The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 14-005

Application of a STUDENT WITH A DISABILITY, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the Irvington Union Free School District

Appearances:
Ingerman Smith, LLP, attorneys for respondent, Susan M. Gibson, Esq.

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 determined that the educational programs and services recommended for their daughter for the 2011-12 and 2012-13 school years were appropriate and denied their request for compensatory services. 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 hearing record reflects that the student has received diagnoses of attention deficit hyperactivity disorder (ADHD), pervasive developmental disorder (PDD), a mixed receptive-expressive language impairment, and deficits in motor planning and fine and gross motor skills (Dist. Exs. 11 at p. 3; 15 at p. 1). As discussed below, the student exhibits difficulties with organization and personal hygiene, social interaction, motor skills, sequencing of multiple directions, and inferential and critical thinking skills.

By email dated August 22, 2011, the parents notified the district of their intention to enroll the student in the district for the 2011-12 school year (Parent Ex. B at pp. 5-6).[1] By email to the

[1] The student's educational history prior to entering the district for the 2011-12 school year included attendance in a district general education kindergarten class for one year, three years in a Montessori program, two weeks in a general

parents dated August 23, 2011, the district scheduled a meeting to review the parents' privately obtained evaluations and determine whether a referral to the CSE was necessary (id. at pp. 2-3). On August 30, 2011, the parents met with the district's director of pupil personal services (the director), the district's CSE "chairperson," and the principal of the district middle school in order to discuss the student's educational history and placement within the district school (Tr. pp. 17-18; Parent Ex. B. at pp. 1-2). After the August 2011 meeting, the district administered a placement examination for the student that revealed struggles with writing and math (Tr. pp. 20-21). Based on the placement examination results, the parents and the district agreed the student would start the 2011-12 school year in a class providing Integrated Co-Teaching (ICT) services and receive additional support in the middle school building support program (Tr. pp. 22, 25-26, 249-50).[2]

The student began attending the district middle school at the beginning of the 2011-12 school year (Tr. p. 23). On the second day of school the CSE chairperson was asked to observe the student because the student appeared to have difficulty navigating the hallways and exhibited inappropriate behaviors for a school setting (Tr. pp. 23-24, 27, 266-67, 390-91). Accordingly, the district "immediately" assigned a 1:1 aide to the student to assist her in getting to class and to teach the student appropriate school habits (Tr. pp. 27, 173-74, 249-50).

At some point within the first few weeks of school, the student was referred to the CSE (Tr. pp. 21, 28, 249-50; Dist. Ex. 3 at p. 2). The parents provided the district with privately-obtained evaluation reports relating to a February 2011 speech-language evaluation, a July 2011 speech-language evaluation, an August 2011 neuropsychological evaluation, and an August 2011 occupational therapy (OT) evaluation (Tr. pp. 28-31; Dist. Exs. 7-10). Additionally, in November 2011 the district conducted a speech-language evaluation, an educational evaluation, a psychological evaluation, a social history, and a classroom observation (Tr. p. 28; Dist. Exs. 11-15).[3]

On November 17, 2011, the CSE convened for an initial eligibility determination meeting (Dist. Ex. 3). The November 2011 CSE reviewed the aforementioned evaluations and, determining

---

education parochial school class, and multiple years of homeschooling (Tr. pp. 16, 247-248, 366, 1466-1467; Dist. Exs. 11 at pp. 4-5; 15 at p. 2).

[2] ICT services are defined in State regulation as "specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). School personnel assigned to a classroom providing ICT services "shall minimally include a special education teacher and a general education teacher" (8 NYCRR 200.6[g][2]). The State Education Department has issued a guidance document which further describes ICT services ("Continuum of Special Education Services for School-Age Students with Disabilities," VESID Mem. [Apr. 2008], at pp. 11-15, available at http://www.p12.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf). The hearing record reflects that the student was placed in the class as a regular education student (Tr. pp. 22, 25, 250). The hearing record further indicates that the building support program was a broad-based support program taught by a special education teacher that provided services to students in need of support with organizational or academic skills (Tr. p. 257). The building support program special education teacher provided a small group of students with pre-teaching and/or re-teaching of material, assistance with organizational skills, and general support in regards to various student-centered matters (Tr. pp. 257-58).

[3] Although the student's native language was reported to be other than English and she was exposed to her parents' native language at home, the parents did not want the student to be evaluated in any language other than English (Tr. pp. 33-35, 253-54; Dist. Exs. 8 at p. 1; 9 at p. 1). Therefore, the districted conducted its evaluations of the student in English only (Tr. pp. 34, 254).

that the student was eligible for special education programs and services as a student with autism, developed an IEP for the student for the remainder of the 2011-12 school year (id.).[4] The November 2011 CSE recommended that the student attend general education classes and receive ICT services for English language arts (ELA), math, and science (id. at pp. 12-13). The CSE also recommended related services of two 30-minute sessions per week of speech-language therapy in a small group (5:1); two 30-minute sessions per week of OT in a small group (5:1); and one 30-minute session per week of individual counseling (id. at p. 13). In addition, the CSE recommended numerous supplementary aids and services, program modifications, and accommodations to support the student's academic and physical needs throughout the school day (id. at pp. 13-15). In particular, the November 2011 CSE recommended that the student receive a full time 1:1 aide and participate in adapted physical education (PE) (id. at pp. 14-15). Other recommended aids and accommodations included assistance with organization, break down directions and tasks, copy of class notes, cue attention, directions clarified, frequent breaks, modified grading, modified homework assignments, pacing, preview materials, refocusing and redirection, and repetition of skills and concepts (id. at pp. 13-14). Recommended testing accommodations consisted of clarified directions, extended time, flexible seating, and use of a word processor (id. at pp. 14-15). The CSE also recommended that the student have access to a word processor throughout the school day (id. at p. 14). General education services not listed on the student's IEP included a daily period in the building support program (Tr. p. 91). In addition, the hearing record reflects that the student would attend social studies in the general education environment because she had a strong liking for the subject and her writing needs related to social studies would be supported in the building support program (Tr. pp. 90, 1480).

