



The University of the State of New York

The State Education Department

State Review Officer

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No. 15-090

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

Appearances:

Law Offices of Regina Skyer and Associates, LLP, attorneys for petitioner, William M. Meyer, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Gail M. Eckstein, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for the costs of her son's tuition at the Ha'Or Beacon School (Ha'Or Beacon) for the 2013-14 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

For the 2012-13 school year, the parent unilaterally placed the student in a self-contained classroom at the Jewish Center for Special Education (JCSE), a nonpublic school (Dist. Exs. 2 at pp. 1-2; 3 at p. 2; 5 at p. 1). On April 11, 2013, a CSE convened to conduct the student's annual review and to develop his IEP for the 2013-14 (second grade) school year (Dist. Exs. 5 at pp. 1, 10-11; 8 at p. 1; see Tr. p. 124).¹ Finding the student eligible for special education and related services as a student with an other health-impairment, the April 2013 CSE recommended a

¹ Although not raised by the parent, the meeting notice included in the hearing record is dated April 8, 2013, less than five days prior to the CSE meeting, in apparent derogation of State regulation (8 NYCRR 200.5[c]).

12:1+1 special class placement in a community school with related services consisting of counseling, occupational therapy (OT), physical therapy (PT), and speech-language therapy (Dist. Exs. 5 at pp. 7-8, 10; 8).² The April 2013 CSE also determined that the student required a behavioral intervention plan (BIP) (Dist. Exs. 5 at pp. 3, 10; 6; 7; see Tr. at p. 35).

In a final notice of recommendation dated June 17, 2013, the district summarized the contents of the April 2013 IEP, and identified the particular public school site to which the student had been assigned to attend for the 2013-14 school year (Dist. Ex. 10).

By letter to the district dated August 23, 2013, the parent rejected the April 2013 IEP and assigned public school site and notified the district of her intention to unilaterally place the student in JCSE for the 2013-14 school year and seek public funding for the costs of the placement if the district did not remedy the alleged defects with the IEP and assigned school site (Parent Ex. B).³

On August 29, 2013, the parent executed an enrollment agreement with Ha'Or Beacon for the student's attendance for the 2013-14 school year (Parent Ex. E at p. 1).⁴ The hearing record reflects that the student attended Ha'Or Beacon for the 2013-14 school year (Tr. pp. 86-88, 154).

On September 10, 2013, the parent visited the assigned public school site (Parent Ex. C at p. 1). In a letter to the district dated September 24, 2013, the parent advised that she found the assigned public school site to be inappropriate for the student (id.). More specifically, the parent described the lunchroom as "extremely loud," and indicated that the student required a "small, structured and calm environment in order to function appropriately especially given his behavioral and attentional issues" (id.). The parent maintained that the student required "consistent adult support and supervision especially during unstructured times," and she did not believe that he would receive that level of support "in such a large and chaotic environment" (id.). Additionally, the parent raised concerns regarding the functional grouping of the proposed 12:1+1 special class placement (id. at pp. 1-2).

A. Due Process Complaint Notice

By due process complaint notice dated June 4, 2014, the parent alleged that the district failed to offer the student a free appropriate public education for the 2013-14 school year (Parent Ex. A). More specifically, as relevant to this appeal, the parent asserted that the April 2013 CSE was not properly constituted (id. at p. 2). Next, the parent alleged that the April 2013 CSE did not rely on sufficient evaluative information to determine the student's present levels of performance and areas of need (id.). The parent also alleged that she did not know whether the district had conducted a functional behavioral assessment (FBA) of the student, and that if one

² The student's eligibility for special education and related services as a student with an other health-impairment is not in dispute (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

³ By letter dated September 11, 2013, the parent amended her notice to advise the district that she intended to unilaterally place the student in Ha'Or Beacon for the 2013-14 school year (Dist. Ex. 11).

⁴ On September 3, 2013, the parent executed an addendum to the enrollment agreement for the cost of related services (Parent Ex. E at p. 2).

had been conducted, she had not been provided with the resultant report (*id.* at p. 3). She further alleged that although the April 2013 IEP indicated that the student required a BIP, the district did not provide her with a copy of the student's BIP, and that she had "no information as to whether a plan was ever created," how it was developed, or whether it would meet the student's needs (*id.*). In addition, the parent asserted that a 12:1+1 special class placement was inappropriate for the student because he would not be appropriately functionally grouped in such a placement, and that the class would be too large to support his needs and provide him with sufficient 1:1 attention (*id.* at p. 2). The parent also argued that the assigned public school site was not appropriate for the student, and that it could not implement his IEP (*id.* at pp. 3-4). She further characterized the school as a "loud and chaotic" environment that would be too overwhelming for the student in light of his behavioral needs (*id.*). Additionally, she alleged that she spoke to a second grade teacher who utilized a classroom-wide behavior plan that "did not seem adequate to address [the student's] behavioral issues" (*id.* at p. 4). The parent also asserted that the students in the second grade classroom were performing academically at grade level, while the student "could not achieve" at that level (*id.*).⁵

