



The University of the State of New York

The State Education Department

State Review Officer

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No. 15-031

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Cynthia Sheps, Esq., of counsel

Law Offices of Neal Howard Rosenberg, attorneys for respondent, Karen Newman, 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 district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) son and ordered it to reimburse the parent for the costs of the student's tuition at the Aaron School for the 2013-14 school year. The appeal must be sustained.

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

This appeal arises from a decision of an IHO that was issued after remand (see Application of the Dep't of Educ., Appeal No. 14-147). Therefore, the parties' familiarity with the factual and procedural history of the case, the IHO's decision, and the issues presented for review on appeal is presumed and they will not be repeated in detail (see id.).¹ Briefly, the hearing record shows that on March 7, 2013, the CSE convened to conduct the student's annual review and develop his IEP for the 2013-14 school year (Tr. p. 31; Dist. Ex. 1 at pp. 1, 12). The student was enrolled in the

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

Aaron School at the time of the March 2013 CSE meeting (Tr. pp. 63, 506;² see Dist. Ex. 6 at p. 3; Parent Ex. B at p. 1).³

Participants in the March 2013 CSE meeting included the parent, a district special education teacher, who also served as the district representative, a district school psychologist, and one of the student's teachers at the Aaron School by telephone (Tr. pp. 38-39; Dist. Exs. 1 at p. 14; 2 at p. 1). The hearing record reflects that the CSE considered a January 25, 2012, psychoeducational evaluation report, a March 1, 2013, clinical summary report prepared by the student's private psychotherapist/speech-language therapist, and the student's progress report from the Aaron School (Tr. pp. 34-36; Dist. Exs. 1 at pp. 1-3; 2 at p. 2; 4 at pp. 1-5; 5 at pp. 1-2; 6 at pp. 10-12, 14).⁴ The district school psychologist also stated that the CSE considered verbal input provided by the parent and the Aaron School teacher (Tr. pp. 39-41; Dist. Exs. 1 at p. 1; 2 at p. 5). The CSE determined the student was eligible for special education as a student with an other health-impairment (Dist. Exs. 1 at p. 1; 2 at p. 1).⁵ The March 2013 CSE recommended placement in a 15:1 special class in a community school for core subjects (i.e., math, English language arts, sciences, social studies) (Dist. Ex. 1 at p. 8). The March 2013 CSE also recommended two 30-minute group (3:1) counseling sessions per week, two 30-minute individual occupational therapy (OT) sessions per week, and two 30-minute group (3:1) speech-language therapy sessions per week (id. at pp. 8-9). Moreover, the IEP recommended the following testing accommodations: extended (double) time, separate location in a quiet room with minimal distractions, revised test directions (read and reread aloud), use of a calculator except on tests measuring computation abilities, and the ability to record answers in test booklets (id. at p. 10).

The parent disagreed with the recommendations included in the March 2013 IEP and reenrolled the student in the Aaron School for the 2013-14 school year (Parent Exs. A at p. 2; B at p. 1; C at p. 3; D; Dist. Ex. 7 at pp. 1-2).⁶ By due process complaint notice dated November 15, 2013, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2013-14 school year (Dist. Ex. 7 at pp. 1-2). For relief, the parent requested reimbursement for the costs of the student's tuition at the Aaron School for the 2013-14 school year (id. at p. 2).

² The transcript of the impartial hearing includes duplicative page numbers as a result of the transcripts for two hearing dates beginning numbering from the same page number. Citations to the hearing transcripts dated July 25, 2014, and January 12, 2015, will be preceded by the date of the hearing (Tr. pp. 1-561; July 25, 2014 Tr. pp. 410-529; Jan. 12, 2015 Tr. pp. 530-548).

³ According to the hearing record, the student has attended the Aaron School since at least the 2011-12 school year (Tr. p. 205).

⁴ The hearing record indicates the CSE also considered the student's prior year IEP, but this document was not included in the hearing record (Tr. p. 34).