Sometime in May 2012, the CSE chairperson, the building support program special education teacher, and the assistant principal of the district middle school met informally with the parents to discuss the student's continued struggles and need for support (Tr. pp. 116-19). According to the hearing record, the district wanted to consider the possibility of placing the student in an 8:1+1 special class placement for ELA and social studies to provide the student with intensive assistance in writing while maintaining her placement in the general education environment for other classes (Tr. pp. 119-22, 274-75, 283-84). In addition, the 8:1+1 special class would provide the student with the opportunity to work on daily living skills (Tr. p. 123). The hearing record reflects that the parents did not approve of the proposed hybrid program but indicated a willingness to consider the program (Tr. pp. 122-25).

The CSE convened on June 4, 2012 to conduct an annual review and develop the student's IEP for the 2012-13 school year (Tr. pp. 125, 276; Dist. Exs. 4; 5 at p. 2). Finding the student remained eligible for special education and related services as a student with autism, the June 4, 2012 CSE recommended continuing the student's full time 1:1 aide and recommended related services of two 30-minute sessions per week of speech-language therapy in a small group; one 30-minute session per week of individual speech-language therapy; one 45-minute session per week of individual OT; and one 30-minute session per week of individual counseling (Dist. Ex. 5 at pp. 2, 14). Although in agreement with the recommended goals and related services, the parents disagreed with the recommendation that the student attend an 8:1+1 special class placement for

[4] The student's eligibility for special education programs and related services as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

ELA and math and the CSE meeting was adjourned so that the parents could observe the recommended 8:1+1 special class setting as well as a general education classroom providing ICT services to understand the demands put on students in the general education environment (id. at p. 2).

On June 18, 2012, the CSE reconvened to complete the development of the student's IEP (Dist. Ex. 5 at pp. 1-2). At the time the CSE reconvened, the parents had not visited either the general education class or the 8:1+1 special class (Tr. pp. 129, 287). After further discussion, a consensus was reached around a recommendation for the student's placement in a general education class with ICT services in ELA, math, and social studies (Dist. Ex. 5 at pp. 2, 13). The June 18, 2012 CSE recommended that in addition to the related services agreed upon at the June 4, 2012 CSE meeting, the student would receive one 30-minute session per week of individual counseling so the student could work on social skills (id. at pp. 2, 14).[5] As a support for school personnel on behalf of the student, the CSE recommended a monthly speech-language consultation to facilitate carryover of speech-language skills from therapy sessions to the classroom environment (id. at pp. 2, 15). Similar to the November 2011 IEP, the June 18, 2012 CSE recommended numerous supplementary aids and services, program modifications, and accommodations to support the student throughout the school day (Dist. Ex. 5 at pp. 14-16). The CSE also recommended that the student continue to participate in adapted PE (Dist. Ex. 5 at p. 16).

At the parents' request, the CSE reconvened on October 22, 2012 for a program review to discuss the student's placement in the adapted PE class as well as the parents' concern regarding the recommended level of speech-language services (Tr. pp. 145; Dist. Ex. 6 at pp. 1-2).[6] The parents also requested independent educational evaluations (IEEs) to assess the student's OT, PT, and speech-language needs (Dist. Ex. 6 at p. 2). The district agreed to provide the requested IEEs and advised the parents that the student would remain in the adapted PE class pending their completion (id.). The parents obtained the IEEs between November and December 2012 and the CSE attempted to reconvene to discuss the parents' concerns; however, the parents requested to defer the CSE meeting (compare Tr. pp. 149-50, with Parent Ex. M at pp. 6-7; see Dist. Exs. 16; 18; 19).[7]

By email to the district dated December 5, 2012, the parents indicated that they were unable to attend a scheduled December 6, 2012 "team meeting" and that they preferred to meet with the student's teachers individually before the larger team meeting in any event (Parent Ex. M at pp. 4-6).[8] The district provided the parents with a copy of the minutes from the December 6, 2012 team

[5] However, while the notes of the CSE meeting indicate that the parties agreed that the student would receive one 45-minute individual session of OT per week, the IEP indicates that the student would receive one 45-minute session of OT per week in a group of five (compare Dist. Ex. 5 at p. 2, with Dist. Ex. 5 at p. 14).

[6] The October 2012 made no substantive changes to the student's IEP; accordingly, for purposes of this decision reference is made to the June 2012 IEP alone.

[7] The hearing record reflects a CSE convened for the student's annual review to develop an IEP for the 2013-14 school year, at which the IEEs were reviewed by the CSE (Tr. pp. 303-04).

[8] The hearing record indicates that teachers at the district middle school were organized into teams and held daily team meetings among the regular and special education teachers, with weekly participation by related service providers and guidance counselors (Tr. pp. 92-93, 264-65).

meeting (id. at p. 3). By responsive email dated December 21, 2012, the parents indicated their disappointment that the district conducted a team meeting without their "participation" as well as the depiction of the student's strengths and weaknesses contained in the meeting minutes (id. at pp. 1-3). The parents also indicated their belief that the district had been unwilling to communicate with the parents as a team, and that the student's continued struggles evidenced a lack of appropriate services and accommodations (id.).

