



The University of the State of New York

The State Education Department

State Review Officer

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No. 12-113

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 [REDACTED]

Appearances:

Law Offices of Andrew K. Cuddy, attorneys for petitioner, Nina C. Aasen, Esq., and Jason H. Sterne, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Lisa R. Khandhar, Esq., of counsel

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 a decision of an impartial hearing officer (IHO) which determined that the educational program and services respondent's (the district's) Committee on Special Education (CSE) had recommended for her son for the 2009-10, 2010-11, and 2011-12 school years were appropriate. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a school 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]; 34 CFR 300.151-300.152, 300.506, 300.511; Educ. Law § 4404[1]; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

The student has received diagnoses of autism and moderate to severe mental retardation (Parent Exs. 25 at p. 5; 29 at p. 4; 30 at p. 6; 32 at p. 2; 33 at p. 3). He has a history of asthma, gastrointestinal problems, and pica, and is treated pharmacologically for difficulty sleeping, hyperactivity, and self abusive and impulsive aggressive behaviors including hitting or scratching himself and hitting the table (Parent Exs. 3 at pp. 4-5; 30 at pp. 1-2; 31; 32 at p. 1). The student is described as having deficits in cognition, academics, receptive and expressive language skills, social interaction, fine and gross motor skills, activities of daily living (ADL) skills, sensory regulation, and attending skills (see Parent Exs. 3 at pp. 3-7; 5 at pp. 3-9; 6 at pp. 3-11; 7 at pp. 3-11, 13; 22 at pp. 3-4). The student has attended public special education programs since the age of four in 6:1+1 special class settings with the support of related services

including speech-language therapy, occupational therapy (OT), physical therapy (PT), and counseling services (Tr. p. 653; Parent Exs. 3 at pp. 1, 10; 5 at pp. 1, 12; 6 at pp. 1, 12; 7 at pp. 1, 13; 27 at p. 3).

On December 2, 2009, the CSE met for an annual review of the student and to develop his IEP (Parent Ex. 6 at pp. 1-2).¹ The resultant IEP recommended that the student be classified as a student with autism and continued its recommendation for the student's placement in a 6:1+1 special class in a specialized school (*id.* at p. 1).² The CSE continued its recommendation for the provision of speech-language therapy, OT, and PT, and discontinued the student's counseling services (*id.* at pp. 1, 12).³ The IEP also included a transition plan to post-school activities and a behavior intervention plan (BIP) was attached to the IEP (*id.* at pp. 15-16). The hearing record indicates that after the December 2009 CSE meeting the student continued to attend his then-current 6:1+1 special class (Tr. p. 98).

On two days in January 2010 and April 2010, a comprehensive psychological evaluation of the student was performed by a private agency to assess the student's current cognitive and adaptive functioning for enrollment in OMRDD services (Parent Ex. 25 at p. 1).⁴ The report recommended that the student apply to receive OMRDD services including respite and residential habilitation and that the student should continue to receive treatment for symptoms related to pica and obsessive compulsive disorder (OCD) (*id.* at p. 5).

In a letter dated November 30, 2010, the district notified the parent that a CSE review meeting had been scheduled for the student for December 20, 2010 (Parent Ex. 15).

On December 20, 2010, the CSE convened for an annual review of the student's IEP (Parent Ex. 5 at pp. 1-2). The CSE recommended continuation of the student's placement in a 6:1+1 special class in a specialized school and related services of OT, PT, and speech-language therapy (*id.* at pp. 1, 12). The CSE also updated the student's goals and his transition plan, and attached an updated BIP to the IEP (*id.* at pp. 6-9, 13-14). The district followed up with an undated notice to the parent indicating that the student's IEP was modified to the extent that annual goals and short-term objectives were updated and that no other changes were made to the student's IEP, and included information regarding the parent's rights should she disagree with the IEP recommendations (Parent Ex. 13 at pp. 1-2).

The hearing record reflects that the student continued to attend his current 6:1+1 class following the December 2010 CSE meeting (Tr. p. 97-99, 129). Sometime in January 2010, another student reportedly hit the student in this case while on the school bus and the student was

¹ I note that although the parent appeals the student's program for the 2009-10, 2010-11 and the 2011-12 school years, the dates of implementation of each of the student's IEPs in this particular case straddle each of the school years (Parent Exs. 3 at p. 2; 5 at p. 2; 6 at p. 2).

² The student's eligibility for special education programs and related services as a student with autism is not in dispute in this proceeding.

³ A December 1, 2009 counseling report reflected that the student's counseling sessions were counter-indicated because they increased the student's emotional discomfort and because the student received limited benefit from them (Parent Ex. 26).

⁴ OMRDD refers to the New York State Office of Mental Retardation and Developmental Disabilities, which has since been renamed the New York State Office of People with Developmental Disabilities (OPWDD).

taken to the hospital (Tr. pp. 626-27, 649, 674-76). The hearing record demonstrates that after this incident occurred, the student developed an increasing aversion to going to school over time (Tr. pp. 101, 108, 627, 629-31, 677, 700-02).

By letter to the district dated January 18, 2011, the parent requested that the student be reevaluated to ensure that he was receiving the appropriate services and was in the appropriate educational setting (Parent Ex. 12). The following day, the district related services coordinator initiated a referral to the SBST/CSE to have the requested evaluations completed (Tr. pp. 568-71; Parent Ex. 11).⁵ On February 3, 2011, the student's teacher wrote to the parent informing her that, among other things, the re-evaluations she requested would be completed around March 26, 2011 (Parent Ex. 10 at p. 1).

On March 1, 2011, the student's teacher completed a "teacher evaluation" of the student which reflected the student's functioning with regard to his expressive and receptive language and ADL skills, and also noted the student's strengths and weaknesses related to his transition needs and learning style (Parent Ex. 23).

On March 7, 2011, the student's teacher provided information regarding the student to a district psychologist as respondent for the Vineland Adaptive Behavior Scales, Second Edition (VABS-II) (Tr. pp. 137-139; Parent Ex. 22). Based on his teacher's responses, the student received an overall level of adaptive functioning in the low range or at a percentile rank of less than one (Parent Ex. 22 at pp. 2, 5).

Also on March 7, 2011, the CSE convened for a review of the student's IEP at the request of the parent (Tr. pp. 115-16; Parent Ex. 3 at pp. 1-2). The resultant IEP indicated that no changes were made to the student's previous December 20, 2010 IEP with regard to the student's placement recommendation, present levels of performance, related services, or the student's transition plan; however, three of the student's annual goals were carried over from the December 20, 2010 IEP (compare Parent Exs. 3 at pp. 1-7, 10-11, with Ex. 5 at pp. 1-10, 12-14).⁶ The hearing record reflects that at the March 7, 2011 CSE meeting, the parent again requested the student be reevaluated to ensure he was receiving appropriate educational services specifically in the areas of OT, PT, and speech-language (Tr. pp. 115-16, 668-70).

The hearing record indicates that the student continued attending the 6:1+1 special class in the district through the end of the 2010-11 school year (see Parent Ex. 47 at p. 2). A report card completed by the student's teacher dated May 13, 2011 showed that for progress updates completed on March 18, 2011 and May 13, 2011, the student had made "little progress" on three short-term objectives from his December 20, 2010 and March 7, 2011 IEPs and that it was anticipated that he would meet these objectives given more time (Parent Ex. 40 at p. 2).⁷

⁵ Testimony by the related services coordinator at that time indicated that she believed the parent requested speech-language, OT, and PT evaluations (Tr. p. 573).

⁶ The March 7, 2011 IEP did not include the fine motor and self-calming (OT) or gross motor (aerobic fitness) goals and objectives reflected in the previous IEP, and did not include a BIP which had been included in the previous December 20, 2010 IEP; however, the IEP did reflect that a BIP had been developed for the student (compare Parent Ex. 3 at pp. 4, 6-7, with Parent Ex. 5 at pp. 8-9, 14).

⁷ I note that page three of Parent Ex. 40 appears to be a duplicate of page two (see Parent Ex. 40 at pp. 2, 3).

A. Due Process Complaint Notice

The parent filed a due process complaint notice dated December 9, 2011 alleging that the student was denied a FAPE for the 2009-10, 2010-11, and 2011-12 school years (Dist. Ex. 1).⁸ Among other things, the parent alleged that (1) the district failed to properly evaluate student; (2) the district failed to monitor the student's progress using a Brigance assessment stated on the student's IEP; (3) the district failed to provide the student with a datafolio called for by the IEP; (4) assessment of the student's present levels of academic and social/emotional performance did not provide a meaningful assessment of the student's levels of ability; (5) the district's failure to provide a meaningful assessment of the student's present levels of performance impeded the CSE's development of IEP goals; (6) the student's IEPs failed to state services mandated by regulation for students with autism; (7) "year after year" the district failed to recommend a program that would provide the student with educational benefit and failed to identify the instructional methodologies on the student's IEP; (8) the IEP lacked social skills training and appropriate goals related to such training; (9) the district failed to conduct a functional behavioral assessment (FBA) or develop a BIP for the student; (10) the district failed to provide adequate speech-language services;⁹ (11) the student's annual goals do not adequately address the student's particular needs because they are insufficient in number and/or have already been achieved, and/or represent a pattern of "dumbing down" the student's IEP; (12) the student's transition plan did not include a coordinated set of activities to be undertaken to address the student's transition to adult living; (13) staff working with the student were not appropriately certified, licensed, or trained to provide services to the student; (14) the district failed to provide the parent with "meaningful" progress reports on the student's goals and objectives which interfered with the parent's participation in the development of the student's IEP; (15) the student's then-current IEP failed to include goals to address the student's behaviors; (16) the student's December 2010 IEP fails to identify accommodations to be used during assessments; (17) an administration of the Vineland-II assessment did not include a Teacher Rating Form; (18) the student deteriorated as a result of inappropriate programming and the student required a residential placement (*id.* at pp. 5-9). The parent disagreed with the student's classification or the program of services recommended by the CSE (*id.* at p. 9).¹⁰ The parent proposed relief including, among other things, that the student's then-current IEP be annulled, multiple evaluations be completed, the CSE immediately convene and develop an appropriate IEP for the student, the student receive intensive speech-language therapy services on an individual basis four times a week, an appropriate transition plan be developed, the CSE review the student's medical and educational records for the purpose of considering a residential placement, and compensatory services be provided (or documentation that services were provided) (*id.* at pp. 9-10). The parent also appended a detailed request for educational records of the student to her due process complaint (*id.* at pp. 11-12).

B. Impartial Hearing Officer Decision

⁸ With a few exceptions, the allegations in the complaint refer to a mass complaint for all three IEPs rather than to the individual IEPs to which the allegations apply (Dist. Ex. 1).

⁹ Its unclear from the due process complaint whether it is alleged that the district failed to provide services in conformity with a written IEP at some period of time or if it is alleged that the IEP is inadequate because it offers an inappropriate level of services (*see* Dist. Ex. 1 at p. 7).

¹⁰ It is unclear why the parent alleged both that the student should receive mandated services for students with autism, yet alleged disagreement with an autism disability classification.

