



The University of the State of New York

The State Education Department

State Review Officer

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No. 12-163

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the [REDACTED]

Appearances:

Law Offices of Regina Skyer and Associates, LLP, attorneys for petitioners, Jaime Chlupsa, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Jessica C. Darpino, 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. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition costs at the Aaron School for the 2011-12 school year. The appeal must be dismissed.

III. Facts and Procedural History

The parties' familiarity with the extensive factual and procedural history of the case, the IHO's decision, and the specification of issues for review on appeal, is presumed and will not be recited here in detail.¹ During the 2009-10 school year (kindergarten), the student attended a general education class placement with integrated co-teaching (ICT) services in a district public

¹ Any additional facts necessary to the disposition of the parties' arguments will be set forth below as necessary to resolve of the issues presented in this appeal.

school and received services consisting of a full-time 1:1 paraprofessional, speech-language therapy, and occupational therapy (OT) (see Parent Ex. I at p. 15; see also Tr. p. 315).²

On March 15, 2010 the CSE convened for the student's annual review and to develop the student's IEP for the 2010-11 school year (see generally Parent Ex. I). Finding the student eligible for special education and related services as a student with an other-health impairment, the CSE recommended a general education class placement with 12:1 ICT services and a full-time 1:1 crisis management paraprofessional, along with related services of speech-language therapy, physical therapy (PT), OT, and counseling (id. at pp. 1, 13, 15).

On December 7, 2010, the CSE reconvened at the parents' request to review the results of a private neuropsychological evaluation report, completed in summer 2010 (see Parent Ex. P at pp. 1-5; Dist. Ex. 13; see also Tr. pp. 24, 316-17). Following discussion of the private neuropsychological evaluation, as well as teacher and related service reports, the December 2010 CSE changed the student's eligibility classification to a student with a learning disability and recommended placement in a 12:1 special class in a community school with full-time 1:1 paraprofessional services (Dist. Ex. 3 at pp. 1-2, 14, 16; see also Tr. pp. 28-31).³ The December 2010 CSE also recommended that the student receive one weekly session each of group and individual speech-language therapy and OT and one group session of counseling per week (Dist. Ex. 3 at p. 16).⁴

According to the parents, by final notice of recommendation (FNR), dated December 15, 2010, the district informed the parents of the particular public school site to which the student was assigned to attend (see Dist. Ex. 1 at p. 4; Tr. p. 329).⁵ The parents visited this assigned public school site on January 5, 2011 (Parent Ex. E; see Tr. p. 329).⁶

By letter dated January 6, 2011, the parents rejected the assigned public school site and notified the district of their belief that the other students in the observed 12:1 special class were functioning at a substantially lower level than the student (Parent Ex. E).

² State regulations define an ICT class as "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). In this case, the terms ICT and collaborative team teaching (CTT) are used interchangeably throughout the hearing record (see, e.g., Tr. pp. 61, 65-66, 73, 315; Dist. Exs. 4 at p. 1; 9 at p. 1; Parent Ex. I at p. 1). For consistency in this decision, the term ICT is used.

³ The student's eligibility for special education and related services as a student with a learning disability is not in dispute in this proceeding (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

⁴ Although the IEP indicates that the December 2010 CSE decided to terminate the student's PT mandate, in another section, it continues to list PT services for the student (compare Dist. Ex. 3 at pp. 1-2, 14, with id. at p. 16).

⁵ A copy of this FNR was not introduced as an exhibit at the impartial hearing.

⁶ According to the assistant principal, the district public school that the student attended during the 2010-11 school year did not have a 12:1 special class appropriate for the student's grade (Tr. pp. 20, 73).

On February 15, 2011, the parents entered into an enrollment contract with the Aaron School for the student's attendance during the 2011-12 school year (see generally Parent Ex. J).⁷

By notice of recommended deferred placement, dated February 28, 2011, the district summarized the program and services recommended in the December 2010 IEP, recommended deferral of the student's placement in the recommended program until August 2011, and advised that the parents that they would receive an FNR by September 7, 2011 (Parent Ex. D). By letter dated March 7, 2011, the parents agreed to deferral of placement until August 2011 and requested that they be given an opportunity to view any proposed classroom while school was still in session (Parent Ex. F). The student continued his then-current placement in the first grade ICT classroom for the remainder of the 2010-11 school year (see Tr. p. 80).

