



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 14-072

**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 New York City Department of Education**

### **Appearances:**

The Cuddy Law Firm, PC, attorneys for petitioner, Kerry McGrath, 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 a decision of an impartial hearing officer (IHO) which determined that the educational programs and services respondent's (the district's) Committee on Special Education (CSE) had recommended for her son for the 2012-13 and 2013-14 school years were appropriate. The appeal must be sustained in part.

### **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 student exhibited academic difficulties as well as behavioral and social difficulties while attending kindergarten in the district during the 2010-11 school year (see Tr. pp. 512-13; Parent Ex. E at pp. 2-4). During the 2011-12 school year, the parent sent the student to live outside of the State with his grandparents and he attended first grade in a private school (Tr. pp. 518-19; Parent Ex. P at pp. 4-5). While the student was out of the State, a private evaluator conducted a psychoeducational evaluation of the student (Parent Ex. P). Although the parent testified that the student was doing well and progressing in school during the 2011-12 school year, the student did not adjust well to being away from his parents and returned to live with the parent in the district in February 2012 (Tr. pp. 519-520). Upon his return, the district placed the student in a kindergarten classroom providing integrated co-teaching (ICT) services as a regular education student (Tr. pp.

522-23; see Parent Ex. R).<sup>1</sup> Although the student continued to exhibit academic delays, he did not exhibit any interfering behaviors upon returning to the district until November 2012 (Tr. p. 525). It appears from the hearing record that the student began receiving support through the district's response to intervention program in October 2012 (Parent Exs. Q at p. 3; R). In November 2012, a request for initial referral was completed by the special education teacher in the student's classroom (Parent Ex. Q; see Parent Ex. N at p. 1).

A CSE convened on February 21, 2013, to determine the student's eligibility for special education and related services (Parent Ex. C). Participants at the February 2013 CSE meeting included a district representative, a social worker, a school psychologist, regular and special education teachers of the student, the student's parents, an additional parent member, and the parent's educational advocate (id.).<sup>2</sup> Finding the student eligible for special education programs and services as a student with an emotional disturbance, the February 2013 CSE recommended the student be placed in an 12:1+1 special class for all academic subjects starting on February 28, 2013, with related services including counseling, occupational therapy (OT), and speech-language therapy (id. at pp. 1, 7-8).<sup>3</sup>

According to the parent, the school never "officially" placed the student in a 12:1+1 special class, but instead placed him in a special class for one period at a time, after which he returned to the general education class (Tr. p. 582). An incident took place at the end of February during which emergency medical services or the police restrained the student, and shortly afterwards the parent removed the student from the public school (Tr. pp. 532-36, 552).

The CSE reconvened on March 21, 2013, for the purpose of amending the student's IEP to reflect placement in an 8:1+1 special class so that the student could attend a district day treatment program (Tr. pp. 436-37, 499-500, 552-54; see Dist. Ex. 2). Differences between the February 2013 IEP and the March 2013 IEP included a change from a 12:1+1 special class to an 8:1+1 special class, the addition of 12-month school year services, a reduction in counseling services, and the addition of specific transportation accommodations (compare Dist. Ex. 2 at pp. 6-7, 9-10, with Parent Ex. C at pp. 7-9, 11-12). The student began attending the day treatment program pursuant to the March 2013 IEP in April 2013 and continued in the same program for the 2013-14 school year (Tr. pp. 48, 112, 194, 228, 555-56).

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<sup>1</sup> Although the parent refers to the classroom as a collaborative team teaching (CTT) class, for consistency with State regulations, in this decision the services are referred to as ICT services. ICT services are defined 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 an integrated co-teaching class "shall minimally include a special education teacher and a general education teacher" (8 NYCRR 200.6[g][2]; see "Continuum of Special Education Services for School-Age Students with Disabilities," VESID Mem., pp. 11-15 [Apr. 2008], available at <http://www.p12.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf>).

<sup>2</sup> The special education teacher was the same teacher who made the request for initial referral (Parent Ex. Q).

<sup>3</sup> With regard to related services, the February 2013 CSE recommended that the student receive two 30-minute individual counseling sessions per week, one 30-minute group counseling session per week, one 30-minute individual OT session per week, one 30-minute group OT session per week, one 30-minute individual speech-language therapy session per week, and one 30-minute group speech-language therapy session per week (Parent Ex. C at p. 8).

## A. Due Process Complaint Notice

In a due process complaint notice dated August 13, 2013, the parent alleged that the district failed to offer the student a FAPE for the 2011-12, 2012-13, and 2013-14 school years (Parent Ex. A). Initially, the parent asserted that the district should have identified the student as a student with a disability prior to the February 2013 CSE meeting and failed to evaluate the student during the 2011-12 and 2012-13 school years after the parent's requests (id. at p. 3). The parent also asserted that the district did not adequately evaluate the student because it relied on a December 2011 psychoeducational evaluation conducted while the student was out of State, the December 2011 evaluation recommended additional evaluations, and the update to the December 2011 evaluation did not reflect the student's needs related to his diagnoses with autism, a learning disability, and a speech-language delay (id.). The parent further contended that the report of the December 2011 evaluation—which was written in Spanish—was not translated prior to the February 2013 CSE meeting and not all of the CSE members could read it (id.).

The parents asserted that the February 2013 CSE erred in a number of aspects (id. at pp. 4-5). Specifically, the parent contended that the CSE improperly classified the student as having an emotional disturbance rather than a learning disability (id. at p. 4). The parent alleged that the goals included in the February 2013 IEP were insufficient because there were no math goals, the goals did not sufficiently address the student's social/emotional or sensory needs, and the recommendations from an OT evaluation report were not included in the goals (id. at pp. 4-5). The parent also asserted that the district failed to conduct an appropriate functional behavioral assessment (FBA) and failed to utilize appropriate strategies to manage the student's behaviors (id. at p. 4). In addition, that parent alleged that the district was required to provide the student with transitional support services and parent counseling and training and failed to do so (id. at p. 5). Further, the parent asserted that the district failed to recommend a remedial program to address the student's academic and social/emotional needs and contended that the recommended program was not appropriate because it did not address the student's needs related to autism, did not develop a transition plan, and used medication to address the student's interfering behaviors (id.).

As relief, the parent requested an order: (1) directing the district to place the student in an appropriate nonpublic school or defer the student's placement to the district's central-based support team ; (2) directing that the student's placement be "in a small structured program for students with autism" and include "a reading specialist in multisensory reading, writing, and spelling"; (3) directing the district to conduct an FBA and develop a behavioral intervention plan (BIP) for the student; (4) directing the CSE to include "an accurate and comprehensive statement of the Student's current levels of performance" and appropriate annual goals; (5) directing the district to provide the student with two sessions of individual speech-language therapy per week and one session of group speech-language therapy per week; (6) directing the district to provide the student with three OT sessions per week; (7) directing the district to continue to provide the student with individual counseling; (8) directing the district to provide parent counseling and training; (9) directing the district to provide the student with compensatory education for services missed from February 21, 2013 through April 2013; and (10) granting the parent attorneys' fees and expenses (Parent Ex. A at pp. 6-7).

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

After a prehearing conference on October 21, 2013, an impartial hearing convened on October 22, 2013 and concluded on February 18, 2014, after four nonconsecutive hearing dates (Tr. pp. 1-586). In a decision dated April 14, 2014, the IHO determined that the district offered the student a FAPE (IHO Decision). Initially, the IHO determined that the statute of limitations did not bar any of the parent's claims and that he would consider the period going back to August 13, 2011 in determining whether the district offered the student a FAPE (*id.* at pp. 3-4). After summarizing the testimony taken during the hearing, the IHO determined that the district addressed the student's needs "through placing [the student] in an ICT class" as a regular education student "without perhaps ever needing to resort to special education" (*id.* at p. 13). The IHO further determined that the district evaluated the student and recommended a "more restrictive" setting "[w]hen it became clear that [the student] needed more" (*id.*). The IHO found that the program recommended in the March 2013 IEP addressed the student's needs and was reasonably calculated to provide educational benefits (*id.*). He further found that the school implemented behavior plans in a way that addressed the student's needs (*id.*). Regarding the student's classification as a student with an emotional disturbance, the IHO noted the conflict between the report from the parent's private psychologist and the district school psychologist and determined that it would not be appropriate to order that the student receive a specific classification and instead left the decision to the CSE (*id.* at pp. 13-14). To that end, the IHO directed the CSE to reconvene and "reconsider [the student's] classification, program and placement" (*id.* at p. 14). Specifically, the IHO directed the CSE to consider whether classifying the student as a student with autism would be appropriate, to consider nonpublic school settings in determining the appropriate placement for the student, to consider a March 2013 private neuropsychological evaluation, and to consider whether updated evaluations were necessary (*id.* at pp. 14-15).

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

The parent appeals from the IHO's decision that the district offered the student a FAPE for the 2011-12, 2012-13, and 2013-14 school years. Initially, the parent objects to the IHO's summary of the hearing testimony and asserts that the IHO omitted facts relevant to the parent's case. The parent also contends that the IHO improperly shifted the burden of proof to the parent by stating that that he saw "no evidence of bad faith by DOE personnel" and by accepting the FBA and BIP as appropriate because the parent did not request an independent evaluation.

Substantively, the parent asserts that the IHO erred in finding that placement in a classroom providing ICT services was appropriate and alleges that the district denied the student a FAPE by failing to evaluate him and recommend special education programs and services between February 2012 and February 2013. The parent also asserts that the IHO erred in finding that the district adequately evaluated the student and contends that the district did not evaluate the student in all areas of need because the district's evaluations did not identify the student as having a learning disability or speech-language impairment and did not sufficiently assess his behavioral needs. The parent also asserts that the IHO erred in failing to order the district to classify the student as a student with autism. The parent alleges that the student did not meet the criteria for being classified with an emotional disturbance. Although the parent admits that the student exhibited interfering behaviors in the classroom, she asserts that those behaviors were caused by frustration, an inability to communicate, and sensory issues rather than an emotional disturbance. Conversely, the parent

argues that classifying the student as a student with autism would have been appropriate because the student exhibited difficulties with transitions and sensory issues. The parent further asserts that the IHO erred in finding that the district had an appropriate BIP in place. The parent asserts that the FBA conducted by the district was vague because it checked off every option as a trigger for the student's behaviors. She also asserts that the BIP was not appropriate because the management strategies included in the BIP were ineffective and the school did not attempt different strategies. The parent contends that the district should have had the student evaluated by a behaviorist.

The parent further asserts that the 12:1+1 class recommended in the February 2013 IEP was inappropriate and that the district never placed the student in a full time 12:1+1 class. The parent also alleges that the student was denied a FAPE because the district never provided the parent with a copy of the March 2013 IEP or a written notice indicating that the student was assigned to his current school. Additionally, regarding the March 2013 IEP, the parent asserts that the IEP did not sufficiently identify the student's present levels of performance because it omitted information from OT and speech-language evaluations conducted in December 2012. The parent alleges that the annual goals were insufficient because there were no goals for math or for speech-language therapy. Additionally, the parent asserts that she never received parent counseling and training. Finally, regarding the student's current school, the parent asserts that a day treatment program is not an appropriate placement for the student because it is not "specifically geared to the unique needs of a child who falls on the autistic spectrum."

## **V. Applicable Standards**

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at \*10

[S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at \*7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at \*15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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. Child Find and Parental Referral**

The parent asserts that the district failed to identify the student and evaluate him upon his return to the district in February 2012. The purpose of the "child find" provisions of the IDEA are to identify, locate, and evaluate students who are suspected of being a student with a disability and thereby may be in need of special education and related services, but for whom no determination of eligibility as a student with a disability has been made (see Handberry v. Thompson, 446 F.3d 335, 347-48 [2d Cir. 2006]; E.T. v. Bd. of Educ., 2012 WL 5936537, at \*11 [S.D.N.Y. Nov. 26, 2012]; A.P. v. Woodstock Bd. of Educ., 572 F. Supp. 2d 221, 225 [D. Conn. 2008], aff'd, 370 Fed. App'x 202 [2d Cir. 2010]; see also 20 U.S.C. § 1412[a][3][A]; 34 CFR 300.111; 8 NYCRR 200.2[a][7]). The IDEA places an affirmative duty on State and local educational agencies to identify, locate, and evaluate all children with disabilities residing in the State "to ensure that they receive needed special education services" (20 U.S.C. § 1412[a][3]; 34 C.F.R. 300.111[a][1][i]; Forest Grove, 557 U.S. at 245; E.T., 2012 WL 5936537, at \*11; see 20 U.S.C. § 1412[a][10][A][ii]; see also 8 NYCRR 200.2[a][7]; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 400 n.13 [N.D.N.Y. 2004]). The "child find" requirements apply to "children who are suspected of being a child with a disability . . . and in need of special education, even though they are advancing from grade to grade" (34 CFR 300.111[c][1]; see 8 NYCRR 200.2[a][7]; D.K. v. Abington Sch. Dist., 696 F.3d 233, 249 [3d Cir. 2012]; J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 660 [S.D.N.Y. 2011]). To satisfy the requirements, a board of education must have procedures in place that will enable it to identify, locate, and evaluate such children (34 CFR 300.111[a][1]; 8 NYCRR 200.2[a][7]).

In this instance, the parent's allegations do not relate to whether the district had procedures in place to enable it to identify, locate, and evaluate students suspected of having a disability, but relate to whether there was reason to suspect the student had a disability, whether special education services were needed to address it, and whether the district adequately responded to the parent's request for an evaluation of the student (see Pet. ¶ 181).

Because the child find obligation is an affirmative one, the IDEA does not require parents to request that the district evaluate their child (see Reid v. District of Columbia, 401 F.3d 516, 518 [D.C. Cir. 2005] ["School districts may not ignore disabled students' needs, nor may they await parental demands before providing special instruction"]; see also Application of the Bd. of Educ., Appeal No. 11-153; Application of a Student Suspected of Having a Disability, Appeal Nos. 11-092 & 11-094). A district's child find duty is triggered when there is "reason to suspect a disability

and reason to suspect that special education services may be needed to address that disability" (J.S., 826 F. Supp. 2d at 660; New Paltz, 307 F. Supp. 2d at 400 n.13, quoting Dep't of Educ. v. Cari Rae S., 158 F. Supp. 2d 1190, 1194 [D. Haw. 2001]). To support a finding that a child find violation has occurred, school officials must have overlooked clear signs of disability and been negligent by failing to order testing, or have no rational justification for deciding not to evaluate the student (A.P., 572 F. Supp. 2d at 225, quoting Bd. of Educ. v. L.M., 478 F.3d 307, 313 [6th Cir. 2007]). States are encouraged to develop "effective teaching strategies and positive behavioral interventions to prevent over-identification and to assist students without an automatic default to special education" (Los Angeles Unified Sch. Dist. v. D.L., 548 F. Supp. 2d 815, 819 [C.D. Cal. 2008], citing 20 U.S.C. § 1400[c][5]). Additionally, the school district must initiate a referral and promptly request parental consent to evaluate a student to determine if the student needs special education services and programs if a student has not made adequate progress after an appropriate period of time when provided instruction in a school district's response to intervention program (8 NYCRR 200.4[a]).

Separate from a district's child find obligations, upon written request by a student's parent, subject to State regulations governing the format of such a request, a district must initiate an individual evaluation of a student (see Educ. Law §4401-a[1], [3]; 8 NYCRR 200.4[a][1][i], [a][2][ii]-[iv], [b]; see also 20 U.S.C. 1414[a][1][B]; 34 CFR 300.301[b]).

A brief review of the student's educational history is relevant to these issues. During the 2010-11 school year the student attended a general education kindergarten class in a public school in the district (Tr. p. 513; Parent Ex. E at p. 1). The parent testified that she discussed the student's difficulties with "understanding instructions," paying attention, and organization with the student's teacher at a parent-teacher conference in fall 2010, at which time she first requested that the student be evaluated (Tr. pp. 512-14). The parent testified that the student began exhibiting behavioral issues later in the school year, which escalated to the point where the student was being disruptive and was repeatedly pulled out of the classroom (Tr. pp. 515-18). The parent's testimony regarding the student's behaviors is consistent with an FBA conducted by the district dated May 11, 2011, which indicated that the student was exhibiting serious behaviors (including threats and physical aggression) on a daily basis for a period of two to three months (Parent Ex. E at pp. 2-3). The parent explained that by the end of the school year, she was frustrated that the student had not been evaluated despite multiple requests and sent the student to live with his grandparents outside of the State (Tr. p. 518).

For the 2011-12 school year, the student attended a private school outside of the State (Tr. pp. 518-19). The parent testified that the student made progress in the private school and did not exhibit any of the behaviors that he had exhibited in the public school (*id.*). In December 2011, the parent obtained a private psychological evaluation of the student (Parent Ex. P). The evaluator indicated that, according to the student's grandmother, the student exhibited tantrums that "interfere with everything" (*id.* at p. 4). The evaluator also indicated that the student had emotional difficulties and difficulties with learning and recommended that the student be referred for special education and receive OT, speech-language, and psychiatric evaluations (*id.* at p. 6). The parent testified that the student did not adjust emotionally to his new environment and she brought him back to live with her in February 2012 because he was unhappy (Tr. p. 520). The student returned to the same school he attended during the 2010-11 school year and was placed in a kindergarten general education class providing ICT services as a regular education student for the remainder of

the 2011-12 school year (Tr. pp. 337, 522-23; see Parent Ex. R). According to the parent, at the time she registered the student for school, she provided the assistant principal of the public school with a copy of the December 2011 psychoeducational evaluation report and requested that the student be referred for special education (Tr. pp. 522-23). Although not submitted into evidence, the parent testified that she sent a note to the school and had e-mail correspondence with the assistant principal in April 2012 following up on her request for a referral to special education (Tr. pp. 523-24).<sup>4</sup>

For the 2012-13 school year, the student was placed, as a regular education student, in a first-grade general education class providing ICT services (Tr. pp. 525-26; see Parent Ex. R). According to the parent, although the student did not exhibit interfering behaviors in his classes until November 2012, the student struggled academically (id.). The district referred the student for response to intervention services on October 11, 2012 (Parent Ex. R at p. 1).<sup>5</sup> The student's teacher then requested an initial referral for special education on November 29, 2012, explaining that the reason for the referral was because "[the student] is having extreme emotional outbursts and disturbances throughout the school day" and "is a danger to himself and others" (Parent Ex. Q at p. 1).

Under these circumstances, the district should have referred the student for special education and initiated the evaluation process by March 2012, at the latest. Although there are no written communications requesting a referral included in the hearing record, the parent's un rebutted testimony indicated that she verbally requested a referral in February 2012—at the time she delivered the December 2011 psychoeducational evaluation report to the district—and followed up with a written note to the school in March 2012 (Tr. pp. 522-24). Without any evidence to rebut the parent's testimony, the parent's request, December 2011 psychoeducational evaluation report, and note to the school constituted a request for an evaluation and the district was obligated to initiate the evaluation process (see Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at \*7-\*8 [S.D.N.Y. Feb. 4, 2013]; J.S., 826 F. Supp. 2d at 664). Additionally, even if the parent did not make a request in writing, the district had sufficient reason to suspect that the student had a disability requiring special education services, as the district was aware of the student's behavioral issues going back to May 2011, at which time the school had already conducted an FBA and developed a BIP for the student (see Parent Ex. E at pp. 2-5).

For a student not previously identified as having a disability, the district must arrange for appropriate special education programs and services to be provided within 60 school days from receipt of consent to evaluate (8 NYCRR 200.4[d], [e]). As discussed above, the student should have been referred for an evaluation by March 2012, at the latest. Considering the district would have had a reasonable time to obtain parental consent (see 8 NYCRR 200.4[a][8]) and would have then had 60 school days to implement appropriate special education programs and services, the

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<sup>4</sup> The parent's testimony regarding her communications with the assistant principal was un rebutted. Additionally, the district school psychologist testified that when she met the parent, the parent informed her that she was very concerned about the student even though he had made progress during his time outside the district and that the parent "had been wanting him to be evaluated prior to that" (Tr. p. 392). The school psychologist also explained that most of the parent's communications up to that point had been with the assistant principal (id.).

<sup>5</sup> The district school psychologist testified that the student initially responded to the academic interventions, but his behaviors escalated (Tr. pp. 390-91).

district may have taken the balance of the 2011-12 school year to develop and implement a program for the student. However, since the March 2013 IEP indicated that the student was eligible for special education programs and services during July and August, the district has essentially conceded that the student was eligible for 12-month school year services and the student was denied a FAPE based on the district's failure to identify and evaluate the student for the nine-month period beginning in July 2012 until the time the student was placed in a special class in April 2013 pursuant to the March 2013 IEP (see Dist. Ex. 2 at pp. 1, 7).<sup>6</sup>

## **B. March 2013 IEP**

### **1. Transmittal of the March 2013 IEP**

The parent asserts that because she did not receive a physical copy of the March 2013 IEP, the district should not be able to rely on the March 2013 IEP in order to establish that it offered the student a FAPE for the 2012-13 and 2013-14 school years. A district is responsible for "ensuring that a copy of the IEP is provided to the student's parents" (8 NYCRR 200.4[e][3][iv]; see 34 CFR 300.322[f]). However, a district's failure to provide a parent with a copy of an IEP does not always rise to the level of a denial of FAPE (see Cerra, 427 F.3d at 192-94; Application of the Dep't of Educ., Appeal No. 13-032 [failure to deliver IEP prior to start of school year did not rise to the level of a denial of a FAPE because parents had actual notice of the contents of the IEP and rejected it prior to the time that the district would have been required to implement it]). In this instance, the present levels of performance and annual goals contained in the February 2013 IEP and the March 2013 IEP are similar (compare Dist. Ex. 2, with Parent Ex. C). In addition, prior to the March 2013 CSE meeting, the parent visited the 8:1+1 program that was recommended in the March 2013 IEP and the student began attending the program in April 2013 (see Tr. pp. 48, 112, 194, 228, 552-53, 555-56). The parent testified that she attended the March 2013 CSE meeting and understood that the purpose of the meeting was to change the student's program recommendation from a 12:1+1 special class to an 8:1+1 special class so that the student could attend the day treatment program she had visited (Tr. pp. 553-54). The parent also acknowledged that transportation accommodations were added at the request of her educational advocate (Tr. p. 558). Under these circumstances, even if the district failed to provide the parents with a copy of the March 2013 IEP prior to implementing it in April 2013, because the student was educated under the IEP there is no indication that such a violation rose to the level of a denial of FAPE by impeding the parent's ability to participate in its development (see Cerra, 427 F.3d at 192-94; but see C.U. v. New York City Dep't of Educ., 23 F. Supp. 3d 210, 226 [S.D.N.Y. 2014]).

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<sup>6</sup> Although the CSE met on February 21, 2012, to develop an IEP for the student, found the student eligible for special education programs and services as a student with an emotional disturbance, and recommended placement in a 12:1+1 class with related services, there is no indication in the hearing record that the district ever attempted to implement the February 2012 IEP (Tr. p. 582; Parent Ex. C). As the student was attending a public program in the district at the time of the February 2012 CSE meeting and there is no indication that the February 2012 IEP was ever implemented, it cannot be a basis for finding that the student was offered a FAPE. Accordingly, the analysis of the district's offered program is based on the March 2013 IEP, including the implementation of the March 2013 IEP beginning in April 2013 (see Dist. Ex. 2).

## 2. Sufficiency of Evaluative Data and Present Levels of Performance

The parent contends that the district "failed to conduct a thorough evaluation" of the student and had "little to rely on in creating his IEP" (Parent Ex. A at p. 2). On appeal, the parent argues that the December 2011 psychoeducational evaluation was insufficient because it did not assess the student in all of his areas of suspected disability, and in particular did not include a behavioral assessment and did not identify the student as having a learning disability or a speech-language disorder. Additionally, the parent asserts that the March 2013 IEP did not sufficiently identify the student's present levels of performance because it omitted information from December 2012 OT and January 2013 speech-language evaluations. However, upon review, the hearing record supports the IHO's finding that the district relied on appropriate evaluations in developing the March 2013 IEP and the evaluations were sufficiently incorporated within the present levels of performance contained in the IEP.

The March 2013 CSE utilized the following evaluative information to develop the March 2013 IEP: a May 2011 FBA and BIP, a December 2011 psychoeducational evaluation report written in Spanish, a December 2012 FBA and BIP, a December 2012 OT evaluation report, a February 2013 speech-language evaluation report, a January 2013 classroom observation report, a February 2013 psychological update report (which referenced the December 2011 psychoeducational evaluation), and a February 2013 teacher report (Tr. pp. 396-400, 405-12, 466, 472-77, 488-90; see Dist. Exs. 3-4; Parent Exs. E-G; L; N; P).<sup>7</sup>

The evaluator who conducted the psychological update assessed the student's cognitive, and visual processing skills, and social/emotional functioning (see Dist. Ex. 4 at pp. 1-2).<sup>8</sup> The examiner noted that the purpose of the update was to determine the student's current level of functioning in all developmental areas and provide current evaluation data (id. at p. 1). As part of the update, an administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) revealed that the student's overall performance fell within the low average range (id.). In particular, the student achieved the following standard scores: verbal comprehension, 98 (average range); perceptual reasoning, 92 (average range); working memory, 68 (deficient range); processing speed, 88 (low average range); and full-scale IQ, 85 (low average range) (id. at p. 2). An administration of the Bender Visual-Motor Gestalt Test, Second Edition (Bender-Gestalt II) yielded a standard score of 101 (average range) and the evaluator noted that the student demonstrated "age appropriate" and "well developed" skills in the visual perceptual area of development (Dist. Ex. 4id. Generally, the evaluator reported that the student's scores were consistent with the December 2011 psychological evaluation; the results of the cognitive/processing assessments indicated an average level of cognitive functioning with

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<sup>7</sup> As the parent raises separate allegations regarding the May 2011 and December 2012 FBAs and BIPs, those allegations and the sufficiency of the FBAs and BIPs are discussed in more detail below.

<sup>8</sup> Although the December 2011 psychoeducational evaluation, upon which the February 2013 update was based, was written in Spanish and was not translated into English at the time of the February 2013 or March 2013 CSE meetings, the evaluator who conducted the update was fluent in Spanish, had experience conducting bilingual psychoeducational evaluations in Spanish, and was present at both CSE meetings to interpret the results of the December 2011 evaluation and her update (see Tr. pp. 383-85, 398-99; Dist. Ex. 2 at p. 12; Parent Ex. C at p. 16). Although it would have been a better practice to have the December 2011 evaluation report translated, under these circumstances, the failure to do so did not contribute to the denial of a FAPE.

significant weaknesses in auditory processing and working memory, and relative strengths in verbal comprehension and perceptual reasoning (Dist. Ex. 4 at p. 2; see Parent Ex. P at pp. 4-6).

In order to determine the student's then-current social/emotional functional level, although the evaluator did not conduct a behavioral assessment, she reviewed the 2011 and 2012 FBAs and BIPs, classroom observations, teacher and student interviews, and what she described as "anecdotal records" (Dist. Ex. 4 at p. 2). According to the evaluator, the student presented with significant deficits in this domain (id.). Notably, within the last three months prior to the psychological evaluation update, the student demonstrated verbally and physically aggressive behaviors in the school environment which were dangerous to himself, his peers, and adults (id.). The student reported to the psychologist that "when he becomes frustrated, he is unable to control his body or his behavior" and "he often feels teased or 'looked at' by other children" (id.). The psychologist indicated that the interventions which had been attempted were generally insufficient and opined that the available data indicated the student met the eligibility criteria for classification as a student with an emotional disturbance (id.).

A review of the March 2013 IEP reveals that the March 2013 CSE incorporated information from the psychological evaluation update, including the testing results from the WISC-IV and Bender-Gestalt-II, as well as information consistent with portions of the evaluator's narrative descriptions of the student's skills (compare Dist. Ex. 2 at pp. 1-5, with Dist. Ex. 4 at pp. 1-2).

With regard to the December 2012 OT evaluation report, although the student exhibited age appropriate skills in self-care tasks and management of classroom tools and materials, he was reported to function significantly below his classmates in "most" areas, and diminished social skills, attention, body awareness, sensory processing, motor planning, safety awareness, writing organization, and attention-seeking behaviors affected his readiness to learn (Parent Ex. G at p. 8). The evaluator assessed the student's functional levels through the administration of the Beery-Buktenica Developmental Test of Visual Motor Integration (VMI), the Sensory Processing Measure, clinical observations, and teacher and parent reports (id. at pp. 2-7). The student's scores on the VMI indicated that his foundations for writing skills were adequate (id. at p. 5). At that time, the student demonstrated difficulty in the following areas which significantly impeded his functioning: moving safely through the school, keeping pace with classroom writing demands, writing on a page in a neat and organized fashion, staying alert, sitting still without excessive movement, respecting others' space, keeping his hands to himself, and transitioning smoothly between activities (id. at pp. 4-6). According to the Sensory Processing Measure, the student demonstrated "definite dysfunction" in the following areas: social participation, body awareness, balance and motion, and planning and ideas (id. at p. 7). A review of the March 2013 IEP indicates that it includes information from the December 2012 OT evaluation report in the description of the student's present levels of physical development and in the management needs section concerning the student's challenges with sensory processing, safety and body awareness, and motor planning skills (compare Dist. Ex. 2 at pp. 1-2, with Parent Ex. G).

A January 2013 classroom observation was conducted and indicated that the student demonstrated difficulty in following directions and participating in classroom activities with his peers; and, further that he demonstrated unpredictable reactions to adult directives (Parent Ex. L). The student was observed rolling on the floor, continually interrupting and trying to touch a book

during a group reading activity (id.). The student became increasingly agitated and physical with adult requests to stop, requiring several attempts to remove him from the group to a different part of the room to engage in a solitary activity (id.).

A review of the present levels of performance and management needs, included in the March 2013 IEP also reflects information obtained from a February 2013 teacher report (compare Dist. Ex. 2 at pp. 1-6, with Parent Ex. N). The February 2013 teacher report provided information from the student's regular education and special education teachers reflecting the student's part-time participation in a 12:1+1 special class since December 2012 (Parent Ex. N at p. 1). The report indicates the student's reading skills were at a beginning kindergarten level and his math computation skills were at a beginning first grade level (id. at pp. 2-3). Although the student could verbally explain expected conventions, he was unable to do so in his writing, which frustrated him and interfered with his participation in the classroom and in the completion of assigned tasks (id.). Consistent with the information reported in the March 2013 IEP and the December 2012 OT report, the student demonstrated significant delays in expressive language, coordination, attention, body awareness, motor planning, social and interpersonal skills, self-regulation and safety awareness (compare Parent Ex. N at p. 4, with Dist. Ex. 2 at pp. 3-5, and Parent Ex. G). Consistent with the March 2013 IEP and the February 2013 psychological evaluation update report, the teacher report indicated that the student was not then responding to attempted interventions (compare Dist. Ex. 2 at p. 1, and Dist. Ex. 4, with Parent Ex. N at p. 5).

As detailed in a February 2013 speech-language evaluation report, the student's speech-language skills were formally assessed through an administration of the Clinical Evaluation of Language Fundamentals-4 (CELF-4), and the Oral and Written Language Scales (OWLS) (Dist. Ex. 3 at p. 1). According to results of the CELF-4, the student was administered several subtests resulting in a core language score of 56 and a percentile rank of 0.2, indicating severe deficits (id. at pp. 1-2). On the OWLS, the student achieved a standard of score of 80, and a percentile rank of 9 (id. at pp. 2-3). The student demonstrated good letter formation, had difficulty copying sentences, used neither punctuation nor spacing, and performed poorly with regard to spelling and capitalization (id. at p. 3). The evaluator further described the student as having great difficulty understanding and following directives and generating sentences (id.). Although the speech-language evaluation report was available to the CSE and was used as a basis for recommending one individual and one group 30-minute speech-language therapy session per week, the March 2013 IEP does not provide a description of the student's speech-language deficits as set forth in the speech-language evaluation report (compare Dist. Ex. 2 at pp. 1-3, 6, with Dist. Ex. 3).

In sum, after reviewing the information considered by the CSE, although the March 2013 IEP did not reflect the contents of the February 2013 speech-language evaluation report, the IEP otherwise accurately reflected the student's present levels of performance as described in the evaluative information available to the CSE (Dist. Exs. 2-4; Parent Exs. E-G; L; N; P). Accordingly, the IHO properly declined to find a denial of a FAPE based on the adequacy of the evaluations or present levels of performance (see Karl v. Bd. of Educ., 736 F.2d 873, 877 [2d Cir. 1984] [finding that although a single component of an IEP may be so deficient as to deny a FAPE, the educational benefits flowing from an IEP must be determined from the combination of offerings rather than the single components viewed apart from the whole]; P.G. v. New York City Dep't of Educ., 959 F. Supp. 2d 499, 511-12 [S.D.N.Y. 2013] [noting that an IEP need not reflect every aspect of a student's presentation in the present levels of performance]).

### 3. Classification

The parent asserts that the student did not meet the conditions for being classified as a student with an emotional disturbance at the time of the March 2013 CSE meeting and contends that the IHO erred by failing to order that the student be classified as a student with autism. Although on appeal the parent is requesting that the student be classified as a student with autism, during the February 2013 and March 2013 CSE meetings the parent requested that he be classified as a student with an other health-impairment or a learning disability (Tr. pp. 541-42).<sup>9</sup> Initially, "it is not the classification per se that drives IDEA decision making; rather, it is whether the placement and services provide the child with a FAPE" (M.R. v. South Orangetown Cent. Sch. Dist., 2011 WL 6307563, at \*9 [S.D.N.Y. Dec. 16, 2011] [emphasis in original]; see 20 U.S.C. § 1412[a][3][B] ["Nothing in [the IDEA] requires that children be classified by their disability so long as each child who has a disability . . . and who, by reason of that disability, needs special education and related services is regarded as a child with a disability"]; 34 CFR 300.111[d]; see also Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011]). In any event, the hearing record supports the CSE's determination that the student was eligible for special education programs and services as a student with an emotional disturbance.

According to State and federal regulations, a student with an emotional disturbance must meet one or more of the following five characteristics:

- (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.
- (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- (C) Inappropriate types of behavior or feelings under normal circumstances.
- (D) A general pervasive mood of unhappiness or depression.
- (E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(34 CFR 300.8[c][4]; see 8 NYCRR 200.1[zz][4]). Additionally, the student must exhibit one or more of the five characteristics "over a long period of time and to a marked degree that adversely affects [the student's] educational performance" (id.; see Mr. N.C. v. Bedford Cent. Sch. Dist., 300 F. App'x 11, 13 [2d Cir. 2008]; M.M. v. New York City Dep't of Educ., 26 F. Supp. 3d 249, 255 [S.D.N.Y. 2014]; see also Maus v. Wappingers Cent. Sch. Dist., 688 F.Supp.2d 282, 296-97 [S.D.N.Y. 2010]; A.J. v. Bd. of Educ., 679 F.Supp.2d 299, 308 [E.D.N.Y. 2010]). The term "emotional disturbance" does not apply to students who are socially maladjusted, unless it is determined that they otherwise meet the criteria above (34 CFR 300.8[c][4]; 8 NYCRR 200.1[zz][4]; see New Paltz, 307 F. Supp. 2d at 398).

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<sup>9</sup> The parent's educational advocate requested that the student be classified as having a speech-language impairment, an other health-impairment, or a learning disability (Tr. pp. 477-79, 495).

In this instance, the student has a history of behavioral difficulties going back to the 2010-11 school year, ultimately resulting in the parent becoming frustrated with the district's inability to manage the student's behaviors and deciding to remove the student from the district (Tr. pp. 517-18; Parent Ex. E). At that time, the student's behaviors included physical aggression and threats of physical harm (Parent Ex. E at p. 2). Although the student did not exhibit behavioral problems upon his return to the district public school in February 2012 through November 2012, the student's behaviors escalated beginning in November 2012 through the time the student was placed in a special class (Tr. pp. 390-91, 488-89, 525-26, 531-32; Parent Ex. F). During the period from November 2012 until the March 2013 CSE meeting, the district was not able to manage the student's behaviors within a general education setting and all of the intervention strategies that the district attempted, including an emergency 1:1 paraprofessional, were unsuccessful (see Tr. pp. 420-22; Dist. Ex. 2 at p. 1; Parent Exs. C at p. 1; F at pp. 1, 4-5).

The parent does not argue that the student's behaviors did not occur over a long period of time or to a marked degree, or that they did not adversely affect the student's educational performance; rather, the parent contends that the student's behaviors were the result of frustration and anxiety caused by a learning disability.

The parent obtained a private neuropsychological evaluation in March 2013, which offered the student diagnoses of a language based learning disorder and autism (Parent Ex. K at pp. 10-12). However, the report was not completed until May 2013 and was not delivered to the district until August 2013 (Tr. pp. 281, 562).<sup>10</sup> As the private neuropsychological evaluation report was not available to the March 2013 CSE, the information contained in the report cannot be utilized to challenge the appropriateness of the IEP (see R.E., 694 F.3d at 186-88; J.M. v New York City Dep't of Educ., 2013 WL 5951436, at \*18-\*19 [S.D.N.Y. Nov. 7, 2013]; F.O. v New York City Dep't of Educ., 976 F. Supp. 2d 499, 513 [S.D.N.Y. 2013]).

In support of her position, the parent also submitted a letter dated January 13, 2013, from a doctor of psychology, indicating that the student "presents with a learning disability and possible speech/language disorder" and that his behaviors "appear connected to frustration and anxiety related to his learning disabilities" (Parent Ex. Z; see Tr. pp. 542-43). The parent testified that she gave the letter to the school psychologist prior to the CSE meeting, but that the CSE declined to consider it in making their recommendation (Tr. pp. 543-45). A CSE must consider privately-obtained evaluations, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]). In this instance, although the parent testified that the district decided not to consider the January 2013 letter, her testimony actually indicates that the school psychologist reviewed the letter and determined to go forward with classification of the student as a student with an emotional disturbance notwithstanding the contents of the letter (Tr. p. 543). Accordingly, the district considered the January 2013 letter to the extent required by law (see CLK v. Arlington Sch. Dist., 2013 WL 6818376, at \*10 [S.D.N.Y. Dec. 23, 2013][a CSE is not required to follow all of the recommendations contained in a private evaluation]; T.G. v. New York City Dep't of

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<sup>10</sup> While the parent testified during the hearing that the district school psychologist had told her the district would reconsider the student's classification if the parent brought a doctor's letter indicating a diagnosis (Tr. pp. 541-42), the parent did not explain why she waited until August 2013—the week of the resolution session—to provide the district with a copy of the private neuropsychological evaluation for consideration (Tr. p. 562).

Educ., 2013 WL 5178300, at \*18-\*19 [S.D.N.Y. Sept. 16, 2013] [CSE considered privately obtained evaluative report even though it was not discussed at CSE meeting]). Additionally, in light of the school psychologist's opinion that the student met the criteria for classification as a student with an emotional disturbance as set forth in the January 2013 psychoeducational update (Dist. Ex. 4 at p. 2) and the student's escalating behaviors (Tr. pp. 390-91, 488-89, 531-32; Parent Ex. F), classification of the student as a student with an emotional disturbance at the time of the March 2013 CSE meeting was not unreasonable, even if classification, rather than educational needs, was the focal point of the parent's concerns at the time of the meeting.

#### 4. Annual Goals

The parent asserts that the IHO erred in failing to find that the annual goals were insufficient. In particular, the parent asserts that the March 2013 IEP did not contain any math goals and that the goals that were developed did not include strategies and were insufficient to address the student's sensory and social/emotional needs.<sup>11</sup>

The March 2013 IEP included approximately 11 annual goals designed to address the student's needs as identified in the present levels of performance and management needs sections of the IEP, related to reading readiness skills, word recognition skills, reading accuracy and fluency, graphomotor skills, attention, self and emotional-state regulation, body awareness, sensory integration, sequencing, physical navigation, participation in tasks through to completion, problem solving in peer and adult relations, transitioning, and social language skills (see Dist. Ex. 2 at pp. 1-5). Specifically, to address the student's sensory needs, one annual goal was designed to improve the student's ability to identify the need for a "movement break" and to perform "heavy work" activities (id. at p. 4). Another annual goal provided the student with multisensory activities to promote body awareness and decrease his touching of peers, the walls, and materials when navigating school hallways (id.). To address social skills, the IEP provided annual goals to improve the student's ability to participate in tasks while exhibiting appropriate behaviors, increase problem solving skills with adults and peers, state an appropriate response to a particular emotional state, and transition appropriately from tasks and activities (id. at pp. 4-5). Further, each annual goal included evaluative criteria (e.g., "four out of five trials" or "60% accuracy"); an evaluation procedure (e.g., "teacher/provider observations"); and a schedule to measure progress (one time per quarter) (id. at pp. 3-5).

While there were no annual goals specifically designed to address the student's deficits in mathematics, math was an area of relative strength for the student and the student's then-current

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<sup>11</sup> On appeal the parent asserts that the March 2013 IEP did not contain any annual goals for speech-language therapy. However, the parent did not raise this claim in the due process complaint notice and it is outside of the scope of the impartial hearing (see Parent Ex. A). 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][b]; B.M. v New York City Dep't of Educ., 569 Fed. App'x 57, 59 [2d Cir. 2014]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-586 [S.D.N.Y. 2013]). Additionally, there is nothing in the hearing record indicating that the district opened the door to the parent's allegation regarding the lack of an annual goal for speech-language therapy (see, e.g., B.M., 569 Fed. App'x at 59).

special education teacher testified that the student enjoyed math and felt good doing math (Tr. p. 138; Dist. Ex. 2 at p. 1). The failure to address each of a student's needs by way of an annual goal does not necessarily constitute a denial of a FAPE (J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at \*13 [S.D.N.Y. Feb. 20, 2013]). In this instance, considering that math was a relative strength for the student and the March 2013 IEP included annual goals targeting the student's other deficits, the CSE's failure to include a goal related to math does not rise to the level of a denial of a FAPE.

### **5. Special Factors—Interfering Behaviors and 8:1+1 Special Class**

The parent alleges that the May 2011 and December 2012 FBAs and the BIPs attached to the FBAs were insufficient. Although a review of the May 2011 and December 2012 FBAs shows that they were not conducted according to State regulations, information available to the CSE and reflected in the March 2013 IEP identified the student's behaviors that interfered with learning, generally identified the contextual factors that contributed to and the frequency of the behaviors, and, as described below, the 8:1+1 special class in a therapeutic setting recommended in the March 2013 IEP adequately addressed the student's behavioral needs.

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 both the May 2011 and December 2012 FBA's were considered in developing the March 2013 IEP, my analysis focuses on the December 2012 FBA as it was the most recent FBA at the time of the March 2013 CSE meeting (Tr. pp. 488-90; Dist. Ex. 2 at p. 3). However, neither of the FBAs complied with State regulations as they are essentially generic checklists along with responses to a teacher questionnaire (see Parent Exs. E at pp. 2-4; F at pp. 2-3, 5).<sup>12</sup> At the time of the December 2012 FBA, the student was a regular education student in a general education classroom providing ICT services (Tr. pp. 522-23; see Parent Ex. R). According to the teacher questionnaire, the classroom consisted of two teachers, a paraprofessional for another student in a part-time 8:1+1 special class, and a second paraprofessional assigned to the student and another student in the class (Parent Ex. F at p. 5). The student's behaviors which interfered with instruction included "extreme violent behavior," physical aggression and use of force, biting, throwing himself

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<sup>12</sup> Exhibit F, which includes the December 2012 FBA and BIP, appears to be out of order, as the BIP was inserted between the two pages of the teacher questionnaire (see Parent Ex. F).

on the floor, threatening adults and peers, cursing/swearing, intentional destruction of property, non-compliance, refusal, and leaving the classroom (Parent Ex. F at pp. 1-3). According to the December 2012 FBA teacher questionnaire the student's behaviors occurred "daily" and had been "severe" in intensity for approximately the past month (id. at p. 3). The student's teacher acknowledged that school staff was "at a loss" as to how the student's then-current environment could be changed to reduce or eliminate the student's behaviors (id. at p. 5). Based on the above, the December 2012 FBA was not based on multiple sources of data and did not define the student's behaviors in concrete terms, identify the contextual factors that contributed to the behaviors, or formulate a hypothesis regarding the general conditions under which the behaviors usually occurred (Parent Ex. F at pp. 1-3).

However, while the 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," the district's failure to conduct a proper FBA does not, by itself, automatically render an IEP deficient (R.E., 694 F.3d at 190; 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]). Instead, the March 2013 IEP must be closely examined to determine whether it otherwise addressed the student's interfering behaviors (C.F., 746 F.3d at 80; F.L., 553 Fed. App'x at 6-7; M.W., 725 F.3d at 139-41).

In this instance, the March 2013 IEP indicated that the student exhibited significant deficits in social-emotional functioning, and described the behavioral difficulties the student demonstrated in the months before the CSE meeting, including verbally and physically aggressive behavior, long periods of crying, screaming, self-injurious behavior, verbal threats, and suicidal utterances (Dist. Ex. 2 at pp. 1-3). According to the IEP, the student reported that when he became frustrated, he was unable to control his body or his behavior (id. at p. 1). The IEP reflected teacher reports indicating that the student generally perceived that he was being teased, threatened, or "looked at" by other students, rather than being subject to actual aggression from other children (id.). Additionally, the IEP indicated that the student was "easily overstimulated" throughout the school day in various school environments and that his behaviors escalated "quickly" (id. at p. 2). The IEP described a variety of interventions that had been attempted, including part-time inclusion in a 12:1+1 special class, daily behavior chart, counseling, and 1:1 paraprofessional services, indicating that "[t]hese interventions have generally been insufficient to successfully and consistently reintegrate [the student] into a classroom setting" (id. at p. 1).

The March 2013 CSE recommended the provision of twice weekly counseling and corresponding annual goals to improve his behavior and social skills (Dist. Ex. 2 at pp. 4-6, 10). In addition, the March 2013 IEP recommended resources and accommodations to address the student's behavioral management needs, including developing strategies to address "difficult times of the day" such as periods of transition, providing notification of transitions to assist the student, offering increased opportunities for movement, and providing alternate choices when the student was reluctant to engage in a task (id. at p. 2).<sup>13</sup>

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<sup>13</sup> However, while the IEP also indicated that the student required "a 1:1 para at all times" (Dist. Ex. 2 at p. 2), one was not recommended for the student (see id. at p. 6).

Most significantly, the March 2013 IEP recommended placement in an 8:1+1 special class in a therapeutic setting (Dist. Ex. 2 at pp. 6, 10).<sup>14</sup> Testimony indicated that the March 2013 CSE met for the purpose of changing the student's placement recommendation from a 12:1+1 special class to an 8:1+1 special class (Tr. pp. 436-37, 499-500, 553-54; Parent Ex. C at p. 7).<sup>15</sup> The parent acknowledged during testimony that, prior to the March 2013 CSE meeting, she visited the specific public school site the district recommended, was aware that it was a therapeutic setting, and was aware that the March 2013 CSE met specifically "so that [the student] could attend that school" (Tr. pp. 552-54).<sup>16</sup> The March 2013 IEP reflects the CSE's recommendation for supports to address the student's numerous management needs, which included "a smaller class setting with fewer students" (Dist. Ex. 2 at p. 2). Additionally, the student's academic needs, including directions being stated in a simple, sequential manner, directions being repeated, visual cues accompanying oral directions, previewing transitions and developing strategies to manage them, movement breaks, flexibility in scheduling, and providing task choices were addressed in the student's 8:1+1 special class (see id.; Tr. pp. 172-73). The student's social/emotional needs, including peer buddying, small group work, modeling expected behaviors, frequent breaks, and behavioral incentives, were also met in his 8:1+1 special class (see Tr. pp. 230-34; Dist. Ex. 2 at p. 2).

The student's special education teacher during the 2013-14 school year indicated that although she used behavioral interventions similar to those described in the December 2012 BIP, her classroom was "extremely different" from the student's prior class because the class included eight students rather than twelve and was in a day treatment therapeutic setting (Tr. pp. 109, 112,

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<sup>14</sup> State regulations describe an 8:1+1 special class as the "maximum class size for special classes containing students whose management needs are determined to be intensive, and requiring a significant degree of individualized attention and intervention, . . . with one or more supplementary school personnel assigned to each class during periods of instruction" (8 NYCRR 200.6[h][4][ii][b]).

<sup>15</sup> The March 2013 IEP indicates that the CSE also considered placing the student in a general education setting with related services only, special education teacher support services, or integrated co-teaching services, a 12:1 special class in a community school, a 12:1+1 special class in a community school, and a 6:1+1 special class in a specialized school, but rejected them as being inappropriate (Dist. Ex. 2 at p. 10).

<sup>16</sup> While testimony regarding how a public school might have implemented an IEP is not an appropriate inquiry where the parent rejected the assigned public school site and chose to enroll the student in a nonpublic school of the parent's choosing, (Reyes v. New York City Dep't of Educ., 760 F.3d 211, 220 [2d Cir. 2014]; R.E., 694 F.3d at 186), in this instance, the student attended the public school beginning in April 2013 and testimony regarding the school explains how a "therapeutic setting," as was indicated would be provided in the March 2013 IEP, addressed the student's behavioral needs (Tr. pp. 172-73, 229-30, 233-34; Dist. Ex. 2 at p. 10).

172-73).<sup>17, 18</sup> The student's psychologist and counselor from the day treatment program testified that she saw the student for a minimum of the two sessions per week mandated by his IEP but typically the student saw her on an as-needed basis (Tr. pp. 230-234). According to the psychologist, she spoke with the student's special education teacher "all the time" and the student was "very happy as of the last several weeks" at the time of her testimony in December 2013 (Tr. pp. 234-35). Additionally, while the psychologist reported only one "very bad temper tantrum" since the student began attending the day treatment program, the December 2012 FBA indicated the student had daily behavioral issues while in the general education setting (Tr. p. 238; see Parent Ex. F at p. 3).

Accordingly, the March 2013 CSE's recommendation for an 8:1+1 special class in a therapeutic setting appropriately addressed the student's behavioral needs (Dist. Ex. 2 at p. 10). Although the parents allege that the district failed to conduct a sufficient FBA and develop a BIP to be utilized in the student's day treatment program, the March 2013 IEP and, in particular, the 8:1+1 special class the student attended included supports that provided significant benefits to address the student's problem behaviors (see, e.g., T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at \*11 [S.D.N.Y. Aug. 23, 2012], aff'd, 530 F. App'x 81 [2d Cir. 2013]). However, as the district failed to comply with State regulations in conducting an FBA and developing a BIP, to the extent that the district has not yet conducted an FBA and developed a BIP in the student's current setting the district is directed to determine whether the student continues to exhibit interfering behaviors such that it is necessary to do so.

## 6. Parent Counseling and Training

The parent asserts that the district failed to provide the parent with parent counseling and training and requests that the district be directed to provide it to her. State regulations require that an IEP indicate the extent to which parent counseling and training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). Parent counseling and training is defined as: "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]). State regulations further provide for the provision

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<sup>17</sup> While the December 2012 BIP identifies some of the student's behaviors, it does not comport with State regulations as it does not identify how the current environment could be changed to reduce/eliminate behaviors and did not include any intervention strategies to be used to alter antecedent events in order to prevent the occurrence of the target behavior, to teach alternative and adaptive behaviors to the student, or to provide consequences for the targeted inappropriate behaviors and alternative acceptable behaviors (see Parent Ex. F at p. 4). Additionally, and more disconcerting, is the district's failure to develop a new BIP after the student began attending an 8:1+1 special class; however, as discussed above, because the student's behaviors were addressed within the recommended 8:1+1 special class, the district's failure to develop an appropriate BIP in this instance did not rise to the level of a denial of FAPE (see, e.g., T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009] K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at \*11 [S.D.N.Y. Aug. 23, 2012], aff'd, 530 F. App'x 81 [2d Cir. 2013]).

<sup>18</sup> The student's teacher described her class as an 8:1+2 special class (Tr. pp. 109-10); however, of the two supplementary support personnel in the class, one was assigned to the entire class and one was a full-time 1:1 paraprofessional dedicated to another student (Tr. pp. 55-56).

of parent counseling and training for the parents of students enrolled in 8:1+1 special classes to enable parents "to perform appropriate follow-up intervention activities at home" (8 NYCRR 200.6[h][4][ii][b], [8]). The Second Circuit has explained that "because school districts are required to provide parent counseling, they remain accountable for their failure to do so no matter the contents of the IEP. Parents can file a complaint at any time if they feel they are not receiving this service" (R.E., 694 F.3d at 191; see M.W. v. New York City Dep't of Educ., 725 F.3d 131, 141-42 [2d Cir. 2013]). In this instance, it is undisputed that the district did not provide for parent counseling and training during the time the student was attending an 8:1+1 special class (Tr. p. 563; Dist. Ex. 2). As the district's failure to recommend or provide parent counseling and training constituted a violation of State regulations, the district is directed to comply with State regulations in providing the parent with counseling and training in the future (8 NYCRR 200.6[h][4][ii][b], [h][8]).

### **C. Relief—Compensatory Education**

As compensatory education is available as an equitable remedy to make up for a denial of FAPE, consideration must be given as to how the parents' request for compensatory education might make up for the district's failure to evaluate the student resulting in a denial of FAPE during the July through March portion of the 2012-13 school year (see Newington, 546 F.3d at 122-23; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994] [holding that "[a]ppropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA"]).

The IDEA authorizes "appropriate" relief to be awarded for a denial of a FAPE, including compensatory education or additional services—specifically, the "replacement of educational services that the child should have received in the first place" (Reid, 401 F.3d at 518; accord Newington, 546 F.3d at 123). Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Within the Second Circuit, compensatory relief in the form of supplemental special education or related services has been awarded to students who are eligible for continued instruction under the IDEA if there has been a denial of a FAPE (see Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; Student X. v. New York City Dep't of Educ., 2008 WL 4890440, at \*23 [E.D.N.Y. Oct. 30, 2008]; see generally R.C. v. Bd of Educ., 2008 WL 9731053, at \*12-13 [S.D.N.Y. March 6, 2008]). Likewise, SROs have awarded compensatory "additional services" to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]; see, e.g., Application of a Student with a Disability, Appeal No. 12-209; Application of the Dep't of Educ., Appeal No. 12-135).

The purpose of an award of additional services is to provide an appropriate remedy for a denial of a FAPE (see Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Reid, 401 F.3d at 524 [holding

that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"; Puyallup, 31 F.3d at 1497). Accordingly, an award of additional services should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. v. L.M., 478 F.3d at 316 [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518, 525 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]; Puyallup, 31 F.3d at 1497 ["There is no obligation to provide a day-for-day compensation for time missed"]).

In the due process complaint notice, the parent requests 360 hours of 1:1 tutoring as compensatory services to remedy the district's failure to offer the student a FAPE for the 2012-13 school year.<sup>19</sup> Although there is little evidence of the student's functioning in the district during the 2011-12 school year, there is sufficient evidence to support a finding that the student's disability required special education services. The parent testified that the student "wasn't doing well" in his ICT class in the district (Tr. p. 525). The parent's assessment of the student's functioning was consistent with the student's teacher's referral of the student for response to intervention services in October 2012, which indicated that the student had "repeated Kindergarten twice," was significantly behind in English language arts and behind in math, and was a candidate for OT and speech-language therapy (Parent Ex. R). Further, while the December 2011 psychoeducational evaluation indicated that the student had intellectual capabilities within the normal range, it also indicated that the student experienced difficulties "in the emotional area and school learning" and recommended a referral for special education including OT, speech-language, and psychiatric evaluations (Parent Ex. P at p. 6). The district did not conduct its evaluations until December 2012 and January 2013; the CSE met in February 2013 and March 2013; and the student was not placed in a special education class until April 2013 (Dist. Exs. 2-4; Parent Exs. C; F-H; L). Accordingly, the student is entitled to compensatory education to make up for the district's failure to provide special education programs and services during the period from July 2012 through March 2013.<sup>20</sup>

In this instance, the December 2011 psychoeducational evaluation indicated that the student should be evaluated with regard to his need for OT and speech-language therapy (Parent Ex. P at p. 6). However, there is little evidence regarding the student's OT and speech-language therapy needs other than the December 2012 OT report and the February 2013 speech-language

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<sup>19</sup> The parent's due process complaint notice also included a request for related services of OT and speech-language therapy (Parent Ex. A at p. 6). Although the request did not specifically reference the parent's claim for compensatory education, it can be read as an additional claim for compensatory additional services.

<sup>20</sup> The March 2013 IEP indicates that the student required 12-month school year services (Dist. Ex. 2 at p. 7).

therapy report (Dist. Ex. 3; Parent Ex. G). Therefore, those reports are used as a foundation for calculating a compensatory education award based on a quantitative approach, rather than a qualitative approach (see, e.g., Application of the Bd. of Educ., Appeal No. 14-013).<sup>21</sup> The December 2012 OT evaluation recommended that the student receive one individual 30-minute session of OT per week and one 30-minute session of OT per week in a group of two (Parent Ex. G at pp. 1, 9). The February 2013 speech-language evaluation report recommended that the student receive two 30-minute sessions of speech-language therapy per week in a group of three (Dist. Ex. 3 at p. 3). Accordingly, I award the student 34 hours of speech-language therapy in a group of three; 17 hours of individual OT; and 17 hours of OT in a group of two as compensatory additional services, which shall be used by the student within two years of the date of this decision, unless the parties otherwise agree.<sup>22</sup>

In addition to the related services described above, the parent seeks additional services in the form of 1:1 tutoring, which may be an appropriate award to make up for academic interventions and supports that the student did not receive because he was in a general education setting rather than an 8:1+1 special class. While academic interventions, such as inclusion in a part-time 12:1+1 classroom and a 1:1 paraprofessional, were attempted with the student during the 2012-13 school year, the hearing record indicates that they were insufficient (Dist. Ex. 2 at p. 1). Accordingly, I award 210 hours of additional services in the form of 1:1 tutoring, to be provided by a certified special education teacher, which shall be used by the student within two years of the date of this decision, unless the parties otherwise agree.<sup>23</sup>

## **VII. Conclusion**

In summary, the hearing record supports finding that the district did not offer the student a FAPE for the portion of the 2012-13 school year prior to April 12, 2013, as the district did not identify and evaluate the student after the parent's request (see R.C., 2013 WL 563377 at \*7-\*8; J.S., 826 F. Supp. 2d at 664). However, the hearing record also supports finding that the district offered the student a FAPE after recommending and placing the student in an 8:1+1 special class in a therapeutic setting.

### **THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

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<sup>21</sup> Although the parent's educational consultant testified that the February 2013 CSE had agreed to provide three 30-minute sessions per week of OT and speech-language therapy, there is no indication in the hearing record that three sessions per week were required in order to provide the student with a FAPE (see Tr. p. 479).

<sup>22</sup> The award is computed based on 6 weeks of missed services during the extended school year and 28 weeks of missed services from the start of the 2012-13 10-month school year through April 12, 2013—the date the student began attending the day treatment program (see Tr. p. 228).

<sup>23</sup> Upon review of the recommendations contained in the private neuropsychological evaluation report (Parent Ex. K at pp. 11-12), an appropriate award to make up for missed services (specifically the district's failure to provide the student with special class instruction for nine months during the 2012-13 school year) consists of daily 1:1 instruction for one-hour per day continuing over the course of a 12-month school year, consisting of 210 days of instruction (30 days during the summer and 180 days during the 10-month school year).

**IT IS ORDERED** that the IHO's decision of December 18, 2013, is modified, by reversing that portion which determined that the district offered the student a FAPE for the portion of the 2012-13 school year prior to April 12, 2013; and

**IT IS FURTHER ORDERED** that the district shall provide additional services to the student in the form of 34 hours of speech-language therapy services in a group of three, at a time and location to be determined by the parties, which shall be used by the student within two years of the date of this decision, unless the parties otherwise agree, provided that if the district is unwilling or unable to provide these services, it shall provide the parent with authorization to obtain these services at district expense; and

**IT IS FURTHER ORDERED** that the district shall provide additional services to the student in the form of 17 hours of OT services in a group of two and 17 hours of individual OT services, at a time and location to be determined by the parties, which shall be used by the student within two years of the date of this decision, unless the parties otherwise agree, provided that if the district is unwilling or unable to provide these services, it shall provide the parent with authorization to obtain these services at district expense; and

**IT IS FURTHER ORDERED** that the district shall provide additional services to the student in the form of 210 hours of 1:1 tutoring services, to be provided by a certified special education teacher at a time and location to be determined by the parties, which shall be used by the student within two years of the date of this decision, unless the parties otherwise agree. If the district is unwilling or unable to provide these services, it shall provide the parent with authorization to obtain these services at district expense; and

**IT IS FURTHER ORDERED** that unless the district has already done so, the district shall determine whether it is necessary to conduct an FBA of the student and develop a BIP for the student in accordance with State regulations.

**Dated:** Albany, New York  
February 18, 2015

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**CAROL H. HAUGE**  
**STATE REVIEW OFFICER**