



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 13-045

**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:**

Cuddy Law Firm, PC, attorneys for petitioners, Andrew K. Cuddy, Esq., of counsel

Young Sommer Ward Ritzenberg Baker Moore, LLC, attorneys for respondent, Kenneth S. Ritzenberg, 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 the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition costs at the Greenwood School (Greenwood) for the 2011-12 and 2012-13 school years. 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 district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

### **III. Facts and Procedural History**

As a preschool age child the student received diagnoses of a mild pervasive developmental disorder, not otherwise specified (PDD-NOS) and an attention deficit hyperactivity disorder (ADHD) (Parent Ex. GG at pp. 1-2).<sup>1</sup> He began receiving special education, speech-language therapy, and occupational therapy (OT) services at four years of age (id. at p. 3).<sup>2</sup> Upon entering respondent's (the district's) elementary school, the student was

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<sup>1</sup> Beginning at approximately four years of age, the student has been administered various medications to address his problems with mood regulation, anxiety, and ADHD (Parent Exs. GG at pp. 1, 8; PPPP at pp. 1-2).

<sup>2</sup> The hearing record contains many duplicative exhibits. Generally, citations to the hearing record in this decision are to exhibits submitted by the parents.

enrolled in a full-day integrated kindergarten class and continued to receive speech-language therapy and OT (id.). The student remained in the district's elementary school through sixth grade, during which time he received a variety of services including special education services, resource room services, speech-language therapy, OT, counseling, and aide support (id.).

When the student was 10 years old the district conducted a psychoeducational evaluation that yielded cognitive functioning scores in the average range, with the exception of processing speed scores that fell within the low average range (Parent Ex. JJ at pp. 7).<sup>3</sup> At that time, the student exhibited average reading and math skills, and overall writing skills at the low end of the average range (id.). Handwriting was reportedly "very difficult" for the student and he used a portable word processor (id.; see Tr. p. 191). Assessments of the student's social/emotional and executive functioning skills revealed difficulties at both home and school (Parent Ex. JJ at p. 7). The student struggled in the classroom with his ability to focus, and although he "desperately" wanted to connect with peers, he was often unsuccessful in his attempts (id.). The evaluator indicated in her report that the student exhibited "many symptoms of Asperger Syndrome" (id.).

During the 2009-10 school year (sixth grade), the CSE determined that the student was eligible for special education and related services as a student with an other health-impairment and recommended placement in a general education classroom (Parent Ex. H at pp. 1, 3). The CSE also recommended that the student receive three sessions per week of 5:1 resource room services, two hours per day of shared aide services, one weekly session of OT, and speech-language consultation services (id. at p. 1). The CSE also recommended that the student receive 20 sessions of group counseling over the course of the school year and, although not included on the student's IEP, the student was also scheduled to receive one session per week of counseling services to be provided by the district school psychologist (Tr. pp. 66-68). The student's sixth grade IEP also provided testing accommodations and program modifications including clearly defined limits/expectations, support to pace the completion of his work, copy of class notes, preferential seating, and assistive technology including use of a portable word processor and mathematics software (Parent Ex. H at p. 2). The student's grades during sixth grade were generally in the A to B range (Parent Ex. PPP at p. 1). Counseling sessions during sixth grade focused on improving the student's ability to connect with peers, coping strategies, and social problem solving skills (Tr. pp. 66, 68-69).

At the outset of the 2010-11 school year (seventh grade), the student was placed in a general education classroom at the district's junior high school and received daily resource room services (Dist. Ex. 8 at pp. 3-4).<sup>4</sup> The CSE also provided one session per month of counseling consultation services with the school psychologist as a support for school personnel on behalf of the student to "ensure that [the student was] successfully building peer relationships and was comfortable with the overall school setting" (id.). The student's IEP also provided one weekly

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<sup>3</sup> At the time of the December 2008 psychoeducational reevaluation and through June 2012, the CSE determined that the student was eligible for special education and related services as a student with an other health-impairment, which is not an issue in dispute in this proceeding (Parent Ex. JJ at p. 1; see Dist. Ex. 8 at p. 3; Parent Exs. C at p. 1; E at p. 1; F at p. 1; G at p. 1; H at p. 1; see also 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

<sup>4</sup> Although the student's IEP recommended five weekly sessions of resource room services, the student's schedule for the 2010-11 school year reflects that he received one session daily (Dist. Ex. 8 at p.3; Parent Ex. KKKK).

session of OT consultation services, and monthly team meetings including staff and the parents (id.).

In September 2010, an independent consultant conducted a district-funded assistive technology evaluation of the student (Parent Ex. II; see Dist. Exs. 12; 13). According to the evaluation report, the student's difficulties with organization and pacing of his work affected all areas of academic performance if not monitored and supported by staff (Parent Ex. II at p. 2). The consultant reported that the student's ability to write was significantly impaired, he wrote too fast, and his ideas were not presented in an organized fashion (id.). The consultant reported that the strategies the district provided—such as cues to slow down, access to word processors, writing templates and graphic organizers, graph paper for mathematics, mathematics software, and modified assignments—had been effective in helping the student to write more effectively (id.). The report indicated that the student preferred to use a keyboard for writing, and was able to type on a typical keyboard at a relatively fast pace with good accuracy (id.). The evaluator recommended continuing the use of the student's current mathematics software program and graphic organizers (id. at p. 3). He further recommended that the student use a "Fusion"—described in the report as a "portable desktop"—for typing assignments, short notes to support note taking, and classroom activities (id.).

In December 2010, the student earned merit roll status, and his academic grades for the first two quarters of the 2010-11 school year generally ranged from A to C (see Dist. Ex. 15; Parent Ex. W). In January 2011, a subcommittee on special education convened and recommended that, in addition to the resource room and consultation services specified above, the student receive 10 sessions of group counseling services, and new testing accommodations of a separate location and small group administration (Dist. Ex. 16 at pp. 4-5, 9).

In late January or early February 2011, the student indicated to district personnel that he was "experiencing suicidal ideation"; however, upon investigation, the school psychologist who provided the student's counseling services, the student's mother, and the student's private psychiatrist determined that the student "misus[ed] the words" out of frustration and difficulty expressing himself rather than an intent to harm himself (Tr. pp. 369-73, 433-34, 1095-98; Dist. Ex. 17).

In March 2011 the parents requested an independent neuropsychological evaluation due to their "ongoing and unresolved concerns" about the student's handwriting and processing difficulties (Dist. Ex. 19). In their letter, the parents expressed their beliefs that the student was not benefitting from the assistive technology he used and a neuropsychological evaluation would identify the causes of his inability to write and process, as well as identify strategies and technology to "ensure his success in school" (id.). In April 2011, the CSE authorized an independent neuropsychological evaluation for the student, and forwarded information about the student to the independent evaluator (Dist. Ex. 21).

In preparation for the independent evaluation, in May 2011 the student's seventh grade special education, science, mathematics, Spanish, English, and social studies teachers completed teacher evaluation forms and provided the independent evaluator with information about the student's strengths and weaknesses (Parent Ex. HH at pp. 1-6). With the exception of the Spanish teacher, who indicated the student's academic performance was "slightly below" grade level, the student's special education, science, mathematics, English, and social studies teachers

indicated that the student's performance was "at grade" level (id.). Although the student's teachers documented the student's difficulty with recognizing social cues, working with peers in groups, and making friends, a review of testimony from the student's seventh grade counseling provider, hall principal, and special education, mathematics, science, social studies, and English teachers does not reflect that the student exhibited behaviors that rose to the level of impeding his learning or that of others (see Tr. pp. 356, 376-77, 497-508, 647-717, 988-1077; Parent Exs. HH at pp. 1-6; see also NNN at p. 1).

Contemporaneous with the completion of the teacher evaluations, the CSE met in May 2011 to complete an IEP for the student for the 2011-12 school year, the first of two school years at issue in this matter (Parent Ex. G). The contents of that IEP and the others at issue in this matter, as well as the relevant factual history surrounding the development of those IEPs, will be more fully discussed below in the analysis of the parents' claims. Briefly, however, the district recommended that the student continue to receive resource room and counseling services, as well as additional program modifications and accommodations similar to those provided during the 2010-11 school year (compare Parent Ex. G at pp. 7-8, with Dist. Ex. 8, and Dist. Ex. 16). In July 2011, a licensed psychologist conducted an independent educational evaluation (IEE) of the student (Parent Ex. GG at pp. 1-12). The CSE reconvened in November 2011 to review the results of the IEE, at which time it recommended no substantive changes to the student's program (compare Parent Ex. F, with Parent Ex. G). The parents informed the district of their concerns regarding the November 2011 IEP in two letters and requested that the district conduct speech-language and vision evaluations of the student, as well as that the CSE reconvene to modify the student's program (Parent Exs. R; S). In response, the district agreed to conduct the requested evaluations and indicated that the CSE would reconvene once the evaluations were completed (Parent Ex. P).

By letter dated January 23, 2012, the parents rejected the program the district recommended in the November 2011 IEP, identified their concerns with the offered program, and notified the district of their intent to unilaterally place the student at Greenwood at public expense (Parent Ex. M).<sup>5</sup> At the end of January 2012, a district speech-language pathologist conducted an evaluation of the student's receptive and expressive language, pragmatic language, and problem solving skills, ultimately not recommending speech-language therapy (Dist. Ex. 42 at pp. 1-2). On January 31, 2012, a district occupational therapist completed an evaluation of the student's visual perceptual and visual motor skills, recommending accommodations to address the student's weaknesses in the areas of visual discrimination, visual memory, and visual spatial relationships (Dist. Ex. 43 at pp. 1-4).

By letter dated February 1, 2012, the district informed the parents that a CSE meeting had been scheduled for February 8, 2012 to discuss the student's educational needs pursuant to a "Requested Review" (Dist. Ex. 44 at p. 1). In an e-mail dated February 7, 2012, the parents informed the district's assistant director of pupil services that they would not be attending the CSE meeting scheduled for the following day, as the student had been unilaterally placed in accordance with the January 23, 2012 notice to the district (Parent Ex. EEEEE). The CSE convened without the parents on February 8, 2012, and recommended a program that, other than

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<sup>5</sup> The hearing record reflects that Greenwood is an out-of-State, nonpublic residential school (see Tr. p. 1277; Parent Exs. M; TT; XX; HHHH).

the addition of two annual goals, was substantially similar to that recommended in the November 2011 IEP (compare Parent Ex. E, with Parent Ex. F).

The hearing record reflects that the student began attending Greenwood on or about February 7, 2012 (see Parent Exs. M; FFFFF at p. 1). In May 2012 the parents sent recent evaluation reports and the student's winter term reports to the district's assistant director of pupil services (Parent Exs. TTTT at pp. 1-2; VVVV). On June 18, 2012, the CSE convened for the student's annual review and to develop an IEP for the 2012-13 school year (Parent Ex. C at pp. 1-15). The June 2012 IEP continued to offer special education programs and services, accommodations, and program modifications similar to those recommended for the student for the 2011-12 school year (compare Parent Ex. C, with Parent Exs. E-G).

### **A. Due Process Complaint Notice**

In a due process complaint notice dated August 29, 2012, the parents requested an impartial hearing and asserted that the district failed to offer the student an appropriate program for the 2011-12 and 2012-13 school years, that their unilateral placement of the student at Greenwood was appropriate, and requested tuition reimbursement and compensatory education (Parent Ex. A). The parents asserted that during the 2011-12 school year, the district's program provided insufficient classroom structure and support for the student, specifically related to his needs in written expression, his nonverbal learning disability, anxiety, and social skills (id. at pp. 3-4). The parents also contended that the district failed to address the student's assistive technology needs in that the student's IEPs for the 2011-12 school year provided for a word-processor, while the student required a laptop and a dictation device as well as word prediction and organization software (id. at p. 4). The parents next asserted that during the 2011-12 school year, the CSE removed a counseling consultation service requiring consultation between the school psychologist and the student's classroom teacher without informing the parents, and that "some or all" of the student's counseling services were provided by interns rather than fully certified school psychologists, both of which led to increased social/emotional problems and anxiety for the student, constituting denials of a free appropriate public education (FAPE) (id.). The parents also argued that the district failed to conduct a functional behavioral assessment (FBA), despite the recommendation made in the July 2011 IEE report, contributing to an escalation of social/emotional and behavioral problems and leading to a denial of a FAPE (id.). Lastly with respect to the 2011-12 school year, the parents asserted that the student's IEPs failed to include appropriate annual goals to address the student's needs with regard to writing, mathematics, self-advocacy, and assistive technology (id. at p 5).

Regarding the June 2012 IEP and the district's recommended program for the 2012-13 school year, the parents asserted arguments similar to those raised with respect to the IEPs developed for the 2011-12 school year, essentially repeating those arguments verbatim (Parent Ex. A at pp. 5-7).<sup>6</sup> Of note, however, the parents argued that the CSE's removal of a counseling consultation service led to increased anxiety and social/emotional problems for the student during the 2011-12 school year (id. at p. 6). In addition, the parents contended that the June 2012 IEP did not provide services to address the student's needs with regard to executive functioning, social/emotional functioning, and negative behaviors (id. at p. 3).

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<sup>6</sup> As the student did not attend the district middle school for the 2012-13 school year, the parents raised no allegation with regard to the manner in which the district implemented the student's counseling services for that year.

The parents asserted that their unilateral placement of the student at Greenwood was appropriate and, for relief, requested reimbursement for the costs of the student's tuition and related expenses at Greenwood from February 7, 2012 through the end of the 2012-13 school year, and additional services to compensate for the alleged denial of FAPE while the student attended the public school program (Parent Ex. A at pp. 7-8).