An impartial hearing convened on January 10, 2012 and concluded on March 6, 2012 after 5 days of proceedings (Tr. pp. 1-722). The district moved to dismiss the parent's claims as moot as a result of the resolution meeting and the IHO issued an interim decision dated January 17, 2012 in which he determined that the parent's claim for compensatory services was not moot, ordered the district to perform the evaluations requested by the parent in her due process complaint notice, and dismissed the parent's claim for attorneys' fees based on a lack of subject matter jurisdiction (IHO Interim Decision at pp. 3-6). The IHO issued a second interim decision dated February 21, 2012 in which he modified his January 17 interim decision as it related to evaluations of the student (Second IHO Interim Decision at p. 3).

After the impartial hearing concluded, the IHO issued a decision dated April 18, 2012 in which he determined that the CSE had adequate evaluative information of the student's functional, developmental, and academic needs upon which to premise its programs for the student for the 2009-10, 2010-11, and 2011-12 school years (IHO Decision at pp. 18-19). The IHO determined that the hearing record demonstrated that the student's cognitive functioning, educational functioning, mental health needs, and adaptive behavior skills were regularly addressed by the CSE since 2006, and that the progress reports prepared by the student's related service providers were sufficiently comprehensive to identify all of the student's related service needs (*id.* at p. 19). The IHO determined that the student's IEPs for the years at issue established annual goals and short-term instructional objectives which were reasonably related to his educational deficits (*id.* at pp. 19-20). The IHO determined that the absence of specific instructional methodologies from the student's IEPs did not impede the student's right to a FAPE, significantly impede the parent's opportunity to participate in the decision-making process, or cause a deprivation of educational benefits (*id.* at pp. 20-21). The IHO determined that the parent's claim with respect to the student's transition plan was without merit and noted the availability of an instructional plan of community integration and independent living skills, learning various work task activities such as sorting and matching and that the 6: 1+1 special class placement included work study opportunities (*id.* at pp. 21-22). The IHO also found that the CSE offered the student sufficient instructional services to meet his individual speech-language needs (*id.* at pp. 22-23).¹¹ The IHO determined that the failure of the student's IEPs to indicate when periodic reports on the student's progress toward his annual goals would be provided to the parent did not impede the student's right to a FAPE, significantly impede the parent's opportunity to participate in the decision-making process, or cause a deprivation of educational benefits because the parent was regularly provided with detailed reports on the student's progress toward his annual goals (*id.* at p. 23). With respect to the adequacy of the student's behavior management, the IHO determined that the CSE has developed BIPs for the student for the years at issue and, although it did not conduct an FBA, the failure to do so did not amount to a denial of a FAPE as the BIPs documented the student's interfering behaviors and proposed strategies and supports to address those behaviors (*id.* at pp. 23-24). The IHO determined that the hearing record was unequivocal that the provision of parent counseling and training was not included on the IEPs at issue, but that the district's failure to do so did not result in a denial of FAPE to the student (*id.* at p. 24).

Having found that the district offered the student a FAPE and implemented the program and services in his IEPs, the IHO determined that the student was not entitled to compensatory additional services (IHO Decision at p. 18).

¹¹ The IHO treated the parent's speech-language services claim as an alleged deficiency in the IEP.

IV. Appeal for State-Level Review

The parent appeals from the IHO's decision and contends that the IHO erred in finding that the CSE relied on adequate evaluations in developing the student's IEPs. Specifically, the parent alleges that the IHO's finding that the CSE had adequate evaluative information of the student's functional, developmental and academic needs upon which to premise its program for the student for the 2009-10, 2010-11, and 2011-12 school years was arbitrary and capricious. Regarding the IHO's findings on annual goals and short-term objectives, according to the parent, the IHO's reasoning consists of boilerplate language and conclusory statements, and is arbitrary, capricious, and contrary to the evidence in the hearing record. The parent argues that the IHO's finding with respect to the adequacy of language instruction is contrary to the testimony in the hearing record and that the speech-language services offered to the student did not address his language needs. Regarding adequacy of the student's behavior management, the parent asserts that the IHO ignored evidence that the district failed to address the student's refusal to attend school. The parent further contends that the IHO's determination that the omission of parent counseling and training from the student's IEPs "does not violate the IDEA" is arbitrary and capricious, and should be annulled. In summary, the parent argued that the IHO erroneously decided that the district offered the student a FAPE and that he consequently erred in failing to award compensatory services to the parent. The parent requests that an SRO grant the relief requested by the parent in the due process complaint notice.¹²

In its answer, the district denied many of the substantive allegations made by the parent. The district argues that to the extent that the parent is asserting claims that accrued prior to December 9, 2009, such claims are time-barred by the statute of limitations. The district further alleges that the district offered the student a FAPE for the 2009-10, 2010-11, and 2011-12 school years. Specifically, the district contends that 1) the CSE relied on adequate evaluative material in developing the student's IEPs, 2) the annual goals and short-term objectives were reasonably related to the student's educational deficits, 3) the student's BIPs addressed his interfering behaviors, 4) the omission of parent counseling and training from the student's IEPs was not a denial of FAPE, and 5) the recommended placement at the assigned school was appropriate for the student. Regarding the parent's requested relief, the district alleges that the parent is not entitled to compensatory services because the district provided the student with a FAPE and because the parent failed to specify any details regarding the compensatory relief sought in her due process complaint or in the petition on appeal. Additionally, the district alleges that the CSE should not be ordered to consider a residential placement for the student because the CSE team convened to develop a new IEP for the student after the filing of the due process complaint notice in this appeal and the parent has filed a new due process complaint notice relating to that specific IEP. The district requests that an SRO uphold the IHO's decision.

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

¹² In the memorandum of law accompanying the parent's petition on appeal, the parent articulated a request for make-up services in the form of "one hour per school day of academic services (540 hours, in the form of direct 1:1 tutoring), and one-for-one make-up related services in speech, OT and PT to support that tutoring (120 hours of each related service, namely 40 hours per school year for each of the three years)" (Petitioner's Memorandum of Law at p. 12). The parent also requests that I direct the CSE to either consider placing the student in a residential setting, or order the district to locate a residential placement for the student.

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 v. T.A., 129 S. Ct. 2484, 2491 [2009]; Bd. of Educ. 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; 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. Florida 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]). 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., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). 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; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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 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]; Perricelli, 2007 WL 465211, at *15). 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 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; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "academic, developmental, and functional needs" of the student]), 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]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Statute of Limitations

The IDEA requires that, unless a state establishes a different limitations period under state law, a party must request a due process hearing within two years of when the party knew or should have known of the alleged action that forms the basis of the complaint (20 U.S.C. § 1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 34 C.F.R.

§ 300.511[e]; 8 NYCRR 200.5[j][1][i]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 114 n.8 [2d Cir. 2008] [noting that the Second Circuit applied the same "knows or has reason to know" standard of IDEA claim accrual both prior to and after codification of the standard by Congress]; M.D. v. Southington Bd. of Educ., 334 F.3d 217, 221-22 [2d Cir.2003]).¹³ An exception to the timeline to request an impartial hearing applies if a parent was prevented from filing a due process complaint notice due to a "specific misrepresentation" by the district that it had resolved the issues forming the basis for the due process complaint notice or the district withheld information from the parent that the district was required to provide (20 U.S.C. § 1415[f][3][D][i]; 34 C.F.R. § 300.511[f]; 8 NYCRR 200.5[j][1][i]).

The district argues on appeal that to the extent that the parent is asserting claims that arose prior to December 9, 2009, such claims are barred by the applicable statute of limitations (Answer ¶ 40). The district states that the parent filed her due process complaint notice on December 9, 2011 and that claims regarding events that occurred prior to December 9, 2009, including the December 2009 CSE meeting, are time-barred (*id.*). I note that this argument is being raised for the first time in the district's answer on appeal. The hearing record does not indicate that this issue was raised at the prehearing conference or the impartial hearing (Tr. pp. 1-722). The district briefly presents its argument in terms of the two year window of time preceding the parent's due process complaint notice. Rather than identify particular events relating to a variety of claims asserted by parent claims related to the 2009-10 school year and when her claims actually accrued, the district makes only a blanket statement that her claims relate to "events that occurred prior to December 9, 2009 (including but not limited to the December 2, 2009 CSE meeting)" without identifying such events (Answer ¶ 40). Under these circumstances, the district's statute of limitations defense is both vague in terms of accrual and was not presented to the IHO either before or even at the conclusion of the impartial hearing and I decline to preclude consideration of the parent's claims presented on appeal and will proceed to determine the merits of the matter relating to the 2009-10, 2010-11, and 2011-12 school years.

B. Scope of Review - Finality of Unappealed Determinations

The district also argues on appeal that the parent failed to appeal certain findings made by the IHO, namely, (1) the absence of specific instructional methodologies from the student's IEP was not a denial of a FAPE, (2) the DOE had consistently developed transition plans for the student over the 2009-10, 2010-11, and 2011-12 school years, and (3) the parent was regularly provided with detailed reports on the student's progress toward his annual goals (Answer ¶ 41). The district further alleges that the parent has raised the second and third above-enumerated issues only in the memorandum of law rather than the petition, and that they should be disregarded as they were not raised in the petition. A review of the parent's petition reveals that the IHO's adverse findings on these issues were not raised therein, and, as such those determinations have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see J.F. v New York City Dept. of Educ., 2012 WL 5984915, at *6 [SDNY Nov. 27, 2012]). I also note that SROs have long held that a memorandum is not a substitute for a petition for review, which is expected to set forth the petitioner's allegations of the IHO's error and include citations to the record on appeal (8 NYCRR 279.8[a][3], [b]; Application of a Student Suspected of Having a Disability, Appeal No. 08-100; Application of a Student with a Disability, Appeal No. 08-003; Application of a Child

¹³ I note that New York State has not explicitly established a different limitations period since Congress adopted the two-year limitations period.

with a Disability, Appeal No. 07-139; Application of the Bd. of Educ., Appeal No. 07-121; Application of a Child with a Disability, Appeal No. 07-112).

C. December 2009 IEP

1. Evaluative Data

Initially, I will address the parent's contention that there is no testimony or documentary evidence that any of the student's evaluations were reviewed by the CSE in preparation for or during any of the three CSE meetings at issue.¹⁴ As discussed further below, the hearing record contains evaluative materials that, based on their date, existed at the time of each of the CSE meetings.