⁵ The parties do not dispute that the student was eligible for special education and related services as a student with an other health-impairment at all times relevant to this appeal (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

⁶ The Aaron School has not been approved by the Commissioner of Education as a school with which school districts may contract for the instruction of students with disabilities (see 8 NYCRR 200.1[d], 200.7).

A. Previous Proceedings

On March 18, 2014, the parties proceeded to an impartial hearing, which concluded on July 25, 2014, after four days of proceedings (see Tr. pp. 8-561; July 25, 2014 Tr. pp. 410-529). In a decision dated August 21, 2014 (IHO Decision I), the IHO concluded that the district failed to offer the student a FAPE for the 2013-14 school year, the student's unilateral placement at the Aaron School was appropriate, and equitable considerations weighed in favor of the parent's requested relief (see id. at pp. 3-14).

Upon appeal by the district, by decision dated November 26, 2014, I vacated the IHO's decision and ordered the matter remanded to the IHO for a determination on the merits of the unaddressed issues set forth in the parent's due process complaint notice (Application of the Dep't of Educ., Appeal No 14-147).

B. Impartial Hearing Officer Decision on Remand

Following remand, in a decision dated February 2, 2015 (IHO Decision II), the IHO adhered to his determination that the district failed to offer the student a FAPE for the 2013-14 school year (see IHO Decision II at p. 5). Initially, the IHO noted that a prehearing conference was held in order to clarify which claims in the due process complaint notice remained unaddressed and determined that the adequacy of the annual goals contained in the March 2013 IEP and whether the recommended program was sufficiently intensive to meet the student's needs remained at issue (id. at pp. 3-5; see Jan. 12, 2015 Tr. pp. 533-46). With regard to the goals contained in the March 2103 IEP, the IHO found that the goals, although imperfect, were derived from information about the student obtained from his providers at the Aaron School, and that the goals and management needs appeared reasonable and addressed the student's needs (IHO Decision II at pp. 4-5). However, the IHO concluded that the district did not establish that the recommended 15:1 program was sufficiently intensive to meet the student's needs (id. at p. 5; see IHO Decision I at pp. 12-14).

IV. Appeal for State-Level Review

The district appeals, seeking to overturn the IHO's determination that the district failed to offer the student a FAPE for the 2013-14 school year.⁷ The district argues that the IHO correctly determined that the goals and management needs on the March 2013 IEP were appropriate, but erred in determining that the recommended 15:1 program with related services would not meet the student's needs. The district contends that the questions of whether the March 2013 CSE reviewed sufficient evaluative information to develop the March 2013 IEP and whether the IEP accurately reflected the student and his needs are not at issue, having been waived by the parents at the prehearing conference. Alternatively, the district asserts that the March 2013 CSE obtained and reviewed sufficient evaluative information with respect to the student, including relying upon input from Aaron School progress reports and an Aaron School teacher who attended the meeting, and that the IEP accurately reflected the student's needs. With respect to the recommendation for placement in a 15:1 special class in a community school with related services, the district asserts that the hearing record provides a basis to determine that the program was appropriate, that it was

⁷ The district does not appeal the IHO's determinations that the Aaron School was an appropriate unilateral placement and that equitable considerations did not weigh against the parent's request for tuition reimbursement.

the student's least restrictive environment (LRE), and that other programs were adequately considered and rejected.

In an answer, the parent responds to the district's petition by admitting and denying the allegations raised and asserting that the IHO correctly determined that the district failed to offer the student a FAPE for the 2013-14 school year, that the Aaron School was an appropriate unilateral placement, and that equitable considerations weighed in favor of the requested relief. The parent also asserts that although sufficient evaluative information was before the CSE, the IEP does not accurately reflect the severity of the student's needs as set forth in the evaluative information and the recommendations in the evaluations were ignored by the CSE, resulting in the recommendation for placement in a 15:1 special class that would not meet the student's needs. Further, the parent asserts that the district's psychoeducational evaluation report failed to note that the parent remained in the evaluation room during testing in order to help manage the student's anxiety, calling the results of the evaluation into question as potentially over-estimating the student's abilities and misleading the CSE. With respect to the annual goals contained in the March 2013 IEP, the parent asserts that the goals were not appropriate because they could be implemented only in the context of a program providing small group instruction with two teachers present in the classroom. However, the parent asserts that the IHO correctly determined that the recommended 15:1 special class program would not provide sufficient support for the student because the student required a classroom with small group instruction and two teachers for every period of the school day. The parent requests that the IHO's decision and order of tuition reimbursement for the 2013-14 school year be upheld.

