



The University of the State of New York

The State Education Department

State Review Officer

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No. 13-076

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

Appearances:

Law Offices of Regina Skyer & Associates, attorneys for petitioners, Gregory Cangiano, Esq., of counsel

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

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for the costs of special education itinerant teacher (SEIT) services, behavioral consultation services, and related services for the 2012-13 school year. 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

The parties' familiarity with the facts and procedural history of the case and the IHO's decision is presumed and will not be recited here.¹ The CSE convened on March 23, 2012, to formulate the student's IEP for the 2012-13 school year (see generally Dist. Ex. 1 at pp. 1-16).

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

The parents disagreed with the recommendations contained in the March 2012 IEP, and in a letter dated June 14, 2012, indicated that they had not yet received a final notice of recommendation (FNR) (see Parent Ex. F at p. 1). In a due process complaint notice, dated July 9, 2012 and in an amended due process complaint notice, dated October 29, 2012, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (see Parent Exs. A at pp. 1-7; C at pp. 1-8).²

On August 9, 2012, the IHO conducted a prehearing conference, and on August 28, 2012 the parties proceeded to an impartial hearing, which concluded on March 7, 2013 after eight days of proceedings (Tr. pp. 1-441). In a decision dated March 28, 2013, the IHO determined that the district offered the student a FAPE for the 2012-13 school year (see IHO Decision at pp. 9-12).³

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parents' petition for review and the district's answer thereto is also presumed and will not be recited here. The gravamen of the parties' dispute on appeal is whether the March 2012 CSE appropriately changed the student's eligibility classification to a speech or language impairment and whether the March 2012 CSE's recommendation of a 12:1+1 special class placement in a community school was appropriate for the student. The parties additionally argue the merits of certain claims that the IHO did not address, including the parents' claims relating to the March 2012 CSE's failure to conduct a functional behavior assessment (FBA) and the March 2012 CSE's failure to recommend a 12-month school year program. Further, the parents also allege that the IHO erred in finding that the district sent an FNR to the parents, and argue that the IHO displayed bias against the parents. The parents do not appeal, however, the IHO's determination that the annual goals in the March 2012 IEP were appropriate. Therefore, this determination has become final and binding upon the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

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]).

² By FNR dated July 10, 2012, the district summarized the recommendations in the March 2012 IEP, and identified the particular public school site to which the district assigned the student to attend for the 2012-13 school year (see Dist. Ex. 4).

³ On August 31, 2012, the IHO issued an interim order on pendency, which directed the district to continue to fund the following services for the student: 25 hours per week of SEIT services, two 30-minute sessions per week of individual occupational therapy (OT), four 30-minute sessions per week of individual speech-language therapy, and one 30-minute session per week of individual physical therapy (PT) (see Interim IHO Decision at p. 2). Here, the IHO's interim order on pendency awarded the parents the same services the parents requested as relief for the district's alleged failure to offer the student a FAPE for the 2012-13 school year (compare Parent Ex. A at pp. 1-3, 6, and Parent Ex. C at pp. 1-3, 8, with Interim IHO Decision at p. 2).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir.

1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "academic, developmental, and functional needs" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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

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

VI. Discussion

A. IHO Decision and IHO Bias

The parents assert that the IHO failed to demonstrate sufficient knowledge of the hearing record—as illustrated by the lack of citation to the hearing record in support of her conclusions in the decision and by making "inaccurate statements" about the student's recommended 12:1+1 special class placement and the March 2012 CSE composition—and the IHO exhibited bias against them. The evidence in the hearing record does not support the parents' contentions, and thus, the parents' allegations must be dismissed.