A. Due Process Complaint Notice

By due process complaint notice dated February 21, 2013, the parents asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 and 2012-13 school years (Dist. Ex. 1).[9] Initially, the parents argued that the district failed to conduct a functional behavioral assessment (FBA) or develop a behavioral intervention plan (BIP) to address the student's interfering behaviors that impeded her learning (id. at pp. 3-4). Moreover, the parents contended that the district failed to offer adequate "alternative behavior modification services," such as home-based therapy, family training, or family counseling (id. at p. 4). In addition, the parents alleged that the student's diagnosis of ADHD was not noted in either the November 2011 or June 2012 IEPs and the parents had not been informed of any scientifically-based methodology or strategy used by the district to address the interfering behaviors resulting from the student's ADHD (id.). The parents also asserted that the district failed to offer the student appropriate social skills training or a sufficient amount of counseling despite her social/emotional and behavioral needs (id. at pp. 4-5). The parents further asserted that the district did not provide the student with a sufficient amount of speech-language therapy (id. at p. 5). The parents further argued that despite the district's knowledge of the student's physical disabilities, it failed to conduct a physical therapy (PT) evaluation of the student or provide her with appropriate PT as a related service (id. at p. 3). The parents also asserted that the district failed to provide the student with a FAPE in the least restrictive environment (LRE) for the 2012-13 school year because the student was removed from her general education PE class and placed in an adapted PE class with no typically developing peers (id. at p. 5). Lastly, the parents asserted that the district failed to offer program modifications or accommodations to address the student's difficulty in writing, such as the use of a scribe (id.).

For relief, the parents requested : (1) that the student's current IEP be annulled; (2) that an IEP be developed that provided appropriate related services, annual goals, accommodations, and supports to address the student's needs in the LRE; (3) compensatory services for the denial of FAPE to the student for the 2011-12 and 2012-13 school years; (4) that an FBA be conducted and a BIP developed to address the student's specific behavioral needs; (6) parent training; (7) removal of any references to stealing, theft, or dishonesty from the student's disciplinary record; (8) reimbursement for privately obtained social skills training, tutoring, and counseling; and (9) reimbursement for or compensatory private speech-language therapy during the pendency of the proceedings (Dist. Ex. 1 at. pp. 6-7).

[9] Unless otherwise noted, the following claims are asserted with respect to both school years.

B. Impartial Hearing Officer Decision

On April 16, 2013 the IHO conducted a prehearing conference and, on May 17, 2013, the parties proceeded to an impartial hearing, which concluded on October 4, 2013, after 7 days of proceedings (Tr. pp. 1-1633; 4/16/2013 Transcript pp. 1-15). In a decision dated December 4, 2013, the IHO determined that the district offered the student a FAPE for the 2011-12 and 2012-13 school years (IHO Decision at pp. 21-22). Specifically, the IHO found credible the testimony of district witnesses that the student did not exhibit interfering behaviors that impeded her learning to the point that an FBA or BIP was necessary and, even if the district was required to conduct an FBA or develop a BIP for the student, the resultant violation did not rise to the level of a denial of a FAPE because the IEPs at issue addressed the student's interfering behaviors and provided the student with counseling and a 1:1 aide (id. at pp. 25-26). The IHO next found that the district appropriately addressed the student's speech-language needs, increased the amount of speech-language therapy when requested by the parent, and that the student had made "significant progress" in this area (id. at p. 25). The IHO also found that there was no evidence in the hearing record that the student required "educationally based PT" (id. at pp. 26-27). With respect to the parents' contention that the student was placed in adapted PE without a CSE meeting, the IHO found that both IEPs at issue indicated that the student would be placed in an adapted PE class and the parent agreed to the student's participation in adapted PE for the 2011-12 school year (id.). Finally, the IHO found that the district's lack of providing parent training and counseling for the parents did not rise to the level of a denial of a FAPE (id. at p. 27).

IV. Appeal for State-Level Review

The parents appeal, arguing that the IHO erred in finding that the district offered the student a FAPE for the 2011-12 and 2012-13 school years and denying their request for relief.

Initially, the parents assert that the IHO made various erroneous findings of fact and improperly relied on inconsistent testimony from district witnesses who were not credible. The parents contend that the district denied the student a FAPE for essentially the reasons stated in their due process complaint notice, including that the district did not conduct an FBA or develop a BIP for the student even though her interfering behaviors affected her learning, the student's diagnosis of ADHD was not reflected on her IEPs, the district did not provide the student with adequate speech-language therapy during the 2011-12 school year, the district did not provide the student with social skills training during the 2011-12 and 2012-13 school years, the district wrongfully placed the student in an adapted PE class without first evaluating her need for PT or providing her with 1:1 PT so that she could access the general education PE class, and the district failed to address the student's writing needs. The parents also allege that that the district denied the student a FAPE because the November 2011 IEP was developed without the parents' participation, the student regressed academically in ELA and Math, and the district did not provide any parent training. Lastly, the parents assert that the student was inappropriately disciplined for behaviors relating to her disabilities.

Consequently, the parents request that an SRO find that the district denied the student a FAPE for the 2011-12 and 2012-13 school years and award relief including (1) requiring the

district to contract with a BCBA to conduct an FBA and develop a BIP for the student[10]; (2) directing the district to convene a CSE meeting to develop an IEP with appropriate related services, accommodations, and supports, in collaboration with private providers;[11] (3) compensatory services including social skills training, 1:1 speech-language therapy, therapy using applied behavior analysis (ABA) methodology, and PT; (4) parent training and compensatory parent training; (5) requiring the district to provide training to district staff regarding the IDEA, including the requirement that instruction methods be scientifically-based and the implementation of BIPs; and (8) reimbursement for out-of-pocket expenses incurred by the parents to supplement the student's education.

In an answer, the district denies the parents' allegations asserts that the IHO correctly determined that the district offered the student a FAPE for the 2011-12 and 2012-13 school years and denied the parents' request for relief.[12]

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

[10] The hearing record reflects that BCBA is an acronym for a board certified behavior analyst (Tr. pp. 1280-81).