The parent argued that Ha'Or Beacon constituted an appropriate unilateral private placement for the student and that equitable considerations favored her request for relief (*see* Parent Ex. A at p. 4). As a remedy, the parent requested an award of direct funding for the costs of the student's tuition at Ha'Or Beacon (*id.*).⁶

B. Impartial Hearing Officer Decision

On November 24, 2014, the parties proceeded to an impartial hearing, which concluded on March 9, 2015, after two days of proceedings (Tr. pp. 1-182). In a decision dated July 28, 2015, an IHO found that the district offered the student a FAPE for the 2013-14 school year (IHO Decision). Specifically, the IHO found that the April 2013 CSE was properly constituted and that the absence of a regular education teacher and an additional parent member "was permissible" (*id.* at p. 12). He further determined that the April 2013 CSE had sufficient evaluative information to develop the student's IEP (*id.* at p. 11). The IHO also held that the recommended 12:1+1 special class placement was appropriate for the student and the April 2013 IEP appropriately addressed the student's management needs (*id.* at p. 14). Lastly, the IHO determined that the parent's claims pertaining to the assigned public school site were speculative and the district was not required to establish the assigned school could have implemented the services recommended in the IEP (*id.* at p. 17).⁷

⁵ Although not raised on appeal, the due process complaint notice also asserted that the April 2013 CSE failed to adequately discuss the student's management needs, behavioral needs, annual goals, testing accommodations, or promotional criteria (Parent Ex. A at p. 2). The parent further contended that the April 2013 IEP did not appropriately describe the student's present levels of performance or management needs, and that the annual goals contained in the IEP were vague, did not address all of the student's needs, and did not specify targets or methods of measurement (*id.* at pp. 2-3).

⁶ The parent purported to "reserve the right" to raise additional claims, but did not thereafter amend her due process complaint notice (Parent Ex. A at p. 4).

⁷ The IHO also concluded that the April 2013 IEP included annual goals that included evaluative criteria, evaluation procedures, and schedules to measure the student's progress toward the goals and "which were reasonably related to [the student's] educational deficits" (IHO Decision at p. 13).

IV. Appeal for State-Level Review

The parent appeals and asserts that the IHO erred in finding that the district offered the student a FAPE for the 2013-14 school year. Specifically, the parent contends that the April 2013 CSE was not properly constituted due to the absence of an individual responsible for implementing the student's IEP or with experience in the type of placement recommended. Next, the parent alleges that the April 2013 CSE did not have sufficient evaluative data upon which to premise the IEP, and that the IHO failed to address her claim that the CSE did not adequately rely on the evaluative information it did have. Additionally, the parent alleges that the April 2013 CSE did not rely on adequate sources of information in conducting an FBA, excluded the parent from the process, and the FBA failed to include information regarding all of the student's interfering behaviors. She further alleges that the BIP was inadequate because it failed to address all of the interfering behaviors included in the FBA. Next, the parent asserts that the IHO erred in finding that a 12:1+1 special class placement was appropriate for the student. With respect to the assigned public school site, the parent asserts that the IHO applied an incorrect legal standard, and that the evidence in the hearing record supports a finding that it would not have been able to implement the student's IEP. Finally, the parent contends that her unilateral placement of the student at Ha'Or Beacon was appropriate to meet his needs, and that equitable considerations favor her request for relief.

In an answer, the district responds to the petition by variously admitting and denying the allegations raised and asserts that the IHO properly found that the district offered the student a FAPE for the 2013-14 school year.⁸

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school

⁸ The district does not challenge the parent's position with regard to the appropriateness of Ha'Or Beacon or that equitable considerations do not preclude her requested relief.

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. 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 [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 [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 [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]).

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. April 2013 CSE Composition

The parent first alleges that the April 2013 CSE was not properly constituted because it did not include a special education teacher or provider responsible for implementing the student's IEP or a teacher with experience teaching in a 12:1+1 special class placement. As more fully explained below, while the absence of a special education teacher from the April 2013 CSE who would have taught the student arguably resulted in a procedural violation, such a procedural violation did not rise to the level of a denial of a FAPE in this instance.

Among the required members of a CSE is a special education teacher of the student, or where appropriate, a special education provider of the student (20 U.S.C. § 1414[d][1][B][ii]-[iii]; 34 CFR 300.321[a][2]-[3]; 8 NYCRR 200.3[a][1][iii]; see 8 NYCRR 200.1[xx] [defining "special education provider," in pertinent part, as an "individual qualified [to provide related services] . . . who is providing related services" to the student]; 8 NYCRR 200.1[yy] [defining "special education teacher," in pertinent part, as a "person . . . certified or licensed to teach students with disabilities . . . who is providing special education to the student"]). The Official Analysis of Comments to the federal regulations indicates that the special education teacher or provider "should" be the person who is or will be responsible for implementing the student's IEP (IEP Team, 71 Fed. Reg. 46670 [Aug. 14, 2006]).