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

With regard to evaluations conducted prior to the development of the December 2009 IEP, the hearing record contains an October 2008 psychoeducational evaluation report which indicated that the student had received diagnoses of severe autism and mental retardation and that he was attending a 6:1+1 special class and receiving counseling, speech-language therapy, OT, and PT (Parent Ex. 28 at p. 1). The report indicated that the student was referred for reevaluation by his mother due to increased behaviors at school and at home which the parent

¹⁴ Testimony by the student's teacher indicated that at the parent's request the district psychologist performed a battery of tests on the student which were discussed at the March 7, 2011 CSE meeting; however, the student's teacher testified that she did not recall the specific tests that the psychologist administered (Tr. pp. 136-37). The hearing record reflects that the student's teacher was the respondent for the March 7, 2011 administration of the VABS although she does not recall this (Tr. p. 138; Parent Ex. 22). The hearing record also reflects that on February 3, 2011 the student's teacher wrote the parent informing her that the re-evaluations she requested would be completed around March 26, 2011, after the March 7, 2011 CSE meeting (Parent Ex. 10 at p. 1).

reported were very aggressive, violent and threatening (id.). The October 2008 report referenced a March 2008 written statement by the student's developmental pediatrician which indicated that the student's outbursts at school had recently worsened and that he would benefit from a 1:1 paraprofessional to assist him in staying focused and calm in class until further evaluations were completed, and also indicated that the cause for the student's heightened aggressiveness was unclear but may be related to changes at home such as the arrival of a new baby, moving to a new home, gastrointestinal complaints, onset of pubertal changes, or other unidentified stressors (id.). The October 2008 evaluation report summarized a June 2008 report by the student's teacher indicating that it was consistent with that of the parent and the developmental pediatrician, and noted that the student's behavior varied with his mood; sometimes he appeared happy and compliant and at other times he appeared angry, frustrated, withdrawn, anxious or restless and often became verbally and physically aggressive, used profanity and was noncompliant (id.). The October 2008 evaluation report further noted that the teacher had completed an FBA on the student in May 2008 to investigate behaviors of concern including self-abuse (eating staples, punching himself, banging furniture with his fists) and verbal and physical aggression (id.). The teacher reported that the student became upset easily when he was told he could not do something that he wanted to do and that the student's negative behaviors could be a function of a release of anger due to poor ability to verbally communicate his feelings (id.). The student's teacher also reported that the student was inconsistent in his motivation, his ability to participate in class discussions, and in his ability to complete work on time (id. at p. 2).

The October 2008 psychoeducational evaluation report also reviewed the student's performance on current and past evaluation measures (Parent Ex. 28 at p. 3). As the student was not able to understand the directions for the administration of the Test of Nonverbal Intelligence (TONI-3) as conveyed by pointing and modeling, a standard score could not be derived (id.). As such, the evaluation report referenced the student's scores from a September 2006 psychological evaluation report which indicated that the student received an IQ of 32 in the extremely low range of functioning on the administration of the Stanford-Binet Intelligence Scale, form L-M; his performance on the Beery Buktenica Developmental Test of Visual-Motor Integration (VMI) fell within the 4 year 10 month range of functioning; and based on responses provided by his mother for the VABS-II, the student's abilities in adaptive functioning including the areas of communication, daily living skills and socialization, was in the profoundly deficient range (id.; see Parent Ex. 33 at p. 1).

With regard to academic functioning, the October 2008 evaluation report reflected that the student's then-current teacher reported that the student was functioning on the pre-K level in all academic areas (Parent Ex. 28 at p. 3). He was reportedly able to count and write numbers one through ten, could write his name, and knew some letters of the alphabet (id. at pp. 3-4).

With regard to social/emotional functioning, the October 2008 evaluation report indicated that in addition to the aggressive behaviors mentioned above, although the student was friendly with peers at times, he was often disengaged (Parent Ex. 28 at p. 4). The student reportedly struggled to maintain attention and concentration in order to complete work and was resistant to sitting for longer periods of time, and he did his best with highly consistent and structured routines (id.).

The evidence also includes a September 2009 comprehensive psychosocial evaluation report of the student wherein the student's mother and step-father served as respondents (Parent Ex. 27). This report provided information regarding the student's family background; his developmental history; his diagnoses of an autistic disorder, pica (eating staples), moderate

mental retardation, and difficulty communicating due to developmental delays; his educational history; his medical and psychiatric history including prescribed medications; his anxiety regarding having a new person in his home; and a description of his abilities related to ADL skills (Parent Ex. 27 at pp. 1-5).

The hearing record also contains a December 1, 2009 counseling report completed by the student's then-current school social worker (Parent Ex. 26). The counseling report indicated that the student was reticent to leave the class for counseling sessions and therefore had been receiving services in the classroom or cafeteria (*id.*). The social worker recommended that the student's counseling services be terminated as they increased his emotional discomfort and, as such, he received limited benefit (*id.*).¹⁵

The hearing record also includes reports which document the student's participation and progress from summer 2009 through January 2010 (Parent Exs. 49 at pp. 1-3; 51 at pp. 1-3; 52 at pp. 1-2). I note that these reports do not specifically indicate the student's progress on his then-current December 2008 IEP goals and objectives, but rather reflect the student's performance related to "Standards and Expected Student Skills/Behaviors and the student's instructional priority plan (compare Parent Ex. 7 at pp. 7-13, with Parent Exs. 49 at pp. 1-3; 51 at pp. 1-3; 52 at pp. 1-2). A January 15, 2010 progress update indicated that the student had increased from "no progress made" during the first trimester to "little progress made" during the second semester on all of his short-term instructional priority objectives (Parent Ex. 49 at pp. 1-3).¹⁶ Teacher comments regarding the first trimester of the 2009-10 school year noted that the student often lost focus during activities and did not enjoy working with peers in group activities (Parent Ex. 51 at pp. 1-3).

Turning to the contents of the December 2009 IEP, the evidence shows that, consistent with reports that confirmed the student's diagnosis of autism, the CSE deemed the student eligible for special education as a student with autism and referenced the student's diagnosis of pica, noting that the student eats staples (compare Parent Ex. 6 at pp. 1, 3-4, with Parent Ex. 27 at pp. 4-5; see also Parent Ex. 26). The CSE recommended continuation of the student's OT, PT, and speech-language therapy, and, consistent with the December 1, 2009 counseling report which indicated that counseling services were counter-indicated as they increased the student's emotional discomfort, the CSE decided to discontinue the student's counseling services (compare Parent Ex. 6 at p. 12, with Parent Ex. 26).¹⁷

¹⁵ The hearing record also contains less recent evaluative material including a psychological evaluation report and a psychosocial evaluation report completed in Fall 2006; a July 2008 letter from the student's developmental pediatrician referencing the student's need for pharmacotherapy to address difficulties with sleep and hyperactive and impulsive, aggressive tendencies at home and school; and a comprehensive psychological evaluation report and a comprehensive psychosocial evaluation report, both completed in August 2008 (Parent Exs. 29-33).

¹⁶ The hearing record reflects that separate from the student's IEP annual goals and short-term objectives, the student's teacher monitored and reported on the student's progress toward "instructional priorities" which included all core content areas and provided information regarding a student's progress toward meeting State standards (see Parent Exs. 38 at p. 1; 45 at p. 1; 49 at pp. 1-3).

¹⁷ I note that although the December 2009 IEP did not include a description of the student's then-current functioning with regard to his fine or gross motor skills, it did include annual goals and short-term objectives in these domains (Parent Ex. 6 at pp. 7, 9-10).

With regard to the student's present levels of academic performance, similar to the description of the student's academic functioning reflected in the October 2008 psychoeducational report, the December 2009 IEP indicated that the student was able to write numbers one to ten, identify colors, and follow many one-step commands (compare Parent Ex. 6 at p. 3, with Parent Ex. 28 at pp. 3-4). The IEP noted that the student did not like school work and, consistent with this, the October 2008 psychoeducational evaluation report reflected that the student struggled to maintain attention and concentration in order to complete work and was resistant to sitting for longer periods of time (compare Parent Ex. 6 at p. 3, with Parent Ex. 28 at p. 4).¹⁸ The academic management needs contained in the December 2009 IEP, including the student's need for highly structured routines, prompts and cues to maintain attention, repetition of directions and instructions, and constant praise and other forms of positive reinforcement to decrease resistance to sitting, were similarly noted in the October 2008 psychoeducational evaluation report (compare Parent Ex. 6 at p. 3, with Parent Ex. 28 at pp. 2, 4). Additional strategies to address the student's management needs were carried over from the student's previous IEP, including modeling of expected classroom behaviors, frequent opportunities to practice newly learned skills, and the use of manipulatives when learning new math skills (compare Parent Ex. 6 at p. 3, with Parent Ex. 7 at p. 3).

The description of the student in the present level of social/emotional performance section of the December 2009 IEP was consistent with that described by the student's mother, his developmental pediatrician, and the student's previous teacher, as reflected in the October 2008 psychoeducational report and the September 2009 Comprehensive Psychosocial Evaluation (compare Parent Ex. 6 at p. 4, with Parent Ex. 27 at p. 4 and Parent Ex. 28 at pp. 1, 4). Similar to the IEP, these sources indicated that the student exhibited variable moods which ranged from happy and compliant to upset, anxious, irritated/angry, frustrated, and restless, and also noted that the student could become verbally and physically aggressive as well as self abusive (punching himself in the head, banging furniture with fists, eating staples), often for no apparent reason (id.). Consistent with the December 2009 IEP, the October 2008 psychoeducational evaluation report and the December 2009 counseling report also reflected that the student required close supervision (Parent Exs. 6 at p. 4; 26; 28 at p. 1). In accordance with the student's continued emotional and behavioral needs, the social/emotional management needs and much of the information included in the student's present level of social/emotional performance were carried over from the December 2008 IEP to the December 2009 IEP (compare Parent Ex. 6 at p. 4, with Parent Ex. 7 at p. 5).

The present level of health and physical development section of the December 2009 IEP indicated that the student was administered medication at home to address sleeping and hyperactivity, and he had a history of gastrointestinal problems, which is consistent in part with information contained in the September 2009 psychosocial evaluation report and the October

¹⁸ The December 2009 IEP reflects that the student was administered the Brigance Inventory of Early Learning in October 2009; however, it reflects "N/A" rather than indicating scores for any of the academic areas listed on the IEP (Parent Ex. 6 at p. 3). The IEP further reflects the student's instructional level as "alternate grade level indicators" (id.). However, the level of the specific academic skills reflected in the academic performance section of the IEP, including that the student was able to write numbers one through ten, copy letters, and identify colors and his name, is consistent with the teachers report that the student was functioning at the pre-K level in all academic areas (Parent Exs. 6 at p. 3; 28 at pp. 3-4). I note also that the Brigance-II test protocol included in the hearing record reflects administrations of that assessment on September 21, 2010 and subsequent dates (Parent Ex. 21 at p. 2); however, a copy of the October 2009 administration is not included in the hearing record.

2008 psychoeducational report (compare Parent Ex. 6 at p. 5, with Parent Ex. 27 at p. 4 and Parent Ex. 28 at p. 1).

The IEP also noted the need for a BIP, and the attached BIP addressed the student's difficulties with attention, controlling and expressing his emotions and anger, and the self abusive behaviors that were identified and described throughout the evaluations as noted above, and as documented in the present level of social/emotional performance of the student's December 2009 IEP (Parent Exs. 6 at pp. 4, 16; 27 at p. 4; 28 at pp. 1, 4). Lastly, the December 2009 IEP included a plan for the student's transition to post high school services which was consistent with the student's functional levels as depicted in the evaluative material available and in the IEP; however, the hearing record does not include a vocational assessment of the student (Parent Ex. 6 at pp. 3-4, 15).¹⁹

Although the district did not show which evaluative information was reviewed during the course of the CSE meeting, the evidence in the hearing record nevertheless supports the IHO's ultimate conclusions. There was ample evidence that evaluations had been conducted to identify the student's special education needs from which the student's IEP could be developed. The evidence leads me to conclude that the student's December 2009 IEP was prepared in a manner consistent with information included in the evaluative materials that had been conducted at the time of the December 2009 CSE meeting and that there was no denial of a FAPE due to inadequate evaluation or an insufficient statement of the student's needs in the December 2009 IEP.