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 [2d Cir. 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156 [2d Cir. 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20 [2d Cir. 2008]).

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

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

Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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

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

VI. Discussion

A. March 2013 IEP

1. Evaluative Information and Present Levels of Performance

The parent asserts that although sufficient evaluative information was before the CSE, the IEP did not accurately reflect the severity of the student's needs as set forth in the evaluative information and the recommendations in the evaluations were ignored by the CSE, resulting in the recommendation for a 15:1 special class that would not meet the student's needs. A review of the evaluative information available to the March 2013 CSE, although not directly contested, provides insight into the student's strengths and weaknesses in relation to the level of classroom support he required. Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). Furthermore, although federal and State regulations require that an IEP report the student's present levels of academic achievement and functional performance, those regulations do not mandate or specify a particular source from which that information must come, and teacher estimates may be an acceptable method of evaluating a student's academic functioning (S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *10 [S.D.N.Y. Nov. 9, 2011]). When a student has not been attending public school, it is also appropriate for the CSE to rely on the assessments or teacher

reports provided by the student's nonpublic school (see S.F., 2011 WL 5419847, at *10 [indicating that a CSE is required to "review existing evaluation data on the child, including (i) evaluations and information provided by the parents of the child; (ii) current classroom-based, local, or State assessments, and classroom-based observations; and (iii) observations by teachers and related services providers"]; see also D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 329-31 [S.D.N.Y. 2013] [upholding a district's reliance upon information obtained from the student's nonpublic school personnel, including sufficiently comprehensive progress reports, in formulating the IEP]; G.W. v. Rye City Sch. Dist., 2013 WL 1286154 at *23 [S.D.N.Y. March 29, 2013]).

As noted above, the CSE garnered information from a variety of documents, including a January 2012 psychoeducational evaluation report, a March 2013 clinical summary report, and the student's progress report from the Aaron School, as well as from the input of meeting participants (Tr. pp. 34-36, 39-41; Dist. Exs. 1 at pp. 1-3; 2 at p. 2; 4 at pp. 1-5; 5 at pp. 1-2; 6 at pp. 10-12, 14). The March 2013 IEP highlighted the student's relative cognitive strengths and weaknesses as demonstrated on the Differential Abilities Scales-Second Edition (DAS-II) during the January 2012 psychoeducational evaluation (Dist. Exs. 1 at p. 1; 4 at pp. 2-4). For example, the IEP indicated the student demonstrated a "definite area of strength" in his verbal-conceptual abilities, with a verbal cluster/composite standard score of 91 (27th percentile) (Dist. Exs. 1 at p. 1; 4 at pp. 2-3). In addition, consistent with the psychoeducational evaluation report, the IEP indicated the student's overall "nonverbal reasoning skills [fell] within the below average range," with a nonverbal reasoning cluster/composite standard score of 82 (12th percentile) (Dist. Exs. 1 at p. 1; 4 at p. 2). In addition, the student also earned a standard score of 93 (32nd percentile) on tasks assessing spatial abilities, within the average range (Dist. Exs. 1 at p. 1; 4 at pp. 2-3). Additionally, the student's overall general cognitive abilities, as assessed by the DAS-II, fell within the below average range, with a standard score of 87 (19th percentile) (id.).

On a measure of visual-perceptual functioning, the student performed within the high average range, earning a standard score of 110 (Dist. Exs. 1 at p. 1; 4 at pp. 3, 5).