By FNR dated August 16, 2011, the district informed the parents of the public school site to which the district assigned the student to attend for the 2011-12 school year (Dist. Ex. 12). By letter to the district, dated August 24, 2011, the parents informed the district: that they were rejecting the December 2010 IEP due to procedural and substantive defects; that the assigned public school site was inappropriate for the student; and that they intended to unilaterally place the student at public expense for the 2011-12 school year (Parent Ex. B at pp. 1-2).

On September 16, 2011, the parents visited and observed the assigned public school site, and, by letter dated September 20, 2011, the parents informed the district of their objection to the December 2010 IEP and the assigned public school site (Parent Ex. G).

By an amended due process complaint notice, dated January 11, 2012, the parents alleged that the district failed to offer the student a free and appropriate public education (FAPE) for the 2011-12 school year (Dist. Ex. at pp. 1-5).

On April 16, 2012, an impartial hearing convened in this matter and concluded on June 8, 2012, after three days of proceedings (see Tr. pp. 1-453). By decision dated July 11, 2012, the IHO found that the district offered the student a FAPE for the 2011-12 school year (IHO Decision at p. 32).⁸ The IHO found that the CSE was properly constituted and that it conducted a thorough review of the evaluative information before it (id. at pp. 29-31). The IHO also found that the expiration of the December 2010 IEP in December 2011 was of no consequence because the CSE would have reconvened to conduct an annual review and to develop a new IEP for the

⁷ The Commissioner of Education has not approved the Aaron School as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d]; 200.7).

⁸ For the substantially the same reasons articulated by the parents in their petition (see Pet. ¶ 19), only the IHO's findings set forth in the final four pages of his decision constitute the findings that are sufficient to permit review in this matter (see IHO Decision at pp. 29-32).

student for the balance of the 2011-12 school year (*id.* at p. 30).⁹ Next, the IHO found that December 2010 IEP was reasonably calculated to enable the student to receive educational benefits (*id.* at pp. 31-32). In particular, the IHO found: that the recommendation for a 1:1 paraprofessional and related services were appropriate for the student; that the IEP's management needs addressed the student's academic functioning, social/emotional needs, and deficits; that the annual goals and short-term objectives were measurable and appropriate; and that a comprehensive behavior intervention plan (BIP), which had been previously beneficial for the student, was included in the IEP and appropriate for the student (*see id.*).

II. Overview—Administrative Procedures

A party aggrieved by the decision of an IHO may 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]).¹⁰

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parents' petition for review and the district's answer thereto is presumed and will not be recited in depth

⁹ With regard to the parents' claim that the student required a transition plan to assist his transition to the assigned public school, the IHO found that, had the student attended the assigned public school site, the district would have been developed such a plan in conjunction with the new school (IHO Decision at p. 30). The IDEA, however, does not specifically require a school district to formulate a "transition plan" as part of a student's IEP when a student transfers from one school to another (*see A.D. v New York City Dep't of Educ.*, 2013 WL 1155570, at *8-9 [S.D.N.Y. Mar. 19, 2013]; *F.L. v. New York City Dep't of Educ.*, 2012 WL 4891748, at *9 [S.D.N.Y. Oct. 16, 2012]; *A.L. v. New York City Dept. of Educ.*, 812 F. Supp. 2d 492, 505 [S.D.N.Y. 2011]; *E.Z.-L. v. New York City Dept. of Educ.*, 763 F. Supp. 2d 584, 598 [S.D.N.Y. 2011], *aff'd sub nom. R.E. v. New York City Dep't of Educ.*, 694 F.3d 167, 195 [2d Cir. 2012]).