[11] The parents also request the removal of any references to stealing, theft, or dishonesty from the student's disciplinary record; however, I do not have authority to issue such relief. A challenge to the contents of a student's educational records more properly constitutes a claim made pursuant to the Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232[g]), and is not within the jurisdiction of an SRO. The IDEA and State law provide for state-level review in matters relating to the identification, evaluation, or educational placement of a student, or the provision of FAPE to the student (20 U.S.C. § 1415[b][6][A]). However, the IDEA and its implementing regulations specifically provide that hearings regarding parental requests for amendment of student records on the basis that they contain inaccurate or misleading information are to be conducted in accordance with the procedures specified in the regulations implementing FERPA, rather than the due process impartial hearing procedures for IDEA claims (20 U.S.C. § 1417; 34 CFR 300.511; 300.618; 300.621; see 34 CFR 99.20-99.22).

[12] The parents submitted a reply to the district's answer. Pursuant to State regulations, a reply is limited to responding to any procedural defenses interposed by a respondent or to any additional documentary evidence served with the answer (8 NYCRR 279.6). In this case, the district did not interpose any procedural defenses in, or submit additional evidence with, its answer; therefore, consistent with the practice regulations, the parents were not permitted to submit a reply to the district's answer and their reply will not be considered.

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 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. Scope of Review

In support of their contention that the district did not offer the student a FAPE for the 2011-12 and 2012-13 school years, the parents assert on appeal that the November 2011 IEP was developed without their participation and that the student regressed in ELA and Math. With respect to these claims, raised for the first time on appeal, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][i][b]; J.C.S. v Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *8-*9 [S.D.N.Y. Aug. 5, 2013]; S.M. v.

Taconic Hills Cent. Sch. Dist., 2013 WL 773098, at *4 [N.D.N.Y. Feb. 28, 2013], aff'd, 2014 WL 322294 [2d Cir. Jan. 30, 2014]; DiRocco v. Bd. of Educ., 2013 WL 25959, at *23 [S.D.N.Y. Jan. 2, 2013]; B.P. v. New York City Dep't of Educ., 841 F.Supp.2d 605, 611 [E.D.N.Y. 2012]; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *12 [S.D.N.Y. Oct. 28, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at *8; see K.L. v. New York City Dep't of Educ., 2013 WL 3814669, at *3, *6 [2d Cir. July 24, 2013]).

Upon review, I find that the parents' due process complaint notice cannot reasonably be read to include claims that the November 2011 IEP was developed without the parents' participation and that the student regressed in the areas of ELA and Math (see Dist. Ex. 1). A further review of the hearing record shows that the district did not agree to an expansion of the issues in this case, nor did the parents attempt to amend the due process complaint notice to include these issues. Accordingly, the allegations in the parents' petition are outside the scope of review and will not be considered (see, e.g., M.P.G., 2010 WL 3398256, at *8).[13]

B. Special Factors—Interfering Behaviors

Turning to the issues properly before me, the parents assert that the IHO erred in finding that the district's failure to conduct an FBA and develop a BIP did not rise to a denial of a FAPE. As set forth in greater detail below, the hearing record indicates that the student's behaviors did not seriously interfere with instruction and that the November 2011 and June 2012 IEPs appropriately addressed the student's behavioral needs.

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 E.H. v. Board of Educ., 361 Fed. App'x 156, 160-61, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at *8; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]). To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]; Piazza v. Florida Union Free Sch. Dist., 2011 WL 1458100,

[13] To the extent that the Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H., 685 F.3d at 250-51; see D.B. v. New York City Dep't of Educ., 2013 WL 4437247, at *6-*7 [S.D.N.Y. Aug. 19, 2013]; N.K., 2013 WL 4436528, at *5-*7; A.M. v. New York City Dep't of Educ., 2013 WL 4056216, at *9-*10 [S.D.N.Y. Aug. 9, 2013]; J.C.S., 2013 WL 3975942, at *9; B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at *5-*6 [S.D.N.Y. May 14, 2013]), the additional issues raised in the petition were not initially elicited by the district and, therefore, the district did not "open the door" to this issue under the holding of M.H. (see A.M., 2013 WL 4056216, at *10-*11; c.f., Y.S. v. New York City Dep't of Educ., 2013 WL 5722793, at *6 [S.D.N.Y. Sept. 24, 2013]; P.G. v. New York City Dep't of Educ., 2013 WL 4055697, at *14 [S.D.N.Y. July 22, 2013]).

at *1 [S.D.N.Y. Apr. 7, 2011]; Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *30 [N.D.N.Y. Sept. 29, 2009]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 380 [S.D.N.Y. 2008]).

In New York State, policy guidance explains that "[t]he IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address [among other things, a student's interfering behaviors,] in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 22, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP" and, if necessary, the "student's need for a [BIP] must be documented in the IEP" (id.).[14] State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student (8 NYCRR 200.4[d][3][i]; 200.22[a], [b]). An FBA is defined in State regulations as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and "include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it" (8 NYCRR 200.1[r]). State regulations require that an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]). Although State regulations call for the procedure of using an FBA when developing a BIP, the failure to comply with this procedure does not automatically render a BIP deficient (A.H., 394 Fed. App'x at 722). Nevertheless, the Second Circuit has explained that when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F.3d at 190). The Court also noted that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE, but that in such instances particular care must be taken to determine whether the IEP address the student's problem behaviors" (id.).

The special factor procedures set forth in State regulations further require 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

[14] While the student's need for a BIP must be documented in the IEP, and prior to the development of the BIP, an FBA either "has [been] or will be conducted ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 22 [emphasis added]), it does not follow that in every circumstance an FBA must be conducted and a BIP developed at the same time as the IEP (see Cabouli v. Chappaqua Cent. Sch. Dist., 202 Fed. App'x 519, 522, 2006 WL 3102463 [2d Cir. Oct. 27, 2006]).