The March 2013 IEP also outlined the student's academic achievement as demonstrated during the January 2012 psychoeducational evaluation (compare Dist. Ex. 1 at p. 1, with Dist. Ex. 4 at p. 4). Specifically, the IEP noted the student's performance on the Woodcock-Johnson Tests of Achievement (WJ ACH),⁸ wherein the student earned standard scores within the average range on tasks assessing spelling (91), quantitative concepts (93), reading fluency (107), and letter-word identification (96), but within the low average range on subtests measuring calculation (87), writing fluency (85), and passage comprehension (86) (Dist. Exs. 1 at p. 1; 4 at p. 4). The student appeared to experience greatest challenge on the WJ ACH math fluency subtest, earning a standard score within the borderline range (70) (id.).

In addition to the student's performance on standardized tests, the March 2013 IEP reflected input from the student's Aaron School teacher regarding the student's daily academic functioning (Tr. p. 38; Dist. Exs. 1 at p. 1; 2 at p. 2). For example, the IEP denoted the Aaron School teacher's estimation that the student's academic functioning was at about a seventh grade level for comprehension and writing, and a sixth grade level for math calculations (Dist. Exs. 1 at p. 1; 2 at p. 2).

⁸ It is not clear from the evaluation report which edition was administered to the student (Dist. Ex. 4).

In terms of the student's engagement in reading, the March 2013 IEP noted, consistent with information provided by the Aaron School, that the student tended to perform better when negotiating meaning within non-fiction texts as opposed to fictional texts, was challenged by "abstract thinking," and struggled to understand the perspective of an author that differed from his own (Dist. Exs. 1 at pp. 1-2; 2 at p. 2; 6 at p. 12). The IEP also reflected the student had a difficult time understanding figurative language, including similes and metaphors, and struggled with differentiating relevant from irrelevant information (Dist. Exs. 1 at p. 2; 2 at pp. 2-3; 6 at p. 5). The CSE meeting minutes also reflected that once the student grasped a concept, he could then use it "to develop his own example . . . [and] uses the previous simile as a blueprint to create his own" (Dist. Ex. 2 at p. 2). In keeping with the student's Aaron School progress report, the March 2013 IEP recounted the student's ongoing efforts to organize his thoughts in written assignments and that he benefitted from the use of graphic organizers (Dist. Exs. 1 at p. 2; 2 at p. 2; 6 at p. 11). Despite these hurdles, minutes from the March 2013 CSE highlighted the student's efforts to write "his own creative play," as well as his initiative to elicit participation from classmates by casting them in his play (Dist. Exs. 1 at p. 2; 2 at p. 2).

With regard to the student's math skills, the IEP stated that although he had "a very good knowledge base," the student's level of success varied by topic (Dist. Ex. 1 at p. 2). For example, the student's graphing skills represented a relative strength, as well as providing evidence of the student's ability to retain information across multiple school years (*id.*). In contrast, the student's facility with algebra problems was more challenged, as he struggled "to retain the rules and steps" (*id.*). While the March 2013 IEP indicated the student required support with identifying "key words/relevant information [and] disregarding extraneous information," he was able to "follow explicit directions, solve simple word problems, and . . . create his own simple word problems" (*id.*; Dist. Ex. 2 at p. 3). The record also indicates the student's teacher reported that the student's "favorite subjects" were math and science (Dist. Ex. 1 at p. 2).

The hearing record presents some conflicting views of the student's social development within the areas of social interaction skills, attending abilities, and executive functioning, as described in the January 2012 psychoeducational evaluation and the March 2013 clinical summary (see Tr. pp. 339, 517; Dist. Exs. 4 at pp. 1-2; 5 at p. 1). For example, while the author of the psychoeducational evaluation report asserted the student "showed adequate executive functioning for his age," as well as an "adequate attention span" as the student "often checked his work carefully to maximize his performance," the author of the clinical summary reported the student's performance was "hampered by deficits in attention [and] executive functioning" (Dist. Exs. 4 at pp. 1-2; 5 at p. 1).⁹ However, despite these differing interpretations of the student's behavior within a clinical setting, a review of the hearing record reveals considerable consensus within and between reports of the student's daily functioning and the March 2013 IEP (see Dist. Exs. 1 at pp. 1-3; 2 at pp. 1-5; 6 at pp. 9-14).