¹⁰ The administrative procedures applicable to the review of disputes 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 are well established and described in broader detail in previous decisions issued by the Office of State Review (*e.g.*, *Application of the Dep't of Educ.*, 12-228; *Application of the Dep't of Educ.*, Appeal No. 12-087; *Application of a Student with a Disability*, Appeal No. 12-165; *Application of the Dep't of Educ.*, Appeal No. 09-092).

here. As discussed more in detail below, the parents argue that the expiration of the 2011-12 IEP in December 2011 denied the student a FAPE; that the recommended 12:1 special class placement in a community school was not appropriate for the student; that the CSE failed to incorporate goals that specified or addressed the role of the 1:1 paraprofessional assigned to the student; that the functional behavioral assessment (FBA) and BIP developed for the student failed to address the student's behavioral needs; and that the assigned public school site was not appropriate. The parent also asserts that the Aaron School was an appropriate unilateral placement for the student for the 2011-12 school year and that equitable considerations favor tuition reimbursement.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. 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., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 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, 486 Fed. App'x 954, 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. New York City Bd. 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. December 2010 CSE and IEP

1. Timing of the CSE meeting

Initially, as the IHO determined, the parents' argument that the district denied the student a FAPE for the 2011-12 school year because the effective dates listed on the IEP did not cover the entire 2011-12 school year must fail. While the IDEA and State Regulations require the CSE to meet "at least annually" (see 20 U.S.C. § 1414[d][4][A] [emphasis added]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]), they do not preclude additional CSE meetings, prescribe when the CSE meeting should occur, or prevent later modification of an IEP during the school year through use of the procedures set forth for amending IEPs in the event a student progresses at a different rate than anticipated (20 U.S.C. § 1414[d][3][D], [F]; 8 NYCRR 200.4[f]-[g]). Additionally, State procedures contemplate changes to an IEP insofar as parents, teachers and administrators are all empowered to refer the student to the CSE if any of those individuals has reason to believe that the IEP is no longer appropriate (8 NYCRR 200.4[e][4]). At the beginning of each school year, a school district must have an IEP in effect for each student with a disability within its jurisdiction (20 U.S.C. § 1414[d][2][A]; 34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]), but there is no requirement that an IEP be produced at a parent's demand (Cerra, 427 F.3d at 194).

In the instant case, the hearing record reflects that the student's December 2010 IEP was in effect at the beginning of the 2011-12 school year, in compliance with State and federal regulations (Dist. Ex. 3 at p. 2). Although the parents accurately observe that the December 2010 IEP's scheduled end date of December 6, 2011 fell prior to the conclusion of the 2011-12 school year, this fact by itself did not render the IEP inadequate to provide the student with a FAPE, insofar as the IEP also indicated a projected review date of December 6, 2011, which would have afforded the CSE an opportunity to conduct an annual review and develop a revised IEP for the student to address the balance of the 2011-12 school year prior to the December 2010

IEP's expiration (*id.*).¹¹ Consequently, the hearing record does not support the conclusion that the effective dates on the December 2010 IEP constituted a procedural violation denying the student of a FAPE for the 2011-12 school year and, even if such timing constituted a violation, under the facts of this case, the evidence does not support a finding that it impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; *see* 34 CFR 300.513; 8 NYCRR 200.5[j][4]; *T.L. v. Dep't of Educ. of City of New York*, 2012 WL 1107652, at *14 [E.D.N.Y. Mar. 30, 2012]).

2. Annual Goals and Short-Term Objectives

Under the IDEA and State regulations, 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]).

In this case, the December 2010 IEP includes thirteen annual goals to address the student's needs in reading, mathematics, writing, attention, participation, answering questions, auditory processing, socialization, fine motor skills, and self-esteem (Dist. Ex. 3 at pp. 6-13). According to the assistant principal, the December 2010 CSE reviewed the annual goals during the meeting, with the input of the student's teachers and related service providers (Tr. pp. 31-32, 61). She further testified that there were no objections to the annual goals at the CSE meeting (Tr. p. 61).