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 (regarding disciplinary action taken against a student as a result of conduct that was a manifestation of the student's disability) (8 NYCRR 200.22[b][1]). As noted above, "[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]).[15] Neither the IDEA nor its implementing regulations require that the elements of a student's BIP be set forth in the student's IEP ("Questions and Answers on Individualized Education Program [IEP] Development, the State's Model IEP Form and Related Requirements," at p. 16, 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, implementation of a student's BIP is required to 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," with the results of the progress monitoring documented and reported to the student's parents and the CSE (8 NYCRR 200.22[b][5]).

As previously discussed, the November 2011 CSE had before it a November 2011 social history report in which the parents described the student's interfering behaviors in the classroom (Dist. Ex. 11). The social history report indicated that the student had needs relating to socialization skills and did not like to be corrected behaviorally (id. at pp. 4-5). Furthermore, the report indicated that while the student was interested in the learning process, she displayed weakness in attention, organization, and study skills, and had difficulties behaving in the manner expected of her (id. at p. 5). The report also noted that the student's impulsivity affected her performance on writing tasks (id.). The parents indicated concerns with regard to the student's hygiene needs, reporting that although the student was capable of self-care tasks, she required frequent reminders (id. at pp. 3, 6). The report also noted the student's lack of understanding with respect to social cues (id. at pp. 5-6).

The school psychologist, who participated at the November 2011 CSE meeting, testified that the student's behavior did not interfere with her education enough to warrant an FBA (Tr. p. 503). The school psychologist further testified that she did not recommend an FBA because upon

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

the student's arrival at the middle school, the level of the student's difficulties did not seem to have a "deep psychological underpinning to it" (Tr. p. 504). Additionally, the school psychologist indicated that the district targeted "prosocial skills and prostudent skills" for the student, as she entered a new environment and because the student had not been in a school environment for some time (id.). Lastly, the school psychologist testified that the student required reminders and prompts across school settings to manage her behavioral needs, rather than a behavior plan (id.).[16]

To address the student's need for behavioral support, a review of the November 2011 IEP reflects that the student's behavior was managed using a routine and schedule so that she was aware of what to expect in her classes, a behavior chart that targeted personal goals for each class, visual cues paired with auditory presentation of instruction, refocusing, and redirection during class time (Dist. Ex. 3 at p. 9; see Dist. Ex. 24). Additionally, the IEP provided for the student to receive counseling and the assistance of a 1:1 aide (Dist. Ex. 3 at pp. 13-14). The IEP also included a large number of program modifications and accommodations to address the student's management needs (id.). Furthermore, the IEP included social/emotional and behavioral annual goals aimed at the student's ability to identify her strengths and weaknesses, read social cues, create positive relationships with peers, and interact in a socially acceptable manner (id. at p. 12). In addition, testimony by the student's building support program/ICT special education teacher revealed that she developed a point system to motivate the student by encouraging her to earn a reward at the end of the day if the student engaged in appropriate behaviors related to organization, hygiene, and moving from class to class (Tr. pp. 894-95, 897-900; Dist. Ex. 24 at pp. 2-6). Towards the middle of the 2011-12 school year, the point system was adjusted to include a rubric that better met the student's developing needs (Tr. pp. 895-96; Dist. Ex. 24 at p. 1). The student's 1:1 aide managed the rubric and behavior chart with the student's input in regards to the student's assessment of her own behavior throughout the day (Tr. pp. 900, 908-09). In addition to the behavior rubric, the student's special education teacher indicated that the teachers provided the student with constant reminders and verbal prompts specific to the study skills goals included in the November 2011 IEP (Tr. pp. 9, 12-13; Dist. Ex. 3 at p. 10). Additionally, with the assistance of the 1:1 aide, the student was able to navigate the hallways with prompting (Tr. p. 286). The hearing record indicates that towards the end of the 2011-12 school year, the student walked appropriately in the hallway, greeted people, and socialized by playing on the playground and interacting in class (Tr. p. 109). The special education teacher characterized the student as someone who "became a student" with the positive supports that the district provided (Tr. p. 926). The special education teacher further indicated that with the help of the rubric and point system, the student was able to transition between classes with few reminders throughout the day (Tr. p. 925). The student was able to identify teachers' expectations, and verbalize those expectations with minimal adult support (Tr. p. 926). The student also made some progress with her hygiene difficulties (Tr. p. 286). Additionally, the student was able to sit in class, raised her hand, and stopped calling out (Tr. p. 925). I find that even if the student's behaviors interfered with her instruction to the extent that the district should have conducted an FBA and developed a BIP, the district adequately addressed the student's needs by provision of appropriate supports including counseling and a 1:1 aide, as well

[16] Although a private psychologist testified that the district should have conducted an FBA, this testimony is unpersuasive for the reasons noted by the IHO: the private psychologist did not observe the student in the classroom, took no notes, did not write a report of her findings, did not conduct any type of standardized testing or evaluation, and did not speak to the student's service providers from the district (IHO Decision at p. 26 n.7; Tr. pp. 1355-1356).

as the implementation of a behavior plan developed specifically for the student.

A review of the June 2012 IEP reveals that the June 18, 2012 CSE continued to address the student's need for behavioral support by providing the student with counseling, annual goals, and modifications and supports to support the student in the school environment (Dist. Ex. 5). The IEP noted that the student's achievements in study skills were accomplished through the use of a behavioral system used as motivation for the student, support of a 1:1 aide, and support from her teachers throughout the school day (id. at pp. 7, 14-15). In addition, the student received adult support through much of the school day, including help understanding directions, and breaking down and simplification of tasks (id.). The school psychologist testified that during the 2012-13 school year, the student made progress with respect to her interactions with peers, whereby she connected with peers and negotiated social conversations with them despite her difficulties reading social cues (Tr. p. 438). In addition, the student displayed the ability to carryover topics discussed during group counseling sessions from one week to the next, and displayed improved eye contact when someone spoke to her, although some attention difficulties remained (Tr. p. 439). Furthermore, the student was more open to talking about her frustration and anxiety than in the past, and seemed to display a higher level of interest and engagement with others (Tr. pp. 440-41). Based on the social/emotional progress observed by district staff members over the course of the 2011-12 school year, it was reasonable for the district to recommend a program with similar supports, while adding a small group counseling session so the student could continue to work on her social skills and to address anxiety reported by the parents (Tr. pp. 422-23; Dist. Ex. 5 at pp. 2, 14).