In this case, the evidence in the hearing record does not suggest that the district special education teacher who attended the April 2013 CSE meeting knew the student from having worked with him previously and there is no indication in the hearing record that the special education teacher would have been responsible for implementing the April 2013 IEP (Tr. pp. 25-26, 45-46). However, the evidence in the hearing record does not suggest that the absence of a special education teacher who would have implemented the student's IEP significantly impeded the parent's opportunity to participate in the decision-making process, thereby resulting in a denial of a FAPE. Here, a district special education teacher and a district school psychologist, who also served as the district representative, attended the April 2013 CSE meeting (see Tr. p. 25; Dist. Exs. 5 at p. 12; 8 at p. 1). The parent also attended the April 2013 CSE meeting, accompanied by a psychologist and program director from JCSE, as well as the student's JCSE classroom teacher, who participated in the meeting via telephone (Tr. pp. 26, 44-45, 146-47; Dist. Exs. 5 at p. 12; 8 at p. 1). According to the parent, the student's providers from JCSE shared information regarding the student's needs with the April 2013 CSE (Tr. p. 147). Similarly, the district school psychologist testified that the April 2013 CSE relied on information solicited from the student's providers in attendance (see Tr. pp. 29-30). Despite the parent's concerns that none of the meeting attendees had experience teaching in a 12:1+1 special class placement, the school psychologist testified that she had previously taught in a 12:1+1 special class (Tr. pp. 47-49).

Even assuming that the absence from the CSE of a district-employed special education teacher who would have implemented the IEP was a procedural violation of the IDEA, nothing in the hearing record supports a conclusion that any procedural infirmity resulted in the district's failure to offer the student a FAPE for the 2013-14 school year, especially where, as here, the student's current teacher from the private school attended the CSE meeting (see C.T. v. Croton-Harmon Union Free Sch. Dist., 812 F. Supp. 2d 420, 430-31 [S.D.N.Y. 2011]).

B. Sufficiency of Evaluative Data

The parent next asserts that the April 2013 CSE lacked sufficient evaluative information upon which to base the IEP; namely, that the district did not use objective measures to assess the student's social/emotional functioning, and that even though the psychoeducational evaluation took place in a 1:1 setting and did not provide data concerning how the student functioned in the context of peers, the district did not conduct a classroom observation. Moreover, the parent alleges that the IHO failed to consider her claim that the CSE failed to adequately rely on the information before it by improperly discounting evaluative information provided by staff from the nonpublic school the student was currently attending.

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); additionally, a district must reevaluate a student at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][2]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound

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

Regarding the parent's allegation that the April 2013 CSE failed to adequately rely on the information before it, the evidence in the hearing record reflects that the CSE relied on information from the student's previous IEP and the psychoeducational testing conducted in April 2013 (Tr. pp. 26-27; see Dist. Ex. 2). Although the school psychologist testified that she could not recall if the April 2013 CSE had written evaluative material from JCSE, she also testified that the April 2013 CSE relied on the input from the student's providers from the school (Tr. p. 29; see Dist. Ex. 8 at pp. 1-2).⁹ The hearing record suggests that the April 2013 CSE used information from the April 2013 psychoeducational evaluation report and April 2013 social history update in developing the student's IEP (compare Dist. Ex. 5 at pp. 1-2, with Dist. Ex. 2, and Dist. Ex. 3 at p. 2).

The April 2013 psychoeducational evaluation report provided an overall description and detailed information regarding the student's educational, social, and physical history, as well as information regarding the student's behavioral needs, cognitive functioning, academic needs, visual-perceptual skills, and social/emotional functioning (see Dist. Ex. 2). With respect to the student's cognitive needs, the school psychologist reported that the student's overall cognitive functioning fell within the low average range, but with discrepancy between domains, indicating difficulty with learning, retention and attention, and suggesting greater potential (id. at p. 7). Administration of the Wechsler Intelligence Scale for Children-Fourth Edition yielded composite scores (percentile) of 102 (55) in verbal comprehension, 86 (18) in perceptual reasoning, 80 (9) in working memory, processing speed 88 (21), and a full scale score of 88 (id. at pp. 2-3, 9). The school psychologist further found that the student exhibited particular weakness in the working memory domain, suggesting difficulty with maintaining efficiency during task, especially those which were independent (id. at p. 7). She also reported that the student demonstrated strengths in language development and verbal reasoning skills, and in skills related to abstract nonverbal reasoning, particularly with the use of manipulatives (id. at pp. 7-8). Accordingly, the school psychologist opined that implications for learning pointed to the inclusion of visual cues and hands-on learning wherever applicable (id.). With respect to current academic functioning, an administration of selected subtests of the Wechsler Individual Achievement Test, Third Edition yielded standard scores (percentile) of 73 (4) in word reading, 89 (23) in pseudoword decoding,

⁹ To the extent the parent argues that the April 2013 CSE failed to adopt the views of the JCSE personnel present at the CSE meeting, as discussed below, the recommendation for a 12:1+1 special class placement was reasonably calculated to enable the student to receive educational benefits, and the CSE was required to consider, not adopt, the views of the private providers (S.W. v. New York City Dep't of Educ., 92 F. Supp. 3d 143, 158 [S.D.N.Y. 2015]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *10-*11 [S.D.N.Y. Mar. 31, 2014]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *11 [E.D.N.Y. Aug. 5, 2013]).