To the extent that the parents argue that the goals in the IEP are not measurable, they are correct that the student's annual goals relating to decoding and mathematics do not contain objective or specific evaluative criteria (Dist. Ex. 3 at p. 6). For example, the first goal on the IEP related to decoding does not explicitly delineate how to determine if the student achieved the goal (*id.*). However, the decoding and mathematics goals provide measurement through teacher conference notes and assessments given every six-to-eight weeks and, as such, "are sufficiently specific so as to allow them to be utilized to demonstrate [the student's] progress over the . . . reporting periods" (*see B.K. v. New York City Dep't of Educ.*, 2014 WL 1330891, at *12 [E.D.N.Y. Mar. 2014]; *see also A.M. v. New York City Dep't of Educ.*, 2013 WL 4056216, at

¹¹ For administrative convenience or to ease the transition from one educational program to another, school districts and parents may often cooperatively engage in efforts to schedule CSE meetings toward the conclusion of an academic school year in order to align the effective dates of revised IEPs with the beginning of the following academic school year; however, a district is not required in all cases to align the effective dates of an IEP with the beginning of a school year in order to comply with its obligations under the IDEA.

*12-*13 [S.D.N.Y. Aug. 9, 2013] [finding that, goals that lack a target achievement level against which progress could be measured, "may still [be] f[ound] . . . 'measurable' if the IEP include[d] a description of how the student's progress toward meeting the annual goals will be measured during the year the IEP is in effect"]; see also R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 295 [S.D.N.Y. 2009], aff'd sub nom., 366 Fed. App'x 239 [2d Cir. 2010]). In any event, while these two annual goals lacked specific evaluative criteria or schedules, the remaining 11 goals were accompanied by "quantifiable evaluative criteria," and therefore, the deficiency with two of the goals did not warrant a finding that the IEP, as a whole, was deficient such that it denied the student a FAPE (B.K., 2014 WL 1330891, at *12; see T.Y. v. New York City Dept. of Educ., 584 F.3d 412, 419 [2d Cir. 2009] [holding that the inadequacies present in the student's IEP did not render it substantively deficient as a whole]; Karl v. Bd. of Educ. of the Geneseo Cent. Sch. Dist., 736 F.2d 873, 877 [2d Cir. 1984] [finding that although a single component of an IEP may be so deficient as to deny a FAPE, the educational benefits flowing from an IEP must be determined from the combination of offerings rather than the single components viewed apart from the whole]; see also Bell v. Bd. of Educ. of Albuquerque Pub. Schs., 2008 WL 5991062, at *34 [D.N.M. Nov. 28, 2008] [explaining that an IEP must be analyzed as whole in determining whether it is substantively valid]; Lessard v. Wilton-Lyndeborough Co-op. Sch. Dist., 2008 WL 3843913, at *6-*7 [D.N.H. Aug. 14, 2008] [noting that the adequacy of an IEP is evaluated as a whole while taking into account the child's needs]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 146-47 [S.D.N.Y. Sept. 26, 2006] [upholding the adequacy of an IEP as a whole, notwithstanding its deficiencies]).

In addition, to the extent that the parents argue that the CSE failed to develop annual goals that incorporated the services to be provided to the student by the 1:1 paraprofessional or to specify training needed by the 1:1 paraprofessional in order to provide services to the student, such failure did not result in the denial of a FAPE for the 2011-12 school year. Initially, annual goals must relate to the student's needs that result from the student's disability and need not be tied to a specific service or provider (cf. J.K. v. Springville-Griffith Inst. Cent. Sch. Dist. Bd. of Educ., 2005 WL 711886, at *9 [W.D.N.Y. Mar. 28, 2005]). Review of the student's December 2010 IEP reveals that it appropriately reflected the role of the 1:1 paraprofessional in supporting the student. In describing the role of the student's crisis management paraprofessional during the 2010-11 school year, the December 2010 IEP stated that the paraprofessional "help[ed] [the student] to be more successful during the school day" and noted that the student was "very easily distracted and benefi[ed] from . . . a full time para[professional]" (Dist. Ex. 3 at p. 3). Further, the IEP specifically lists the paraprofessional as a personal responsible for providing the student behavioral support (id. at p. 4). Further, the student's BIP indicated that the paraprofessional would aid the student "focus, transitions, and follow-through" (id. at p. 17). As such, I decline to find that the CSE's failure to develop annual goals specifying and targeting the servicesto be provided to the student by the 1:1 paraprofessional, with the particularity desired by the parents, does not rise to the level of a denial of a FAPE.