⁹ The parent testified that she remained in the evaluation room during the 2012 psychoeducational evaluation because the student was reluctant to enter the office alone (Tr. p. 521). While the parent's presence during the evaluation is not documented in the psychoeducational evaluation report or substantiated elsewhere in the hearing record, the January 2012 report indicated that initially the student "displayed considerable anxiety and questioned the purpose of the testing" but that "his initial anxiety lessened when provided with much emotional reassurance and encouragement" (Dist. Ex. 4 at pp. 1, 3).

Also in the social/emotional realm, according to the March 2013 IEP the student's then-current teacher reported the student struggled "to read social cues, reactions, and emotions of others" (Dist. Exs. 1 at p. 2; 2 at p. 5). The Aaron School progress report catalogued related difficulties across academic subjects in terms of recurring instances during which the student made off-topic and inappropriate comments (Dist. Ex. 6 at pp. 4, 10, 13-14). Specifically, as reflected in the IEP, the student was working on his social interaction skills, including the "appropriate initiation of conversations," and the IEP identified strategies employed to support change, such as the use of rewards, a behavior chart, and adult support to "process and understand the outcome" of problematic exchanges (Dist. Exs. 1 at pp. 2-3; 6 at pp. 10-13).

In terms of relative strengths within the social development domain, the IEP indicated that during the CSE meeting, the student's private school teacher highlighted the student's "ability to display leadership qualities and motivate the participation of his peers," echoing the Aaron School progress report (Dist. Exs. 1 at p. 3; 2 at p. 5; 6 at p. 14). Furthermore, consistent with the psychoeducational evaluation report, the clinical summary, and the Aaron School progress report, the IEP portrayed the student as a motivated learner, who was responsive to adult support and encouragement, despite his ongoing challenges with understanding and navigating social interactions (Dist. Exs. 1 at pp. 1-2; 2 at p. 4; 4 at p. 1; 5 at p. 1; 6 at pp. 12, 14).

With regard to the student's physical development, the March 2013 IEP reported that for the most part, the student was in good health (Dist. Ex. 1 at p. 3). The IEP indicated the student experienced a variety of allergies, and wore orthotics "to assist his gait" (*id.*).

Management needs as detailed on the March 2013 IEP were drawn from multiple sources, including the private clinical summary and the psychoeducational reports, and included the use of verbal and visual prompts, consistent/repeated support, positive reinforcement, small class environment, teacher/provider support, reminders, redirection, visual supports, modeling, use of graphic organizers, checklists, outlines, mnemonic devices, multisensory instruction, kinesthetic activities, and support with peer interactions (Dist. Exs. 1 at p. 3; 2 at p. 5; 5 at p. 1; 6 at pp. 9-12).¹⁰

In sum, a review of the information considered by the March 2013 CSE and discussed at the CSE meeting as detailed above shows that the student's present levels of performance were adequately and accurately reflected on the March 2013 IEP, based on the information available to the CSE at the time the student's IEP was developed (P.G. v. New York City Dep't of Educ., 959 F. Supp. 2d 499, 511-12 [S.D.N.Y. 2013]). Accordingly, the hearing record does not support a finding of a denial of a FAPE on this basis.

¹⁰ To the extent testimony by a school psychologist from the Aaron School and the psychotherapist who drafted the March 2013 clinical summary suggested that the student may have exhibited behaviors consistent with some aspects of an autism spectrum disorder and an attention deficit disorder, the hearing record is devoid of any documentary evidence of these diagnoses available to the CSE or any indication of how they impacted the student's functioning in school other than in manners already reflected in the March 2013 IEP (*see* Tr. pp. 378, 417, 440, 451; Dist. Exs. 1; 2; 4; 5; 6).