2. Goals

Turning to the goals in the December 2009 IEP, an IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

To address the student's needs set forth in the present levels of performance in the December 2009 IEP and in evaluative materials described above, the December 2009 IEP contained goals in the areas of academics, community awareness, social interaction, gross and fine motor skills, and social conversation skills (Parent Ex. 6 at pp. 6-11). The hearing record also shows that the December 2009 CSE reviewed the student's previous December 2008 IEP in developing the December 2009 IEP, as some of the student's annual goals and short term objectives were carried over from the previous IEP to the December 2009 IEP. Specifically, the December 2009 IEP included goals and objectives in the areas of reading, math, handwriting, community awareness (identifying community signs and travel symbols), and social interaction skills (participating in classroom games and jobs with peers), that reflected some modification to

¹⁹ Testimony by the student's mother indicated that she vaguely remembers providing input for a vocational assessment of her son at least once, and perhaps twice, at some point in 2009 to 2010 via a form that was sent home (Tr. p. 690).

those contained in the student's previous IEP, such as new short term objectives and changes in the criteria required for mastery of an annual goal or short-term objective (compare Parent Ex. 6 at pp. 6-8, with Parent Ex. 7 at pp. 7, 9, 11). A review of the annual goals and short term objectives in the December 2009 IEP reveals that they contained sufficient specificity by which to guide instruction and intervention, evaluate the student's progress, and gauge the need for continuation or revision, and they contained adequate evaluative criteria (see Parent Ex. 6 at pp. 6-11). The December 2009 IEP indicated how often the student's progress on his goals would be measured and how often progress would be reported to the parent, as mandated by State regulations (see Parent Ex. 6 at pp. 6-11). However, I note that one goal related to fine motor skills failed to include the frequency that the student's progress would be reported to the parent (id. at p. 10), I remind the district to comply with this requirement.. Based on the above, the student's December 2009 IEP annual goals and short-term objectives overall adequately and appropriately addressed his needs and the one deficiency did not rise to the level of a denial of a FAPE in this case (see J.L. v City School Dist. of City of New York, 2013 WL 625064 at *13 [S.D.N.Y. Feb. 20, 2013]; R.R. v Scarsdale Union Free Sch. Dist., 615 F Supp 2d 283, 294 [S.D.N.Y. 2009] affd 2010 WL 565659 [2d Cir 2010]). There is no reason to disturb the IHO's findings with regard to the goals.

3. Speech-Language Instruction

The hearing record reflects that the district recommended two 30-minute sessions of speech-language therapy per week in a group of three for each of the three IEPs at issue in this appeal (Parent Exs. 3 at p. 10; 5 at p. 12; 6 at p. 12). I note that although the parent contended that the district failed to offer daily language instruction mandated for students with autism in the Regulations of the Commissioner of Education Part 200.13 during the 2009-10, 2010-11, and 2011-12 school years, State regulations mandate that instructional services shall be provided to meet the individual language needs of a student with autism and do not dictate daily language instruction for all students with autism (8 NYCRR 200.13[a][4]). Furthermore, testimony by the student's teacher indicated that language acquisition was also addressed in the classroom in addition to the student's group speech-language therapy sessions, and that she collaborated with the speech-language teacher (Tr. p. 115).

The December 2009 IEP reflects that the CSE recommended continuation of the student's two 30-minute speech-language therapy sessions in a group of three per week which suggests that the student received this same frequency of speech-language services in the prior IEP (the December 2008 to December 2009 IEP, Parent Ex. 7) (Parent Ex. 6 at p. 12).²⁰ The December 2009 IEP noted that related services were being modified insofar as counseling services had been terminated, but it appears that OT, PT, and speech-language services were to be continued, not modified (see Parent Ex. 6 at pp. 2, 12).²¹ The related services coordinator for the district

²⁰ The copy of the December 2008 IEP in the hearing record does not include the related services page (see Parent Ex. 7). However, a September 2009 comprehensive psychosocial evaluation reflected that as per parent report, at that time the student was receiving three 30-minute sessions of speech-language therapy per week (Parent Ex. 27 at pp. 1, 3).

²¹ The March 2007 IEP reflects that the student received one 30-minute individual and one 30-minute group (of 2) speech language sessions per week (Parent Ex. 8 at p. 13). However an October 2008 psycho-educational report indicated that at the time of the report the student was receiving speech-language therapy of "1x30x1, 3:1" (Parent Ex. 28 at p. 1). The parent testified that she did not recall who provided the student's speech-language services during the 2009-10 school year however, she indicated that the student did receive speech-language services for all three years at issue (2009-10, 2010-11, 2011-12) (Tr. pp. 666, 681).

testified that generally the speech mandates for high school age students was commonly scheduled twice per week for 30 minutes in a group of three (Tr. p. 564).

I find that the hearing record sufficiently shows that the December 2009 IEP adequately addressed the student's speech-language needs at the time it was formulated. The December 2009 IEP reflected that the student was "partially verbal," understood many one-step commands and communicated with others by pointing to indicate his wants and needs (Parent Ex. 6 at p. 3). Although the parent alleged that the student's language deficits were not addressed, the December 2009 IEP included a goal which focused on the student's ability to initiate social conversation with peers and adults, which would address the student's expressive language skills (*id.* at p. 11). Furthermore, the December 2009 IEP contained an annual goal addressing the student's social interaction skills that included a corresponding short-term objective addressing the student's ability to play board games, which would require the student to follow directions and as such would address the student's receptive language skills (Parent Ex. 6 at p. 8). That goal also contained a short-term objective which in part required the student to identify dinner utensils, which would address his expressive language skills (*id.*).

4. Special Factors and 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. Board of Educ., 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at *8; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]; Application of a Student with a Disability, Appeal No. 09-101; Application of a Student with a Disability, Appeal No. 09-038; Application of a Student with a Disability, Appeal No. 08-028; Application of the Dep't of Educ., Appeal No. 07-120). To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]; Piazza v. Florida Union Free Sch. Dist., 2011 WL 1458100, at *1 [S.D.N.Y. Apr. 7, 2011]; Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *30 [N.D.N.Y. Sept. 29, 2009] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 380 [S.D.N.Y. 2008]; see also Schreiber v. East Ramapo Central Sch. Dist., 700 F. Supp. 2d 529, 556 [S.D.N.Y. 2010] [noting that when defending a unilateral placement as appropriate under the IDEA, a parent in some circumstances may also be required to demonstrate that appropriate "supplementary aids and services" are provided to the student]).

In New York State, policy guidance explains that "the IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address one or more of the following needs in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 25, Office of Special Educ. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). "The behavioral interventions and/or supports should be

indicated under the applicable section of the IEP," and if necessary, "[a] student's need for a [BIP] must be documented in the IEP" (*id.*).²² 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 having an FBA conducted and a BIP developed for a student in certain non-disciplinary situations (8 NYCRR 200.4[d][3][i], 200.22[a], [b]). An FBA is defined in State regulations 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 and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also 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 failure to comply with this procedure does not automatically render a BIP deficient (*A.H.*, 2010 WL 3242234). Nevertheless, 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 F3d at 190). The Court also noted that when required "[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 address the student's problem behaviors (*id.*).

With regard to a BIP, the special factor procedures set forth in State regulations further note that the CSE or CPSE "shall consider the development of a [BIP] for a student with a disability when: (i) the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions; (ii) the student's behavior places the student or others at risk of harm or injury; (iii) the CSE or CPSE is considering more restrictive programs or placements as a result of the student's behavior; and/or (iv) as required pursuant to" 8 NYCRR 201.3 (8 NYCRR 200.22[b][1]). Once again, "[i]f a particular device or service, including an intervention, accommodation or other program modification is needed to address the student's behavior that impedes his or her learning or that of others, the IEP shall so indicate" (8 NYCRR 200.22[b][2]). If the CSE determines that a BIP is necessary for a student "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

²² While the student's need for a BIP must be documented in the IEP, and prior to the development of the BIP, an FBA either "has [been] or will be conducted" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 25 [emphasis in original]), it does not follow that in every circumstance an FBA must be conducted and a BIP developed at the same time as the IEP (see *Cabouli v. Chappaqua Cent. Sch. Dist.*, 2006 WL 3102463 [2d Cir. Oct. 27, 2006]).

effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR 200.22[b][4]).²³ 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," Office of Special Education [April 2011], available at <http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf>). However, once a student's BIP is developed and implemented, "such plan shall be reviewed at least annually by the CSE or CPSE" (8 NYCRR 200.22[b][2]). Furthermore, "[t]he implementation of a student's [BIP] shall include regular progress monitoring of the frequency, duration and intensity of the behavioral interventions at scheduled intervals, as specified in the [BIP] and on the student's IEP. The results of the progress monitoring shall be documented and reported to the student's parents and to the CSE or CPSE and shall be considered in any determination to revise a student's [BIP] or IEP" (8 NYCRR 200.22[b][5]).

The December 2009 IEP contained information regarding the student's behavioral needs that was used to develop a BIP. Specifically, the December 2009 IEP noted that the student's behavior seriously interfered with instruction and required additional adult support, and it indicated that behavioral support would be provided by the classroom teacher and paraprofessional as well as the student's related services providers (occupational therapist, physical therapist, and speech-language therapist) (Parent Ex. 6 at pp. 4, 12). The student's behavioral needs were reflected in more detail in the IEP in the description of his present level of social/emotional performance, including that the student's mood and personality often changed from happy to upset, anxious, irritated and frustrated; that he could be verbally and physically aggressive; and that at times the student engaged in self-abusive behaviors such as punching himself in the head, scratching himself, and eating staples (*id.* at p. 4).²⁴ To address the student's behavioral needs, the IEP included strategies to address the student's social/emotional management needs, including provision of constant praise and other forms of positive reinforcement; prompts and redirection to maintain attention and focus; and instruction, modeling and reinforcement of social skills (*id.*). In addition to the IEP, a BIP was prepared for the student which described the behaviors that interfered with the student's learning, including his difficulty paying attention and maintaining concentration; difficulty controlling and expressing his emotions and poor anger management; and self-abusive behaviors such as punching himself, ganging fists on table, and eating staples (*id.* at p. 16). The BIP outlined the student's expected behavior changes including demonstrating ability to sit for extended periods of time (improved attention and concentration); to communicate his feelings and control his anger/frustration (manage his emotions in more socially appropriate ways); and to engage less frequently in self-abusive behavior (*id.*). According to the BIP, the strategies that would be employed in order to change the student's behavior included the provision of: (1) constant positive reinforcement in the form of tangible rewards (cookies, tokens to exchange for chosen reinforcer) and privileges such as the use of a computer, puzzles, or music; (2) consequences for poor behavior including loss of privileges, removal from desk, or talking to/reprimanding him; (3) the opportunity to re-earn a reward if the student demonstrates appropriate behavior; and (4) ongoing communication between teacher, parent, related service providers, and the outside

²³ The Official Analysis of Comments to the federal regulations explains that the decision regarding whether a student requires interventions such as a BIP rests with the CSE and is made on an individual basis (Consideration of Special Factors, 71 Fed. Reg. 46683 [August 14, 2006]).