## **B. Impartial Hearing Officer Decision**

An impartial hearing commenced on November 13, 2012 and concluded on December 10, 2012 after nine hearing dates (Tr. pp. 1-1671). In a decision dated February 15, 2013, the IHO found that the district offered the student a FAPE for both the 2011-12 and 2012-13 school years (IHO Decision at pp. 24-25). Initially, the IHO found that the district did not commit any procedural violations that rose to the level of a denial of a FAPE (*id.* at pp. 20-21). The IHO next found that the student's IEPs for both the 2011-12 and 2012-13 school years were likely to produce progress, calculated to provide meaningful benefits, and afforded the student an opportunity to make progress greater than mere trivial advancement (*id.* at p. 23). Furthermore, the IHO noted that in addition, the student made actual improvement with regard to his academic and emotional development under the challenged IEPs (*id.*). Although the parents argued that the IEPs contained insufficient amounts of related services, the IHO found that the programs and placements offered to the student were appropriate "and in all likelihood would have benefitted [the student]" (*id.* at p. 24). In particular, although the student exhibited deficits were regard to writing, attention, and executive functioning, the IHO found that they "were being addressed in a focused and coordinated manner" by the district (*id.* at p. 25). The IHO also found no denial of FAPE for the district's failure to conduct an FBA for either school year at issue because the student's behaviors were rarely an issue, his grades were commensurate with his abilities, he showed no outward signs of behaviors that prevented him from achieving satisfactorily, and the IEPs developed for both school years included strategies to address the student's behavioral and social deficits (*id.* at pp. 17, 21). With respect to the June 2012 IEP, the IHO found that it addressed the student's social skills deficits, anxiety, and written expression deficits (*id.* at p. 18).

The IHO also found that the parents' unilateral placement of the student at Greenwood was not appropriate because it was overly restrictive (IHO Decision at pp. 25-26). Additionally, the IHO found that the student's social and emotional status may have regressed at Greenwood, noting in particular that the student continued to misinterpret and overreact to statements made by peers and had difficulty regulating his emotions, and Greenwood staff did not appear confident that they could succeed in assisting the student to overcome his social skills deficits (*id.*).

## **IV. Appeal for State-Level Review**

The parents appeal, and assert that the IHO erred in finding that the district offered the student a FAPE for the 2011-12 and 2012-13 school years and that Greenwood was not an appropriate unilateral placement for the student.

As a preliminary matter, the parents maintain that the IHO decision lacked citations to the hearing record in violation of State regulation. The parents also assert that the IHO misstated the hearing record in a number of ways, including the findings that the student did not have

behavioral needs, that the student's IEPs accurately described the student's needs and abilities,<sup>7</sup> that Greenwood staff provided input at the June 2012 CSE meeting, that an evaluator had expressed the opinion that the student did not require a residential placement, and that the student made little progress at Greenwood. For these reasons, the parents request that an SRO disregard the IHO's findings of fact.

With regard to the programs recommended for the student, the parents assert the same challenges to the IEPs developed for the student for both the 2011-12 and 2012-13 school years. The parents contend that the IHO erred in finding that the assistive technology provided in the IEPs was sufficient to meet the student's needs. The parents further assert that the IHO erred in finding that removal of counseling consultation from the student's recommended program did not deny the student a FAPE. The parents also assert that the IHO erred in finding that the failure to conduct an FBA did not deny the student a FAPE. The parents next contend that the IHO erred in finding annual goals in the student's IEPs were appropriate. Finally, the parents assert that the IHO erred in finding that the student's IEPs addressed his needs in written expression, his nonverbal learning disability, social skills, and anxiety, and that a general education program with resource room and related services provided the student with enough support to make progress.

With respect to the parents' unilateral placement of the student at Greenwood, the parents assert that the IHO erred in finding that Greenwood was overly restrictive for the student because Greenwood is the least restrictive environment (LRE) for the student at present and the student has made progress at the school. For relief, the parents request reimbursement for the costs of the student's tuition and related expenses at Greenwood for the 2011-12 and 2012-13 school years.

In an answer, the district responds to the parents' allegations, denies the parents' contentions regarding the IHO's characterization of the hearing record, and argues to uphold the IHO's conclusions that the district offered the student a FAPE for the 2011-12 and 2012-13 school years, and that Greenwood was not an appropriate unilateral placement. In addition, the district argues that equitable considerations weigh against the parents' requested relief.

## **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.

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<sup>7</sup> In particular, the parents assert that the student's IEPs did not reference the student's sensory processing issues.

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 [2d Cir. 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 [2d Cir. 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 [2d Cir. 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 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 [2d Cir. 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. Impartial Hearing Officer Decision**

Initially, a review of the IHO decision reveals that the decision contains relatively few specific citations that reference the hearing transcript or exhibits entered into evidence at the impartial hearing. The parents have raised a valid criticism, as State regulations provide in relevant part that "[t]he decision of the impartial hearing officer shall set forth the reasons and the factual basis for the determination. The decision shall reference the hearing record to support the findings of fact" (8 NYCRR 200.5[j][5][v]). In order to properly reference the hearing record, pages of transcript and relevant exhibit numbers should be cited with specificity. State regulations further require that an IHO "render and write decisions in accordance with appropriate standard legal practice" (8 NYCRR 200.1[x][4][v]). Citations to the hearing record

are the norm in "appropriate standard legal practice," and should be included in any IHO decision. The failure to cite with specificity facts in the hearing record on which the decision is based is not helpful to the parties in understanding the decision and deciding if a basis exists on which to appeal. The IHO is advised in the future to enhance compliance with State regulations, by cite to specific transcript or documentary exhibit pages to support relevant fact findings, and provide a reasoned analysis of those facts in light of the applicable law when supporting his conclusions.

However, the only relief requested by the parents with regard to this claim is that an SRO disregard the IHO's findings of fact; because I am required to conduct an impartial review of the IHO's findings and decision, examine the entire hearing record, and make an independent decision thereafter based solely upon the hearing record, it is unnecessary for me to directly address each and every one of the IHO's findings of fact, except as relevant to my analysis of the issues raised on appeal (20 U.S.C. 1415[g][2]; 34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]; see M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 329-30 [E.D.N.Y. 2012]). Regarding the specific errors the parents allege to have been made by the IHO, the discussion below sets forth the facts as established in the hearing record to the extent necessary to support the conclusions herein.

## **B. 2011-12 School Year**

### **1. May 2011 IEP**

On May 16, 2011, a subcommittee of the CSE convened for the student's annual review and to develop the student's IEP for the 2011-12 school year (Parent Ex. G; see Dist. Ex. 23 at p. 2).<sup>8</sup> The district's director of pupil services, the assistant director of pupil services, the student's special education teacher, a guidance counselor, the school psychologist who provided some of the student's counseling services, a speech-language therapist, the student's regular education social studies teacher, and the parents attended the meeting (Dist. Ex. 23 at pp. 1-2; see Tr. pp. 220-21, 356, 1048; Parent Ex. HH at p. 6). According to the May 2011 IEP, the CSE had available to it March 2011 Level 1 assessment results, parent/student conference, teacher/staff, and record review information; the results of a February 2010 administration of academic achievement testing; the results of an April 2009 administration of language testing; the results of a December 2008 administration of cognitive and academic achievement testing; the results of an April 2005 administration of visual motor testing; and the results of the student's sixth grade State English language arts (ELA) and mathematics assessments (Parent Ex. G at pp. 1-2).

The May 2011 IEP academic present levels of performance indicated that the student displayed strong skills in all academic areas, and functioned within the average range of intelligence (Parent Ex. G at p. 2). Achievement test results indicated that the student had the skills to master eighth grade content; however, he did not always demonstrate his academic strengths due to his distractibility and impulsivity on assignments and tests (id.). According to the May 2011 IEP, the student often rushed through academic assignments and tests, which led

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<sup>8</sup> On April 27, 2011, the student's mother, guidance counselor, occupational therapist and special education teacher met for a "pre-meeting" (Parent Ex. G at p. 1; see Dist. Ex. 23 at p. 3). The assistant director of pupil services testified that generally parents, special education teachers, and—depending on the student—related service providers meet prior to a CSE meeting to develop a draft IEP for the CSE to consider based on conversations and collaboration with the parents (Tr. pp. 271-74).

to incorrect or incomplete answers (id.). The student resisted going back to check his work before handing it in, although when directed to check his work, he found many of his own errors or ways to improve the work he had done on the assignment (id.). The May 2011 IEP indicated that the student had strong mathematics computation skills, but due to poor handwriting and attention skills, experienced difficulty at times writing numbers using the proper spacing required to accurately complete problems (id. at p. 3). In writing, the May 2011 IEP reflected that the student benefitted from support throughout the writing process, including reviewing assignment requirements, using graphic organizers, and adult support for expanding his ideas and editing his work (id.). According to the May 2011 IEP, the student used a word processor for responses longer than one sentence, note taking, homework assignments, and to record daily assignments (id.). The May 2011 IEP further indicated that the student struggled with organizational skills, often placed notes and assignments in the wrong folders, and forgot to label materials/assignments when printing from his computer (id.).

The May 2011 IEP identified a number of academic needs, including that the student needed to slow down and check his work in all academic areas, specifically checking work for legibility when handwriting and, when using the computer, ensuring his work was labeled and printing out assignments ahead of time (Parent Ex. G at p. 3). The May 2011 IEP indicated that the student needed to continue to work on the steps of the writing process, including discussing the requirements of the task with an adult before starting an essay, using graphic organizers to outline thoughts and add supporting details, and editing his work first before seeking adult support (id.). The IEP indicated that the student would benefit from checks for understanding with regard to long-term projects and essays, strategies on breaking long-term projects into manageable tasks, and assistance using graphic organizers to plan his writing and to organize materials (id. at p. 4). In mathematics, the May 2011 IEP indicated that the student needed to use graph paper to line up numbers and show his work, noting that he benefitted from having fewer math problems on the page to minimize visual over-stimulation and his anxiety (id. at p. 3). The IEP suggested that the student attempt to apply self-regulation strategies to manage his work pace (id. at p. 4). Additionally, the May 2011 IEP indicated that the student required continued support to strengthen his organization and study skills (id. at p. 3). The May 2011 IEP noted that the student was "very resistant to completing assignments and projects that require lengthy writing and/or sustained attention" (id.). Finally, the May 2011 IEP indicated that the student needed to seek out support after school when he felt overwhelmed by essays and projects (id.).

The May 2011 IEP's description of the student's social development present levels of performance reflected the student's diagnoses of an ADHD and a PDD-NOS (Parent Ex. G at p. 3). According to the May 2011 IEP, the student was willing to participate in discussions in resource room and larger classroom settings (id.). He was described as willing to provide support to peers who needed help with academics and offering to tutor students after school (id.). At times, the student displayed delays in social and attention skills, or misinterpreted situations, interfering with his participation in age-appropriate activities (id.). Although the IEP reflected that he was a compassionate student, he was often distracted by social issues, and continued to work on turn taking, listening to peers, and interpreting body language (id.). The May 2011 IEP indicated that in counseling, the student continued to work on developing social problem-solving strategies to apply throughout the school setting (id.). According to the May 2011 IEP, socially the student needed to establish lasting positive peer relationships and to be more understanding of others' opinions and interests (id.). The May 2011 IEP indicated that the student would continue group counseling to develop social skills (id.). The CSE subcommittee determined that

the student did not exhibit behaviors that impeded the student's learning or that of others such that the student required the use of strategies to address them (id. at p. 5).

In the area of physical development, the May 2011 IEP indicated that the student demonstrated decreased fine motor coordination and "great difficulty" writing, characterized by disorganized and often illegible handwriting, which affected his ability to produce legible assignments in all academic areas (Parent Ex. G at p. 4). The student benefitted from using a desktop computer or portable word processor for writing assignments (id.). According to the May 2011 IEP, the student used technology effectively and efficiently, and willingly used it for writing assignments (id.). He was aware of his writing difficulty and receptive to and interested in using assistive technology (id.). Physical development needs identified in the May 2011 IEP included that the student required seating close to the teacher, prompts to stay on task and maintain pacing, and clear, consistent classroom expectations (id.). Furthermore, although the student sometimes required breaks from instruction, the IEP reflected that the student may use breaks to escape when feeling anxious (id.). The IEP indicated that the student also needed to use technology to improve his written communication skills, and use a portable word processor or computer for written assignments due to his fine motor deficits (id.).

#### **a. Special Factors—Assistive Technology**

The parents assert that the district failed to offer the student appropriate assistive technology devices or services to address the student's needs in that the IEP failed to recommend a laptop with writing software, dictation devices, word prediction software, and software for organizing written work. Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. One of the special factors that a CSE must consider in developing a student's IEP is whether the student "requires assistive technology devices and services, including whether the use of school-purchased assistive technology devices is required to be used in the student's home or in other settings in order for the student to receive a [FAPE]" (8 NYCRR 200.4[d][3][v]; see 20 U.S.C. § 1414[d][3][B][v]; 34 CFR 300.324[a][2][v]). Accordingly, the failure to recommend specific assistive technology devices and services rises to the level of a denial of a FAPE only if such devices and services are necessary for the student to access his educational program (see, e.g., Application of the Bd. of Educ., Appeal No. 13-214; Application of a Student with a Disability, Appeal No. 11-121).

A review of the hearing record does not support the parents' assertion on appeal that the IHO erred in finding that the recommended assistive technology addressed the student's needs, in light of the recommendations stemming from the September 2010 assistive technology evaluation report.<sup>9</sup> The student's May 2010 and January 2011 IEPs for the 2010-11 school year provided him with the use of a portable word processor or computer for all written assignments and a flash drive to allow the student to store work completed on the school computer to be transferred to the home computer or classroom (see Dist. Exs. 8 at pp. 4-8; 16 at pp. 5-8). According to the special education teacher who provided the student's resource room services during the 2010-11 school year, the student used an Alpha Smart, described in the hearing record as a portable word processor; Kurzweil, which the special education teacher described as a scanner that read back scanned material to the student, and a flash drive that he used to save his

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<sup>9</sup> To the extent the parents assert that the May 2011 IEP failed to offer the assistive technology recommended in the July 2011 IEE, this evaluation had not been conducted at the time of the May 2011 CSE meeting (see Parent Ex. A at pp. 3-4).

work at school and home so he could work on projects in both places (Tr. pp. 194-95, 278, 650, 661). As of the third quarter of the 2010-11 school year—leading up to the May 2011 CSE subcommittee meeting—the student had achieved the following grades: B+ (English), B (mathematics), B (social studies), C (science), and C (Spanish) (Parent Ex. NNN at p. 1).