Accordingly, I find that the district adequately addressed the student's needs by way of the annual goals contained in the December 2010 IEP (N.S. v. New York City Dept of Educ., 2014 WL 2722967, at *9 [S.D.N.Y. June 16, 2014]; B.K., 2014 WL 1330891, at *12; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013]).

3. 12:1 Special Class Placement

Next, for the reasons discussed more fully below, the evidence in the hearing record leads to the conclusion that the CSE's recommendation of a 12:1 special class was appropriate to address the student's needs as identified in the evaluative data available to the December 2010 CSE.¹² The hearing record indicates that the December 2010 CSE reviewed a June/July 2010 neuropsychological evaluation, a classroom observation, and the student's December 2010 teacher and related service progress reports (Tr. pp. 28-31, 33; Parent Ex. C at p. 2; Dist. Exs. 7-10; 13; 14).¹³

The student was referred for a neuropsychological evaluation to aid in educational and treatment planning in light of his recent receipt of an ADHD diagnosis (Dist. Ex. 13 at p. 1). The student was assessed in June and July 2010 using the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV), the Developmental Neuropsychological Assessment (NEPSY-II), Woodcock Johnson III Tests of Achievement (W-J III), Clinical Evaluation of Language Fundamentals (CELF-4), and the Behavior Assessment System for Children-Second Edition (BASC II) (Dist. Ex. 13 at pp. 10-12). The evaluator reported that the student's abilities and verbal skills as assessed by the WISC-IV were quite variable (id. at p. 2). The student performed strongest on a task that required him to categorize words, performing at the 63rd percentile and in the average range (id.). The student had more difficulty on a task that required him to orally define vocabulary words, and performed at the 25th percentile (id.). His full scale IQ was measured at 89, which is in the 23rd percentile or the low average range, but was described by the evaluator as a poor indicator of his overall functioning and potential (id.). The student's general abilities index (GAI) of 97, which is in the 42nd percentile or average range, was described as a better estimate of his abilities, but still comprised of very discrepant skills (id.). The student had the most difficulty on a task that required him to solve social and life situations (id. at p. 3). The student performed below the first percentile in processing and responding to open ended "wh" questions (id.). The evaluator stated that, while the student was bright, his language difficulties would impact his learning if he did not continue to receive intensive support (id. at p. 5). The student was described as having academic skills near grade level but at risk for falling behind academically (id.). Finally, the evaluator recommended that the student's eligibility classification should be changed to a student with a learning disability; that OT and speech-language therapy services should continue at a reduced frequency; that PT should be eliminated; and that the student should receive intensive reading support from an Orton Gillingham or Wilson trained reading specialist (id. at p. 6).

The December 7, 2010 IEP described the student's needs in the areas of academic performance and learning characteristics; social/emotional performance; and health and physical development (Dist. Ex. 3 at pp. 3-5). According to the IEP, the student was able to read and comprehend "C" level books and recognize all letters and numbers through 30 (id. at p. 3). His

¹² State regulations define a 12:1 special class in a public school as "the maximum class size for those students whose special education needs consist primarily of the need for specialized instruction which can best be accomplished in a self-contained setting" (8 NYCRR 200.6[h][4]).

¹³ The district's due process response states that the team relied on a classroom observation, among other information, to make its decision at the December 2010 CSE meeting held for the student (Parent Ex. C).