²⁴ As noted in earlier discussion this description of the student was consistent with information provided by the student's mother, his developmental pediatrician and the student's teacher as reflected in the October 2008 psychoeducational report and the September 2009 comprehensive Psychosocial Evaluation (compare Parent Ex. 6 at p. 4 with Parent Ex. 27 at p. 4 and Parent Ex. 28 at pp. 1, 4).

pediatrician (*id.*). The BIP also incorporated supports to assist the student in changing his behavior including related services, reinforcing classroom goals and ongoing support from classroom paraprofessionals (*id.*). Although the hearing record does not indicate that an another FBA after the May 2008 FBA was completed prior to the development of the December 2009 BIP, I note that the lack of an FBA does not automatically result in a denial of a FAPE, particularly where, as here, the IEP "adequately identifies the problem behavior and prescribes ways to manage it" (A.C., 553 F.3d at 172; FB v New York City Dept. of Educ., 2013 WL 592664 at *10 [SDNY Feb. 14, 2013]) Based on the above, the hearing record demonstrates that for the December 2009 IEP, the CSE developed an adequate and appropriate BIP for the student.

5. 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]). State regulations further provide for the provision of parent counseling and training for the purpose of enabling parents of students with autism to perform appropriate follow-up intervention activities at home (8 NYCRR 200.13[d]). Under State regulations, the definition of "related services" includes parent counseling and training (8 NYCRR 200.1[qq]). 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 individualized education program" (8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]). However, Courts have held that a failure to include parent counseling and training on an IEP does not constitute a denial of a FAPE where a district provided "comprehensive parent training component" that satisfied the requirements of the State regulation (see M.W. v. New York City Dep't of Educ., 2012 WL 2149549, at *13 [E.D.N.Y. June 13, 2012]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *10 [S.D.N.Y. Oct. 28, 2011]; M.N. v. New York City Dep't of Educ., 700 F. Supp. 2d 356, 368 [S.D.N.Y. Mar. 25, 2010]), or where the district was not unwilling to provide such services at a later date (see M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 509 [S.D.N.Y. 2008]; but c.f., P.K. v. New York City Dep't of Educ., 2011 WL 3625088, at *9 [E.D.N.Y. Mar. 2011], adopted at, 2011 WL 3625317 [E.D.N.Y. Aug. 15, 2011]; R.K. v. New York City Dep't of Educ., 2011 WL 1131492, at *21 [E.D.N.Y. Jan. 21, 2011], adopted at, 2011 WL 1131522 [E.D.N.Y. Mar. 28, 2011]). Recently, the Second Circuit explained that "because school districts are required by [State regulation]²⁵ to provide parent counseling, they remain accountable for their failure to do so no matter the contents of the IEP. Parents can file a complaint at any time if they feel they are not receiving this service" (R.E., 694 F3d at 191). The Court further explained that "[t]hrough 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" (*id.*).

A review of the December 2009 IEP reveals that parent counseling and training was not included in the CSE's recommendations and consequently the district failed to satisfy the requirement that such services be identified on the IEP (Parent Ex. 6). The evidence shows that the service was available, insofar as the assistant principal at the school testified that the school offered parent counseling and training including a monthly family night where parents are invited to participate in various workshops and the services of a parent coordinator who provides training and is also available at certain times for parents to contact (Tr. p. 226). She further

²⁵ 8 NYCRR 200.13[d].

testified that parents are informed about the workshops via a recording that calls parents to inform them of events at school, as well as via fliers and outreach from the parent coordinator and teachers (Tr. p. 227). She also testified that she took attendance at the workshops and the student's parent did not attend any of the trainings at school (Tr. p. 226). Testimony by the parent indicated that, while she was aware of family night and had seen flyers on the school bulletin board related to general topics such as guardianship and Medicaid service coordination, she was never made aware of any workshop or training specific to parenting children with autism or how the student's disability affects him (Tr. pp. 703-05).

I find under the circumstances of this case that the district's failure to incorporate parent counseling and training into the December 2009 IEP was a violation of State regulation, but it did not rise to the level of a denial of a FAPE to the student (see R.E., 694 F.3d at 191; C.F., 2011 WL 5130101, at *10; M.N., 700 F. Supp. 2d at 368; M.M., 583 F. Supp. 2d at 509; M.W., 2012 WL 2149549, at *13). Additionally, I note that, as stated by the Second Circuit, the district "remain[s] accountable for its failure to [provide parent counseling and training] no matter the contents of the IEP" due the requirements in State regulation (R.E., 694 F3d at 191).

D. December 2010 IEP

1. Evaluative Data

Turning next to the second IEP at issue in this case, the hearing record shows that additional evaluative information regarding the student had been documented at the time of the December 20, 2010 CSE meeting (Parent Exs. 21; 24; 25; 43; 44; 45; 46; 47; 49; 50). An update of the student's progress related to his short-term instructional priorities was completed on January 15, 2010 (Parent Ex. 49). The progress report indicated that the student had made "little progress" on all of his short-term instructional priority objectives but was anticipated to meet his IEP goals given more time (id. at pp. 1-3).

A comprehensive psychological evaluation of the student was completed on January 20, 2010 and April 21, 2010 (Parent Ex. 25). The resultant evaluation report reiterated information regarding the student's developmental and educational history and his diagnoses, provided new information regarding the student's current medications and noted the behavioral observations made during testing, including that the student demonstrated poor eye contact, difficulty with his level of attention and concentration, demonstrated inadequate frustration tolerance for challenging tasks, and was able to speak in single words but had difficulty following simple, single step directives of the evaluator during the testing session (Parent Ex. 25 at pp. 1-2). With regard to the student's cognitive functioning, the report indicated that administration of the Stanford Binet Intelligence Scales-Fifth Edition (SB-5) yielded a Full Scale IQ of 40 (or less than 0.1 percentile) (id. at pp. 2-4). Administration of the VABS-II with the student's mother serving as respondent, yielded a Communication standard score of 45 (less than 1 percentile), a Daily Living Skills standard score of 52 (less than 1 percentile), a Socialization standard score of 52 (less than 1 percentile), and an Adaptive Behavior Composite of 50 (less than 1 percentile) (id. at pp. 3-5). The parent reported that, among other things, that the student followed simple, single step directives and sometimes had difficulty following two-step directives (Parent Ex. 25 at p. 4). The evaluator indicated that the student's current testing indicated that he functioned within the moderate range of mental retardation (id. at p. 5).

On June 18, 2010, a PT progress report was also completed with regard to the student (Parent Ex. 50).²⁶ The progress report reflected that the student was receiving PT services of two 30-minute individual sessions per week in and out of the classroom setting, and noted the student's deficits in muscle strength on both lower extremities and that his developmental and cognitive delays prevented him from participating in basic school activities (id. at pp. 1-2). The PT report indicated that the student had made progress toward but had not yet met the goals on his December 2009 IEP which addressed increasing his overall fitness level and activity tolerance necessary for participation in school activities (id.) The PT progress report also included two new short-term objectives that modified the criteria for mastery of previous short-term objectives which focused on activity tolerance and improving his coordination, and one new short-term objective that addressed maintaining his trunk balance (id. at p. 2.).

The student's progress toward his instructional priority plan goals was reflected in a report card dated August 13, 2010 completed by the student's teacher, indicating that the student was anticipated to meet four of his six instructional priority plan goals and that he had met the remaining two (Parent Ex. 47 at p. 1). Teacher comments indicated that the student had also been "meeting a few of his IEP goals" (id.).

A document described as a "Student's Strengths-Based Profile" was completed on September 17, 2010 which included brief notes regarding the student's current program and staff; his autism diagnosis and medical history; his communication mode and ability expressively, receptively, and interpersonally; sensory issues, self stimulatory and self injurious behaviors; motivators; preferred mode of learning and level of support required; academic performance levels; and ADL skills (Parent Ex. 46; see Tr. p. 299).

The hearing record also reflects that the student was administered the Brigance Inventory of Early Development-II on September 21, 2010 (Tr. p. 110; Parent Ex. 21 at p. 2). The test booklet indicates that the student's mother participated in the administration of the Brigance on that date (Parent Ex. 21 at p. 2).²⁷

A document entitled "Student Communication Profile" dated October 8, 2010, described the student's abilities related to comprehension/receptive language and expressive language (Parent Ex. 24 at pp. 1-2; see Tr. p. 285). According to the October 2010 document, the student responded to gestures but was on a higher prompt level and indicated the number and type of symbols that the student understood, the size of the symbols to be presented at one time, and that the student understood spoken multiple word combinations and spoken sentences when repeated in a positive way (Parent Ex. 24 at p. 1). Expressively, the profile indicated that the student utilized banging on the table to communicate and that, given access to symbols, he did not use them but instead purposefully communicated with others via nonverbal means such as gesturing,

²⁶ The June 18, 2010 PT progress report reflects that at the time of the report the student was 19 years old; however, based on his date of birth the student was 14 years of age (see Parent Ex. 50 at p. 1).

²⁷ Although the Brigance Inventory of Early Development II reflects that the student was assessed on September 21, 2010, the December 2010 IEP reflects that the test was administered in October 2010 (compare Parent Ex. 5 at p. 3, with Parent Ex. 21 at p. 2). A color copy of Parent Ex. 21 was requested of the parties by the Office of State Review on July 30, 2012; however, the parties responded indicating that a color version was never submitted into evidence. As such, it is not possible to discern which tasks were assessed on September 21, 2010 because two subsequent dates of assessment are also recorded in this test booklet- a May 5, 2011 administration recorded in blue and a September 20, 2011 administration recorded in red, neither of which can be discerned from the September 21, 2010 administration which was recorded in pencil, without a color copy of the exhibit.

eye pointing, and reaching (id. at pp. 1-2). According to the profile, the student communicated with others using any of the following: spoken words, object symbols, TOBIs, photo symbols or line-drawing symbols (id. at p. 2).²⁸ The profile also indicated that the student required accommodations including de-escalation (calming) strategies, alerting strategies, and a sample practice item to make directions clear (id.). The profile also indicated that gestural prompts could be used with the student, minimally; verbal prompting should be done repeatedly; visual prompts should be paired with verbal prompts; and modeling could be very helpful to the student by giving him a clear idea of what to do with a presented task (id.).

The student's progress on the goals in his December 2009 IEP between January 2010 and November 2010 was documented in a report card that was signed by the student's teacher on November 1, 2010 and the student's mother on November 10, 2010 (Parent Ex. 45). Although the report card did not note the student's progress related to his OT goals, it reflected that the student's performance on all of his other annual goals showed steady improvement from January 2010 through August 2010; however, during November 2010 the student's performance declined (id. at pp. 2-6).²⁹

The hearing record also contains an instructional priority data collection sheet which describes the student's progress during November and December 2010 on short term objectives related to his December 2009 IEP goals with regard to academic areas, handwriting skills, gross motor skills, and community skills (Parent Ex. 43 at pp. 1-2). The data indicates that for both months, the student made "little progress" (ratings of 2) in his ability to identify the numbers in his phone number, identify community signs and traffic symbols, and write his name and letters of the alphabet within the lines on primer sized lined paper (id.). The data reflects that the student had made progress toward, although had not met (ratings of 3) short-term objectives including looking at picture books for enjoyment during reading; answering basic questions about a text read to him; understanding that numbers represent amounts; setting a dinner table; distributing class materials to peers; developing activity tolerance (15-20 minutes on a stationary bike); ambulating up and down four flights of stairs; catching and throwing a ball; and improving his respiratory chest expansion using a theraband (id.).³⁰

On December 3, 2010, a trans-disciplinary meeting took place to discuss the student's goals in preparation for the upcoming CSE meeting (Tr. p. 179; Parent Ex. 16). The meeting

²⁸ The hearing record does not describe the acronym "TOBI."

²⁹ An additional December 17, 2010 report of the student's progress reflected that his performance had improved from "no progress made" to "little progress made" in reading and community awareness skills (Parent Ex. 44 at p. 1; see Parent Ex. 45 at p. 2). This document did not include a report of the student's progress on any of the other goals on the student's current IEP (Parent Ex. 44 at pp. 1-2).

³⁰ I note that the progress ratings on the student's 2010-11 report card are not consistent with the progress reflected in the data collection sheets for November and December 2010 (compare Parent Ex. 43 at pp. 1-2, with Parent Ex. 44 at p. 1 and Parent Ex. 45 at pp. 2-5). For example, while the report card reflects that the student made no progress (indicated by a rating of 2) in his reading skills during November 2010, the November 2010 data collection sheet indicates that the student made progress (indicated by a rating of 3) on two of his three short term objectives related to the annual reading skills goal (compare Parent Ex. 43 at p. 1 with Parent Ex. 45 at p. 2). Overall, the data collection sheet reflects that the student was demonstrating a higher level of functioning than does the November 2010 report card (compare Parent Ex. 43 at p. 1, with Parent Ex. 44 at pp. 2-5). I note that the keys at the bottom of the pages of the data collection sheets and the report card are not the same, specifically with regard to progress ratings, which may account for the different ratings of the student's progress reflected in the two documents (compare Parent Ex. 43 at p. 1, with Parent Ex. 45 at pp. 2-6).

was attended by the student's special education teacher, his occupational therapist, and his physical therapist (Parent Ex. 16). Minutes from the trans-disciplinary meeting noted that the student's primary need was to focus on vocational goals and also indicated that there was no need for a change in program (*id.*). On the same day, the district sent the parent the results of the New York State Alternative Assessment (NYSAA) which indicated that the student's performance was at a level 4 in English language arts, math, science, and social studies, and that he had met or was above the New York State alternate learning standards (Parent Ex. 48).³¹

As described below, the hearing record reflects that new evaluative information had been obtained prior to the December 2010 CSE meeting regarding the student's cognitive, academic, behavioral, and adaptive functioning including communication, daily living, and socialization skills. Although testimony by the parent indicates that she did not receive speech-language, OT, or PT progress reports for the student during the 2010-11 school year, the hearing record contains reports of the student's progress related to all of his goals except his OT goals and objectives (Tr. p. 683; Parent Exs. 44; 45; 50). I note that the CSE ultimately recommended that the student receive speech-language therapy, OT, and PT in the December 2010 IEP and that, if the parent did not receive related services reports, it did not result in a reduction of or termination of related services for the student (Tr. p. 683; Parent Ex. 5 at p. 12).³² Additionally, I note that the student's then-current special education teacher, who would have been familiar with the student's current functioning, participated in the December 2010 CSE meeting and also served as the district representative (Tr. pp. 98-99; Parent Ex. 5 at p. 2).

A review of the December 2010 IEP demonstrates that it contained information that was consistent with the evaluative information available at that time. Consistent with reports, including the January and April 2010 comprehensive psychological evaluation, the September 17, 2010 Strengths-Based Profile, and the June 18, 2010 PT progress report, the December 2010 IEP reflected the student's classification as a student with autism, and noted his history of asthma, gastrointestinal problems, attention deficits, and need for medication, although it did not include that the student had pica and obsessive compulsive disorder (compare Parent Ex. 5 at pp. 1, 5, with Parent Exs. 25 at pp. 1-2; 46; 50 at p. 1). The December 2010 IEP reflects that the CSE recommended continuation of the student's related services including OT, PT, and speech-language therapy (Parent Ex. 5 at p. 12). Although the hearing record does not contain a then-current speech-language progress report, the CSE's recommendation for speech-language therapy was consistent with information contained in the 2010-11 school year student communication profile which indicated overall that the student continued to demonstrate significant deficits in both receptive and expressive language; was consistent with the September 17, 2010 Students Strengths-Based Profile; and was consistent with the student's standard score of 45 (in the low range with moderate deficits) on the communication domain of the VABS-II which was reflected in the January and April 2010 comprehensive psychological evaluation report (Parent Exs. 24 at pp. 1-2; 25 at p. 4; 46). The recommendation for continued PT was consistent with information presented in the June 18, 2010 PT progress report which indicted that the student continued to demonstrate deficits in muscle strength and needed to increase his activity tolerance and overall fitness level (Parent Ex. 50 at pp. 1-2). With regard to the CSE's recommendation for continued OT services, the hearing record does not contain any OT progress reports or evaluations,

³¹ The New York State Alternate Assessment for students with severe cognitive disabilities is further described at <http://www.p12.nysed.gov/assessment/nysaa/home.html>.

³² Testimony by the parent indicated that she did not receive progress reports for the student's related services for the 2009-10, 2010-11, or the 2011-12 school years (Tr. pp. 682-83).

although the June 18, 2010 PT progress report and the Students Strengths-Based Profile noted that the student was independent in most ADL skills (Parent Exs. 46; 50 at p. 1). However, based on the parent's responses, the student's standard score of 52 on the daily living skills domain of the VABS-II indicates that the student's skills fell in the low range with mild to moderate deficits and indicated continued need (Parent Ex. 25 at p. 4). Regarding handwriting skills, both the Instructional Priority Data Collection Sheets for November and December 2010 and the student's November 2010 report card reflected that the student had not met his December 2009 IEP goals and demonstrated continued need in this area (Parent Exs. 43 at pp. 1-2; 45 at pp. 5, 7, 10). Furthermore, the hearing record indicates that the student required de-escalation (calming) strategies associated with his difficulty communicating, which would also indicate a need for OT services (Parent Ex. 24 at p. 2).

A review of the academic performance and learning characteristics section of the December 2010 IEP reveals that it included information consistent with that in the September 2010 Students Strengths-Based Profile, the October 2010 student communication profile, and the June 18, 2010 PT progress report regarding communication and attention, in that it reflected that the student communicated using phrases to express his wants and needs and could follow simple one and two-step directions, and that he required close supervision to redirect his attention and remain focused (compare Parent Ex. 5 at p. 3 with Parent Exs. 24 at pp. 1-2; 25 at p. 4; 46; 50 at p. 1). Consistent with the January and April 2010 comprehensive psychological evaluation, the December 2010 IEP indicated that the student could recognize and name many objects in pictures (Parent Ex. 25 at p. 3). Similar to the previous IEP, the December 2010 IEP reflected that the student was administered the Brigance Inventory of Early Development II in October 2010; however, the IEP does not include specific scores for any academic areas but instead indicates "N/A" under the scores column and further reflects "alternate performance indicators" where the student's instructional levels would normally be indicated (Parent Ex. 5 at p. 3).³³ As such, the student's then-current academic functional level is not documented in the December 2010 IEP. However, the IEP contained a description of some of the tasks that the student was able to perform within the classroom setting including following a daily picture schedule with prompting; completing work task activities throughout the day such as matching letters, sorting coins/bills, sorting by color, shape, and size, completing a color, cut, and paste activity independently, and participating in a computer activity (id.). Although the hearing record does not indicate the source of this information, as noted above, the student's teacher, who would have been familiar with the student's then-current abilities, participated in the December 2010 CSE meeting (id. at p. 2).

Regarding the student's academic management needs, the December 2010 IEP carried over all of the strategies that were included in the student's previous IEP except for the student's need to use math manipulatives and that he was resistant to sitting for long periods of time (compare Parent Ex. 5 at p. 3, with Parent Ex. 6 at p. 3).³⁴ Consistent with the academic

³³ Although Parent Exhibit 21 is a monochrome copy of the Brigance Inventory of Early Development, the specific tasks that the student was able to perform during the September 21, 2010 administration of the test cannot be discerned from those recorded during two subsequent administrations of the test in the absence of a color copy of the original test protocol (see Parent Ex. 21 at p. 2).

³⁴ I note that in accordance with the deletion of the use of math manipulatives, the December 2010 IEP did not include annual goals and short-term objectives in the area of math skills (see Parent Ex. 5 at pp. 6-9). Furthermore, I note that testimony by the student's teacher indicated that many of the students in her class reach a plateau in their ability to acquire academic skills and, while she continues to work with students as much as possible academically, she also works on functional activities to prepare students for independence or working in the community after they graduate (Tr. p. 109). In accordance with this, the December 2010 IEP does not

management needs included in the December 2010 IEP, the student's continued deficits in attending and his need for prompts and cues to maintain attention to tasks, as well as his need for repetition of directions and instructions and modeling of tasks, were also reflected in the then-current evaluative information (Parent Exs. 24 at pp. 1-2; 25 at p. 2; 46; 50).

A review of the description of the student's present level of social/emotional performance on the December 2010 IEP reveals that it contains updated but similar information to that in his previous IEP with regard to his verbally and physically aggressive and self abusive behaviors when frustrated or irritated, his need for close supervision, and his need for constant prompting to maintain his attention to task (compare Parent Ex. 5 at p. 4, with Parent Ex. 6 at p. 4). A review of then-current evaluative information demonstrates that the student continued to exhibit these behaviors prior to the December CSE meeting. For example, with regard to his attending needs, the September 2010 Students Strengths-Based Profile indicated that the student required continual redirection to task (Parent Ex. 46); the June 2010 PT progress report reflected that the student exhibited a poor attention span which interfered with task completion (Parent Ex. 50 at p. 1); the 2010-11 Student Communication Profile noted that the student required "alerting strategies" and repeated verbal and visual prompts (Parent Ex. 24 at p. 2); and the January/April 2010 Comprehensive Psychological Evaluation indicated that the student demonstrated difficulty with his level of attention and concentration and his ability to remain on task (Parent Ex. 25 at p. 2). This evaluation also noted that the student demonstrated inadequate frustration tolerance and that he would push items away and attempt to walk away when presented with challenging tasks (id.). The June 2010 PT progress report indicated that the student's mood varied greatly and that at times he was upset, irritated, and frustrated (Parent Ex. 50 at p. 1). The 2010-11 Student Communication Profile reflected that the student communicated behaviorally through aggressive behavior such as banging on the table and that he required de-escalation or calming strategies as an accommodation to address his communication difficulties (Parent Ex. 24 at pp. 1-2). However, I note that the hearing record does not indicate whether a vocational assessment of the student was completed prior to the development of the December 2010 IEP (see Tr. pp. 180-81, 690).³⁵

As described above, the evidence shows that there was adequate evaluative material was available from which the student's December 2010 IEP could be developed and therefore the parent's claim that the district failed to evaluate the student must fail. The evidence also demonstrates that the statement of the student's special education needs in the December 2010 IEP was consistent overall with information that was reflected in evaluative materials that had been completed at the time of the December 2010 CSE meeting. Consequently any of the deficiencies alleged by the parent in her complaint did not result in a denial of a FAPE and therefore the IHO's conclusion in this regard is well supported by evidence in the hearing record and, once again, will not be disturbed.

2. Goals

A review of the December 2010 IEP reveals that the CSE did not continue annual goals and short-term objectives which addressed academics and that, as noted above in the discussion

contain any goals that address academics (see Parent Ex. 5 at pp. 5-9).

³⁵ As noted above with regard to the December 2009 IEP, the parent testified that she vaguely remembers providing input for a vocational assessment of her son via a form that was sent home at least once and perhaps twice during 2009 and 2010 (Tr. p. 690).

of the student's academic management needs and consistent with the student's transition plan, the new goals and objectives placed greater degree of focus on the development of functional skills (Parent Ex. 5 at pp. 6-9). Specifically, the December 2010 IEP included annual goals and short-term objectives which addressed the student's ability to set the table, sort pictures of food and clothing by category, and use a computer keyboard to type his name (*id.* at pp. 6-7). Consistent with the student's social/emotional management needs reflected in the December 2010 IEP, which indicated that the student required instruction, reinforcement and modeling of social skills, this IEP also included long term goals and short-term objectives which focused on pragmatic language skills including identifying and exchanging items for an activity with a peer; taking turns in a group activity and verbalizing "my turn," and greeting peers with a handshake (*id.* at p. 6).³⁶ The December 2010 IEP also addressed the student's needs related to OT including his fine motor and ADL skills with a goal and objectives that addressed the student's ability to tie his shoes, and also addressed the student's sensory and behavioral needs with a goal and short-term objectives that addressed the student's use of self-calming and relaxation techniques (Parent Ex. 5 at pp. 4, 8-9). The December 2010 IEP also addressed the student's gross motor needs with an annual goal and short-term objectives which focused on developing the student's overall aerobic fitness level (*id.* at p. 8).³⁷ Based on the above, with the exception of fine and gross motor skills, the student's goals were consistent with his needs as reflected in the present levels of performance on the IEP.

The student's December 2010 annual goals and short-term objectives contained sufficient specificity by which to guide instruction and intervention, evaluate the student's progress, gauge the need for continuation or revision, and contained adequate evaluative criteria (see Parent Ex. 5 at pp. 6-9). The December 2010 IEP annual goals and short-term objectives included evaluative criteria, evaluative procedures, and evaluative schedules similar to those included in the previous IEP, including, for example, 4/5 trials within a two week period as evaluative criteria; teacher observation, data collection, and classroom activities as evaluative procedures; and evaluative schedules including at each marking period, every four months, or every two weeks (compare Parent Ex. 5 at pp. 6-9, with Parent Ex. 6 at pp. 6-11). Based on the above, the December 2010 IEP annual goals and short-term objectives were appropriate and adequately addressed the student's needs.

3. Speech-Language Instruction

With regard to the student's speech-language needs at the time of the December 2010 CSE meeting, the December 2010 IEP reflected that the student was communicating using short sentences and phrases to express his wants and needs, could follow one and two-step directions, and recognized many pictures and symbols (Parent Ex. 5 at p. 3). The IEP reveals that the CSE continued its recommendation for two 30-minute group (of 3) speech-language sessions per week and, although not specifically identified as speech-language goals, the CSE incorporated annual goals and short-term objectives that addressed both the student's expressive and receptive language skills (*id.* at pp. 6, 12). For example, to address the student's expressive language skills, the IEP included goals that required the student to identify items needed during an

³⁶ I note that the short-term objectives listed under the annual goal which addresses setting the table are not related to this goal and, as such, are actually three additional annual goals (Parent Ex. 5 at p. 6).

³⁷ Although the December 2010 IEP reflected a recommendation for both OT and PT services for the student and included annual goals and objectives in these domains, the IEP did not include a description of the student's fine and gross motor skills in the present levels of performance (Parent Ex. 5 at pp. 8-9, 12).

activity, verbalize "my turn" when taking turns during a group activity, and greet students by shaking hands (*id.* at p. 6). To address the student's receptive language skills, the IEP included an annual goal with short-term objectives that required the student to place pictures of the same category together given verbal cues to do so, and in response to, "Where does this picture go?" (*id.*). The student's speech language services were similar to those contained on his December 2009 IEP and with regard to the December 2009 IEP goal that focused on the student's ability to initiate social conversation with peers and adults (Parent Ex. 6 at p. 11), the evidence shows that the student had made progress on this goal as indicated in IEP progress updates between January 15, 2010 and November 10, 2010 where the student earned a rating of 4 (progress made; goal not yet met) on four of the six progress updates and earned a rating of 3 (little progress made) on the two remaining updates (Parent Ex. 45 at p. 6). The hearing record reflects that overall the student made progress toward meeting his social interaction goal that addressed the student's receptive language skills in his December 2009 IEP; the student earned ratings of 3 (little progress) on this annual goal during three of the six updates, earned a rating of 4 (progress made; goal not yet met) on two of the six updates, and earned a rating of 2 (no progress made) on one progress update (Parent Ex. 45 at p. 3; *see* Parent Ex. 6 at p. 8). I note that an undated handwritten notation on the progress update indicated that the student had met the short-term objective that addressed his ability to play board games (*id.*). The forgoing progress under the December 2009 IEP shows that the CSE's decision to continue similar speech language services in the December 2010 IEP was appropriate. As the court explained in S.H. v. Eastchester Union Free School Dist. (2011 WL 6108523, at *10 [S.D.N.Y. Dec. 8, 2011]), "[a]lthough past progress is not dispositive, it does 'strongly suggest that' an IEP modeled on a prior one that generated some progress was 'reasonably calculated to continue that trend'" (quoting Thompson R2-J Sch. Dist. v. Luke P. ex rel. Jeff P., 540 F.3d 1143, 1153 [10th Cir. 2008]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at * 12 [E.D.N.Y. Sept.2, 2011] J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F.Supp.2d 606, 650 [S.D.N.Y.2011] M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *16 [S.D.N.Y. Sept. 29, 2008]). Similarly in this instance, the hearing record demonstrates that the annual goals and short-term objectives together with the twice weekly speech-language services set forth in the December 2010 IEP were adequately designed to address the student's speech-language needs.

4. Special Factors and Interfering Behaviors

The December 2010 IEP contained information similar to that in the December 2009 IEP with regard to the student's behavioral needs. Similar to the December 2009 IEP, the December 2010 IEP indicated that the student's behavior seriously interfered with instruction and required additional support from the classroom teacher, classroom paraprofessional, and the student's related service providers which would include the student's occupational therapist, his physical therapist, and his speech-language therapist (Parent Ex. 5 at pp. 4, 12). The December 2010 IEP also continued to reflect that at times, the student displayed inappropriate behavior including anger, negative behavior, and work refusal, and that the student may become verbally abusive and/or self-abusive when frustrated, irritated, or "caught doing something" (*id.* at p. 4). The IEP also noted that it was "best to engage [the student] in work task activities with constant verbal prompting in order to keep him occupied" (*id.*). Accordingly, to address the fact that the student continue to have behaviors that interfered with his learning, the IEP carried over provision of the strategies used to address the student's social/emotional management needs from the previous IEP, including provision of constant praise and other forms of positive reinforcement; prompts and redirection to maintain attention and focus; and instruction, modeling, and reinforcement of social skills (*compare* Parent Ex. 5 at p. 4, *with* Parent Ex. 6 at p. 4).

With regard to his interfering behaviors, the student's BIP was also updated (compare Parent Ex. 5 at p. 14, with Parent Ex. 6 at p. 16). The revised BIP indicated that similar strategies to those included in the previous BIP would be utilized to try to change the student's behaviors, including provision of constant positive reinforcement in the form of tangible rewards, consequences for poor behavior, and ongoing communication between teacher and student (compare Parent Ex. 5 at p. 14, with Parent Ex. 6 at p. 14). The December 2010 BIP also reflected supports that would be employed in order to assist the student in changing his behavior including the provision of verbal praise and/or a preferred activity from the teacher or classroom staff and reinforcers after the student completed his work task activities (Parent Ex. 5 at p. 14). Again, although the hearing record does not reflect that an additional FBA was completed after May 2008 and prior to the development of the December 2010 BIP, I note that any lack of an FBA did not in this instance result in a denial of a FAPE where the IEP also identified the problem behaviors and prescribed strategies to address them.

5. Parent Counseling and Training

A review of the December 2010 IEP reveals that parent counseling and training once again was not included among the CSE's written recommendations (Parent Ex. 5). As noted previously, the hearing record also includes testimony by the assistant principal at the school that indicated that the school offered a monthly family night where parents are invited to participate in various workshops and the services of a parent coordinator who provides training and is also available at certain times for parents to contact, and that parents are informed about the workshops via a recording that calls parents to inform them of events at school, as well as via fliers and outreach from the parent coordinator and teachers (Tr. pp. 226-27). While the assistant principal testified that she knew that the student's parent did not attend any of the trainings at school because she took attendance at the workshops, testimony by the parent indicated that while she was aware of family night and had seen flyers on the school bulletin board related to general topics such as guardianship and Medicaid service coordination, she was never made aware of any workshop or training specific to parenting children with autism or how the student's disability affects him (Tr. pp. 226, 703-05). I only note that this retrospective evidence appears in the hearing record, but it may not be used to rehabilitate an IEP. However, I also note that similar to the December 2009 IEP, that the failure to note parent counseling and training on the IEP did not in this instance rise to the level of a denial of a FAPE to the student (see R.E., 694 F3d at 191).

E. March 7, 2011 IEP

1. Evaluative Data

With regard to the development of the March 7, 2011 IEP, the student's 2010-11 special education teacher testified that after the parent requested a reevaluation of the student in January 2011, the district psychologist administered a battery of tests which were later discussed at the March 7, 2011 CSE meeting (Tr. pp. 115-16, 136-37, 181; Parent Ex. 12). However, as described below, the hearing record in this case contains only two of the tests that were prepared in preparation for the March 7, 2011 CSE meeting; a March 7, 2011 VABS-II survey interview report conducted by the district psychologist where the student's teacher served as respondent, and a March 1, 2011 teacher evaluation (Parent Exs. 22; 23).

The March 1, 2011 teacher evaluation consisted of a brief one page report indicating that with regard to receptive and expressive language skills, the student communicated using short

sentences and phrases; could follow two-step directions and a daily picture schedule with some verbal prompting; was able to recognize and match many pictures and symbols; and could identify colors, shapes and numbers up to ten (Parent Ex. 23). With regard to the student's strengths, weaknesses and needs, the teacher evaluation reflected that the student required close supervision to redirect his attention and to remain focused on tasks and that he benefited most when lessons were presented using visual cues and verbal prompting (id.). The report also indicated that the student was independent in all ADL skills including eating, drinking, toileting, and hand washing (id.).

Based on responses provided by the student's then-current teacher, the March 7, 2011 VABS-II survey interview report indicated that the student's adaptive level was in the low range of functioning in all domains assessed, which included communication, daily living skills, and socialization, and the assessment yielded an adaptive behavior composite score in the low range as well (Parent Ex. 22 at pp. 2-5). The report also indicated that the student's abilities earned a percentile rank of less than one for each of the domains above and for his adaptive behavior composite score (id. at p. 2). I note that the student's functioning in the motor skills domain was not included in this report (id.).

The hearing record also contains documents that reflect the student's progress toward his December 2010 IEP goals and objectives during January and February 2011, just prior to the March 7, 2011 CSE meeting (Parent Exs. 38 at p. 2; 43 at pp. 4-5). The report card/progress report and the instructional data collection sheets indicated ratings of "little progress made" for all three of the short term objectives rated and further indicated that the student was anticipated to meet his goals given more time (Parent Exs. 38 at pp. 2-4; 43 at pp. 4-5).³⁸

A review of the student's March 7, 2011 IEP shows little change from the student's previous December 2010 IEP. The CSE did not make modifications with regard to the student's placement recommendation, present levels of performance, related services, or to the student's transition plan (compare Parent Ex. 3 at pp. 1-5, 8, 10, 11, with Parent Ex. 5 at pp. 1, 3-5, 10, 12, 13). With regard to annual goals, although the OT and PT goals addressing fine motor, self-calming and gross motor (aerobic fitness) skills from the previous December IEP were not included in the March 2011 IEP, the IEP reflected that the student's OT and PT services continued at the same frequency and duration as in the previous IEP (see Parent Exs. 3 at pp. 6, 7, 10; 5 at pp. 8, 9). With regard to the student's BIP, the March 2011 IEP indicated that a BIP had been developed for the student although it was not included in the IEP (Parent Ex. 3 at p. 4).

The evidence in the hearing record regarding the updated information available to the March 2011 CSE indicates that there was little change in the student's needs between December 2010 and March 2011 and that it was consistent with the information set forth in the March 2011 IEP. The March 1, 2011 teacher evaluation indicated that the student's classroom functioning continued to be consistent with that described in the academic present level of performance section of the March 2011 IEP. For example, both documents reflected that the student communicated using short sentences and phrases to express his wants; that he was able to identify colors, shapes, and numbers up to ten; that he could follow two-step directions; that he required close supervision to redirect his attention and remain focused on tasks at hand; could follow a daily picture schedule with verbal prompting; could recognize many pictures and

³⁸ I note that the hearing record contains several other exhibits which are duplicative with respect to the student's progress during this time period (see Parent Exs. 40 at pp. 2-3; 41 at pp. 2-4; 42 at p. 1; 47 at p. 2).

symbols; and that the student benefited from provision of visual cues and verbal prompts (compare Parent Ex. 3 at p. 3, with Parent Ex. 23 at p. 1). The results of the VABS-II survey interview report was also consistent with the description of the student in the present levels of academic and social/emotional performance sections of the March 2011 IEP in that it showed the student's significant deficits in receptive and expressive communication, and in his coping and social skills (compare Parent Ex. 3 at pp. 3-4, with Parent Ex. 22 at pp. 2-4). The current report card/progress report and instructional data collection sheets indicated that the student was earning ratings of "little progress made" and was expected to meet his goals given more time (Parent Exs. 38 at pp. 2-4; 43 at pp. 4-5).³⁹

2. Goals

With regard to annual goals and short-term objectives, the March 2011 IEP carried over the goals from the December 2010 IEP that addressed the student's ability to use a computer to type his name, his social pragmatic skills, and his sorting skills (Parent Ex. 3 at pp. 6-7). These goals continued to be appropriately linked to the information reflected in the March 2011 IEP. The OT and PT goals addressing fine motor, self-calming and gross motor (aerobic fitness) skills from the previous IEP were not included in the March 2011 IEP although the hearing record does not reflect that the student's needs related to these areas had changed or that the student had met these goals at the time of the March 2011 CSE meeting (Parent Exs. 3 at pp. 6-7; 5 at pp. 8-9).

3. Speech-Language Instruction

The March 2011 IEP indicated no change in the description of the student's speech-language needs or in the annual goals or short-term objectives that addressed the student's expressive and receptive language skills (compare Parent Ex. 3 at pp. 3, 7, with Parent Ex. 5 at pp. 3, 6). I note that there is nothing in the hearing record that indicates that the student's speech-language needs had changed since the previous December 2010 CSE meeting and, consistent with this, the March 7 2011 IEP recommended continuation of the two 30-minute group (of 3) speech-language therapy sessions per week (Parent Ex. 3 at p. 10). The hearing record contains a progress update for February 4, 2011 which reflected the student's progress on the annual goals and two of the short-term objectives related to the student's communication skills (compare Parent Ex. 38 at pp. 2-3, with Parent Ex. 5 at p. 6).⁴⁰ The update also indicated that the student earned ratings of 3 (little progress made) for his performance related to identifying items needed during an activity and placing pictures of the same category together given verbal cues but further indicated that the student was anticipated to meet his goals and objectives (Parent Ex. 38 at pp. 2-3). In view of the forgoing, it was reasonable in March 2011 to continue the student's speech language services from his December 2010 IEP (see S.H., 2011 WL 6108523, at *10).

4. Special Factors and Interfering Behaviors

³⁹ Testimony by the student's speech-language therapist and the assistant principal at the school indicated that a speech-language evaluation was completed in March 2011 by the student's speech-language therapist, and that it could be provided for the impartial hearing (Tr. pp. 244, 372). The assistant principal further testified that the speech-language evaluation was part of the student's record which was provided in its entirety for the impartial hearing; however, I note that the speech-language evaluation is not contained in the hearing record (Tr. pp. 244, 372).

⁴⁰ I note that in the February 4, 2011 progress update only the first short-term objective under each annual goal was rated (compare Parent Ex. 5 at p. 6, with Parent Ex. 38 at pp. 2-3).

A review of the March 2011 IEP reveals that the description of the student in the present level of social/emotional performance section of the IEP remained unchanged from the previous IEP (compare Parent Ex. 5 at p. 4, with Parent Ex. 3 at p. 4). Accordingly, the IEP continued to indicate that the student's behavior seriously interfered with instruction and that the classroom teacher, classroom paraprofessional, and service providers would be responsible for providing behavioral support (Parent Ex. 3 at p. 4). However, although the IEP indicated that a BIP had been developed for the student, it was not attached to the March 2011 IEP (id.). Although the parent contends that the IHO ignored that the district did not address the student's refusal to attend school, the evidence in the hearing record does not show the student had refused to attend school at the time of the development of the March 2011 IEP. To the contrary, the student's teacher testified that during the 2010-11 school year the student had good attendance and was rarely absent (Tr. p. 194). The assistant principal testified that prior to the student's last day of attendance in November 2011, the student's attendance had been sporadic since September 2011 (Tr. p. 224), which shows that the attendance issue developed a substantial period of time after the IEP in question had been developed. While school refusal that occurs subsequent to the development of a student's IEP may in some circumstances prompt the need for a districts to convene a CSE to review a student's IEP, the Second Circuit has explained that when reviewing the adequacy of a particular IEP, it must be evaluated prospectively as of the time it was created (R.E., 694 F3d at 188).⁴¹

5. Parent Counseling and Training

A review of the March 2011 IEP reveals that parent counseling and training were once more, not included in this IEP (Parent Ex. 3). The facts in the hearing record regarding the

⁴¹ The hearing contained a significant amount of information regarding matters which post dated the issues identified in the parent's due process complaint notice. In a letter to the district dated June 1, 2011, the parent again requested an IEP review for the student, indicating that new information needed to be added to the student's IEP and that she would like to review the student's current placement and services (Parent Ex. 9). Among other things, the hearing record indicates that on June 24, 2011, a "corrected" social/emotional performance page of the December 20, 2010 IEP was created which indicated that a BIP had not been developed for the student for that IEP (Parent Ex. 64). The "corrected" page was initialed by the student's teacher (id.). The student attended the recommended district 6:1+1 program during fall 2011 (see Parent Ex. 34). The student's performance and attendance during PT sessions from September 9, 2011 to November 14, 2011 was documented in session notes completed by the student's physical therapist (Parent Ex. 56 at pp. 1-17). The hearing record reflects that the parent had increasing difficulty getting the student to cooperate with getting on the school bus and going to school beginning in August or September 2011, and that there were occasions when the student needed to be brought to the emergency room due to his escalated behavior (Tr. pp. 101, 108, 193-94, 584, 627, 701-02). The student ultimately stopped attending school on November 18, 2011 after an incident where the parent attempted to get the student to school via taxi which resulted in the police being called and the student taken to the psychiatric emergency room (Tr. pp. 696-701). The student's teacher completed a 2011-12 Instructional Priority Plan Report Card dated November 2011 which reflected that for the October and November 2011 progress updates, the student had demonstrated "little progress" on four of his IEP short-term objectives and was anticipated to meet them, given more time (Parent Ex. 37 at pp. 1-3). Attached to the report card were Instructional Priority Data Collection Sheets for September through December 2011 which included weekly data taken on IEP objectives as well as on the student's performance on additional curriculum areas (id. at pp. 4-11). Page four of Parent Exhibit 37, which shows data related to September 2011, appears to have been photocopied for October and November 2011 (compare Parent Ex. 37 at p. 4 with Parent Ex. 37 at pp. 6, 8). Also data is included for the month of December 2011, however, the student stopped attending school on November 18, 2011 (Parent Ex. 37 at p. 10). While this is troubling information regarding the student and could well form the basis of other claims that may be raised in a complaint by the parent in another proceeding, it is not relevant to this proceeding for the purpose of determining whether the preceding March 2011 IEP was appropriate at the time it was formulated.

parent counseling and training offered by the district are the same as above with regard to the March 2011 IEP. Again, although the district offered monthly workshops on various topics to all parents and access to the parent coordinator, the parent did not avail herself to these trainings as she characterized them as general in nature and not related to parenting children with autism or to how the student's disability affects him (Tr. pp. 226-27, 704-05). I note that the facts and circumstances relating to this specific student is one instance where individualized counseling and training tailored to this parent's and this student's needs would have been more appropriate than the generic services offered to all parents, which underscores the importance of mandating such services on a student's IEP.

VII. Conclusion

Having thoroughly reviewed the entire hearing record as a whole, I find that the evidence does not support a conclusion that the IEPs were not designed to address the student's educational needs. I agree with the IHO's decision to order new evaluations, especially in light of evidence that the parent requested them and due to the fact that the student had a sudden decline in November 2011. I note that the district appears to have offered the parent much of the relief she requested during the resolution meeting of this matter (see Tr. pp. 20-52) and I encourage the parties to continue to work together in a cooperative fashion.

I have considered the parties' remaining contentions and find them unnecessary to address in light of my determinations herein.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
March 15, 2013**


**JUSTYN P. BATES
STATE REVIEW OFFICER**