91 (27) in numerical operations, 99 (47) in problem solving, and 77 (6) in spelling (id. at p. 10). The evaluating school psychologist described the student's academic functioning as variable (id. at p. 8). She reported that the student recognized all of the letters of the alphabet and could write them, albeit awkwardly, and that he could write his name independently (id. at pp. 6, 8). In addition, the school psychologist found that the student's phonemic awareness appeared to be emergent, and that he could discriminate sound/letter association, inconsistently identifying initial but not final consonants (id. at pp. 5, 8). She estimated his reading skills to be at a K.7 equivalent (id.). Regarding mathematics, the school psychologist described such skills as "a relative strength," at mid to upper-first grade equivalent (id. at p. 8). She also found that the student's problem solving skills were slightly better developed than basic calculation, and that he could easily identify numbers 1-20, successfully discriminate between letters and numbers, and rote count to 29 (id. at pp. 5, 8). According to the school psychologist, the student enjoyed mathematical problem solving, and although he could grasp concepts, details could escape him due to impulsivity (id. at p. 8). Additionally, the school psychologist found that the student presented with delayed writing skills, and she noted that he exhibited graphomotor, motor planning, and fine motor difficulties (id.).

With respect to social/emotional functioning and behavioral needs, the school psychologist characterized the student's ability to maintain attention and concentration as "poor," and further reported that he required frequent redirection and refocusing (Dist. Ex. 2 at pp. 6-8). According to the April 2013 psychoeducational report, it was difficult for the student to follow classroom routines and remain involved in the learning without continuous reinforcement and encouragement (id. at pp. 7-8). The school psychologist described the student as "extremely verbal" and as someone who truly enjoyed interacting with his peers, yet might find it difficult to negotiate the social climate (id. at p. 7). Contrary to the parent's claim that the evaluative information before the April 2013 CSE did not contain information regarding how the student functioned in the context of peers, the school psychologist reported that due to impulsive behaviors, interactions with his peers could erode into conflicts; however, she noted that such behaviors had decreased since September (id. at pp. 7-8). Despite his poor impulse control, the school psychologist also found that the student presented with a "solid sense of self and endearing personality" (id. at p. 7). Furthermore, while the school psychologist found that the student was sensitive to rejection, she also noted that he did not always internalize how his actions might cause a reaction from a peer (id.). In addition, she commented that the student responded to the classroom reward system, which allowed him to earn points/prizes for appropriate behaviors (id. at p. 8). Moreover, the school psychologist indicated that while the student was eager to perform, the student could become frustrated and withdraw effort; however, he could be re-engaged with reinforcement and concrete rewards (id. at pp. 7-8). To address this, the psychologist suggested that tasks be broken into small manageable parts to minimize frustration and increase the student's motivation (id. at p. 7). She further found that the student responded well to strong limit setting and boundaries, with clear and consistent expectations and consequences (id. at p. 8).

Regarding the parent's claim that the district failed to conduct a classroom observation, and that there was no measure of the student's social/emotional functioning, as set forth above, the April 2013 CSE reviewed evaluative material that assessed the student in all areas of functioning, including cognition, academics, and social/emotional functioning and also included information regarding his functioning within the classroom setting (Dist. Exs. 2 at pp. 7-8; 8 at p. 1). Moreover, a review of the hearing record reveals no evidence of substantive harm resulting

from the district's failure to obtain further evaluative data regarding the student. Accordingly, there is no evidence in the hearing record showing that it was necessary for the district to conduct any further evaluations of the student prior to the April 2013 CSE meeting or that its failure to do so impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process, or deprived the student of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513; 8 NYCRR 200.5[j][4]; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *9-*10 [S.D.N.Y. Sept. 27, 2013], aff'd, 589 Fed. App'x 572, 575 [2d Cir. Oct. 29, 2014]; see T.F. v. New York City Dep't of Educ., 2015 WL 5610769, at *4 [S.D.N.Y. Sept. 23, 2015]; M.C. v. New York City Dep't of Educ., 2015 WL 4464102, at *5 [S.D.N.Y. July 15, 2015]; M.M. v. New York City Dep't of Educ., 2015 WL 1267910, at *5-*6 [S.D.N.Y. Mar. 18, 2015]; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 329-31 [S.D.N.Y. 2013]). Based on the information discussed above, the hearing record supports the IHO's holding that the April 2013 CSE had sufficient evaluative information available to it in order to determine the student's needs and to develop the April 2013 IEP.