sight word knowledge was increasing and with support he was using the word wall to spell words correctly (id.). The student continued to be challenged by writing activities and required much support to complete simple tasks (id.). With prompts the student accurately counted to 29, and needed adult assistance to complete basic addition problems (id.). The IEP indicated that the student "always tried to do his best" and was generally compliant with adult requests (id.). The student was "very easily distracted" and required frequent reminders to stay on task in academic and non-academic settings (id.). He benefitted from small grouping and a full-time paraprofessional, but often the student appeared to be unfocused and confused during lessons even with those supports (id.). Management needs identified in the IEP indicated that the student required one-on-one attention, prompting, positive reinforcement, affirmative questions, previewing, warnings, auditory or tactile redirection, removal/reduction of distractions, and preferential seating to engage in activities/complete tasks (id.). The IEP further indicated that the student experienced more success during small group or one-to-one instructional situations than in large group settings (id.). According to the IEP, the student was aware of other peers, but did not readily interact with them without support, modeling, and directions (id. at p. 4). Additionally, the student: tended toward "self-involvement"; became lost in his own thoughts; needed prompting to engage in activities and conversations; exhibited decreased eye contact; and displayed limited responsiveness to other people (id.). The IEP also indicated that the student presented with graphomotor, grasp, visual-motor integration, sensory processing, attention, fine and gross motor coordination, and strength and balance deficits, which interfered with his school performance (id. at p. 5).

With regard to the December 2010 CSE's recommendation to change the student's placement from a general education class placement with ICT services to a 12:1 special class, testimonial evidence in the hearing record indicated that the CSE decided that the ICT setting class was becoming overwhelming for the student (Tr. p. 35-36). The assistant principal of the public school, which the student attended for the 2010-11 school year, stated that, as the work was becoming more demanding, the student was withdrawing more and that a 12:1 special class with a 1:1 crisis paraprofessional would be more appropriate for the student (Tr. p. 36). According to the assistant principal, the December 2010 CSE believed that the student "had capacity" but that, as the class work moved faster, the student was feeling worse about himself and his abilities (Tr. p. 36-37). In addition, the student only participated during small groups, and the CSE agreed that the student would be more successful with a smaller class size (Tr. p. 37).

In support of the CSE's recommendation to change the student's placement to a 12:1 special class, the December 2010 IEP included a statement under other programs/services considered that the student required a more intensive program within a community school setting (Dist. Ex. 3 at p. 15). Furthermore, testimony from the parent also indicated that everyone at the December 2010 CSE meeting agreed the student needed a more intensive program than an ICT setting and that other placements on the continuum offered more support than the student required (see Tr. pp. 37, 61-62, 76-77, 325-26; see also Tr. pp. 425-26).

Based on the foregoing, the evidence contained in the hearing record supports the IHO's determination that the district's December 2010 IEP, which recommended an educational program including a 12:1 special class in a community school, speech language therapy, OT,

counseling services, and a 1:1 crisis paraprofessional, was appropriate to address his special education needs as identified in the evaluative information before the December 2010 CSE and was reasonably calculated to enable the student to receive educational benefits for the 2011-12 school year (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). Although I understand that the well-meaning parents in this case may have preferred a smaller educational setting for the student that more closely approximated his Aaron School setting, the hearing record does not support a conclusion that the student would not have had the opportunity to receive educational benefits in the district's recommended 12:1 special class.¹⁴ The district was obligated to offer the student an appropriate education rather than offer one that would maximize the student's potential (Rowley, 458 U.S. at 189), and it met that obligation in this case.

4. Special Factors - Interfering Behaviors

On appeal, the parents argue that the district failed to conduct an appropriate FBA and that the BIP failed to address the student's interfering behaviors and did not address or provide appropriate strategies/interventions to address those behaviors. The hearing record supports the IHO's finding that the December 2010 CSE did not conduct a proper FBA but that a comprehensive BIP, which was developed after a long time of working with the student, was included with the December 2010 IEP (IHO Decision at pp. 31-32). For the reasons discussed below, I find that the district's failure to conduct a proper FBA, standing alone, does not amount to a denial of a FAPE.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ., 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. E. 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;

¹⁴ Although the parents in this case desired a specialized school for the student, the IDEA requires that a student's recommended program must 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 P. v. Newington, 546 F.3d 111, 119-21 [2d Cir. 2008]; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 132 [2d Cir. 1998]; Patskin v. Bd. of Educ. of Webster Cent. Sch. Dist., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]). Thus, the IDEA requires that students with disabilities, such as the student in this case, be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. North Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobol, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). Here, there is no evidence in the hearing record demonstrating that the nature or severity of the student's deficits are such that the student requires removal from a community school in order to receive educational benefit.