2. Annual Goals

With regard to the dispute about the adequacy of the annual goals in the March 2013 IEP, an IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

The March 2013 IEP included eleven annual goals that addressed the student's needs in reading, writing, math, executive functioning/organization/task completion, and verbal and nonverbal social language skills (Dist. Ex. 1 at pp. 4-8). Each goal included criteria by which to determine achievement of the goal, a method by which to measure the student's progress toward meeting the goal, and a schedule for progress monitoring (id.).

The IEP goals targeted specific challenges identified in the present levels of performance, such as the student's need to improve his mathematical problem solving, including the appropriate application of computational skills across a range of tasks and in a variety of settings (Dist. Ex. 1 at p. 5). Other goals centered on enhancing the student's language functioning across reading, writing, and social interactions (id. at pp. 4-7). For example, the IEP presented goals intended to improve the student's ability to scrutinize text for critical features, such as identifying the main idea, and finding "textual evidence to support [his] analysis" (id. at pp. 4-5). The IEP also included goals to improve the student's ability to "organize his thoughts in written language assignments," enrich his conversational skills, including recognizing nonverbal social cues, and developing social sensitivity regarding the impact of his comments on others (id. at pp. 5, 7-8). Overall, the goals are responsive to the student's specific needs and challenges as documented in the present levels of performance of the March 2013 IEP and the hearing record presents no reason to overturn the IHO's finding that the goals in the IEP were sufficient to guide a teacher in providing instruction to address the student's needs and any deficiencies do not rise to the level of a denial of a FAPE (see N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at *9-*10 [S.D.N.Y. June 16, 2014]; B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 359-63 [E.D.N.Y. 2014]; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *13 [S.D.N.Y. Sept. 27, 2013], aff'd, 589 Fed. App'x 572 [2d Cir. 2014]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013]; P.K. v. New York City Dep't of Educ., 819 F. Supp. 2d 90, 109 [S.D.N.Y. 2011], aff'd, 526 Fed. App'x 135 [2d Cir. 2013]).¹¹

¹¹ While the parent asserts the IEP did not include "goals to improve memory," the IEP included a number of strategies to help the student in this area (Dist. Ex. 1 at p. 3). For example, the IEP listed graphic organizers, checklists, outlines, and mnemonic devices as resources that would provide support to address the student's needs with regard to memory (id.; see Tr. at p. 89). Furthermore, the parent provides no argument that the IHO erred in not finding that the failure to include such a goal rose to the level of a denial of a FAPE. Rather, she argues generally that the goals could not have been properly implemented in a 15:1 special class setting. As discussed below, the hearing record supports a finding that a 15:1 special class would have been an appropriate placement for the student.

3. 15:1 Special Class in a Community School

As discussed above, the March 2013 CSE recommended placement in a 15:1 special class in a community school for core academic subjects, as well as the related services of OT, speech-language therapy, and counseling (Dist. Ex. 1 at pp. 8-9; 2 at p. 1). State regulations provide that a 15:1 special class placement is designed to address the needs of students "whose special education needs consist primarily of the need for specialized instruction which can be best accomplished in a self-contained setting" (8 NYCRR 200.6[h][4]). The hearing record supports a finding that the CSE's recommendation was consistent with the student's needs and State regulations.

First, the hearing record indicates the CSE was aware that the parent and Aaron School staff felt the student required an environment where he felt "safe" and that he benefited from a "small/nurturing" setting (Dist. Exs. 1 at p. 3; 2 at p. 4). As reported by the district school psychologist, the special education teacher in a 15:1 special class would be prepared to individualize instruction, "adapting the curriculum and . . . tailoring [the approach] to the individual child's needs" to meet the student's "academically based special education services" (Tr. pp. 52, 58). The school psychologist also noted that the special education teacher was responsible for providing the "overall structure of the classroom," including "classroom management," and could provide instruction adapted to meet a student's needs, using strategies such as a multisensory approach, modeling, and repetition and review of information (Tr. pp. 54, 59). As such, the student's management needs as depicted in the IEP would not have exceeded the scope of standard practice within the 15:1 special education classroom (Tr. pp. 54-59). The district school psychologist also testified the recommended 15:1 special class placement would have been able to implement the goals in the March 2013 IEP (Tr. p. 112).