Based on the foregoing, I find that the district's failure to conduct an FBA or develop a BIP in this case does not support a finding that the district failed to offer the student a FAPE, particularly because the November 2011 and June 2012 CSEs accurately identified and addressed the student's behavioral needs in the November 2011 and June 2012 IEPs (Dist. Exs. 3; 5).

Regarding the parents' assertion that the November 2011 and June 2012 IEPs failed to discuss the student's attention deficit hyperactivity disorder (ADHD) diagnosis, I note that federal and State regulations do not require the district to set forth the student's diagnosis' in an IEP; instead, they require the district to conduct an evaluation to "gather functional developmental and academic information" about the student to determine whether the student falls into one of the disability categories under the IDEA and information that will enable the student be "involved in and progress in the general education curriculum" (34 CFR 300.304[b][1]; see 8 NYCRR 200.4[b][1]; see also Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011]; Application of a Student with a Disability, Appeal No. 09-126 ["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"]). Here, the November 2011 and June 2012 IEPs addressed the student's needs related to her attention deficits and impulsivity which was sufficient to address the student's deficits related to her diagnosis of ADHD. Specifically, the IEPs provided the student with a reward system, repetition of skills and concepts, redirection, visual cues and the assignment of a 1:1 paraprofessional (Dist. Exs. 3 at pp. 9, 14; 5 at pp. 10, 15).

C. Speech-Language Therapy

On appeal, the parents assert that the student did not receive adequate speech-language services during the 2011-12 school year and that the district did not provide any social skills training for the student. As discussed more fully below, the hearing record reflects that the district adequately addressed the student's speech-language and social needs during the 2011-12 and 2012-13 school years.

The student's speech-language pathologist indicated that she participated in the development of the present levels of performance for the November 2011 IEP at the November 2011 CSE meeting, based on the two private speech-language evaluations available to the November 2011 CSE, as well as the speech-language evaluation she conducted in November 2011 (Tr. pp. 584, 586; Dist. Exs. 7-8; 13).[17] The speech-language pathologist recommended that the student receive speech-language therapy two times per week in a group of five students to focus on the student's social pragmatic skills (Tr. pp. 586-87). The student's speech-language related service provider delivered the speech-language therapy in the building support program classroom to avoid disruption to the student's day (Tr. pp. 589-90). The speech-language pathologist testified that she was concerned that pull-out sessions would have been disruptive for the student because she struggled with transitions between activities, as well as with changing classes (id.). According to the student's speech-language pathologist, in the beginning of the 2011-12 school year the student appeared unaware of where she was in space and the people around her (Tr. p. 596). However, by the end of the 2011-12 school year, the student progressed from appearing completely unaware of those around her to someone who reciprocated in social pleasantries (Tr. p. 597). In addition, the student grew to enjoy interacting with her peers and was able to engage in age-appropriate topics (Tr. pp. 597-98). Other pragmatic improvement was seen in the student's understanding of appropriate interpersonal space and use of eye contact when conversing with others (Tr. p. 598). In addition, the speech-language pathologist testified that the student "became a student" (id.). The speech-language pathologist further testified that the student was able to stay in her seat and participate for the duration of the 42-minute class, transition from room to room, partake in group activities with her peers with some assistance, and participate in conversations with peers without overtaking the conversation (Tr. p. 608). Moreover, the speech-language pathologist testified that the student's difficulty with drooling improved (Tr. p. 598).

Moving forward to the 2012-13 school year, the hearing record reflects that the district addressed the student's speech-language and social needs and the student made progress in her 2012-13 speech-language goals with the recommended related services and supports and strategies (Tr. pp. 613-20; Dist. Ex. 21 at pp. 6-8). A review of the June 2012 IEP reflects that some of the recommended speech-language goals for the 2012-13 school year were more advanced than the goals the student worked on during the 2011-12 school year (compare Dist. Ex. 3 at pp. 11-12, with Dist. Ex. 5 at pp. 12-13). The speech-language pathologist testified that in consideration of the student's progress during the 2011-12 school year, it was appropriate to recommend that the student receive two group speech-language therapy sessions per week to address targeted areas, as

[17] The speech-language pathologist indicated that she evaluated the student in November 2011 and worked with the student indirectly during the 2011-12 school year (Tr. pp. 550-53). Although the student had a different speech-language therapy provider during the 2011-12 school year, the speech-language pathologist indicated that she was in constant communication with the student's provider (Tr. p. 554; see Tr. p. 591).

well as one individual session per week to work on the student's grammar and writing needs (Tr. p. 607).[18] Furthermore, the June 18, 2012 CSE recommended a monthly speech-language consult with the student's team to ensure consistency of message to the student and modifications and strategies used (Tr. p. 609).[19] The speech-language pathologist indicated the student presented like "night and day" in comparison to how she presented at the beginning of the 2011-12 school year (Tr. p. 624). The speech-language pathologist further characterized the student at the time of the impartial hearing as an "active and productive member of the class" (id.). Furthermore, contrary to the parents' contentions, in comparing the formal test results from speech-language testing obtained by the parents in February 2011 and the speech-language IEE from November 2012, the student made progress in several areas, with some of her performance indicating ability within normal limits (Tr. pp. 625-29, 631-32; Dist. Exs. 7; 18). The progress made by the student under the November 2011 IEP shows that the June 2012 CSE's decision to continue similar speech language services in the June 2012 IEP was appropriate. As explained by a court,"[a]lthough past progress is not dispositive, it does 'strongly suggest that' an IEP modeled on a prior one that generated some progress was 'reasonably calculated to continue that trend'" (S.H. v. Eastchester Union Free School Dist., 2011 WL 6108523, at *10 [S.D.N.Y. Dec. 8, 2011], quoting Thompson R2–J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153 [10th Cir. 2008]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *12 [E.D.N.Y. Sept. 2, 2011]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F.Supp.2d 606, 650 [S.D.N.Y.2011]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *16 [S.D.N.Y. Sept. 29, 2008]). Similarly in this instance, the hearing record reflects that the November 2011 and June 2012 IEPs contained appropriate speech-language therapy recommendations that adequately addressed the student's speech-language and social needs.