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]; Gavity 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. E. Ramapo Cent. 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 pp. 25-26, 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. at p. 25). 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]). State regulations define an FBA as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and

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

(8 NYCRR 200.1[r]). According to State regulations, an FBA shall be based on multiple sources of data 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, at *2).¹

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 effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR 200.22[b][4]). 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]).

In this case, the December 2010 IEP described the student as needing frequent reminders to stay on task and indicated that he was easily distracted and often seemed to be unfocused or confused (Dist. Ex. 3 at p. 3). According to the IEP, the student was aware of other peers, but did not readily interact with them without support, modeling and directions (id. at p. 4). Additionally, the student tended toward "self-involvement," becoming lost in his own thoughts, requiring prompting to engage in activities and conversations, and exhibiting decreased eye contact and limited responsiveness to other people (id.). The December 2010 CSE determined that his behavior seriously interfered with instruction and required additional adult support (id.).

According to the assistant principal, the student's first grade teachers (who attended the December 2010 CSE meeting) developed the BIP based on their completion of an "informal" FBA, consisting of several different behavior charts and observation of the student's success when the classroom teacher utilized systems, in which the student earned desired items or the ability to decline tasks he did not want to complete (Tr. pp. 48-49; see Tr. pp. 25-26). Through

the course of " a lot of trial and error" and using these interventions, the teachers determined that the student was having a difficult time participating but that the paraprofessional helped make activities accessible to him (Tr. pp. 48-50). According to the assistant principal, the classroom teachers attempted to identify triggers and patterns in the student's behavior, and, although none were found, the teachers were able to discern that the student had the most difficulty when on the rug with the whole group (Tr. pp. 48-49). The teachers concluded that the "real behavior[s]" that interfered with his learning were the student's distractibility and how slowly he moved, which became the focus of the BIP (Tr. p. 48).

The district's failure to conduct a proper FBA does not, by itself, automatically render the IEP deficient, as the December 2010 IEP must be closely examined to determine whether it otherwise addressed the student's interfering behaviors (see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 80 [2d Cir. 2014]; F.L., 553 Fed. App'x at 6-7; M.W., 725 F.3d 131, 139-41 [2d Cir. 2013]; R.E., 694 F.3d at 190). The interventions the classroom teachers implemented over the course of the 2010-11 school year did cause them to identify the instructional situation in which the student experienced the most difficulty (whole group activities), the types of difficulties he was having (participating and attending), and what supports were beneficial (paraprofessional aid) (Tr. pp. 48-49; Dist. Ex. 3 at p. 17). Further, as described more fully below, given the description of the student's difficulties in the December 2010 IEP present levels of performance and the CSE's identification (in both the IEP and BIP) of these behaviors as interfering with his learning, the failure of the CSE to identify the triggers of the student's behavior did not result in the denial of a FAPE in this instance (Dist. Ex. 3 at pp. 3-5, 17 [noting the student's high distractibility, slow processing, and slow transition between activities]; Dist. Ex. 13 at p. 1; see also M.W., 725 F.3d at 140 ["Failure to conduct an FBA . . . does not render an IEP legally inadequate under the IDEA so long as the IEP adequately identifies a student's behavioral impediments and implements strategies to address that behavior."]).

With regard to the development and adequacy of the BIP, the BIP attached to the December 2010 IEP and developed by the district described the behaviors that interfered with the student's learning as high distractibility, slow processing, and slow transition/movement between activities (Dist. Ex. 3 at p. 17; see also Tr. p. 78).¹⁵ Behavior changes that the student was expected to make included maintaining his focus through looking or listening, following two and three step directions, and transitioning between activities with greater ease (Dist. Ex. 3 at p. 17). The BIP identified proposed strategies to change the identified behaviors, including: pre-alerting for transitions; visual cues to help with focus and transitions; process charts to develop independence; paraprofessional services to aid with focus, transitions and follow through; and preteaching/reteaching of lesson topics and main ideas (id.). Suggested supports to help the student change his behavior included process charts, preferential seating, visual cues to help with transitions/focus, paraprofessional services throughout the day, verbal praise and stickers for positive behaviors, preteaching/reteaching of the lesson topics and main ideas, breaks, and extended/shortened time depending on task (id.).