C. Consideration of Special Factors—Interfering Behaviors

Next, the parent argues that the district failed to rely on adequate sources of information in conducting the FBA, that it did not include information regarding all of the student's interfering behaviors, and that she never received a copy of the FBA. Likewise, the parent asserts that the BIP was insufficient, did not address all of the student's behavioral needs, did not specify interventions to be used, and did not provide a baseline measure of the interfering behaviors. Moreover, the parent alleges that the district failed to provide her with a copy of the BIP.

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 R.E., 694 F.3d at 190-91; A.C., 553 F.3d at 172).

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]). 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]). 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 adequately addresses the student's problem behaviors (id.).

With regard to a BIP, the special factor procedures set forth in State regulations further provide that the CSE 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 is required to identify: the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors; 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 behaviors and alternative acceptable behaviors; and 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]).¹⁰ Neither the IDEA nor its implementing regulations require that the elements of a student's BIP be set forth in the student's IEP ("Student Needs Related to Special Factors," Office of Special Educ. [Apr. 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" (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," and "[t]he results of the progress monitoring shall be documented and reported to the student's parents and to the CSE . . . and shall be considered in any determination to revise a student's [BIP] or IEP" (8 NYCRR 200.22[b][5]).

In this instance, the district school psychologist testified that the April 2013 CSE discussed the FBA and BIP and created the BIP with the student's then-current classroom teacher (Tr. pp. 34-35; Dist. Ex. 8 at p. 1). The FBA identified aggressive responding, impulsivity, use of inappropriate language, and poor task completion as the targeted inappropriate behaviors (Dist. Ex. 6 at p. 1). It noted that the behaviors were moderate in intensity, occurred on a daily basis within the classroom, as well as in the yard and hallway, and lasted throughout class (*id.*). The FBA further indicated that the student's attempts to be in control of a peer relationship served as a trigger before the targeted behavior occurred, and that the student could also become oppositional when asked to do something that was not of his creation, or complete a difficult task (*id.*). According to the FBA, challenges within academic tasks and peer competition were environmental conditions that might affect the targeted behavior (*id.*). Although the FBA did not describe what the student gained or lost as an immediate result of the targeted behavior, the FBA indicated that regaining control of an interpersonal interaction or avoiding failure served as the presumed purpose of each behavior (*id.*). The FBA did not specify previously attempted interventions; however, it noted that the incentive to engage in positive behaviors using a visual chart and concrete rewards and consequences should be among planned interventions (*id.*). Moreover, the FBA noted that the student viewed prizes, special privileges, animal toys, and the chance to be the leader as positive reinforcement (*id.*). Increased compliance within the classroom and a reduction in impulsive responding/aggressive reactions were listed as the expected behavior changes, and the FBA further indicated that a visual chart that tracked appropriate/inappropriate behaviors at 15-minute intervals with opportunities to accumulate points to earn rewards should be utilized as a method for outcome measurement (*id.* at pp. 1-2). However, the FBA did not include a detailed "baseline of the student's problem behaviors with regard to frequency, duration, intensity and/or latency across activities, settings, people and times of the day," as required by State regulation (8 NYCRR 200.22[a][3]).

The resultant BIP indicated that the student's classroom teacher, service providers and school psychologist would be responsible for implementing the plan, and that it should reviewed

¹⁰ The Official Analysis of Comments to the federal regulations explains that the decision regarding whether a student requires interventions such as a BIP rests with the CSE and is made on an individual basis (Consideration of Special Factors, 71 Fed. Reg. 46683 [Aug. 14, 2006]).

every 10 weeks (Dist. Ex. 7). The BIP further provided that a meeting would take place before the end of the school year (*id.*). Consistent with the FBA, the BIP identified poor task completion, inappropriate use of language when frustrated or upset and aggressive behaviors as the targeted behaviors (*id.*). According to the BIP, expected behavior changes included an increase in on-task behaviors, the use of proper language when frustrated or upset, and the use of verbal, rather than physical responses (*id.*). The BIP specified use of a chart with "green" and "red" behaviors to track appropriate behaviors at 15-minute intervals, giving the student an opportunity to earn a reward or consequence (*id.*). Nevertheless, the parent correctly argues that the BIP did not conform to State regulation in that it did not include a baseline measure of the student's problem behaviors or identify intervention strategies to alter antecedents, and provide consequences for the targeted inappropriate behaviors or alternative behaviors (8 NYCRR 200.22[b][4][i]-[iii]).