To the extent the parent asserts the student required a classroom setting staffed with two teachers, the hearing record does not support a finding that the student exhibited a need for this level of support (see Dist. Exs. 4; 6). While the educational supervisor for the Aaron School upper school testified the student required "more than one teacher in the room to help him . . . mark his behavior chart, to redirect him when he's becoming inappropriate, to provide him individualized support," the student's Aaron School progress report suggested otherwise (Tr. pp. 211-212; Dist. Ex. 6 at pp. 10-12).¹² For example, the Aaron School progress report described the student's responsiveness to positive reinforcement and the beneficial use of a behavior management chart that "helped [the student] monitor the appropriateness and necessity of his comments" (Dist. Ex. 6 at p. 11). The Aaron School progress report also recounted the student's use of organizational strategies designed to foster greater independence, including "scaffolded step-sheets, a checklist of tasks[,] and visual and video examples of student work" (*id.*). In addition, the progress report noted that the "integration of technology including PowerPoint presentations, student-made video reflections and online web explorations helped reinforce the concepts [presented] during instructional periods" (*id.*). While the Aaron School progress report reflected the student's need for redirection on occasion, the report also indicated that when redirection was necessary, the student "immediately returned" to his work and "focused on addressing the criteria in the assignment" (*id.* at p. 12). Furthermore, the Aaron School progress report incorporated comments

¹² The Aaron School staff members who testified at the impartial hearing were not in attendance at the March 2013 CSE meeting.

from a number of the student's teachers that stressed the student's marked level of motivation, active engagement, and work ethic, observations echoed in the January 2012 psychoeducational evaluation report (Dist. Exs.4 at pp. 1-2; 6 at pp. 11-15). The student's responsiveness to verbal prompts and redirection, his motivation to perform well in the classroom setting, and his reported use of the behavior chart to self-monitor the appropriateness of his actions, undermine the claim that the student required the presence of two full-time teachers in order to benefit from instruction.

Relatedly, I find that the hearing record does not support the parent's assertion that the student required special education support during non-academic periods, which the March 2013 IEP does not provide. The program recommended in the March 2013 IEP provides special education support for nearly all of a given school day in the form of a 15: 1 special class for six periods of the school day as well as at least one session of a related service per day on average (see Dist. Ex. 1 at pp. 8-9). It is not apparent from the hearing record that the student's social, behavioral, or academic needs were so severe as to require special education support during the limited number of non-academic periods identified by the parent (see generally Dist. Exs. 4 at p. 5; 5 at p. 1; 6 at pp. 9-14).¹³

In light of the above, I find that the IHO erred in determining that the recommended program was insufficiently intensive to meet the student's educational needs, and, accordingly, I reverse the IHO's determination that the district failed to offer the student a FAPE during the 2013-14 school year.

VII. Conclusion

Having determined that the evidence in the hearing record demonstrates that the district sustained its burden to establish that it offered the student a FAPE in the LRE for the 2013-14 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether the student's unilateral placement at the Aaron School was an appropriate placement or whether equitable considerations supported the parents' requested relief (Burlington, 471 U.S. at 370; see M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]).

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decisions, dated August 21, 2014, and February 2, 2015, are modified by reversing so much thereof as found that the district failed to offer the student a FAPE and ordered the district to reimburse the parent for the costs of the student's tuition at the Aaron School for the 2013-14 school year.

Dated: **Albany, New York**
 May 4, 2015

CAROL H. HAUGE
STATE REVIEW OFFICER

¹³ In addition, the IEP noted that the student required "teacher/provider support" for social interactions and indicated it was one of the student's management needs (Dist. Ex. 1 at pp. 2-3).