D. Adapted Physical Education/Physical Therapy

The parents assert that the district failed to offer the student a FAPE for the 2011-13 and 2012-13 school years because the district placed the student in adapted PE without first conducting a PT evaluation to assess the student's need for PT support so that she could have access to the general education PE curriculum.[20]

With respect to the parents' contention that the district should have provided the student with PT supports within the school, the director testified that the criteria for PT in an educational setting is to remove barriers for access to the curriculum, and that it was germane to ensure a student could physically access classes by moving from class to class, navigating the stairs, and be safe in the school building (Tr. p. 291). Specific to the student, the director indicated there was

[18] Testimony from the student's speech-language therapy provider for the 2011-12 school year in regards to the student's progress 2011-12 was consistent with the testimony by the speech-language pathologist (see Tr. pp. 673-738). The student's speech-language provider indicated that the student made growth "all around" and that her area of greatest growth was pragmatic speech (Tr. p. 738).

[19] The district speech-language pathologist testified that she met with the team weekly or sometimes daily (Tr. pp. 609-10).

[20] Although the parents initially raised this issue as violating the district's obligation to place the student in the LRE, their argument on appeal appears to be that the district placed the student in adapted PE so as to avoid providing her with appropriate PT services (Pet. pp. 8, 15).

nothing physically preventing the student from accessing her classes, and that the student was assigned a 1:1 aide for navigational, rather than mobility, needs (Tr. pp. 291-92). Moreover, the director noted that the August 2011 private OT evaluation indicated that during the evaluation, the student ambulated independently and negotiated routine indoor obstacles (Tr. p. 291; Dist. Ex. 10 at p. 1). The August 2011 OT evaluation report also indicated the student's performance and accuracy of gross motor tasks improved with repetition, indicative of motor planning difficulties (Dist. Ex. 10 at p. 1). According to the director, the district addressed the student's motor planning needs for additional practice of motor skills through the provision of adapted PE (Tr. p. 293). However, even if the student would have been able to benefit from PT in an educational setting, the hearing record does not support a conclusion that the student was denied a FAPE for the 2011-12 and 2012-13 school years by the district's decision not to provide her with PT.

The hearing record reveals that during the student's 2011-12 school year, the November 2011 CSE recommended that the student be placed in an adapted PE class (Dist. Ex. 3 at p. 15). The director indicated that the district recommended this service based on the student's difficulties in a regular PE class at the beginning of the school year and because of the student's perceptual deficits, out of safety concerns, and that the parents raised no objections to the student's placement in adapted PE at any time during the school year (Tr. pp. 95-97, 295). When the CSE convened to develop the student's IEP for the 2012-13 school year, the June 18, 2012 CSE recommended that the student remain in the adapted PE class (Dist. Ex. 5 at p. 16). During the June 2012 CSE meetings, the parents did not object to this; however, at the beginning of the 2012-13 school year there was a scheduling error and the student was inadvertently placed in a regular PE class instead of the adapted PE class recommended by the June 18, 2012 CSE (Tr. pp. 139-40, 293). The error was discovered within the first couple of weeks of school, whereupon the student was switched into her mandated adapted PE class (id.). The parents objected to the switch because the students in the adapted PE class were less social and had lower language abilities than the students in the student's adapted PE class for the 2011-12 school year (Tr. pp. 140-41, 293-94).

Based on the parents' concerns, the CSE reconvened in October 2012 to discuss the student's placement in the adapted PE class (Tr. pp. 145; Dist. Ex. 6 at pp. 1-2). During the October 2012 CSE meeting, the parents indicated that the student complained about the switch from the regular PE class to the adapted PE class (Dist. 6 at p. 2). The parents further indicated that although they consented to the student attending an adapted PE class at the time of the June 18, 2012 CSE meeting, the parents were not aware that the student would be placed in an adapted PE class with nonverbal students (id.). The parents requested that the student return to the regular PE class because the student was not challenged in adapted PE as much as the prior year due to a lack of socialization opportunities in the adapted PE class (id.). The CSE chairperson testified that the students from the 2011-12 school year were more social and had better language skills and were better role models (Tr. pp. 140-141). The CSE chairperson further testified that during the 2012-13 school year, there were 4 or 5 males in the adapted PE class, and the student was the only female in the adapted PE class (Tr. p. 142). The October 2012 IEP reflects that the physical education teacher and occupational therapist in attendance at the October 2012 CSE meeting indicated that the adapted PE class was appropriate to address the student's coordination delays and vestibular needs, and that for safety reasons she should remain in the adapted PE class (Dist. Ex. 6 at p. 2). At some time after the October 2012 CSE meeting, with consent from the parents, the student was

ultimately placed in a regular PE class, consisting of a parallel curriculum with the assistance of a 1:1 aide and the physical education teacher (Tr. pp. 140-44, 296-97).[21]

Based on the foregoing, the hearing record supports the IHO's conclusion that the student's gross motor needs did not require the provision of PT to permit the student to access the general education curriculum or receive academic benefits. Furthermore, to the extent the parents assert that the student was improperly placed in adapted PE, the district has since placed the student, with parental consent, in a regular PE class with additional supports and the hearing record does not support a finding that the district deprived the student of a FAPE on this basis.