However, the district's failure to conduct an FBA and develop a BIP in conformity with State regulations does not, in and of itself, automatically render the IEP deficient, as the April 2013 IEP must be closely examined to determine whether it otherwise addressed the student's interfering behaviors (see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 80 [2d Cir. 2014]; F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 6-7 [2d Cir. 2014]; M.W. v. New York City Dep't of Educ., 725 F.3d 131, 139-41 [2d Cir. 2013]; R.E., 694 F.3d at 190).¹¹ Regarding the parent's assertion that the BIP did not address all of the behaviors referenced in the FBA, the present levels of performance in the April 2013 IEP identified the student's interfering behaviors, noting the student's continued difficulty with maintaining attention and concentration on tasks within the classroom, and the parent's concern regarding the student's performance being affected by his distractibility (Dist. Ex. 5 at p. 1). The April 2013 IEP further noted that while the student's classroom behaviors had improved, the student continued to present with impulsivity that impeded performance during classroom lessons (*id.*). Socially, the April 2013 IEP indicated that the student presented with "sensory integration" deficits and impulsivity, and that he could become aggressive with peers (i.e., pinching, hitting), although those behaviors had decreased since September (*id.* at p. 2). The April 2013 IEP further noted that the student was difficult to engage in challenging tasks; however, he displayed the capacity to work well and take pride in his accomplishments when his interest was captured and he was motivated (*id.*). In addition, the April 2013 IEP noted that the student did not take ownership of his actions (*id.*). According to the April 2013 IEP, JCSE employed a classroom behavior modification program, under which the student received pennies for good behaviors and could earn rewards or consequences (*id.*). The IEP indicated the student appeared to be responsive to the classroom behavior program, exhibiting a desire to achieve the rewards and to avoid the consequences (*id.*). Lastly, the April 2013 IEP included the parent's concern regarding the student's need to decrease impulsivity and aggressive behaviors, as well as her concerns that the student had "a lot of energy and need[ed] much redirection" (*id.*). The April 2013 IEP further noted the parent's concerns regarding the student's ability to stay focused and complete his work, in addition to his need to learn appropriate social skills, as his impulsivity impeded his capacity to effectively socialize with peers (*id.*). In view of the foregoing, the April 2013 CSE incorporated the following strategies to address the student's behaviors into the April 2013 IEP: the provision of rewards for small gains, redirection and refocusing when needed, preferential seating, as well as frequent opportunities

¹¹ According to the April 2013 CSE meeting minutes, the student did not have a BIP at JCSE (Dist. Ex. 8 at p. 1).

for task analysis, repetition and review (*id.*). In addition, the April 2013 CSE developed an annual goal in relation to the student's social/emotional needs that targeted the student's abilities to increase cooperation with authority, follow class procedures and task instructions with minimal prompting, make positive comments about peers and initiate appropriate interpersonal overtures after repeated role play and modeling, and enhance his social skills by learning strategies to talk to teachers and peers with appropriate words (*id.* at p. 6). Similarly, the April 2013 IEP included a speech-language goal designed to improve the student's pragmatic language skills by identifying a conflict using appropriate language and identifying the least aggressive solution from several choices when presented with problematic social scenarios (*id.* at p. 5). Finally, the April 2013 IEP included a recommendation for counseling twice per week, once individually and once in a group, which the school psychologist testified was important for the student to overcome the behaviors that impeded his learning (Tr. pp. 50-51; Dist. Ex. 5 at p. 7).

Accordingly, in this case, the April 2013 CSE's failure to comply fully with State regulations regarding the conducting of an FBA and development of a BIP did not result in a failure to offer the student a FAPE for the 2013-14 school year, as the April 2013 CSE otherwise identified and addressed the student's problem behaviors with appropriate strategies (see E.H. v. New York City Dep't of Educ., 611 Fed. App'x 728, 730-31 [2d Cir. May 8, 2015]; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 169 [2d Cir. 2014]; C.F., 746 F.3d at 80; F.L., 553 Fed. App'x at 6-7; M.W., 725 F.3d at 140-41; R.E., 694 F.3d at 190; A.C., 553 F.3d at 172-73).¹²

D. 12:1+1 Special Class Placement

The parent also alleges that the IHO erred in finding that the evidence supported a finding that a 12:1+1 special class placement was appropriate for the student, as the weight of the information before the April 2013 CSE showed that the student needed a smaller and more supportive setting. A review of the hearing record supports the IHO's determination.

State regulations provide that a 12:1+1 special class placement is intended for students "whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students" (8 NYCRR 200.6[h][4][i]). Management needs for students with disabilities are defined as "the nature of and degree to which environmental modifications and human or material resources are required to enable the student to benefit from instruction" (8 NYCRR 200.1[ww][3][i][d]). A student's management needs must be determined with respect to the student's academic achievement, functional performance and learning characteristics, social development, and physical development (8 NYCRR 200.1[ww][3][i][d]).