Initially, a review of the decision reveals that the IHO decision contains no specific cites to the transcript or exhibits to support the IHO's conclusions; however, in this particular instance the parents' claim that the IHO's failure to cite to the hearing record or legal authority, while a valid criticism, does not support a finding that the IHO lacked sufficient knowledge of the hearing record to warrant a reversal of the IHO's decision. 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 applicable law are the norm in "appropriate standard legal practice," and should be included in any IHO decision. In this case, the IHO's decision included citations to both testimonial and documentary evidence in setting forth each parties' respective cases (see IHO Decision at pp. 5-8). However, the failure to cite with specificity facts in the hearing record and law 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 reminded in the future to comply with State regulations, cite to relevant facts in the hearing record with specificity, and provide a reasoned analysis of those facts that reference applicable law in support of her conclusions.

The parents argue that the IHO's "myriad inaccurate statements" demonstrated her lack of knowledge regarding the facts of this case. Initially, the testimonial evidence does not clearly indicate whether the 12:1+1 special class placement was in fact a "bilingual Yiddish class"—as so described by the IHO in the decision—or whether the "bilingual Yiddish class" referred, instead, to a classroom at the assigned public school site that offered integrated co-teaching services (see Tr. pp. 77-92; IHO Decision at p. 7). However, even if the IHO incorrectly described the 12:1+1 special class placement at the assigned public school site, the parents do not argue how this error should result in a reversal of the IHO's decision. With regard to the March 2012 CSE composition, the IHO recounted in the decision the district school psychologist's testimony regarding the individuals who attended the March 2012 CSE meeting—which included the student's regular education teacher from his nonpublic school—and further noted the district school psychologist's testimony that the identified CSE members "participated during the entire IEP meeting" (see Tr. pp. 33-36; IHO Decision at pp. 5-6). However, the IHO failed to note the regular education teacher's own testimony, which indicated that she participated at the March 2012 CSE meeting via telephone for approximately 20 to 30 minutes and was not

"present" during that portion of the meeting when the March 2012 CSE recommended the student's "program" (compare Tr. pp. 106-07, with IHO Decision at pp. 5-8, 11-12). However, it is unclear how such error demonstrates that the IHO's knowledge of the facts of the case was so lacking that reversal is warranted. Therefore, the parents' allegations concerning the IHO's lack of factual knowledge must be dismissed.

The parents allege that the IHO was biased and acted in a manner that did not conform to federal or State regulations. Upon a careful and complete review of the hearing record, neither the IHO's management of the impartial due process hearing nor her decision manifested bias or prejudice against—or in favor of—either party. Therefore, the parents' contentions must be dismissed. It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see Application of a Student with a Disability, Appeal No. 12-066; Application of a Student with a Disability, Appeal No. 11-144; Application of the Bd. of Educ., Appeal No. 10-097; Application of a Student with a Disability, Appeal No. 10-018; Application of a Student with a Disability, Appeal 10-004; Application of a Student with a Disability, Appeal No. 09-084; Application of the Bd. of Educ., Appeal No. 09-057; Application of a Student with a Disability, Appeal No. 09-052; Application of a Student with a Disability, Appeal No. 08-090). An IHO must also render a decision based on the hearing record (see Application of a Student with a Disability, Appeal No. 09-058; Application of a Student with a Disability, Appeal No. 08-036). Moreover, an IHO, like a judge, must be patient, dignified and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, and shall not, by words or conduct, manifest bias or prejudice, according each party the right to be heard (Application of a Student with a Disability, Appeal No. 12-064; Application of a Student with a Disability, Appeal No. 07-090; Application of a Student with a Disability, Appeal No. 07-075; Application of a Student with a Disability, Appeal No. 04-046; Application of a Student Suspected of Having a Disability, Appeal No. 01-021). In addition, State regulations require that an IHO "exclude evidence that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious," and moreover, empower an IHO with the discretion to "limit examination of a witness by either party whose testimony the [IHO] determines to be irrelevant, immaterial or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]-[d]). Here, the parents cite to several pages in the hearing transcript to support their allegation that the IHO was biased without any further explanation. The portions of the transcript cited include instances where the IHO overruled the parents' objections (see Tr. pp. 337, 339, 365, 406-07). However, as the district indicates, the hearing record also contained instances where the IHO overruled the district's objections (see Tr. pp. 56, 161, 211, 356-57).