¹⁵ The student's mother testified that, although she did not recall a discussion regarding a BIP at the December 2010 CSE meeting, she did agree that the student's behaviors were discussed to some extent because they affected the way he learned (Tr. p. 428).

The assistant principal testified that the BIP was developed after the first grade classroom teachers had worked "a long time" with the student attempting various interventions (Tr. pp. 48-49). The resultant BIP put forth the expectation that the student would remain focused for as long as possible, and increase the amount of steps he could follow at a time (Tr. p. 50; Dist. Ex. 3 at p. 17). According to the assistant principal, the BIP was implemented during the 2010-11 school year and she opined that it was beneficial for the student and district staff observed progress over the course of the year (Tr. p. 51).

Furthermore, to the extent that the parents assert that the BIP failed to identify the student's tendency to withdraw, exhibit anxiety, demonstrate an inability to disengage from preferred topics, or show distracted behaviors (such as looking out the window or playing with the carpet), the December 2010 IEP also provided strategies, including the recommendation of a 1:1 crisis paraprofessional (Dist. Ex. 3 at pp. 3-4), to address these behaviors and sufficiently address the student's needs (see R.E., 694 F.3d at 193; M.W., 725 F.3d at 141). For example, with regard to the student's anxiety, the evidence in the hearing record indicates that this was caused by how the other students were moving past him academically (Tr. p. 41). To address the student's anxiety, the CSE recommended counseling and 1:1 paraprofessional support, as well as small group instruction (Dist. Ex. 3 at pp. 3-4). In addition, the December 2010 IEP contained an annual goal that targeted the student's ability to maintain self-esteem and persevere when tasks took him longer to complete than other children (id. at p. 13). The student's tendency to withdraw was addressed through two annual goals that targeted the student social skills to improve eye contact and interactions with peers (id. at p. 12). Moreover, goals and strategies addressing the student's distractibility included small grouping, preferential seating, cueing, extra time, breaks and assistance from paraprofessional (id. at pp. 3, 7, 17). Under the circumstances of this case, the parents' claim that the district did not offer the student a FAPE by failing to incorporate appropriate behavioral supports in the December 2010 IEP and the attached BIP is without merit.

B. Assigned Public School Site

With respect to the parents' claims relating to the assigned public school site, which the IHO did not address in any detail and which the parties continue to argue on appeal (see IHO Decision at pp. 29-32; Pet. ¶¶ 59-73; Answer ¶¶ 55-59), in this instance, similar to the reasons set forth in other State-level administrative decisions resolving similar disputes, (e.g., Application of the Dep't of Educ., Appeal No. 14-025; Application of the Dep't of Educ., Appeal No. 12-090; Application of a Student with a Disability, Appeal No. 13-237), the parents' assertions are without merit. The parents' claims regarding the class size at the assigned public school site and the functional grouping of the students in the proposed classroom turn on how the December 2010 IEP would or would not have been implemented and, as it is undisputed that the student did not attend the district's assigned public school site, the parents cannot prevail on such speculative claims (R.E., 694 F.3d at 186-88; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9, 2014 WL 53264 [2d Cir. Jan. 8, 2014]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL 3814669 [2d Cir. July 24, 2013]; P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141, 2013 WL 2158587 [2d Cir. May 21, 2013]; see also C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. Mar. 4, 2014]; C.L.K. v. Arlington Sch.

Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]).

VII. Conclusion

In sum, the evidence in the hearing record supports the IHO's final determination that the district offered the student a FAPE for the 2011-12 school year. Having reached this determination, it is not necessary to reach the issues of whether the Aaron School was appropriate for the student or whether equitable considerations support the parents' request for tuition costs and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134). I have considered the parties' remaining contentions and find that I need not consider them in light of my determinations herein.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
October 22, 2014**

**JUSTYN P. BATES
STATE REVIEW OFFICER**