With respect to management needs, the April 2013 IEP indicated that the student continued to require a full-time small group placement that could provide more individualized support and attention to address the student's academic, cognitive, and language delays (Dist. Ex. 5 at p. 2). According to the April 2013 IEP, the student's ability to maintain attention was poor, and he required frequent redirection and refocusing (*id.* at p. 1). The IEP further noted that

¹² This should not be taken as an endorsement of the district's failure to comply with State regulations, but an acknowledgement that under the facts of this case, its failure to do so did not preclude the student from receiving educational benefits under the April 2013 IEP.

without continuous reinforcement and encouragement, it was difficult for the student to follow routines of the class and remain involved in the learning (id.). Similarly, the school psychologist testified that the student was very responsive to motivational techniques and encouragement, and that the student's need for redirection could be accommodated in a structured classroom setting such as a 12:1+1 special class (Tr. pp. 57-58). The district school psychologist testified that the April 2013 CSE believed that the 12:1+1 special class placement was appropriate for the student, based on his functional needs as assessed by the testing, and from information provided by the parent and JCSE teacher and psychologist (Tr. p. 38). She further testified that enrollment in a large class was the main concern for the student, and that his prior placement in a general education setting with integrated co-teaching (ICT) services was too overwhelming and too stimulating for him; therefore, the April 2013 CSE determined that the student needed a special class setting in order to receive supervised attention in a structured class (Tr. pp. 38-39; Dist. Ex. 5 at p. 11).

Moreover, to address the student's academic management needs, the April 2013 CSE recommended the following suggestions for modified learning: the use of outline and graphic organizers; a multisensory approach to reading; structuring and breaking down work into manageable units and providing rewards for small gains; redirection and refocusing when needed; preferential seating; frequent opportunities for task analysis, repetition and review; use of a planner to help the student remain organized and on track; highlighted work and study sheets; verbal cueing; keyword prompts; semantic mapping; and rephrasing, explanation, and elaboration of verbal directions and instructions (Dist. Ex. 5 at p. 2). In addition, the April 2013 CSE developed annual goals that targeted the student's needs related to reading, mathematics, OT, science, social studies, speech-language, and PT, as well as his social/emotional deficits (id. at pp. 3-6). Lastly, the April 2013 CSE recommended related services consisting of one 30-minute session per week of individual counseling, one 30-minute session per week of counseling in a group, two 30-minute sessions per week of OT in a group, two weekly 30 minute sessions of individual PT, one weekly 30-minute session of individual speech-language therapy, and one 30-minute session per week of speech-language therapy delivered in a group setting (Dist. Exs. 5 at p. 7; 8 at p. 1).

The evidence in the hearing record reveals that the recommendation for a 12:1+1 special class placement, in conjunction with the related services and additional supports provided by the April 2013 IEP, was reasonably calculated to meet the identified needs of the student and provide him with a FAPE.

E. Assigned Public School Site

Regarding the appropriateness of the assigned public school site, the parent alleges that it could not implement the April 2013 IEP as written, the 12:1+1 special classroom she visited at the assigned school utilized a behavior plan that would not be effective for the student, and that in light of the environment at the assigned school, the student would be dysregulated and unable to attend to instruction for most of the day.

Generally, the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see E.H., 611 Fed. App'x at 731; R.B. v.

New York City Dep't of Educ., 603 Fed. App'x 36, 40 [2d Cir. Mar. 19, 2015]; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]). Furthermore, when parents have rejected an offered program and unilaterally placed their child prior to the time for implementation of the student's IEP, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141 [2d Cir. May 21, 2013]) and "[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. July 24, 2013], quoting R.E., 694 F.3d at 187). Accordingly, when a parent brings a claim challenging the district's "choice of school, rather than the IEP itself . . . the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'" (F.L., 553 Fed. App'x at 9, quoting R.E., 694 F.3d at 187 n.3). Therefore, if the student never attends the public schools under the proposed IEP, there can be no denial of a FAPE due to the parent's suspicions that the district will be unable to implement the IEP (R.E., 694 F.3d at 195; see E.H., 611 Fed. App'x at 731).

However, the Second Circuit has held that although a district's assignment of a student to a particular public school site is an administrative decision, it must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to assign the student to a school that cannot implement the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244-45 [2d Cir. 2015]; R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 419-20; see C.F., 746 F.3d at 79). In particular, the Second Circuit has stated that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (M.O., 793 F.3d at 244; see T.F. v. New York City Dep't of Educ., 2015 WL 5610769, at *7 [S.D.N.Y. Sept. 23, 2015] [holding that for claims regarding an assigned school not to be speculative, the hearing record should contain "definitive evidence that [the student] would not have received the services set forth in her IEP"]; Y.F. v. New York City Dep't of Educ., 2015 WL 4622500, at *6 [S.D.N.Y. July 31, 2015] [noting that the "the inability of the proposed school to provide a FAPE as defined by the IEP [must be] clear at the time the parents rejected the placement"]; M.C. v. New York City Dep't of Educ., 2015 WL 4464102, at *6-*7 [S.D.N.Y. July 15, 2015] [noting that claims are speculative when parents challenge the willingness, rather than the ability, of an assigned school to implement an IEP]; S.E. v. New York City Dep't of Educ., 2015 WL 4092386, at *12-*13 [S.D.N.Y. July 6, 2015] [noting the preference of courts for "'hard evidence' that demonstrates the assigned [public school] placement was 'factually incapable' of implementing the IEP"]; see also N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at *12-*13 [S.D.N.Y. June 16, 2014]).

