the relevant regulations, the student's right to a FAPE was not impeded. Moreover, the district witnesses provided extensive testimony concerning the content of the FBA and the methodology utilized by the district psychologist and behavioral specialist in conducting the assessment. In addition, the IHO gave the testimony of the parent's expert "less weight" than the district's witnesses because the expert was unfamiliar with district procedures, never met the student, conducted a limited review of the student's records, and was an expert on autism which was not the student's medical diagnosis or classification (IHO Decision at p. 33).[29] While the parent's expert identified how she

[29] To the extent the IHO's weighing of the testimony of the district's witnesses over that of the parent's expert was based on a credibility determination, generally, an SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read

might have conducted the FBA in a different manner, and questioned some of the choices made by the district psychologist and behavioral specialist in creating the FBA, she failed to raise any serious concern showing that the district's FBA was conducted in an inappropriate manner or in a way that led to a gap in vital necessary information regarding the student's behavior, and her specific critiques of the FBA were persuasively rebutted by the district witnesses.

With respect to the other IEEs requested by the parent, the IHO held that the hearing record supported a finding that the evaluations performed by the district, as a whole, were appropriate and accurately identified the student's needs for purposes of creating an IEP (IHO Decision at pp. 30, 33; see Dist. Exs. 11, 16-19, 24-25). In support of this conclusion, the IHO specifically held that the evaluations conducted by the district, together with the parent's private psychological evaluation in October 2017, concurred that the "student was proficient academically and that his acting out behaviors varied over time" (IHO Decision at p. 30).

Turning to the individual evaluations with which the parent expressed disagreement, the parent asserts that the district failed to present testimony at the impartial hearing to defend the appropriateness of its November 2017 psychological evaluation of the student. According to State regulation, a psychological evaluation generally includes the use of "a variety of psychological and educational techniques and examinations in the student's native language, to study and describe a student's developmental, learning, behavioral and other personality characteristics" (8 NYCRR 200.1[bb]). In this instance, the November 2017 psychological evaluation by the district consisted of the following: a record review, behavioral observation, parent and teacher rating scales for the Behavior Assessment Scales for Children (BASC -3) and the Kaufman Assessment Battery for Children, Second Edition (KABC-II) (see Dist. Ex. 18). The district's November 2017 psychological evaluation addressed the student's behavior during the evaluation, his cognitive functioning and social-emotional functioning and included suggested interventions and educational strategies to help the student decrease his aggression, improve his low frustration tolerance, and improve his attentional abilities (id.).. Accordingly, on its face, the November 2017 district psychological evaluation comported with State regulation and the parent does not identify any specific deficiency in the evaluation that would warrant a neuropsychological IEE at public expense. In addition, the parent obtained an October 2017 private psychological evaluation of the student which the CSE considered at its November 2017 meeting, and the district also conducted a November 2017 psychiatric evaluation which provided further evaluative information with respect to the student's behavioral needs and social/emotional functioning.

With regard to the parent's assertion that the district did not demonstrate the appropriateness of its OT evaluation of the student or defend its decision not to conduct a speech-language evaluation of the student, I note that the parent does not appear to disagree with the contents of the OT evaluation but rather argues that the evaluation showed that the student should receive OT and the district declined to recommend OT to the student on his IEPs. The parent has also failed to state with any degree of particularity why a speech-language evaluation of the student

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in its entirety, compels a contrary conclusion (see Carlisle Area Sch., 62 F.3d at 524, 528-29; P.G. v. City Sch. Dist. of New York, 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 12-076).

was warranted. Although the district may not have affirmatively presented evidence at the impartial hearing as to why a speech-language evaluation was not part of its initial evaluation of the student, given the varied and comprehensive nature of the evaluations the district did conduct, especially with regard to the student's area of greatest need, his interfering behaviors, it was not required to demonstrate that it conducted every assessment the parent might have preferred in order to prove the appropriateness of its initial evaluation of the student. Moreover, a review of the hearing record reveals that the student scored within the average range on the language-oriented sub-tests that were part of his cognitive testing (Dist. Ex. 18 at p. 4), was described by his kindergarten classroom teacher as having "advanced vocabulary and cognitive abilities" (District Ex. 21 at p. 2), was described by his mother in the social history as "highly verbal and very articulate and expressive"(Dist. Ex. 13 at p. 2), and also scored in the high average range on the passage comprehension subtest of the WJ-IV (Dist. Ex. 16 at p. 3). Accordingly, it was reasonable for the district to conclude that speech-language was not an area of suspected disability for the student.

In summary, the evidence in the hearing record shows that the district's initial evaluation of the student relied on a battery of multiple assessments and strategies to gather relevant functional, developmental, and academic information about the student. The district did not rely on a single measure or assessment as the sole criterion in evaluating the student and instead used a variety of technically sound instruments in the evaluation of the student. There is no basis in the hearing record upon which to conclude that the evaluation was conducted by district staff who lacked appropriate training or knowledge to administer the assessments. Additional information was not required in order to comprehensively and individually evaluate the student for purposes of developing an IEP for the student, and the district was not required to show that it had exhaustively performed every assessment that the parent or her experts could point to in order to prevail. Accordingly, because I find the district's evaluation was appropriate, the parents are not entitled to a neuropsychological IEE, an FBA IEE, an OT IEE or a speech language IEE at public expense. While I appreciate that the parent believes that further information would be valuable and that her child has a unique and complex educational profile that warrants, in effect, a "second opinion" from outside experts, the federal regulation provides for this particular contingency—the parent still has the right to an IEE, but not at public expense (34 CFR 300.502[b][3]).[30]

VII. Conclusion

Based on all of the foregoing, the evidence in the hearing record shows that the district obtained evaluations and engaged in educational planning for the student that was in most ways appropriate and thoughtful and aligned with the student's challenging behavioral needs. However, despite the district's efforts in this regard, the evidence in the hearing record shows that the district's failure to properly follow requirements for use of a time out room or removal of the student to an IAES ultimately denied the student a FAPE for the time periods at issue in this matter. Having determined that the evidence in the hearing record establishes that the student was denied a FAPE

[30] Furthermore, the district sought consent for the triennial evaluation due in November 2020, however, the parent failed to consent to the evaluation stating that the "initial ones were deficient, it did not provide us with enough information to provide services" (Tr. pp. 1834-35). If the parent ultimately consents to a district next re-evaluation of the student, the parent may wish to revisit her request for an independent neuropsychological evaluation, FBA, OT evaluation, and speech-language evaluation if she disagrees with any aspect of the re-evaluation.

for the 2017-18, 2018-19, and a portion of the 2019-20 school years, the parent is entitled to compensatory educational services of tutoring in the amount of 94.8 hours.

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated March 10, 2021 is modified by reversing those portions which found that the district offered the student a FAPE for the 2017-18, 2018-19, and 2019-20 school years; and

IT IS FURTHER ORDERED that the parent is entitled to compensatory tutoring in the amount of 94.8 hours to be provided by a district special education teacher or a district BCBA.

Dated: **Albany, New York**
May 20, 2021

SARAH L. HARRINGTON
STATE REVIEW OFFICER