The parents argue that a further illustration of the IHO's bias was the IHO's "unjustified" denial of the request for recusal. The parents argue that the IHO should have recused herself as a result of a February 6, 2012 complaint filed with the New York State Education Department by parents' counsel, which alleged that this same IHO mishandled cases assigned to the Law Offices of Regina Skyer and Associates. An IHO may not be an employee of the district that is involved in the education or care of the child; may not have any personal or professional interest that conflicts with the IHO's objectivity; must be knowledgeable of the provisions of the IDEA and State and federal regulations, and the legal interpretations of the IDEA and its implementing regulations; and must be possess the knowledge and ability to conduct hearings and render and

write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]). Here, the hearing record does not include the February 6, 2012 complaint as evidence, and the hearing record is otherwise devoid of evidence that calls into question the IHO's denial of the parents' recusal application. Therefore, the parents—as the party bearing the burden to provide evidence with respect to the IHO's alleged bias—level nothing more than bald, conclusory assertions unsupported by the evidence in the hearing record. Accordingly, the parents' allegations must be dismissed.

B. March 2011 IEP

Turning first to the issues addressed by the IHO in the decision, upon careful review the hearing record supports the IHO's conclusion that the district offered the student a FAPE for the 2012-13 school year (see IHO Decision at pp. 9-12). The IHO accurately recounted the facts of the case, addressed the majority of the specific issues identified in the parent's due process complaint notice, set forth the proper legal standard to determine whether the district offered the student a FAPE for the 2012-13 school year, and applied that standard to the facts at hand (id. at pp. 3-12). The decision shows that the IHO carefully considered the testimonial and documentary evidence presented by both parties, and further, that she weighed the evidence (id.). Furthermore, an independent review of the entire hearing record reveals that the impartial hearing was conducted in a manner consistent with the requirements of due process and there is no reason appearing in the hearing record to modify the determinations of the IHO (see 20 U.S.C. § 1415[g][2]; 34 CFR 300.514[b][2]). Thus, while my reasoning may have differed from the IHO's in some respects, the conclusions of the IHO are hereby adopted.

In particular, a review of the hearing record demonstrates that the IHO correctly determined that there were no procedural violations which impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits. The evidence in the hearing record supports the IHO's finding that the March 2012 IEP was developed collaboratively with the parents, the student's teachers, and the student's related service providers; the March 2012 CSE considered the information provided by the parents, the student's teachers, and the student's related service providers; and the parents and providers were given a full opportunity to participate in the March 2012 CSE meeting and to express their opinions (see Tr. pp. 33-36, 39, 54, 63, 65, 106-07, 119, 136-42, 192-93, 272-73, 332-33, 384-89, 394; Dist. Ex. 1 at p. 16; compare Dist. Ex. 1 at pp. 1-8, with Dist. Ex. 2 at pp. 2-9, and Dist. Ex. 3, and Parent Ex. G at pp. 1-4, and Parent Ex. H at pp. 1-2, and Parent Ex. I at pp. 1-3, and Parent Ex. J at pp. 1-4).

A review of the hearing record also demonstrates that the IHO correctly found that the March 2012 CSE's decision to change the student's eligibility classification from autism to speech or language impairment was supported by the results of the evaluations and the entire hearing record (see Tr. pp. 39-44, 54-56, 333-34, 391-94; Dist. Exs. 1 at pp. 1-3; 2 at pp. 2-9; 3; Parent Exs. G-J). Courts have given considerably less weight to identifying the underlying theory or root causes of a student's educational deficits and have instead focused on ensuring the parent's equal participation in the process of identifying the academic skill deficits to be addressed through special education and through the formulation of the student's IEP (see Fort

Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011] [noting the IDEA's strong preference for identifying the student's specific needs and addressing those needs and that a student's "particular disability diagnosis" in an IEP "will, in many cases, be immaterial" because the IEP is tailored to the student's individual needs]; Draper v. Atlanta Indep. Sch. Sys., 480 F. Supp. 2d 1331, 1342 [N.D. Ga. 2007]; see also Application of the Dep't of Educ., Appeal No. 12-013; Application of a Student with a Disability, Appeal No. 09-126 [noting that "a student's special education programming, services and placement must be based upon a student's unique special education needs and not upon the student's disability classification"]. The hearing record demonstrates that the parents, along with the student's teachers and related services providers, were provided an opportunity to identify the student's needs (see Tr. pp. 39, 45, 62, 65, 106-07, 136-42, 192-94, 272-73, 332-33, 384-94).

A review of the hearing record further demonstrates that the IHO correctly determined that the March 2012 CSE's recommendation of a 12:1+1 special class placement at a community school with related services was a "program reasonably calculated to meet the student's needs in the least restrictive environment" (LRE) (IHO Decision at p. 9-11). The evidence in the hearing record indicates that the student's individual needs, as described in the March 2012 IEP, could be met in a 12:1+1 special class placement at a community school along with the related services of individual speech-language therapy, individual PT, individual OT, and individual and group counseling (see Tr. pp. 44-45, 57, 68-69, 395-96; Dist. Exs. 1 at pp. 1-3). The March 2012 IEP reflects that the March 2012 CSE considered and rejected a general education setting because the student "ha[d] language, academic, and fine motors deficits that [a]ffect his involvement and progress in the general education curriculum" (Dist. Ex. 1 at p. 3). Additionally, the management needs recommended in the March 2012 IEP were consistent with those indicated in the March 2012 psychoeducational evaluation report, the March 2012 classroom observation report, and February 2012 progress reports (compare Dist. Ex. 1 at p. 3, with Dist. Ex 2 at pp. 2, 5-6, and Dist. Ex. 3, and Parent Ex. G at p. 2, and Parent Ex. H at p. 1, and Parent Ex. J at pp. 1-2, 4).

Additionally, a review of the hearing record demonstrates that the IHO correctly determined that the district sent the parents an FNR after the parents' original due process complaint notice, dated July 9, 2012, in which the parents denied receiving an FNR (see Dist. Ex. 4; Parent Ex. A at pp. 1, 5). The address listed on the FNR is the same one listed on all of the parent's correspondence with the district, including the due process complaint notices (compare Dist. Ex. 4, with Parent Ex. A at p. 1, and Parent Ex. C at p. 1, and Parent Ex. F at p. 1, and Parent Ex. L at p. 1). Therefore, the hearing record supports the IHO's finding that the district sent the parents an FNR.

Next, the parents assert that the IHO's failure to address certain issues in the decision—namely, whether the March 2012 CSE failed to conduct an FBA of the student or whether the March 2012 CSE failed to recommend a 12-month school year program—resulted in a finding that the district failed to offer the student a FAPE for the 2012-13 school year. As discussed more fully below, the parents' contentions are not supported by the evidence in the hearing record.

1. Consideration of Special Factors—Interfering Behaviors

The parents alleged that the March 2012 CSE failed to conduct an FBA of the student. The district argues that the March 2012 CSE did not conduct an FBA because the student did not have behaviors that interfered with his ability to learn. A review of the evidence in the hearing record supports the district's arguments, and thus, the parents' contentions must be dismissed.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ., 361 Fed. App'x 156, 161, 2009 WL 332662 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at *8; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]). 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] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 380 [S.D.N.Y. 2008]).

In New York State, policy guidance explains that "the IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address," 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, "a "student's need for a [BIP] must be documented in the IEP" (*id.*). 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]). State regulation defines an FBA as the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and

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

(8 NYCRR 200.1[r]).

According to State regulations, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]).

Although State regulations call for the procedure of using an FBA when developing a BIP, the Second Circuit has explained that, when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F3d at 190). The Court also noted that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE," but that in such instances particular care must be taken to determine whether the IEP addresses the student's problem behaviors (id.).

With regard to a BIP, the special factor procedures set forth in State regulations further note that the CSE or CPSE shall consider the development of a BIP for a student with a disability when:

- (i) the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions;
- (ii) the student's behavior places the student or others at risk of harm or injury;
- (iii) the CSE or CPSE is considering more restrictive programs or placements as a result of the student's behavior; and/or
- (iv) as required pursuant to 8 NYCRR 201.3

(8 NYCRR 200.22[b][1]).

Once again, "[i]f a particular device or service, including an intervention, accommodation or other program modification is needed to address the student's behavior that impedes his or her learning or that of others, the IEP shall so indicate" (8 NYCRR 200.22[b][2]). If the CSE determines that a BIP is necessary for a student the BIP shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . . ; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR 200.22[b][4]).⁴ Neither the IDEA nor its implementing regulations require that the elements of a

⁴ The Official Analysis of Comments to the federal regulations explains that the decision regarding whether a

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

It is undisputed that the March 2012 CSE did not conduct an FBA of the student in this case. The district school psychologist, who attended the March 2012 CSE meeting, testified that the student did not have any overt behaviors that interfered with his ability to receive educational benefit, and therefore, there was no need to conduct an FBA of the student (see Tr. pp. 69-70). The parents testified that the March 2012 CSE discussed the student's social and behavioral issues (see Tr. p. 391). The March 2012 IEP indicated—as reflected in the March 2012 psychoeducational evaluation report and the February 2012 progress reports—that the student had difficulty sustaining attention, he frustrated easily, and he did not react well to new concepts and tasks (compare Dist. Ex. 1 at pp. 1-2, with Dist. Ex. 2 at pp. 2, 5, and Parent Ex. G at p. 1, and Parent Ex. H at pp. 1-2, and Parent Ex. I at pp. 1-2, and Parent Ex. J at pp. 1, 4). The March 2012 classroom observation report relied upon by the March 2012 CSE indicated that the student's attention was average and no disruptive behavior was observed (see Dist. Ex. 3). The March 2012 IEP indicated—as reflected in the March 2012 psychoeducational evaluation report and February 2012 progress reports—that the student demonstrated understanding when focused and prompted (compare Dist. Ex. 1 at p. 1, with Dist. Ex. 2 at p. 5, and Parent Ex. G at p. 1). The March 2012 IEP also indicated—as reflected in the February 2012 OT progress report—that the student was calm and happy when his daily routine was consistent (compare Dist. Ex. 1 at p. 2, with Parent Ex. I at pp. 1, 3). To address the student's attention and frustration, the March 2012 IEP included the following strategies—as noted in the February 2012 progress reports and the March 2012 psychoeducational evaluation report—as management needs: praise, encouragement, refocusing, redirection, and being given tasks in increments (see Dist. Exs. 1 at p. 3; 2 at p. 5; Parent Exs. G at p. 1; J at pp. 1-2). Additionally, the March 2012 IEP addressed the student's frustration and resistance to change with annual goals, such as following a classroom routine and asking for clarification, along with speech-language therapy and counseling (see Dist. Ex. 2 at pp. 2, 4, 6, 9). Based upon the foregoing, the evidence in the hearing record does not support a finding that the student's attention needs and behavior impeded his learning or that of others such that the March 2012 CSE was required to conduct an FBA (see 8 NYCRR 200.4[d][3][i], 200.22[a], [b]).

2. 12-Month School Year Program

The parents assert that the hearing record demonstrated the student's need for a 12-month school year program to prevent substantial regression. The district asserts that the March 2012

student requires interventions such as a BIP rests with the CSE and is made on an individual basis (Consideration of Special Factors, 71 Fed. Reg. 46683 [August 14, 2006]).