The May 2011 IEP management needs indicated that the student would continue to use a portable word processor or desktop computer to take notes during class, complete writing tasks longer than a sentence, fill out graphic organizers, and compose essays (Parent Ex. G at p. 4). Additionally, the May 2011 IEP stated that the student would use a flash drive to transfer assignments between home and school (*id.*). Rather than use a paper planner, the May 2011 IEP indicated that the student would use the calendar feature included in his portable word processor to keep track of assignments and upcoming tests (*id.*). Testing accommodations in the May 2011 IEP included that the student was permitted use a computer or word processor for all answers requiring more than one sentence (*id.* at p. 9). The May 2011 IEP provided the student with access to a portable word processor to use throughout the school day during writing assignments of longer than one sentence and to take notes in all academic classes, and a flash drive to use throughout the school day in all academic subjects to save work done on a school computer to work on at home (*id.* at p. 8). The May 2011 IEP also provided once weekly consultation with an occupational therapist to monitor the student's assistive technology needs and make needed repairs (*id.* at pp. 4, 8). The hearing record supports a finding that the May 2011 IEP assistive technology recommendations—similar to those the student successfully used during the 2010-11 school year—were adequate to meet his needs (*id.* at p. 8; *see* Parent Exs. NNN at p. 1; UUUUUU at pp. 1-2). Accordingly, the failure to recommend additional assistive technology, at the time the May 2011 IEP was developed, did not constitute a denial of FAPE to the student, considering his previous success with the recommended technology (H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 67 [2d Cir. 2013]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at \*20 [E.D.N.Y. Aug. 19, 2013]).

### **b. Annual Goals**

The parents allege that the IHO erred in finding that the annual goals contained in the May 2011 IEP were appropriate, despite the lack of goals for writing, mathematics, self-advocacy, and assistive technology. An IEP must include a written statement of measurable annual goals, including academic and functional goals, designed to (1) meet the student's needs that result from the student's disability so as to enable the student to be involved in and make progress in the general education curriculum; and (2) 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]). Under the IDEA and State and federal regulations, a determination of the appropriateness of a particular set of annual goals for a student turns not upon their suitability within a particular classroom setting or student-teacher ratio, but rather whether the goals are consistent with and relate to the needs and abilities of the student (*see id.*).

A review of the May 2011 IEP shows that it included eight annual goals to address the student's study skills and social/emotional needs (Parent Ex. G at pp. 6-7). While the May 2011 IEP did not include annual goals in the area of written language, the 2010-11 school year final IEP progress report included two annual goals in that area—improving the student's ability to complete written assignments using graphic organizers, and edit his own writing using a checklist—both of which the student achieved (Parent Ex. OOO at pp. 3-4). As noted above, the

May 2011 IEP provided guidance to staff working with the student that he needed to continue to work on the steps of the writing process, including discussing the requirements of the task with an adult before starting an essay, using graphic organizers to outline thoughts and add supporting details, and editing his work first before seeking adult support (Parent Ex. G at p. 3). Also noted previously, to address the student's physical difficulty with writing, the May 2011 IEP provided the student with access to a word processor for any tasks longer than one sentence, a flash drive to transfer assignments between home and school, and a copy of class notes for all academic subjects, to be reviewed and supplemented in his resource room sessions, which appropriately met his needs (Tr. p. 650, 652; Parent Ex. G at pp. 4, 7-8).

The hearing record does not support a finding that the student required mathematics annual goals, as the May 2011 IEP noted mathematics achievement test results in the average range, and that the student exhibited "strong math computation skills" (Parent Ex. G at pp. 1, 3). Rather, the student's needs in this subject area arose from his difficulty writing numbers out and using proper spacing, which the May 2011 IEP addressed by recommending that the student be provided with graph paper, and strategies to self-regulate pacing such as covering up problems and/or folding the paper in half during mathematics testing (id. at pp. 3-4, 7).<sup>10</sup> Furthermore, the IEP included a goal regarding the use of graph paper for math assignments (id. at p. 6).

Regarding the parents' claim that the May 2011 IEP failed to include annual goals for self-advocacy, it appears from review of the hearing record that this issue first arose at the November 2011 CSE subcommittee meeting (see Tr. pp. 318, 322-23; Dist. Ex. 34 at pp. 2-3; Parent Ex. F at p. 2). To the extent that the parents allege that the May 2011 IEP failed to include self-advocacy goals, I note that the May 2011 IEP indicated that the student was "always willing to participate in discussions" in both resource room and large classroom settings, and acknowledged that he needed to seek out support after school when feeling overwhelmed by essays and projects (Parent Ex. G at p. 3). A review of the documents provided by the student's seventh grade special education and academic subject teachers, and the most recent preceding evaluation report to the CSE meeting, does not support a conclusion that at the time of the May 2011 CSE subcommittee meeting the student exhibited self-advocacy needs to the extent that annual goals were required in that area to provide him with an appropriate educational program (see, e.g., Parent Exs. HH at pp. 1-6; JJ at pp. 1-8).

As discussed in greater detail above, the assistive technology devices recommended by the May 2011 CSE subcommittee addressed the student's writing needs, and the May 2011 IEP indicated that the student "utilize[d] technology effectively and efficiently," noting that the student "willing" used technology for writing assignments and was "receptive and interested in exploring assistive technology resources" (Parent Ex. G at p. 4). While the hearing record showed that during the 2010-11 school year at times the student's assistive technology was unavailable because it needed repair or to be charged, the student's IEP did not need to include annual goals to learn how to effectively use the technology provided (see e.g. Tr. pp. 211-14; Parent Exs. QQQQQQ; SSSSSS; TTTTTT; UUUUUU at pp. 1-2).<sup>11</sup>

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<sup>10</sup> During the 2010-11 school year the student received mathematics grades of B and C+ (Parent Ex. NNN at p. 1).

<sup>11</sup> Annual goals are required to be designed to meet a student's needs resulting from his or her disability (see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]), and the use of assistive technology is designed to diminish the effects of a student's disability on his or her ability to receive a FAPE

For the foregoing reasons, the hearing record does not support a conclusion that the decision not to include annual goals on the May 2011 IEP in the areas of written expression, mathematics, self-advocacy, and assistive technology constituted a denial of FAPE, where the IEP adequately addressed the student's needs as reflected in the evaluative information available to the CSE (J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at \*13 [S.D.N.Y. Feb. 20, 2013]).

### **c. General Education Placement with Resource Room Services**

On appeal the parents allege that the IHO erred in finding that the recommendations in the May 2011 IEP addressed the student's special needs in written expression, needs related to his diagnosis of a nonverbal learning disability, and social skill needs; that a general education placement with resource room services was "sufficiently structured," and that the removal of the consultation between the school psychologist and special education teacher did not deny the student a FAPE.<sup>12</sup> However, a review of the hearing record does not support the parents' position.

For the 2011-12 school year, the May 2011 CSE subcommittee recommended a general education placement with 40-minute resource room services five times weekly, 20 sessions per year of small group counseling services, and one weekly 30-minute OT consultation to monitor the student's use of technology (Parent Ex. G at pp. 7-8). To address the student's difficulty with writing, organization, and sustaining attention, the May 2011 IEP also provided the student with assistive technology and program modifications and accommodations including access to a portable word processor, a flash drive, refocusing and redirection/prompting, a copy of class notes, graph paper, seating close to the teacher, clearly defined limits/expectations, and testing accommodations (*id.* at pp. 7-9). The May 2011 IEP included quarterly team meetings with the student's parents to review progress and address concerns (*id.* at p. 8). According to May 2011 CSE subcommittee meeting information, the team agreed to meet in September 2011, after

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(*see E.F.*, 2013 WL 4495676, at \*20; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 647-48 [S.D.N.Y. 2011]). If a student has needs which require the use of assistive technology devices, while a school district may opt to reference the use of such devices in annual goals, a district is not required to develop annual goals with the purpose of referencing assistive technology devices used by the student. Instead an "assistive technology service" is a potential element of an IEP, which means "any service that directly assists a student with a disability in the selection, acquisition or use of an assistive technology device" (8 NYCRR 200.1[f]). As described previously, the student was able to use the devices and there is no evidence that the student needed an assistive technology service in addition to the assistive technology devices already listed in the IEP in order to receive a FAPE.

<sup>12</sup> The independent evaluator first offered the student a diagnosis of a nonverbal learning disability in July 2011, subsequent to the May 2011 CSE meeting (*compare* Parent Ex. G at p. 2, *with* Parent Ex. GG at pp. 1, 9). According to the evaluator, needs arising from a nonverbal learning disability include "poor visual-spatial organization, social cognition and sensory motor skills" (Parent Ex. GG at p. 9). While the special education programs and related services recommended to address a student's individual needs is often of more import than the student's actual eligibility classification or failure to include a diagnosis in the IEP, for the purposes of this decision, I will examine the May 2011 IEP with regard to how it addressed the student's special education needs arising from that diagnosis (*see Fort Osage R-1 Sch. Dist. v. Sims*, 641 F.3d 996, 1004 [8th Cir. 2011]; M.R. v. South Orangetown Cent. Sch. Dist., 2011 WL 6307563, at \*9 [S.D.N.Y. Dec. 16, 2011]; Draper v. Atlanta Indep. Sch. Sys., 480 F. Supp. 2d 1331, 1342 [N.D. Ga. 2007]).

receipt of the IEE report, to discuss and possibly make changes to the IEP (Dist. Ex. 23 at pp. 2-3).

The May 2011 IEP included numerous, specific management needs that provided context for the May 2011 CSE recommendations described above (Parent Ex. G at p. 4). For essay writing, the IEP indicated that the student would use graphic organizers to plan his writing and receive adult support with editing his work (id.). The May 2011 IEP noted that the student's teachers would assist the student in determining when he should handwrite an assignment or type his work (id.). In mathematics class, the May 2011 IEP indicated that the student would use graph paper to solve computation problems and show the steps used to solve equations (id.). Due to growth in the student's ability to write legibly on large graph paper, the May 2011 IEP indicated that the student would attempt to use smaller graph paper and, eventually, unlined paper to work through problems (id.). The student would also continue to apply strategies to self-regulate his pacing by covering up problems during testing or folding the paper in half (id.). In the area of organization, the May 2011 IEP stated that the student would receive resource room support to organize his materials and use his locker to store books, papers, and other items (id.). The IEP further noted that the student would benefit from checks for understanding when assigned long-term projects or essays, as well as strategies on how to break down long-term projects into manageable tasks (id.). Throughout the school day, the May 2011 IEP indicated that the student would receive preferential seating close to the teacher, to allow for prompts to check his work, pacing, and to make sure he was using his word processor (id.). The student at times needed a break from instruction, although the May 2011 IEP noted that the breaks could also be used as an escape when the student felt anxious (id.). Finally, the May 2011 IEP indicated that the student should be encouraged to stay after school to start homework and receive support with lengthy assignments, noting that the parents were "very supportive" of the student staying after school for help with academics and participating in clubs that would help to increase his social skills (id. at pp. 4-5).

A review of the hearing record as detailed above supports the conclusion that the May 2011 IEP appropriately addressed the student's special education needs related to his nonverbal learning disability, including deficits in visual-spatial organization, social cognition, and motor skills (Parent Ex. G at pp. 4, 7-9; see Parent Ex. GG at p. 9). Contrary to the parents' assertion, the May 2011 IEP social/emotional present levels of performance, management needs, and annual goals provided information about the student to district staff commensurate with the information in the hearing record about the student's social skill needs at the time of the May 2011 CSE meeting (compare Parent Ex. G at pp. 3-4, 6-7, with Tr. pp. 356-65).

Regarding the parents' assertion on appeal that the IHO erred in finding that a general education placement with resource room services was sufficiently structured to allow the student to progress, as discussed above the hearing record showed that in general the student was academically successful during the 2010-11 school year in a general education program with resource room services, despite the parents' concerns about the consistency of the assistive technology (Dist. Exs. 8 at p. 3; 16 at p. 4; compare Dist. Ex. 19, with Parent Ex. NNN at p. 1). The hearing record also showed that while the student exhibited some social struggles during the 2010-11 school year, district staff were aware of his needs and provided counseling consultation and direct counseling services, strategies for the student to write down his concerns during the day and review them with the special education teacher, hand signals to help the student cue into behaviors that were not socially appropriate, involvement in a "Gamers" socialization group, and

direct instruction in reflecting on others' perspectives, providing socially appropriate responses, improving listening skills, tone of voice, and personal space, and identifying social stresses/socially appropriate responses (Tr. pp. 356-65; Dist. Ex. 8 at p. 4; 16 at p. 2; Parent Exs. NNNNNN; OOOOOO; UUUUUU; VVVVVV; WWWWWW; XXXXXX; YYYYYY; ZZZZZZ; AAAAAA). The student's final IEP progress report for the 2010-11 school year indicated that he had achieved an annual goal to identify and discuss three examples of socially acceptable behavior during different social situations (Parent Ex. OOO at p. 5). Therefore, the hearing record supports the conclusion that the May 2011 IEP was reasonably calculated to provide the student with educational benefits, based upon his performance in a similar placement with similar services during the 2010-11 school year (compare Parent Ex. G at pp. 4, 7-8, with Dist. Ex. 8 at pp. 3-4, and Dist. Ex. 16 at pp. 4-5).<sup>13</sup> "Because [the student's] previous IEPs provided [him] access to a meaningful educational benefit, there is no reason to believe that a similar IEP would not continue to do so" (H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 2012 WL 2708394, at \*14 [S.D.N.Y. May 24, 2012], aff'd 528 Fed. App'x 64 [2d Cir. 2013]).

Finally, the parents argue on appeal that the IHO erred in finding that the removal of the consultation between the school psychologist and special education teacher did not deny the student a FAPE. The hearing record shows that at the outset of the 2010-11 school year, the student did not receive direct counseling services; rather, his IEP provided one 30-minute counseling consultation per month (Dist. Ex. 8 at p. 4). According to the school psychologist, the consultation services entailed her meeting with the student's academic subject matter and special education teachers, the guidance counselor, and the parents to discuss the student's progress and his transition from a district elementary school to junior high school (Tr. pp. 356-59). The hearing record suggests that another function of the consultation service was for the school psychologist and special education teacher to develop and implement a strategy that entailed the student writing down his concerns that arose throughout the day and reviewing them with the special education teacher during resource room—a strategy that the student used during the 2010-11 school year (Tr. pp. 360, 379, 650-52). In January 2011, the CSE subcommittee reconvened and added direct counseling services to the IEP, and continued the monthly consultation service (Parent Ex. 16 at pp. 4-5). The school psychologist testified that she continued to attend the student's team meetings, met with the student's mother and the student's guidance counselor, and discussed the student with the special education teacher (Tr. p. 365). According to the school psychologist, the direct group counseling services worked "very well" for the student during the 2010-11 school year (Tr. pp. 363-65).

The May 2011 IEP provided 20 sessions per year of direct counseling services, and 60-minute quarterly team meetings that included the parent, to "provide current progress, review upcoming curriculum, and address any concerns that may arise (Parent Ex. G at p. 8). Although not the monthly consult between the special education teacher and school psychologist the parents sought, the hearing record supports a finding that the direct counseling and team meetings the May 2011 IEP provided were adequate, such that removal of the counseling consultation did not rise to the level of a denial of a FAPE (see Parent Ex. G at pp. 7-8).<sup>14</sup>

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<sup>13</sup> The student's mother testified that at the May 2011 CSE subcommittee meeting she agreed that for the 2011-12 school year the student would continue to receive resource room services and 20 sessions of counseling (Tr. p. 1101).

<sup>14</sup> I note in particular that the parents' memorandum of law cites to the July 2011 IEE and the student's subsequent IEP as support for their argument that the student continued to require counseling consultation

## 2. Relevant Events Subsequent to the May 2011 CSE Meeting

In summer 2011, the parents obtained private tutoring services for the student from a special education teacher (Tr. pp. 949-50). The tutor worked with the student twice weekly for one hour to prepare the student for the eighth grade curriculum (Tr. pp. 949-51).

Over three dates in July 2011, a licensed psychologist (the evaluator) conducted an IEE of the student (Parent Ex. GG at pp. 1-12). Administration of the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV) yielded a verbal comprehension index standard score of 110, a perceptual reasoning index standard score of 86, a working memory index standard score of 94, a processing speed index standard score of 80, and a full scale IQ of 92 (*id.* at p. 13). The evaluator reported that the student consistently performed in the higher end of the average range on verbal abilities tasks, exhibited variable performance on tasks measuring nonverbal skills and working memory, and performed in the low average to borderline range on measures of processing speed (*id.* at pp. 4-5). Academically, the student performed in the average range on assessments of various reading and mathematics skills (*id.* at pp. 5-6). He achieved overall written expression scores in the borderline/impaired range, which the evaluator indicated was the student's "most significant weakness" (*id.* at p. 5).

Following assessments of the student's attention and executive functioning, memory, visual perceptual and motor skills and completion of behavior ratings, the evaluator reported that despite multiple pharmacological interventions over an extended period of time, the student continued to show signs of depression, hyperactivity and attention problems (Parent Ex. GG at pp. 6-8). According to the evaluator, the student also exhibited low frustration tolerance, was easily upset when faced with tasks he perceived as "too challenging or effortful," and tended to avoid writing activities and group work (*id.* at p. 8). From parent and teacher reports, the evaluator gleaned that the student continued to demonstrate social difficulties falling within the realm of a pervasive developmental disorder, characterized by self-focused interactions, difficulty reading social cues and taking different perspectives, and problems adapting to change (*id.*).

Diagnostically, the evaluator concluded that the student continued to meet criteria for a mild PDD-NOS, and also a developmental coordination disorder, disorder of written expression, and learning disorder, NOS (Parent Ex. GG at p. 8). She further indicated that it was "reasonable" to conceptualize the student's cognitive strengths and weaknesses as consistent with a nonverbal learning disability, "characterized by strong verbal abilities and poor visual-spatial organization, social cognition and sensory motor skills (*id.* at p. 9).<sup>15</sup>

Regarding the diagnoses of developmental coordination disorder and disorder of written expression, the student presented with significant problems with handwriting, spelling, writing

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services, neither of which reflects on the appropriateness of the May 2011 IEP (Parent Mem. of Law at pp. 4-5, citing Parent Exs. F; GG).

<sup>15</sup> The evaluator noted in her report that the nonverbal learning disability diagnosis was not included in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV), but the difficulties the student exhibited did fall within the realm of learning disorder, NOS, which was included in the DSM-IV (Parent Ex. GG at p. 9).

mechanics, and difficulty organizing information on a page (Parent Ex. GG at p. 9). Following administration of measures of attention and executive functioning, the evaluator reported that the student exhibited difficulty with sustained auditory attention, working memory, mental control, cognitive shifting, and inhibition (id. at pp. 6-7, 9). Parent and teacher reports also identified the student's poor inhibitory control, emotional regulation, flexibility, working memory, and self-monitoring abilities, which the evaluator indicated negatively affected the student's behavior and functioning in academic, social, and life skills situations (id. at p. 9).

The evaluator reported that the student's parents were "particularly concerned about [the student's] social difficulties," noting his longstanding history of difficulty interacting with peers (Parent Ex. GG at p. 9). In particular, the evaluator indicated that the student did not appear to appreciate social boundaries, engaged in inappropriate and annoying behaviors, and appeared socially naïve (id.). Although some difficulties may have been the result of poor impulse control, the evaluator reported that the student's difficulty processing large amounts of visual information and integrating that information contributed to his social difficulties (id.). Emotionally, the evaluator indicated that the student continued to demonstrate moodiness and problems with emotional regulation, opining that the student's moodiness related to the anxiety he felt when faced with uncertainty, significant challenges, and unpredictable situations (id.). The evaluation report contained numerous recommendations to address the student's written language, executive functioning, organization, social skill and behavior, and visual perceptual difficulties (id. at pp. 10-12).

In September 2011, the parents and the district's director of pupil services received the IEE report, which the assistant director of pupil services, the school psychologist, and the special education teacher reviewed (Tr. pp. 225-26; see Dist. Ex. 21; Parent Ex. KKKKKK at p. 2). Following their review of the report, both the director and the assistant director of pupil services met with the parents and discussed the IEE report and the student's technology (Tr. p. 226; Parent Ex. KKKKKK at p. 1). The parents continued the student's private tutoring services one hour per week, which worked on improving the student's organization skills and providing him with homework support (Tr. pp. 950-51).

In late September 2011, the district technology department installed "Dropbox" on the computer in the resource room, and district staff met to discuss mathematics paper spacing needs, and the possibility of the student using an iPad II (Parent Ex. IIIII).<sup>16</sup> In mid-October 2011, the parent informed the assistant director of pupil services that the Dropbox was "working great" (Parent Ex. GGGGGG). The hearing record shows that the parents and district staff communicated throughout fall 2011 about the student's technology and academic performance (Parent Exs. TTTTT; UUUUU; VVVVV; XXXXX; YYYYY; ZZZZZ at pp. 1-2; BBBB; CCCCC; DDDDD; EEEEE; FFFFF at pp. 1-2; GGGGG; HHHHH; IIIII; JJJJJ; KKKKK at p. 1).

The district determined that a classroom observation of the student was needed to supplement the information provided in the IEE report, allowing feedback from the student's teachers and providing information regarding his functioning in the classroom (see Tr. pp. 226-27; Dist. Ex. 27; Parent Ex. F at p. 2). On October 18, 2011, the parents provided consent for the

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<sup>16</sup> Dropbox is described in the hearing record as a web-based technology solution that enabled the student to access files across multiple computers (Tr. pp. 237-38, 590).

district to conduct a classroom observation of the student, which the school psychologist completed on October 27, 2011 (Dist. Ex. 28; Parent Ex. FF at pp. 1-2). The student achieved first quarter grades of B- (English), C (mathematics), B- (social studies), B+ (science), and 65 (Spanish) (Parent Ex. MMM).

### **3. November 2011 IEP**

On November 30, 2011, the CSE subcommittee reconvened to review the IEE report (Parent Ex. F at pp. 1-2).<sup>17</sup> Participants included the assistant director of pupil services, a building counselor, the school psychologist, five special education teachers, two guidance counselors, a speech-language pathologist, an occupational therapist, a teacher representative, a regular education teacher, and the student's mother (Parent Exs. F at p. 1; X). Meeting information indicated that the CSE subcommittee reviewed the results of the IEE and the school psychologist's classroom observations of the student (Parent Ex. F at p. 2). According to the IEP, the CSE subcommittee agreed to continue the student's placement and classification (*id.*). The IEP also reflected that the CSE subcommittee discussed the requests of the student's mother that the IEP include more details from the IEE report and that teachers pre-teach the student concepts, her concerns about the student's performance in mathematics and Spanish, and her report that the student presented with anxiety and fear of attending school (*id.*).

A review of the November 2011 IEP shows that it included behavior rating, academic achievement, and cognitive test results from the July 2011 IEE, and the student's performance on the seventh grade State ELA and mathematics tests (Parent Ex. F at pp. 3-4). The CSE subcommittee included the majority of the May 2011 IEP present level of performance information in the November 2011 IEP with some exceptions described further below (compare Parent Ex. G at pp. 2-5, with Parent Ex. F at pp. 5-7). The November 2011 IEP reflected the student's diagnoses of a disorder of written expression and a developmental coordination disorder, and indicated that the student exhibited weak visual perceptual and motor skills (Parent Ex. F at pp. 6-7).

#### **a. Special Factors—Assistive Technology**

The parents allege on appeal that the IHO erred in finding that the "minimal" assistive technology addressed the student's needs, in light of the recommendations included in the September 2010 assistive technology evaluation and July 2011 IEE reports. The July 2011 IEE report recommendations included that the evaluation findings be shared with the CSE and incorporated into the student's IEP, including that the CSE discuss options for writing accommodations, modifications, and supports, and agree on consistent tools "such as a laptop with appropriate writing software, dictation devices, word predictions software and software for organizing written work," and provide the student with a scribe "when possible and appropriate" (Parent Ex. GG at p. 10).<sup>18</sup>

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<sup>17</sup> The CSE subcommittee originally planned to convene on November 16, 2011; however, the meeting date was changed at the parents' request (Dist. Ex. 30 at p. 1; Parent Ex. WWWW).

<sup>18</sup> The evaluator recommended that the CSE consider training the student to use a dictation device, noting that "training dictation software is very time consuming and requires patience" (Parent Ex. GG at p. 10).

According to the occupational therapist who provided the student's weekly technology consultation during the 2011-12 school year, during fall 2011 the student used a Fusion word processor, and also began using an iPad (Tr. pp. 528-29, 534-35, 539, 551; see Parent Ex. UUUUU). The district occupational therapist testified that a Fusion was "a more complex portable word processor" that also had a mechanism to record the student's assignments, voice output software, and calendar, planner, spell check, thesaurus, and word prediction functions (Tr. pp. 534-35, 550-51). In mid-November 2011, the parents, the student's guidance counselor, the assistant director of pupil services, the student's special education teacher, and the evaluator who conducted the student's September 2010 assistive technology evaluation met and discussed possible software applications to address the student's academic and organization needs (Parent Ex. UUUUU). Around that time, the district's technology department installed Dropbox and Notability applications on an iPad that was provided to the student (id.; see Tr. pp. 238, 637).<sup>19</sup> The special education teacher who worked with the student during the 2011-12 school year testified that during resource room she worked with the student using iPad and Dropbox technology to improve his writing and organization skills (Tr. pp. 582-84, 587-91; see Tr. p. 637).

The November 2011 IEP provided the student with access to a portable word processor or desktop computer, and also specified that the student would use "drop box technology" to transfer assignments from home to school (Parent Ex. F at pp. 7, 10). As described above, the Fusion and iPad hardware and Dropbox software provided the majority of the assistive technology supports and functions recommended by the July 2011 IEE report, which the student's special education teacher and occupational therapist for the 2011-12 school year testified adequately met the student's needs (see Tr. pp. 537-38, 575, 589-92, 594; compare Parent Ex. F at pp. 7, 10, with Parent Ex. GG at p. 10). In light of the above, I find that the assistive technology services provided for in the November 2011 IEP were appropriate. While the parents assert that the CSE erred in not providing each of the assistive technologies mentioned in the July 2011 IEE report, the report indicates that it was "important to consider" additional assistive devices, but such aspirational statements do not render them necessary in order for the student to receive educational benefits (Parent Ex. GG at p. 10). Accordingly, the hearing record does not demonstrate that the student required the use of additional assistive technology—beyond that recommended in the November 2011 IEP—in order to receive a FAPE (H.C., 528 Fed. App'x at 67; E.F., 2013 WL 4495676, at \*20).

### **b. Special Factors—Interfering Behaviors**

The parents assert that the IHO erred in finding that the district's failure to conduct an FBA did not rise to a denial of a FAPE. The parents contend that the student's emotional health as demonstrated at home deteriorated during the 2010-11 school year and continued to do so during the 2011-12 school year, which triggered the requirement for the CSE to conduct an FBA. As set forth in greater detail below, the hearing record indicates that the student's behaviors did not seriously interfere with instruction and that the November 2011 appropriately addressed the student's behavioral needs.

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<sup>19</sup> Notability is described in the hearing record as a note-taking word processing application for the iPad that is compatible with Dropbox (Tr. pp. 238-40, 251, 637-38).

Among the special factors a CSE must consider in the development of an IEP for a student whose behavior impedes his or her learning or that of others is the use of 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 C.F. v. New York City Dep't of Educ., 746 F.3d 68, 72-73 [2d Cir. 2014]; E.H. v. Board of Educ., 361 Fed. App'x 156, 160-61 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at \*14 [E.D.N.Y. Mar. 31, 2014]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at \*9 [S.D.N.Y. Mar. 31, 2014]; 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]). 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., 777 F.Supp.2d 669, 673 [S.D.N.Y. 2011]; Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at \*30 [N.D.N.Y. Sept. 29, 2009]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 380 [S.D.N.Y. 2008]).

In New York State, policy guidance explains that "[t]he 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 [among other things, a student's interfering behaviors,] in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 22, 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, the "student's need for a behavioral intervention plan [BIP] must be documented in the IEP" (*id.*)<sup>20</sup> 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 (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]). State regulations require that 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

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<sup>20</sup> 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. 22 [emphasis added]), 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., 202 Fed. App'x 519, 522 [2d Cir. 2006]).

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 (M.W. v. New York City Dep't of Educ., 725 F.3d 131, 140-41 [2d Cir. 2013]; A.H., 394 Fed. App'x at 722). 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 F.3d at 190). The Court also noted that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE, but that in such instances particular care must be taken to determine whether the IEP address the student's problem behaviors" (*id.*, see F.L. v. New York City Dep't of Educ., 2014 WL 53264, at \*3 [2d Cir. Jan. 8, 2014]; M.W., 725 F.3d at 140-41).

The July 2011 IEE report indicated "[if the student's] behavior continues to be problematic this year, [t]he CSE should consider a Functional Behavior Analysis [sic], followed by a positive behavioral support plan to improve independent work completion and reduce avoidance and inappropriate behaviors" (Parent Ex. GG at p. 11).<sup>21</sup> The hearing record shows that the IEE evaluator based the student history included in her report on an interview with the parents, forms completed by the student's mother, the student, and the student's seventh grade teachers, and a review of "medical and school records" (Parent Ex. GG at p. 1). The evaluator further indicated in the IEE report that "[b]ecause this evaluation took place over the summer, I did not have direct contact with [the student's] teachers" (*id.* at p. 10). Student "weaknesses" identified on the forms the seventh grade teachers completed included that the student was impulsive and exhibited difficulty staying on task, avoided social situations with peers, tried to draw negative attention to himself, became "excessively fixated on a thought/issue/worry," and had difficulty recognizing social cues, working with peers in groups, and making friends (Parent Ex. HH at pp. 1-6).

On October 27, 2011, the school psychologist prepared a report of her observations of the student in both science and mathematics classes (Parent Ex. FF at pp. 1-2). According to the report, in both classes the student sat appropriately and remained on task and engaged (*id.* at p. 2). The school psychologist observed the student following class routines, participating appropriately in class discussions, taking notes, and completing assignments at the pace of his peers (*id.*). She further reported that the student's behavior was "consistent with that of his peers" (*id.*).

As noted above, by November 21, 2011, the student had achieved the following first quarter grades: B- (English), C (mathematics), B- (social studies), B+ (science), and 65 (Spanish) (Parent Ex. MMM). The student's report card effort and conduct designations were either "[g]ood" or "[e]xcellent" in all courses with the exception of "effort needs improvement" in Spanish (*id.*; see Parent Ex. JJJ at p. 3). Comments included on the November 2011 report card included that the student was a pleasure to have in class, contributed in class, was enthusiastic and eager to learn, and that he needed to put forth more effort on his homework (Parent Ex. MMM). As of November 2011, the student was "progressing satisfactorily" toward five of six IEP study skill annual goals, and "progressing gradually" toward an annual goal to improve his

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<sup>21</sup> Despite the parents' representations to the contrary, the independent evaluator did not recommend that the district conduct an FBA if the student "continue[d] to struggle with social and emotional functioning" (Parent Mem. of Law at p. 7).

ability to refocus when prompted and attend to an activity (Parent Ex. KKK at p. 2). The IEP progress report also indicated that by November 2011 the student was "progressing satisfactorily" toward both social skill annual goals (*id.* at p. 3).

The hearing record shows that during the 2011-12 school year, the school psychologist and the special education teacher provided the student with direct instruction to address his identified executive functioning and social/emotional needs (Tr. pp. 456-60, 583, 587-91; Parent Ex. KKK at pp. 2-3). According to the special education teacher, the student also participated in a social group that met with the guidance counselor during lunch (Tr. pp. 620-21). The school psychologist who provided the student's direct counseling services during the 2011-12 school year testified that in addition to scheduled counseling sessions, the student sought her out when he struggled with an issue that arose during the school day (Tr. p. 378). According to the school psychologist, the exchanges were "brief," because there was a "protocol and procedure for getting [the student] to reflect on the behaviors and getting him back to class, which was our goal" (Tr. p. 379; *see* Tr. p. 499). She further testified that the student did not seek her out on a frequent basis, and that he also sought support from the guidance office (Tr. p. 379).

The special education teacher who provided the student's resource room services during the 2011-12 school year testified that she observed a "huge improvement" from the 2010-11 to 2011-12 school years regarding the frequency with which he required a "check in" with the special education teacher between classes (Tr. pp. 583, 591). She further testified that from the 2010-11 to 2011-12 school years the student "matured a lot," and did not go to her or disrupt classes to talk about a social problem the way he had in the past (Tr. pp. 591, 611). According to the special education teacher, during his time in resource room the student was not "a behavior problem," nor did she ever need to send him to the principal (Tr. p. 598). Although the parent reported behavioral concerns reflected in the July 2011 IEE report, the school psychologist testified that the student's behavior did not create discipline problems or prevent him from functioning throughout his day, and she observed "far less" emotional reactivity than at the beginning of the 2010-11 school year (Tr. pp. 387-88; Parent Ex. GG at pp. 7-8). She further testified that although some of the student's behavior was "reactive," the student did not exhibit discipline or conduct problems, or aggression (Tr. p. 388). Additionally, she indicated that because of the student's age, some of the student's acting out behavior was developmentally appropriate (Tr. pp. 388-89).<sup>22</sup>

Based on the above, the hearing record shows that the district identified and provided services/supports to address the behaviors associated with the student's executive function and social skill needs which, given his report card grades and progress toward IEP annual goals, did not rise to the level of interfering with his learning or that of others requiring the district to conduct an FBA (*A.D. v. New York City Dep't of Educ.*, 2013 WL 1155570, at \*9-\*10 [S.D.N.Y. Mar. 19, 2013]; *see* Parent Ex. F at p. 7).

### **c. Annual Goals**

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<sup>22</sup> To the extent the parents now assert that the district was required to conduct an FBA due to their concerns, reflected on the November 2011 IEP, that the student was presenting with anxiety and fear of attending school (Parent Ex. F at p. 2), they have provided no explanation for why the student's anxiety at home constituted a behavior impeding his learning under the circumstances of this case, when district staff indicated that the student "appear[ed] to be coping well and appears happy and relaxed" at school and, as discussed elsewhere in this decision, continued to achieve passing grades in all of his classes (*id.*; *see* Parent Ex. JJJ at p. 1).

The parents allege on appeal that the IHO erred in finding that the annual goals were appropriate, despite the absence of goals in writing, mathematics, self-advocacy, and assistive technology. A review of the hearing record shows that the November 2011 IEP retained the student's annual goals from the May 2011 IEP (compare Parent Ex. G at pp. 6-7, with Parent Ex. F at pp. 8-9).

The student's special education teacher who provided the resource room services during the 2011-12 school year testified that at the outset of eighth grade, the student's needs related to executive functioning/organization and writing skills (Tr. pp. 583, 589). To address writing needs, the special education teacher encouraged the student to handwrite short answer or fill-in-the-blank questions, but use technology such as the iPad for longer activities (Tr. p. 589). She further stated that in resource room, the student's worksheets and class notes were scanned, providing the student with the ability to type on his iPad to complete assignments (Tr. pp. 589-90). The November 2011 IEP included the student's diagnoses of a disorder of written expression and a developmental coordination disorder, as well as weak visual perceptual and motor skills, indicating that "[i]ssues associated with these diagnoses impact on [the student's] ability to plan and organize his assignments, as well as the legibility of his writing" (Parent Ex. F at pp. 6-7). Providing guidance to teachers about the student's written language needs, the November 2011 IEP indicated that the student needed to continue to work on the steps of the writing process, including discussing the requirements of the task with an adult before starting an essay, using graphic organizers to outline thoughts and add supporting details, and editing his work before seeking adult support (id. at p. 5). The IEP further indicated that the student required adult support with each stage of the writing process (id.). As detailed above, the November 2011 IEP provided the student with adequate assistive technology supports to address his physical writing and organizational difficulties (see Tr. pp. 537-38, 575, 589-92, 594; Parent Ex. F at pp. 5, 7, 10). To further accommodate the student's writing difficulties, the November 2011 IEP also provided the student with a copy of class notes in all academic subjects, to be supplemented during resource room (Parent Ex. F at p. 9). The hearing record therefore does not support a finding that, given the other supports and services the November 2011 IEP provided, that the student required annual goals in the area of writing to receive a FAPE.

The parents' assertion that the student required mathematics annual goals is similarly not supported by the hearing record. July 2011 mathematic academic achievement test results included in the November 2011 IEP reflected the following standard scores: numerical operations (98), math problem solving (97), and math fluency composite (95); scores the independent evaluator characterized as "consistently" in the average range (Parent Exs. F at p. 4; GG at p. 6). As noted previously, the student's difficulty with mathematics stemmed from his decreased ability to write numbers out and use proper spacing to complete problems accurately because of his deficits with regard to handwriting and attention (Parent Ex. F at p. 5). The November 2011 IEP addressed these issues by indicating that the student benefitted from fewer mathematics problems on a page, providing the student with graph paper, and recommending strategies to self-regulate pacing such as covering up problems or folding the paper in half during mathematics testing (id. at pp. 5-9, 11).

Nor does the hearing record show that the student required goals in the area of assistive technology to receive a FAPE. The assistant director of pupil services and the student's special education teacher for the 2011-12 school year testified that the student was "great with

technology" and that the district provided afterschool support to the student while new technology was being set up (Tr. pp. 251-52, 589, 593). The occupational therapist stated that during the 2011-12 school year, she worked directly with the student and provided him with support in his use of assistive technology including the iPad (Tr. pp. 537-39). She described the student as "a very savvy technology user," who took to the iPad "very quickly" (Tr. p. 538). As discussed above, the November 2011 IEP provided the student with the majority of assistive technology supports and functions recommended by the July 2011 IEE report, which the student's 2011-12 special education teacher and occupational therapist testified adequately met the student's needs (see Tr. pp. 537-38, 575, 589-92, 594; compare Parent Ex. F at pp. 7, 10, with Parent Ex. GG at p. 10). To further support the student and his use of technology, the November 2011 IEP provided a weekly OT consultation to monitor the student's needs and make repairs (Parent Ex. F at p. 10).

Regarding the parents' allegation that the November 2011 IEP lacked goals to improve the student's self-advocacy skills, the 2011-12 special education teacher testified that she tried to concentrate on increasing the student's independence and responsibility for his own work, handing in assignments, learning to use new technology, and asking questions for himself (Tr. pp. 580, 589). To accomplish this, she taught the student to scan his own homework, space out mathematics assignments, and use a routine with his teachers to ensure he had a copy of class notes (Tr. p. 591). The student used a planner on his iPad, which the special education teacher reviewed with him and taught him to use (id.). Although it "took a little while" for the student to learn the routine, she opined that it worked fairly well for him (Tr. p. 592). A review of the October 2011 classroom observation report indicates that the student worked on assignments independently, raised his hand to answer questions, independently put his materials away, and asked the teacher a clarifying question (Parent Ex. FF at pp. 1-2). As noted previously, during the 2011-12 school year the district had a procedure in place—which the student utilized—to seek out the school psychologist or special education teacher when he became anxious or wanted to discuss a situation (Tr. pp. 378-79, 591, 611). The district suggested that the student stay after school for assistance, and although the special education teacher indicated that the student did not fully utilize that opportunity, the student's mother testified that he stayed after school "every day" (Tr. pp. 593-94, 1123; Parent Ex. F at p. 7). In addition, the special education teacher indicated that the student "was starting to speak up for himself" during the 2011-12 school year (Tr. pp. 611-12). The November 2011 IEP indicated that district staff reported that during the school day the student appeared to be coping well, happy, and relaxed (Parent Ex. F at p. 2). Given the foregoing supports and services provided, the hearing record does not support a finding that the student required self-advocacy annual goals in order to receive a FAPE.

As with the May 2011 IEP, the hearing record does not support a conclusion that the decision not to include annual goals on the November 2011 IEP in the areas of written expression, mathematics, self-advocacy, and assistive technology constituted a denial of FAPE, where the IEP adequately addressed the student's needs as reflected in the evaluative information available to the CSE (J.L., 2013 WL 625064, at \*13).

#### **d. General Education Placement with Resource Room Services**

On appeal the parents allege that the IHO erred in finding that the recommendations addressed the student's special needs in written expression, needs related to his diagnosis of a nonverbal learning disability, and social skill needs; that a general education placement with

resource room services was "sufficiently structured," and that the removal of the consultation between the school psychologist and special education teacher did not deny the student a FAPE.

A review of the hearing record shows that during the 2011-12 school year prior to the November 30, 2011 CSE subcommittee meeting, the student's special education needs were being met and he was generally successful in his then-current placement with the supports and services provided in the May 2011 IEP (Tr. pp. 413-16, 550, 591-94; Parent Exs. FF at pp. 1-2; KKK at pp. 1-3; MMM; see Parent Ex. F at pp. 5-7, 9-11).<sup>23</sup> The intent of the November 2011 CSE subcommittee meeting was to discuss the IEE and classroom observation reports with the parent, which she testified occurred (Tr. pp. 1117-18; Parent Ex. F at p. 1). The hearing record shows that at the meeting the parent discussed her concerns and the district provided responses to her concerns and requests (Parent Ex. F at p. 2). The November 2011 IEP indicated that the CSE subcommittee agreed not to recommend a change in the student's placement (Parent Ex. F at p. 2).

Additionally, an overall review of the hearing record does not suggest that the student's special education needs changed significantly from the time the May 2011 IEP was developed through the time of the November 2011 CSE subcommittee meeting such that changes in then-current programming and placement were required for the student to receive a FAPE (compare Parent Exs. F at pp. 1-13; MMM, with Parent Ex. G at pp. 1-11, Parent Ex. GG at pp. 1-12, and Parent Ex. NNN at p. 1).

#### **4. Relevant Events Subsequent to the November 2011 CSE Meeting**

Correspondence contained in the hearing record shows that subsequent to the November 2011 CSE subcommittee meeting, the parents and district staff communicated via e-mail with each other about the student's technology needs, his willingness to complete work, the supports available to help the student with peer interactions, and potential changes to his schedule (Parent Exs. FFFFF at pp. 1-2; GGGGG at pp. 1-2; IIIII; JJJJJ at pp. 1-2; MMMMM; OOOOO; PPPPP; QQQQQ; RRRRR; SSSSS).

In a letter dated December 7, 2011 sent to the district's assistant director of pupil services, the parents identified a number of concerns they had with the November 2011 IEP (Parent Ex. S). In particular, with regard to assistive technology the parents requested that the district immediately implement the assistive technology recommendations contained in the IEP, that the IEP be amended to reference the specific iPad applications used by the student and to include assistive technology goals, and suggested that it may be necessary to retain the services of a consultant (id. at pp. 1, 3). The parents also requested that the student be pretaught new material as recommended by the July 2011 IEE, indicating that the student had responded well to preteaching of the eighth grade curriculum by the tutor hired by the parents during summer 2011 (id. at pp. 1-2). Next the parents requested that the district exempt the student from the language other than English requirement due to his language difficulties with both English and Spanish

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<sup>23</sup> To the extent that the parents continue to assert that the removal of the counseling consultation between the school psychologist and the special education teacher—which had occurred pursuant to the May 2011 IEP—denied the student a FAPE, the hearing record supports a finding that the November 2011 IEP adequately addressed the student's social/emotional needs, and included a provision for quarterly team meetings, in much the same way as did the May 2011 IEP (see Tr. pp. 413-16, 420-22; Parent Exs. F at pp. 6-7, 9-10; FF at p. 2; KKK at p. 3).

(id. at p. 2). Addressing their concerns that the student felt anxious and unsafe at school, the parents requested that a goal regarding self-advocacy be added to the student's IEP, that the district conduct a speech-language evaluation of the student to determine if the student's pragmatic language deficits were precluding the student from advocating for himself and leading to social difficulties (id. at pp. 2-3). Also with regard to the student's social/emotional needs, the parents expressed concern that the counseling consult had been removed from the student's IEP and that his direct counseling services were being provided by uncertified interns (id. at p. 3). The parents next requested that the district conduct an evaluation of the student to determine how his visual motor and visual perceptual skills affected his ability to learn (id.). Finally, the parents also indicated that they believed the student's IEP should also include goals for writing and math (id.).

The parents sent a follow-up letter dated December 21, 2011, which touched on the issues in their previous letter, requested speech-language and developmental vision evaluations, and identified additional concerns in the areas of assistive technology, language expression, and social/emotional needs (Parent Ex. R). Initially, the parents objected to the manner in which the November 2011 CSE meeting was conducted, in particular the amount of time allocated, the lack of an additional parent member, the number of participants, and that several attendees were not reflected on the IEP (id. at pp. 1, 3). The parents expressed concern that the student was "doing rather poorly or close to failing" in Spanish, math, English, and art (id. at p. 1). The parents also indicated that the student was becoming "more stressed, anxious, and frustrated with school," and would "fall[] apart" at home after "holding it together in school" (id.). In addition, with regard to the November 2011 IEP, the parents indicated that the recommendations made in the IEE "were not given the consideration that they deserved" and requested that the CSE reconvene "to develop an IEP that we as parents agree would be appropriate" (id.). Regarding assistive technology, the parents reiterated their request that the student's IEP "list" specifically all assistive technology that the student would receive and also requested that the IEP include "Assistive Technology Service" as a related service, that the student be permitted to use all assistive technology devices at home that he used in school, that the student's teachers be given primary responsibility for providing materials to the student in formats compatible with his assistive technology (id. at p. 2). With regard to their request that the student be exempted from the language other than English requirement, the parents elaborated that "learning a foreign language is not the priority" and that the student was experiencing anxiety as a result "at the expense of his other core academic classes" (id.). The parents also reiterated their belief that the counseling consultation service previously provided the student should be reinstated and the student should not receive counseling services from interns (id.). The parents similarly reiterated their desire for the student to receive preteaching of new materials (id. at pp. 2-3). Finally, the parents again stated their belief that the IEP should include annual goals in the areas of writing, math, assistive technology, and self-advocacy (id.).<sup>24</sup>

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<sup>24</sup> Although the two letters include a number of claims that were not included in the parents' due process complaint notice or in their petition, and accordingly were not litigated and are not subject to review, the letters, later provided as evidence at the impartial hearing, appear provide the most cogent, direct statement of the parents' objections to the IEPs developed for the student by the district, more so than their due process complaint or pleadings in this appeal. Accordingly, they are described in full to provide context to the parties' interactions and the parent's concerns prior to initiating due process. To be clear, however, administrative proceedings under the IDEA are by law bound to adhere to the due process complaint, IHO decision, and pleadings in subsequent appeals, subject to limited exceptions not applicable to this case.

The district responded to the parents' concerns in detail by letter dated January 10, 2012 (Parent Ex. P). Initially, the district agreed to evaluate the student's speech-language, visual motor, and perceptual motor integration skills (id. at p. 1). With regard to the parents' requests for further specificity regarding the student's assistive technology, the district indicated that it was willing to reference a particular software program the student used but noted that "it creates difficulties in subsequently altering software" (id. at p. 2).<sup>25</sup> Regarding the parents' request that the student be permitted to use the same assistive technology at home as at school, the district indicated that while it had provided the student with Dropbox software permitting him to download all work done at school to his home computer, it was willing to provide the student with a Fusion instead of an iPad if the parents desired the hardware to travel back and forth with the student (id.). The district also indicated that because the student was capable of adequately using the assistive technology, there was no need to include assistive technology as a related service on the student's IEP (id.). With regard to preteaching, the district indicated, as referenced in the parents' letter, that the CSE was concerned that it could be more detrimental than useful to the student (id.; see Tr. pp. 240-41). Similarly, the district indicated that with regard to the parents' request for the student to receive an exemption from the language other than English requirement, the district members of the CSE had a "strongly held belief . . . that it would be a disservice to [the student]," who was passing his Spanish class at the time (Parent Ex. P at p. 2; see Tr. pp. 241-42; Parent Ex. MMM). Regarding the parents' concerns regarding the removal of counseling consultation from the student's IEP, the district indicated that because the student was recommended to receive direct counseling services, there was no need to include consultant services and that in any event the student's social needs could be addressed at the quarterly team meetings provided for in the November 2011 IEP (Parent Ex. P at p. 2; see Parent Ex. F at p. 10). With respect to the counseling services provided to the student, the district asserted that they would be provided by "appropriately certified school personnel," and the assistant director of pupil services testified that the district employed only "mastery level interns," supervised pursuant to guidelines promulgated by the National Association for School Psychologists (Tr. p. 244; Parent Ex. P at p. 2).<sup>26</sup> Regarding the student's annual goals, the district agreed that the student required goals relating to his writing deficits and indicated it would draft some for the parents' review, but that the student did not require goals "in the other academic areas [the parents] mentioned" (Parent Ex. P at p. 2; see Tr. p. 245). The district indicated that a CSE meeting would be scheduled "as soon as the requested evaluations are completed" to address the parents' concerns (Parent Ex. P at p. 3).<sup>27</sup>

In a letter dated January 23, 2012, the parents rejected the program the district recommended in the November 2011 IEP, identified their concerns with the offered program,

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<sup>25</sup> According to the district assistant director for pupil services, the district preferred to specify the purpose of the software used by the student rather than to list specific applications used by the student, as that would necessitate modifying the student's IEP any time the software used by the student changed (Tr. pp. 239-40). Furthermore, the assistant director indicated that the parents never made a request for a particular application that was denied by the district (Tr. p. 240).

<sup>26</sup> The district's assistant director of pupil services indicated that with regard to the parents' concerns about the student's self-advocacy and pragmatic language needs, district staff was not aware of concerns that the student was experiencing social difficulties to the level expressed by the parents (Tr. p. 243).

<sup>27</sup> The district requested consent to evaluate the student by prior written notice dated January 18, 2012, and the parents provided consent on January 20, 2012 (Dist. Exs. 38; 39).

and notified the district of their intent to unilaterally place the student at Greenwood at public expense as of February 7, 2012 (Parent Ex. M).

At the end of January 2012, a district speech-language pathologist conducted an evaluation of the student's receptive and expressive language, pragmatic language, and problem solving skills (Dist. Ex. 42 at pp. 1-2). Administration of an assessment of the student's receptive and expressive language skills yielded a core language standard score of 111 (average range) (id. at p. 1). The speech-language pathologist reported that the student worked through the language assessment with "little to no difficulty" (id.). On a measure of the student's ability to effectively use social language and evaluate whether his responses to social situations would be successful, the student achieved a standard score of 97 (average range) (id.). Weakness noted included the student's ability to tailor messages to different people, take turns, be aware of listener knowledge, and attend to the point of view of his audience (id.). The student also achieved a standard score in the average range (88) on a measure of his ability to problem solve and think critically about everyday situations (id. at p. 2). Overall, the evaluation report indicated that the student demonstrated strengths in expressive and receptive language skills and—although he exhibited some difficulty with pragmatic language—his pragmatic language skills fell "within the average range" (id.). The speech-language pathologist did not recommend that the student receive speech-language therapy (id.).

On January 31, 2012 a district occupational therapist completed an evaluation of the student's visual perceptual and visual motor skills (Dist. Ex. 43 at pp. 1-4). Test results indicated that the student demonstrated average visual motor integration skills, and below average skills in the areas of visual discrimination, visual memory, and visual spatial relationships (id. at p. 3). The occupational therapist also noted that students with his diagnoses (PDD-NOS, ADHD, disorder of written expression, nonverbal learning disability, and developmental coordination disorder) typically experienced some degree of visual perceptual weakness (id.). The OT evaluation report included recommendations to accommodate the student's weaknesses such as preferential seating, graph paper for mathematics, reduced visual stimuli on worksheets/handouts, copy of class notes, predictable location of assignments across classrooms, access to a word processor for lengthy assignments, assistance with organizing materials, pairing visual information with verbal explanations, and teaching the student to block out areas of a worksheet that were visually overstimulating (id.).

The student's report card dated February 1, 2012 reflected the following first semester grades: C- (English), C (mathematics), C (social studies), B- (science), and 70 (Spanish) (Parent Ex. JJJ at p. 1). Report card comments included that the student needed to show more effort on homework, that homework was missing, and that he needed to focus in class, seek help, and complete work on time (id.).

On February 1, 2012, the district scheduled a CSE meeting for February 8, 2012 (Dist. Ex. 44). In an e-mail dated February 7, 2012, the parents informed the assistant director of pupil services that they would not be attending the CSE meeting scheduled for the following day, because they had unilaterally placed the student and provided notice to the district (Parent Ex. EEEEE).

## **5. February 2012 IEP**

On February 8, 2012 the CSE convened without the parents to review the results of the speech-language and OT evaluation reports (Parent Ex. E at pp. 1-2; see Parent Ex. L at p. 1). Participants included the director of pupil services, the assistant director of pupil services, a principal, the student's special education teacher, the school psychologist, the occupational therapist, the speech-language pathologist, the guidance counselor, an additional parent member, and a regular education teacher (Parent Ex. E at p. 1). According to meeting information, the CSE reviewed the parents' December 7, 2011 letter requesting evaluations and the district's January 10, 2012 response (id. at p. 2). The information indicated that the speech-language pathologist and occupational therapist both presented the results of their testing and their determination not to recommend speech-language or OT services at that time (id.). The CSE also added two annual goals on writing to the student's IEP (id. at pp. 2, 9).

#### **a. Special Factors—Assistive Technology**

Regarding the parents' allegation that the IHO erred in finding that the recommended assistive technology addressed the student's needs, a review of the hearing record and the February 2012 IEP supports the IHO's determination. As discussed above, in fall 2011 the parents and district staff met with the evaluator who had conducted the September 2010 assistive technology evaluation, and the district subsequently provided the student with an iPad and software applications including Notability and Dropbox (Tr. pp. 537-38, 589-91, 637-38; Parent Exs. UUUUU; XXXXX). The February 2012 IEP specifically referenced iPad, Notability, and Dropbox technology, indicating that the student used this technology "across curriculum settings" and that the technology facilitated the student's work to and from home, and the IEP provided support related to the student's deficits in visual perceptual and motor skills, as well as his ability to plan and organize his assignments (Parent Ex. E at p. 7). I find that the February 2012 IEP adequately addressed the student's assistive technology needs, for the reasons, discussed above, I found that the assistive technology provided the student on the November 2011 IEP was appropriate (H.C., 528 Fed. App'x at 67; E.F., 2013 WL 4495676, at \*20).

#### **b. Special Factors—Interfering Behaviors**

The parents assert on appeal that the IHO erred in finding that the district's failure to conduct an FBA did not deny the student a FAPE. The school psychologist testified that around the time the student left the district in February 2012, there was "ongoing informative assessment" and "tracking" of the student's social/emotional progress in counseling and his day-to-day functioning in the classroom, which is reflected in the report on the progress the student was making toward the annual goals contained in the November 2011 IEP (Tr. pp. 475-76; see Parent Ex. KKK at p. 3). She further testified that conversations with the parents indicated to her that the student's behaviors were not consistent between home and school, in that although the parents reported the student struggled significantly at home, that behavior was not consistent with what district staff observed at school (Tr. pp. 481-82).

Although the parents allege that by this time the student's emotional health had deteriorated to the point the district should have conducted an FBA, it is unclear from the petition what behavior(s) the parents believe the student exhibited at school that interfered with his learning such that an FBA was required. The hearing record does show that the student had increased difficulty completing assignments and his grade in English declined from a B- to a C, in social studies from a B- to a C-, and in science from a B+ to a B- during the period between

the November 2011 CSE subcommittee meeting and his unilateral placement at Greenwood at the beginning of February 2012 (Parent Exs. JJJ at p. 1; FFFFF at pp. 1-2; GGGGG at pp. 1-2; IIIII; JJJJ at pp. 1-2; MMMMM; OOOOO; PPPPP; SSSSS).<sup>28</sup> A review of the hearing record shows that during this time period district staff continued to provide the student with counseling services, communicated with the parents, the student, and his teachers regarding missing or incomplete assignments, encouraged the student to stay after school to make up work, offered to change the student's classes, enlisted additional technological support, and reviewed with the student how to use his assistive technology (Tr. p. 615; Parent Exs. E at p. 2; FFFFF at pp. 1-2; GGGGG at pp. 1-2; IIIII; JJJJ at pp. 1-2; MMMMM; OOOOO; PPPPP; SSSSS).<sup>29</sup> Aside from these difficulties—which the district attempted to address—the hearing record does not otherwise indicate that during this time period the student exhibited behaviors that interfered with his learning or that of others such that an FBA was required to provide him with a FAPE (Parent Ex. E at p. 8; see, e.g., Tr. pp. 508, 598, 670).

I find that the February 2012 IEP adequately addressed the student's behavior needs, for the same reasons I also found that behavioral need were adequately addressed in the November 2011 IEP as discussed above (see A.D., 2013 WL 1155570, at \*9-\*10). In sum, I note that the hearing record shows that the student expressed few social/emotional issues while in school, that the parents' expressed significant concerns about the student's social/emotional needs, and that the district took their concerns seriously and took steps in an attempt to address those concerns.

### **c. Annual Goals**

The parents allege on appeal that the IHO erred in finding that the annual goals were appropriate, despite the absence of goals in writing, mathematics, self-advocacy, and assistive technology.<sup>30</sup> Contrary to the parents' assertion that the February 2012 IEP lacked annual goals in the area of writing, the February 2012 IEP indicated that the student's special education teacher included two writing goals into the IEP to improve the student's ability to review his written work and self-correct, and to use the pre-writing process to produce stories/essays, which appropriately related to difficulties identified in the present levels of performance (Parent Ex. E at pp. 2, 5-7, 9).<sup>31</sup> Regarding the alleged lack of mathematics annual goals, at the time the February 2012 IEP was developed, the student had achieved a grade of C in mathematics, consistent with his performance in this subject since the beginning of the 2011-12 school year (Parent Ex. JJJ at p. 1). The February 2012 IEP included the same mathematics present levels of

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<sup>28</sup> The student's mathematics grade remained a C, and his Spanish grade increased from a 65 to a 67 (Parent Ex. JJJ at p. 1).

<sup>29</sup> The private tutor who worked with the student once per week for an hour from the start of the 2011-12 school year until January 2012 testified that she observed the student "emotionally upset" about something that had occurred at school on approximately two to three occasions (Tr. pp. 949-51, 955-56).

<sup>30</sup> While the petition does not specify between the three IEPs developed for the 2011-12 school year, the parents' memorandum of law asserts that "neither the April [sic] 2011 nor the November 2011 IEPs contain[ed] annual goals addressing these needs" (Parent Mem. of Law at p. 8).

<sup>31</sup> Although formalized as annual goals in the February 2012 IEP, the May 2011 and November 2011 IEPs had previously provided guidance to the student's teachers that when directed to check his work he can find errors, that he benefitted from the use of graphic organizers and support throughout the writing process, and that he required adult support to expand his ideas and edit his work (Parent Exs. F at pp. 5-7; G at pp. 2-4).

performance, management needs, and provision of graph paper as the May 2011 and November 2011 IEPs which, as described in detail above, adequately met the student's needs related to mathematics (compare Parent Ex. E at pp. 5-7, 10, with Parent Ex. F at pp. 5-7, 9, and Parent Ex. G at pp. 3-4, 7). Regarding the assertion that the February 2012 IEP lacked assistive technology and self-advocacy annual goals, as described above related to the parents' FBA claim—given the relatively short amount of time between the November 2011 CSE subcommittee meeting and the student's removal from the district in early February 2012—the hearing record shows that the district responded to the student's increasing difficulty consistently accessing his technology, and provided supports to assist him with completing assignments and developing relationships with teachers, such that the lack of IEP annual goals in these areas did not rise to the level of a denial of a FAPE (Tr. p. 615; Parent Exs. E at p. 2; FFFFF at pp. 1-2; GGGGG at pp. 1-2; IIIII; JJJJJ at pp. 1-2; MMMMM; OOOOO; PPPPP; SSSSS).

#### **d. General Education Placement with Resource Room Services**

The February 2012 IEP retained the majority of present levels of performance student information from the November 2011 IEP (compare Parent Ex. E at pp. 3-7, with Parent Ex. F at pp. 3-7). New information in the February 2012 IEP present levels of performance included that the student had received a diagnosis of a learning disorder-NOS, that he wore corrective lenses, that he benefited from using a word processor for lengthy writing assignments and to organize his daily homework planner, and that recent testing revealed slightly below average skills in visual discrimination, visual memory, and visual spatial relationships (Parent Ex. E at pp. 6-7). The February 2012 IEP also reflected information from the January 2012 OT evaluation report that the student's below average scores correlated to his diagnoses of a nonverbal learning disability and developmental coordination disorder, necessitating accommodations such as preferential seating, reduced visual stimuli on worksheets, a copy of class notes, and paring of visual instruction with verbal explanation (compare Dist. Ex. 43 at p. 3, with Parent Ex. E at p. 7). Contrary to the parents' allegation on appeal, as previously addressed in this decision relative to the November 2011 and February 2012 IEPs, the hearing record supports a finding that the February 2012 IEP appropriately addressed the student's special education needs in the areas of writing and written language, and social/emotional skills (see Parent Exs. E at pp. 1-14; Parent Ex. P at pp. 1-3).

Regarding the parents' assertion that a general education placement with resource room services was not sufficiently structured, a review of the parents' December 7 and December 21, 2011 letters shows that while the parents did raise specific concerns regarding assistive technology, preteaching of information, exemption from the language other than English requirement, the student's feelings about school, the provision of counseling, and annual goals, the letters cannot reasonably be read to suggest to the district that the parents believed a change in the student's placement was necessary (Parent Exs. R at pp. 1-3; S at pp. 1-3). The student's 2011-12 special education teacher testified that she had a few meetings with the parent, but at no time did the parent suggest that the resource room services provided to the student were not adequate or that the student should be placed in additional self-contained classrooms (Tr. pp. 594-95). The school psychologist testified that during the first half of the 2011-12 school year "testing and teacher reports and observations all indicated [the student] was . . . doing well social and emotionally and making progress academically" (Tr. pp. 414-16). At the time of the

February 2012 CSE meeting, the student's grades ranged from B- to C-, and he had achieved a 70 in Spanish (Parent Ex. JJJ at p. 1).<sup>32</sup>

Additionally, an overall read of the hearing record does not suggest that the student's special education needs changed significantly from the time the November 2011 IEP was developed through the time of the February 2012 CSE meeting such that changes in then-current programming and placement were required for the student to receive a FAPE (compare Parent Exs. E at pp. 1-14; JJJ, with Parent Ex. F at pp. 1-13, and Parent Ex. MMM).<sup>33</sup> A review of the district's response to the parents' December 2011 letters in which they expressed their concerns about the student's program shows that the district attempted to address the parents' concerns, and continued to believe that it was providing the student with an appropriate program and services (Parent Ex. P at pp. 1-3).

## **6. Relevant Events Subsequent to the February 2012 CSE Meeting**

The hearing record suggests that the student's last day in the district was on or about February 7, 2012 and that he subsequently began attending Greenwood soon thereafter (see Tr. pp. 835, 1338-39, 1521-22; Parent Ex. M; ). At Greenwood the student received instruction in reading, spelling/word work, handwriting, study skills, mathematics, science, social pragmatics, "shop," music, physical education, writing, and art (see Parent Exs. KK at pp. 1-6; MM at pp. 1-3; NN; OO at pp. 1; PP at pp. 1-2; QQ at p. 1; RR at p. 1; SS at p. 1; UU at pp. 1-2; WW at p. 1).

On February 15 and 23, 2012, a speech-language pathologist conducted a phonological and language screening of the student at Greenwood by administering assessments of the student's phonological processing and higher level language skills (Parent Ex. EE at pp. 1-2). The speech-language pathologist reported that the student exhibited "average phonological awareness skills and phonological memory," with rapid naming skills in the high average range (id. at p. 2). She further reported that the student demonstrated good comprehension and use of higher level language skills and vocabulary, although there were indications of a lack of language "flexibility" regarding ambiguous language and a lack of familiarity with some idiomatic expressions (id.). The speech-language pathologist indicated that "speech and language support" did not appear warranted at that time (id.).

On March 8, 2012 an occupational therapist conducted an evaluation of the student's visual perceptual and visual motor skills, and written work output, and also oculomotor and gross motor screenings at Greenwood (Parent Ex. DD at pp. 1-5). The occupational therapist reported that the student's performance was in the average range on tests measuring his visual discrimination, visual sequential memory, and visual figure ground skills (id. at p. 4). The student's scores were in the low range of performance for visual memory, visual spatial relations, visual closure, and visual form constancy (id.). The occupational therapist reported that

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<sup>32</sup> The intent of the February 2012 CSE meeting—which the parents chose not to attend—was to discuss the results of the January 2012 OT and speech-language evaluations that the parents had requested the district conduct (Parent Exs. E at p. 2; R at pp. 1-2; S at p. 3; EEEEE).

<sup>33</sup> To the extent that the parents assert that the removal of the counseling consultation between the school psychologist and the special education teacher denied the student a FAPE, for the reasons discussed at length above, the hearing record supports a finding that the February 2012 IEP adequately addressed the student's social/emotional needs, and included a provision for quarterly team meetings (see Parent Ex. E at pp. 6-7, 9-11).

assessment results indicated that the student required "much more assistance performing classroom-related activities than is typical for students of his grade" (*id.* at p. 5). She recommended direct OT services on a weekly basis, with weekly consultation to the student's teachers (*id.*).

In May 2012 the parents inquired of the district when the student's annual review would be held, and sent the recent OT and phonological processing/language evaluation reports and the student's winter term reports to the assistant director of pupil services (Parent Exs. TTTT at pp. 1-2; UUUU; VVVV). The assistant director of pupil services informed the parent that she had "reached out" to Greenwood and requested that Greenwood staff participate in the meeting via phone conference (Parent Ex. TTTT at p. 1).

### **C. 2012-13 School Year—June 2012 IEP**

On June 18, 2012 the CSE convened for the student's annual review and to develop an IEP for the 2012-13 school year (Parent Ex. C at pp. 1-15). Participants at the meeting included the parents, the director of pupil services, the assistant director of pupil services, the school psychologist, the student's former special education teacher, the guidance counselor, a CSE co-chairperson, a regular education teacher, and an additional parent member (*id.* at p. 1; *see* Tr. pp. 669-70). According to CSE meeting information, the student's former special education teacher reviewed the IEP and updated present levels of performance, management needs, accommodations/modifications, special factors, testing accommodations, and annual goals (Parent Ex. C at p. 2). The IEP indicated that the parents requested time to review the IEP and meet with the high school special education staff before "making their decision" (*id.*).

The June 2012 IEP present levels of performance included scores and narrative results from the spring 2012 Greenwood phonological processing/language and OT evaluation reports (*compare* Parent Ex. C at pp. 3-4, 7-8, *with* Parent Ex. DD at pp. 1, 4-5, *and* Parent Ex. EE at pp. 1-2).<sup>34</sup> The hearing record also indicated that the CSE had Greenwood teacher progress reports

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<sup>34</sup> In their petition, the parents contend that the IHO erred in stating that the student's IEPs for the 2011-12 and 2012-13 school years provided a clear indication of the student's "condition to date and his specific academic needs" because "at no point does either [sic] IEP mention any of [the student's] sensory processing issues" that were identified in a June 2012 Greenwood OT evaluation/progress report, which included the results of a Dunn Sensory profile administered to the student (IHO Decision at p. 3; Parent Ex. VV; Pet. ¶¶ 64-65). However, although in May 2012 the parents provided the CSE with a March 2012 Greenwood OT evaluation report, that report did not contain any indication that the student had sensory processing needs, and included a treatment plan that recommended a sensory processing evaluation (*see* Parent Exs. DD at p. 5, TTTT at p. 2). The June 2012 IEP includes the results of the March 2012 Greenwood OT evaluation (*see* Parent Exs. C at pp. 3-4; DD at p. 1). The hearing record does not indicate that the parents provided the June 2012 CSE with a copy of the June 2012 Greenwood OT evaluation/progress report that indicated the student exhibited sensory processing needs (*see* Parent Exs. C at p. 3; VV; TTTT at p. 2). Accordingly, the IHO did not err in finding that the June 2012 IEP gave a clear indication of the student's condition to date and his specific academic needs, as the June 2012 CSE was not made aware of the results of the June 2012 Greenwood OT evaluation/progress report (*see R.E.*, 694 F.3d at 186-88 [holding that an "IEP must be evaluated prospectively as of the time of its drafting"]; *C.L.K. v Arlington Sch. Dist.*, 2013 WL 6818376, at \*13 [S.D.N.Y. Dec. 23, 2013] ["a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE"]; *J.M. v New York City Dep't of Educ.*, 2013 WL 5951436, at \*18-\*19 [S.D.N.Y. Nov. 7, 2013] [holding that materials that are "unavailable" to the CSE at the time the student's IEP is developed may not be used to challenge the appropriateness of the IEP]).

available (Parent Ex. C at p. 3).<sup>35</sup> According to the assistant director of pupil services and the special education teacher, the resultant IEP included some information from the February 2012 IEP, and new information from the Greenwood reports designated with an asterisk (Tr. pp. 265-66, 672-73; compare Parent Ex. C at pp. 6-8, with Parent Ex. E at pp. 5-7). Despite the inclusion of the Greenwood evaluation and teacher report information, a review of the June 2012 IEP's description of the student's present levels of performance shows that the student's performance at Greenwood generally remained consistent with his performance while in the district (see Tr. pp. 266-70, 674; compare Parent Ex. C at pp. 6-8, with Parent Ex. E at pp. 5-7, Parent Ex. F at pp. 5-7, and Parent Ex. G at pp. 2-4).

At the outset, a review of the petition reveals that the parents allege the same claims for the 2012-13 school year as described above for the 2011-12 school year, which have been previously discussed in great detail. Additionally, in general the evaluative information available from Greenwood is in harmony with that previously obtained by the district and contained in the July 2011 IEE, with each of these sources of information presenting a similar picture of the student's needs, strengths and weaknesses.

### **1. Special Factors—Assistive Technology**

The June 2012 IEP indicated that the student used a word processor for lengthy (longer than a sentence) responses, note taking, homework assignments, and for recording his daily assignments in place of a planner (Parent Ex. C at p. 7). The June 2012 IEP also indicated that the student used technology effectively and efficiently, willingly used technology for writing assignments, and was receptive to and interested in exploring assistive technology resources (id. at p. 8). Information the district indicated was derived from Greenwood reports and showed that the student "requires access to a word processor for writing assignments longer than one paragraph" (id.; see Tr. p. 266). Consistent with the student's use of a laptop at Greenwood, the June 2012 IEP provided the student with a word processor on a daily basis in all academic classes, allowance to type all assignments longer than a paragraph, and one weekly OT consult to monitor the student's technology needs and make repairs as needed (Parent Ex. C at p. 12; see Parent Exs. BBB at p. 1; UU at p. 2). Therefore, for substantially the reasons stated above with respect to the student's IEPs for the 2011-12 school year, the hearing record supports a finding that the June 2012 IEP continued to offer the student appropriate assistive technology (H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 67 [2d Cir. 2013]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at \*20 [E.D.N.Y. Aug. 19, 2013]).

### **2. Special Factors—Interfering Behaviors**

A review of the student's Greenwood reports from winter and spring 2012 shows that the student improved his ability to moderate emotional responses, reduce impulsive comments and behaviors peers interpreted as "bossy," and developed skills to make friends (Parent Exs. KK at pp. 1, 6; OO at p. 1; XX at p. 1; ZZ at p. 1; AAA at p. 1; GGG at p. 1; HHH). Although at times

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<sup>35</sup> It is unclear from the hearing record which Greenwood reports the June 2012 CSE had available, as the majority of the Greenwood reports from this timeframe are dated either "March 2012" or "Spring 2012;" with some reports dated "Winter 2012" (see Tr. pp. 264-70; see, e.g., Parent Exs. KK at p. 1; MM at p. 1; NN; OO at p. 1; PP at p. 1; WW at p. 1; XX; YY at pp. 1-2; ZZ; AAA at p. 1; BBB at p. 1; EEE at p. 1; FFF at p. 1; GGG at p. 1; HHH at p. 1). Some of the Greenwood reports are dated Winter or Spring 2011; however, the student did not attend Greenwood until February 2012 (see Parent Exs. M; UU at p. 1; DDD at p. 1; FFFFF at p. 1).

the student exhibited "attitude," "moodiness," and task avoidance behaviors, a spring 2012 Greenwood report indicated that the student responded well to discussions and suggestions about how to deescalate, and by the end of the 2011-12 school year his "rants"—although still occurring—were "less intense" (Parent Ex. KK at p. 5). Greenwood reports also indicated that the student exhibited good progress toward goals to improve his conversational turn-taking skills with peers, tolerate others' opinions, demonstrate increased self-awareness, and identify two coping strategies (Parent Ex. PP at pp. 1-2). Despite continued social and regulatory difficulties, the winter 2012 Greenwood tutorial report reflected reports from the student's teachers that the student was performing well academically, that he was consistently in the "highest merit group," and that he had earned many privileges (Parent Exs. KK at p. 6; AAA at p. 1). A review of the winter/spring 2012 Greenwood reports did not reflect that the student engaged in inappropriate behaviors outside those described above related to his difficulty with mood regulation and social interaction (see Parent Exs. KK; MM; NN; OO; PP; UU; WW; XX; YY; ZZ; AAA; BBB; CCC; EEE; FFF; GGG; HHH). Notably, the student's spring 2012 tutorial report stated that the student's behavior "in and out of class was always very good," further indicating that he had "no behavior feedback slips at all during his time at the school" (Parent Ex. KK at p. 5).

The June 2012 IEP indicated that according to Greenwood reports, the student tended to be bossy, complain, and not filter what he was saying; his voice was loud and his words could be condescending; he found it difficult to read body language and missed subtle clues about how people were feeling; he could be inflexible and perceive situations as non-negotiable; and he became anxious when presented with new experiences (Parent Ex. C at p. 8; see Parent Ex. AAA at pp. 3-4). Information contained in previous IEPs and retained in the June 2012 IEP included that the student displayed delays in social skills, may misinterpret situations that could interfere with his participation in age appropriate activities, and that he continued to work on turn-taking, listening to peers and interpreting body language, and social problem-solving strategies (Parent Ex. C at p. 8; see Parent Exs. E at p. 6; F at pp. 5-6; G at p. 3). The June 2012 IEP further indicated that the student needed strategies to address behaviors that impede the student's learning or that of others (Parent Ex. C at p. 9).

According to the June 2012 IEP, the student's needs required that he further develop the ability to monitor his social interactions with peers and apply social skills learned in counseling, his social perceptiveness and social problem-solving skills, and strategies to cope with anxiety (Parent Ex. C at p. 8). The June 2012 IEP provided the student with adult support to monitor and provide support with implementing social and coping skills throughout the day, and to assist with motivation, sustained effort, and task completion (id. at p. 9). Annual goals included in the June 2012 IEP addressed the student's need to use various scenarios to verbally identify examples of how his actions affected others, to identify "cognitive distortions" of events that had occurred during the school day and also strategies to deal with those situations, to facilitate negotiations or compromises with peers, to identify and discuss examples of socially acceptable behavior across different social situations, and discuss/assess a problem situation and review alternative solutions without acting impulsively (id. at pp. 10-11). The June 2012 IEP provided the student with twenty sessions per year of small group counseling services, and clearly defined limits/expectations regarding what is expected of him academically and behaviorally in the classroom and throughout the school setting (id. at pp. 11-12). To the extent that the district's determination that the student required "strategies to address behaviors that impeded his learning or that of others" indicated that an FBA should have been conducted pursuant to the IDEA and federal and State regulations (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; 8 NYCRR

200.4[d][3][i]), as discussed above a review of the June 2012 IEP shows that it adequately addressed the student's social/emotional and behavioral needs, such that the lack of an FBA did not rise to the level of a denial of a FAPE (F.L., 2014 WL 53264, at \*3; M.W., 725 F.3d at 140-41; R.E., 694 F.3d at 190; see Parent Ex. C at pp. 8-12).

### **3. Annual Goals**

The parents allege on appeal that the IHO erred in finding that the annual goals contained in the June 2012 IEP were appropriate despite the absence of goals in writing, mathematics, self-advocacy, and assistive technology. In the area of writing, the June 2012 IEP reflected Greenwood reports that the student exhibited excellent proficiency in spelling, good progress with editing and elaboration of ideas/creativity, and that he needed improvement in sentence structure, paragraph development, essay development, and keyboarding/file management skills (Parent Ex. C at p. 7; see Tr. p. 266). A writing annual goal included in the June 2012 IEP addressed the student's need to improve his ability to write a four paragraph essay that was coherent, sequential, and logical (Parent Ex. C at p. 10). In addition to the annual goal to improve writing skills, the June 2012 IEP identified academic needs the student required including support to write a well written essay, use graphic organizers to plan his writing, and adult support to assist with improving sentence structure and paragraph development (id. at pp. 7, 9). The June 2012 IEP further noted that the student required continued practice with handwriting skills, and identified his need for adult support to assist with the production of legible handwriting (id. at pp. 8-9). Therefore, the hearing record supports a finding that the June 2012 IEP adequately met the student's writing needs (id. at pp. 7-10).

In the area of mathematics, Greenwood reports from winter/spring 2012 reflect that the student achieved grades of A and A-, and the results of an administration of the Iowa Test of Basic Skills-Math yielded subtest scores that ranged from the 57th to the 62nd percentile (Parent Exs. MM at pp. 1-2; CCC at p. 1). The June 2012 IEP reflected Greenwood reports that the student demonstrated mastery of math facts and whole number operations, was making good progress with number sense, and worked hard in math and was comfortable taking risks (Parent Ex. C at p. 6). The June 2012 IEP indicated that the student needed to improve his command of part-to-whole operations, problem solving, and application; however, given the student's performance in mathematics both in the classroom and on mathematics assessment, the hearing record supports a finding that the lack of mathematics annual goals did not rise to the level of a denial of a FAPE (id.; see Parent Exs. MM at pp. 1-2; CCC at p. 1).

Regarding the parents' claim that the June 2012 IEP was inappropriate because it lacked annual goals in the areas of self-advocacy, a review of the hearing record supports a contrary conclusion. Winter/spring 2012 Greenwood reports—as previously described above—reflected that the student's greatest social/emotional deficits were his ability to regulate his responses and develop appropriate friendship/social interaction skills (Parent Ex. KK at pp. 1, 6; OO at p. 1; PP at pp. 1-2; XX; AAA at pp. 1, 3-4; GGG at p. 1; HHH). Although the June 2012 IEP annual goals do not specifically reference the student's "self-advocacy" skills, the goals do address the student's documented need to develop the ability to monitor his social interactions with peers and apply social skills learned in counseling, his social perceptive-taking and social problem-solving skills, and strategies to cope with anxiety, such that the lack of a specific self-advocacy annual goal does not result in a denial of a FAPE (Parent Ex. C at pp. 8, 10-11).

Although the parents assert that the June 2012 IEP lacked annual goals for assistive technology, a review of Greenwood reports do not reflect that the student required assistive technology annual goals (see Parent Ex. UU at p. 2). A Greenwood writing report indicated that the student's use of technology and keyboarding was "strong" and that he exhibited the ability to use voice-to-text technology, and assistive technology to assist him in reading lengthy text for content (Parent Ex. UU at p. 2). Another Greenwood writing report indicated that the student often edited his own work without help, especially when working on his laptop (Parent Ex. BBB at p. 1). The report further indicated that although the student used a hunt-and-peck typing style, he used his laptop "with ease" (id. at p. 2). The hearing record does not show information contrary to the June 2012 IEP statement that the student "utilizes technology effectively and efficiently," and therefore assistive technology annual goals were not required for a FAPE (J.L., 2013 WL 625064, at \*13).

#### **4. General Education Placement with Resource Room Services**

The June 2012 IEP indicated that the student was functioning in the average range of intelligence, and that achievement test results indicated that he had the skills to master grade level content (Parent Ex. C at p. 6). Additionally, the student presented with average phonological awareness and phonological memory skills, and rapid naming skills in the high average range (id.). Information from Greenwood reports reflected in the June 2012 IEP shows that academically, the student generally exhibited adequate reading, mathematics and spelling skills, and that he needed to improve his higher level reading comprehension skills, his understanding of specific mathematics concepts, and his use of the writing process (id. at pp. 6-7).

For the 2012-13 school year, the June 2012 CSE recommended a general education setting with daily resource room services, 20 sessions of small group counseling per year, and a weekly occupational therapist consult (Parent Ex. C at pp. 1-2, 11-12; see Tr. p. 264). The June 2012 IEP also provided the student with refocusing and redirection, preferential seating, clearly defined limits/expectations, and a word processor during class time and when taking tests (Parent Ex. C at pp. 11-13). The June 2012 IEP identified the student's need for adult support to use a graphic organizer for writing and to complete other written language tasks, produce legible handwriting, and assist with motivation, sustained effort, task completion, and to implement social/coping skills throughout the day, supports that—in conjunction with the IEP annual goals—addressed his special education needs related to writing and written language, visual motor, and social/emotional skills (id. at pp. 7, 9-11).

The special education teacher—who had worked with the student while he attended the district junior high school, attended the June 2012 CSE meeting, and assisted in preparing the June 2012 IEP—opined that based upon her knowledge of the student and the information contained in the Greenwood reports, the student was prepared to enter the district's high school for ninth grade in "typical classes" with the resource room support provided to him in the IEP (Tr. pp. 650, 670, 672-74; Parent Ex. C at p. 1). Based upon her experience providing services to the student during his time in the district's junior high school, the school psychologist—who also attended the June 2012 CSE meeting—opined that the June 2012 IEP was adequate to meet his needs (Tr. pp. 419-22). Additionally, an overall read of the hearing record does not suggest that the student's special education needs changed significantly from the time the February 2012 IEP was developed through the time of the June 2012 CSE meeting such that changes in

programming and placement were required for the student to receive a FAPE (compare Parent Exs. C at pp. 1-15; KK; MM; NN; OO; PP; AAA; BBB; CCC; DDD; GGG; HHH, with Parent Ex. E at pp. 1-14).<sup>36</sup>

## **VII. Conclusion**

Having determined that the evidence in the hearing record demonstrates that the IHO correctly found that the district sustained its burden to establish that it offered the student a FAPE for the 2011-12 and 2012-13 school years, the necessary inquiry is at an end and there is no need to reach the issues of whether the student's unilateral placement at Greenwood was appropriate or whether equitable considerations support an award of tuition reimbursement (Burlington, 471 U.S. at 370; M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]).

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

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
May 29, 2014**

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**JUSTYN P. BATES  
STATE REVIEW OFFICER**

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<sup>36</sup> To the extent that the parents continue to assert that the removal of the counseling consultation between the school psychologist and the special education teacher denied the student a FAPE, for the reasons discussed at length above, the hearing record supports a finding that the June 2012 IEP adequately addressed the student's social/emotional needs (see Parent Ex. C at pp. 8-11).