In light of the foregoing, the parent cannot prevail on her claims regarding the assigned school environment or the behavior plan employed at the assigned public school site. It is undisputed that the parent rejected the district-recommended program and instead chose to enroll the student in a nonpublic school of her choosing (see Parent Ex. C at pp. 1-2). Furthermore, the hearing record is devoid of any evidence to indicate that the assigned school could not implement the IEP. While the parent asserts that she rejected the assigned school based, in part, upon observations and information provided by the IEP coordinator and the teacher of a 12:1+1 special classroom during her visit to the assigned school, the hearing record contains no support

for the proposition that the assigned school was incapable of implementing the student's IEP. The parent testified that the student would have been required to eat lunch and attend gym class in a large group, which would have "been a disaster" for the student (Tr. pp. 159-62). In addition, while the parent expressed concern that the classroom behavioral plan would have been insufficient to meet the student's needs, she did not testify that she provided the April 2013 IEP to the classroom teacher or that the teacher indicated she would not have been able to implement the strategies to address the student's behavioral needs specified in the IEP (Tr. pp. 161-62). The parent's observations during her visit provide support only for what the parent believed might occur at the assigned school, rather than evidence that the assigned school was incapable of implementing the student's IEP. This is made clear by the language of the parent's letter to the CSE following her visit to the assigned school, expressing her opinions regarding the environment, allegations regarding the methods of instruction utilized at the school, and vague concerns regarding the parent's impressions of students in the class she observed based on the teacher's description of their needs (Parent Ex. C at pp. 1-2). Accordingly, the parent's claims based on her visit to the assigned school site and conversation with the district school social worker and classroom teacher regarding the environment at the assigned public school site generally, rather than with respect to the implementation of the student's IEP, cannot provide a basis for a finding of a denial of a FAPE in this instance (see R.B., 589 Fed. App'x at 576 [holding that a parent's observations during a visit to an assigned school constituted speculative challenges that the school would not implement the student's IEP]; E.P. v. New York City Dep't of Educ., 2015 WL 4882523, at *7-*8 [E.D.N.Y. Aug. 14, 2015]). To the extent the parent asserts that the student would have been placed in a large environment during lunch and gym periods, indicating that the assigned school would not have implemented the requirement in the April 2013 IEP that the student be in a small group, 12:1+1 special class placement on a full-time basis (Dist. Ex. 5 at pp. 2, 7), the IEP also indicates that the student would have full participation with his nondisabled peers in all nonacademic activities (Dist. Ex. 5 at p. 9), making it unclear whether the IEP required the school to maintain a 12:1+1 ratio during all periods of the school day.¹³ Furthermore, even assuming that participating in lunch and gym in a large group would have represented a failure of the district to implement the student's IEP, the hearing record does not support a conclusion that it would have constituted a material or substantial deviation from the student's IEP so as to constitute a denial of a FAPE (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010]; Y.F., 2015 WL 4622500, at *6; M.L. v. New York City Dep't of Educ., 2015 WL 1439698, at *11-*12 [E.D.N.Y. Mar. 27, 2015]).

Accordingly, as the April 2013 IEP was appropriate to meet the student's needs for the reasons set forth above, any conclusion regarding the district's ability to implement the IEP at the assigned public school site, the functional grouping within the classroom, or the effect of the school or class size on the student's ability to learn would necessarily be based on impermissible speculation, and the district was not obligated to present retrospective evidence at the impartial hearing regarding the implementation of the student's program at the assigned public school site or to refute the parent's claims related thereto (M.O., 793 F.3d at 244-46; R.B., 589 Fed. App'x at 576; F.L., 553 Fed. App'x at 9; K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 187 & n.3).

¹³ To the extent the parent raises this as a claim relating to the appropriateness of the recommendation for a 12:1+1 special class placement, she did not raise the claim in this manner in her due process complaint notice (Parent Ex. A). In addition, the hearing record contains no indication that being placed in a large group environment for nonacademic periods for lunch and gym would prevent the student from receiving educational benefits under the April 2013 IEP.

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determination that the district offered the student a FAPE for the 2013-14 school year, the necessary inquiry is at an end. I have considered the parties' remaining contentions and find it unnecessary to address them in light of my determinations above.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
November 12, 2015**

**CAROL H. HAUGE
STATE REVIEW OFFICER**