CSE was not required to recommend a 12-month school year program, and further, the hearing record did not demonstrate that the student experienced substantial regression of skills to warrant a 12-month school year program recommendation. A review of the evidence in the hearing record does not support the parents' contentions.

The IDEA does not automatically require the provision of school services during the summer months; rather, such services must be provided when they are a necessary element of a FAPE for the student (see Antignano v. Wantagh Union Free Sch. Dist., 2010 WL 55908, at *11 [E.D.N.Y. Jan. 4, 2010]). Pursuant to State regulations, students "shall be considered for 12-month special services and/or programs in accordance with their need to prevent substantial regression" (8 NYCRR 200.6[k][1]). State regulation defines substantial regression as "a student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa]; see 34 CFR 300.106).⁵

The district school psychologist testified that the March 2012 CSE recommended a change from a 12-month school year program to a 10-month school year program for the 2012-13 school year (see Tr. p. 61). The parents and the student's SEIT—who attended the March 2012 CSE meeting—testified that the March 2012 CSE discussed whether a 12-month school year program would be appropriate for the student (see Tr. pp. 194-95, 397). According to the parents, during the March 2012 CSE meeting the student's SEIT and therapists "verbally disagreed with the ten month program" and provided "some real examples as to what would happen if [the student] [did not] remain in a 12 month program and how difficult it would also be for [the student] to start the school year" (Tr. pp. 397-98). The parents also testified that a 12-month school year program was recommended by all of the student's therapists (see Tr. p. 398). However, the SEIT teacher could not recall whether she provided her recommendations for a 12-month school year program to the March 2012 CSE (see Tr. p. 196). The student's occupational therapist who attended the March 2012 CSE meeting testified that she did not remember whether a 12-month school year program was discussed at the March 2012 CSE meeting, but further testified that the student "ha[d] to have a 12 month program" (Tr. p. 276).

However, contrary to the parents' assertion, all of the student's progress reports did not recommend a 12-month school year program for the student (see Parent Exs. G-J). In fact, the evidence in the hearing record only includes two statements in the SEIT's February 2012 progress report, which recommended a 12-month school year program to "prevent regression" and which noted that the student's progress would be "impede[d]" if the student had to "start from scratch in September" (Parent Ex. H at p. 2). In the report, the student's SEIT did not provide any further explanation or examples to support these statements (see Parent Ex. H at pp.

⁵ Generally, a student is eligible for a 12-month school year service or program "when the period of review or reteaching required to recoup the skill or knowledge level attained by the end of the prior school year is beyond the time ordinarily reserved for that purpose at the beginning of the school year" ("Extended School Year Programs and Services Questions and Answers," VESID Mem. [Feb. 2006], available at <http://www.p12.nysed.gov/specialed/applications/ESY/2014-QA.pdf>). Typically, the "period of review or reteaching ranges between 20 and 40 school days," and in determining a student's eligibility for a 12-month school year program, "a review period of eight weeks or more would indicate that substantial regression has occurred" (id. [emphasis in original]).

1-2). Without additional evidence, the SEIT's recommendation in the February 2012 progress report is not sufficient to establish that the student required a 12-month school year program to prevent substantial regression. Therefore, the hearing record demonstrates that the March 2012 CSE's failure to recommend a 12-month school year program did not result in a failure to offer the student a FAPE for the 2012-13 school year.

VII. Conclusion

In this case, the evidence in the hearing record supports the IHO's determination that the district offered the student a FAPE for the 2012-13 school year. While not addressed by the IHO, the evidence in the hearing record also supports findings that the March 2012 CSE was not required to recommend a 12-month school year program or to conduct an FBA of the student. Therefore, the necessary inquiry is at an end and there is no need to reach the issues of whether the student's program—consisting of SEIT services, related services, and behavioral and consultation services—was appropriate or whether equitable considerations weighed in favor of the parents' requested relief. I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
October 28, 2014**

**CAROL H. HAUGE
STATE REVIEW OFFICER**