E. Writing Accommodations

On appeal, the parents allege that the district did not appropriately address the student's writing disabilities.

Consistent with an August 2011 private OT evaluation available to the district and the OT progress reports specific to each school year, the hearing record indicates the district addressed the student's handwriting difficulties during both the 2011-12 and 2012-13 school years (Dist. Exs. 3 at p. 3; 5 at p. 3; 10 at p. 2-3; 20 at pp. 9-10; 21 at p. 10). Review of the November 2011 IEP indicates the November 2011 CSE noted that the student should be expected to take class notes, but also would be given a copy of class notes to ensure she received all content presented in class (Dist. Ex. 3 at p. 7). At that time, among other supports, the student was noted to require modified classroom assignments and homework when there were writing tasks involved (id.). The November 2011 IEP also indicated the student's handwriting was labored and affected by fine motor difficulties (id. at p. 8). The IEP noted that the student needed OT to improve her keyboarding skills and strategies for organization (id.). The OT goals in the November 2011 IEP included one goal specific to keyboarding skills (id. at p. 12). Finally, the November 2011 CSE recommended the student have access to a word processor for written assignments throughout the school day (id. at p. 14).

A review of the June 2012 IEP revealed that the student's handwriting, ability to take notes, and typing skills greatly improved over the 2011-12 school year (Dist. Ex. 5 at p. 7). The June 2012 IEP indicated the student preferred to type, and with reminders, used specialized software to help with spelling, grammar, and organization (id.). The IEP also indicated that physically, the student required support for visual perceptual tasks, keyboarding as an alternative to handwriting

[21] I remind the district of its obligation to provide the parents with prior written notice on forms prescribed for that purpose by the Commissioner of Education (available at http://www.p12.nysed.gov/specialed/formsnotices/PWN/home.html) pursuant to federal and State regulations, which require the district to provide a description of each evaluation procedure, assessment, record, or report that was used as a basis for the proposed action (see 34 CFR 300.503; 8 NYCRR 200.5[a]). Here, the hearing record does not indicate that the district provided the parents with prior written notice when the district changed the student's PE program. However, I note that adapted PE is defined by State regulation as "a specially designed program of developmental activities, games, sports and rhythms suited to the interests, capacities and limitations of students with disabilities who may not safely or successfully engage in unrestricted participation in the activities of the regular physical education program" (8 NYCRR 200.1[b]). As described in the hearing record, although the student was participating in regular PE, her participation was not unrestricted, and it is at least arguable that she continued to receive adapted PE in accordance with her IEP.

for lengthier assignments, and activities to support coordination and fine motor movements (id. at pp. 9-10). The provision for class notes was also indicated in the June 2012 IEP (id. at p. 14). OT goals in the IEP included one goal specific to keyboarding skills with criteria for achievement that required more from the student than the previous year (id. at p. 13). The June 2012 IEP also included three goals targeting the student's needs specific to the mechanics of writing and grammar (id. at p. 11). The June 18, 2012 CSE continued the recommendation that the student have access to a word processor for written assignments throughout the school day (id. at p. 15).

Based on the foregoing, the district provided the student with appropriate writing accommodations for the 2011-12 and 2012-13 school years. While it is possible that the student might benefit from access to a scribe, the district's failure to recommend a scribe during the 2011-12 and 2012-13 school years did not rise to the level of a denial of FAPE where the student was provided access to a word processor, the assistance of a 1:1 aide, and copies of class notes, as well as modified homework and testing conditions (Dist. Exs. 3 at pp. 7-8, 13-14; 5 at pp. 7-8, 14-15).

VII. Conclusion

Based on the above, the hearing record supports the IHO's determination that the district offered the student a FAPE for the 2011-12 and 2012-13 school years and the necessary inquiry is at an end.[22] Lastly, the hearing record reflects that the district agreed to reimburse the parents for OT, PT and speech-language IEEs; however, there is some indication in the hearing record that at the time of the impartial hearing, the parents had not yet been reimbursed (Tr. pp. 326-333). Accordingly, I shall direct the district to reimburse the parents for the OT, PT, and speech-language IEEs they obtained in November and December 2012, if it has not done so already.

[22] Nonetheless, I agree with the parents that the district failed to include parent counseling and training on the student's IEP as required by State regulation (8 NYCRR 200.4[d][2][v][b][5]; 200.13[d]). As stated by the Second Circuit, the district "remain[s] accountable for its failure to [provide parent counseling and training] no matter the contents of the IEP," due to the requirements in State regulation (R.E., 694 F.3d at 191). In light of the district's failure in this case to identify parent counseling and training on the student's IEP as required by the IDEA and State regulations, I order that when the CSE next reconvenes to develop a program for the student, the district shall consider whether the related service of parent counseling and training is required to enable the student to benefit from instruction and, after due consideration, provide the parent with prior written notice on the form prescribed by the Commissioner that, among other things, specifically describes whether the CSE recommended or refused to recommend parent counseling and training on the student's IEP together with an explanation of the basis for the CSE's recommendation in conformity with the procedural safeguards of the IDEA and State regulations (34 CFR 300.503[b][1]-[2]; see 8 NYCRR 200.1[oo]). I have considered the parties' remaining contentions and find that they are without merit and that I need not address them in light of the determinations made herein.

THE APPEAL IS DISMISSED.

IT IS ORDERED that at the next CSE meeting regarding the student's special education programming, the district shall consider whether it is appropriate to include parent counseling and training on the student's IEP and, thereafter, shall provide the parents with prior written notice consistent with the body of this decision; and

IT IS FURTHER ORDERED that the parents shall provide the district with proof of payment for the costs of the speech-language, OT, and PT IEEs and, within 30 days of receipt of proof of payment, the district shall reimburse the parents for the IEEs if it has not already done so.

Dated: **Albany, New York**
February 12, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER