



The University of the State of New York

The State Education Department

State Review Officer

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No. 15-058

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 Board of Education of the City School District of the City of Mount Vernon

Appearances:

Gina DeCrescenzo, PC, attorneys for petitioners, Gina M. DeCrescenzo, Esq., of counsel

Ingerman Smith, LLP, attorneys for respondent, Thomas Scapoli, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request for compensatory educational services. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; *see* 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the

identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

At the time the due process complaint notice was filed, the student exhibited significant deficits across all areas of development, including cognition, communication, social/emotional development, adaptive behavior, and fine motor skills (Dist. Exs. 1; 18; 24; Parent Exs. 4 at p. 1; 38 at p. 1). In addition, the student was described as a happy, sweet boy who required prompts and redirection throughout the day (Parent Ex. 38 at p. 1). The student was also noted to display behavioral problems in school (Dist. Ex. 31 at p. 1).

With regard to the student's educational history, the student received a diagnosis of a pervasive developmental disorder-not otherwise specified at approximately 15 months of age, was found eligible to receive early intervention services, and continued to receive special education services during preschool (Parent Ex. 38 at pp. 1-4). The hearing record reveals that the student has attended an 8:1+2 special class placement with related services in a board of cooperative

educational services (BOCES) program in a public school since the 2011-12 school year (Dist. Ex. 24 at p. 1).¹

On May 22, 2012, a CSE convened to conduct the student's annual review and to develop an IEP for the 2012-13 school year (see Parent Ex. 21). The May 2012 CSE recommended a 12-month school year program in an 8:1+2 special class placement in a BOCES program at a public school and speech-language therapy, occupational therapy (OT), counseling, and parent counseling and training (*id.* at pp. 1, 12-14). The CSE also recommended the provision of a 1:1 teaching assistant to assist the student throughout the day as needed (*id.* at p. 13). In addition, the CSE recommended 15 hours per week of home-based instruction using principles of applied behavior analysis (ABA) ("home-based ABA services") (*id.* at pp. 12, 14).²

On March 11, 2013, the district conducted a functional behavioral assessment (FBA) of the student at the parent's request (Parent Ex. 17 at p. 1). In addition, the district developed a behavioral intervention plan (BIP) for the student in March 2013 that focused on preventive strategies and antecedent manipulations to address the student's interfering behaviors (Parent Ex. 18).

On July 3, 2013, the CSE convened to conduct the student's annual review and to develop an IEP for the 2013-14 school year (see Parent Ex. 13).³ The July 2013 CSE recommended a 12-month school year program in an 8:1+2 special class placement in a BOCES program at the same public school as the prior year and speech-language therapy, OT, counseling, and parent counseling and training (*id.* at pp. 1, 14-15). The CSE also recommended the provision of a 1:1 teaching assistant to assist the student throughout the day as needed (*id.* at p. 15). In addition, the CSE recommended a reduction in the student's home-based ABA services to 10 hours per week (*id.* at pp. 14-15). In January 2014, a BIP was developed at the request of the CSE to coordinate behavioral intervention procedures between the BOCES program and the providers of the student's home-based ABA services (Dist. Ex. 33 at p. 1).

On August 8, 2014, the CSE convened to conduct the student's annual review and to develop an IEP for the 2014-15 school year (see Parent Ex. 4). The August 2014 CSE recommended a 12-month school year program in an 8:1+2 special class placement in a BOCES program at a different public school from the prior two years and speech-language therapy, OT, counseling, and parent counseling and training (*id.* at pp. 1, 14-15). The CSE also recommended the provision of a 1:1 teaching assistant to assist the student throughout the day as needed during the 10-month school year (*id.* at p. 14). In addition, the CSE recommended a further reduction in the student's home-based ABA services to six hours per week (*id.* at pp. 14-15).

¹ The student's eligibility for special education and related services as a student with autism at all times relevant to this appeal is not in dispute (see 34 CFR 300.8 [c][6]; 8 NYCRR 200.1[zz][1]).

² The IEPs for the relevant school years at issue identify the home-based ABA services as "Parent Counseling and Training" (Tr. pp. 475-77, 499; Parent Exs. 4 at pp. 14-15; 13 at pp. 14-15; 21 at pp. 12, 14). These services are referred to as "home-based ABA services" in order to avoid any confusion.

³ The CSE originally convened on June 7, 2013 and reconvened in July (Parent Ex. 13 at p. 2).

A. Due Process Complaint Notice

The parent filed a due process complaint notice dated September 24, 2014 alleging that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13, 2013-14, and 2014-15 school years (Parent Ex. 1). Initially, the parent indicated that, during the school years in dispute, the district failed to provide the student with "rigorous ABA discrete-trial programming" (id. at p. 9). The parent further indicated that the district failed to successfully address the student's behavioral needs because it developed "a series of flawed BIPs" without the parent's participation, failed to identify antecedents to the student's maladaptive behaviors, and failed to implement the BIPs "according to ABA principles" (id. at pp. 5-9).⁴

Specific to the 2012-13 school year, the parent argued that the student made "little progress" toward his speech-language goals (Parent Ex. 1 at p. 9). More specifically, the parent argued that, despite the student not achieving any interim benchmarks toward his speech-language goals, a progress report indicated that the student had made progress (id. at pp. 9-10). The parent also asserted that the district failed to implement a reading goal contained in the May 2012 IEP (id. at p. 11). With respect to the FBA conducted in March 2013, the parent argued that the district failed to identify any antecedents for or strategies to address the student's interfering behaviors (id. at p. 5). In addition, the parent argued that the student's March 2013 BIP incorporated text from the student's 2013 FBA verbatim (id.).

Turning to the 2013-14 school year, the parent argued that the July 2013 CSE reduced the student's home-based ABA services despite the parent's objection and against recommendations from the student's private evaluators (Parent Ex. 1 at p. 6). Next, the parent argued that the speech-language goals and interim benchmarks required the student to achieve these goals with "moderate assistance" but did not specify what "moderate assistance" the student would receive or indicate whether the student mastered the skills addressed by the goals (id. at pp. 9-10). The parent further argued that certain speech-language, reading, and mathematics goals were omitted from the July 2013 IEP despite not being achieved during the prior school year (id. at pp. 10-11). Next, the parent argued that an annual goal in the area of hand-writing was vague and structured in such a way as to make it unclear whether the student had made progress in this area the previous school year (id. at p. 12).

With regard to the 2014-15 school year, the parent contended that the August 2014 CSE reduced the student's home-based ABA services "without any rationale or justification" and despite the student's lack of progress (Parent Ex. 1 at p. 9). The parent further contended that the student's social/emotional/behavioral goal and "some" speech-language goals contained in the August 2014 IEP were identical to the goals identified in the July 2013 IEP, despite that the student had reportedly achieved the speech-language goals (id. at pp. 9, 11). Next, the parent averred certain goals were omitted from the August 2014 IEP despite not being achieved the prior year (id. at pp. 11-12).

⁴ Although in her due process complaint notice, the parent asserted that the district did not include the parent in the development of the student's BIPs, she does not raise this issue on appeal, therefore it is not further addressed (compare Parent Ex. 1 at p. 9, with Pet. ¶¶ 1-18).

As relief, the parent sought annulment of the student's current IEP and development "of an appropriate IEP" designed to address the student's academic and behavioral needs (Parent Ex. 1 at p. 13). The parent also requested that the district fund independent educational evaluations (IEEs) to determine the student's speech-language and sensory processing needs, and that the district conduct an evaluation to determine the student's assistive technology needs (id.). Next, the parent requested that the student be placed in "an appropriate out of district school" with the provision of "at least" 15 hours of home-based ABA services, as well as compensatory educational services in the form of additional ABA services, speech-language therapy, and OT (id. at pp. 13-14). Lastly, the parent invoked the student's right to a pendency (stay put) placement based on the student's last agreed upon (July 2013) IEP, consisting of 10 hours per week of home-based ABA services (id. at p. 13).

B. Impartial Hearing Officer Decision

On October 22, 2014, the IHO conducted a prehearing conference and on November 4, 2014, issued a summary of the prehearing conference (Nov. 8, 2014 Interim IHO Decision; see also 8 NYCRR 200.5[j][3][xi]). On December 3, 2014, the parties proceeded to an impartial hearing, which concluded on February 18, 2015, after six days of proceedings (Tr. pp. 1-791). In an interim order on pendency dated December 30, 2014, the IHO found that—based on the agreement of the parties—the student's pendency placement included 10 hours per week of home-based ABA services, and further ordered the district to provide the student 40 hours of compensatory home-based ABA services to make up for the district's failure to implement the student's pendency entitlement from September 3, 2014 (Dec. 30, 2014 Interim IHO Decision).

By decision dated April 27, 2015, the IHO concluded that the district offered the student a FAPE for the 2012-13, 2013-14, and 2014-15 school years (see IHO Decision at pp. 20, 27, 33).⁵ Initially, the IHO found that the CSEs for each of the school years in dispute were duly composed and that the district failed to have a completed IEP in place at the beginning of the 2013-14 and 2014-15 school year (id. at pp. 19-21, 28).⁶ With respect to the parent's request for a program providing full-time 1:1 instruction using a "discrete trial" ABA methodology,⁷ the IHO found that such a program would be "too restrictive" for the student and that, despite the student's "continual behavioral problems," he was "progressing" until the 2014-15 school year (id. at pp. 33-34).

⁵ The IHO began his analysis with an extensive discussion regarding whether the district offered the student a FAPE for the 2011-12 school year (IHO Decision at pp. 12-19), a year not put at issue by the parent's due process complaint notice, the evidence presented during the impartial hearing, or the parent's post-hearing brief (see Tr. pp. 1-791, Parent Exs. 1; 41). It is presumed that the IHO did so for purposes of discussing the appropriateness of the subsequent, similar May 2012 IEP.

⁶ The parent did not assert in her due process complaint notice that the CSEs at issue were improperly composed or that the district failed to have completed IEPs in place at the beginning of the 2013-14 and 2014-15 school years, and the IHO exceeded his jurisdiction in ruling on these issues sua sponte (compare IHO Decision at pp. 19-21, 28, with Parent Ex. 1 at pp. 1-14).

⁷ Discrete trials are described in the hearing record as "a teaching procedure used in [ABA]," whereby subcomponents of target skills and behaviors are acquired and eventually "linked together" (Tr. p. 543; Parent Ex. 38 at p. 7).

Specific to the 2012-13 school year, the IHO found that the May 2012 CSE offered the student a FAPE because the student achieved most of his goals on his May 2012 IEP and the student's report card indicated that he met standards in twenty-one out of twenty-three categories (IHO Decision at pp. 19-20).

With respect to the 2013-14 school year, the IHO found that, because the hearing record indicated that the student made progress with respect to his interfering behaviors, it was reasonable for the July 2013 CSE to recommend a reduction in the student's home-based ABA services, and that the July 2013 IEP offered the student a FAPE for the 2013-14 school year (IHO Decision at pp. 21-27).

Regarding the 2014-15 school year, the IHO found that, in light of the student's "continued progress," it was reasonable for the August 2014 CSE to recommend a further reduction in the student's home-based ABA services, in keeping with the IDEA's requirement that student's be educated in the least restrictive environment (LRE) (IHO Decision at pp. 29-32). Although the IHO noted that the student's interfering behaviors increased during the 2014-15 school year, the IHO found that it was not appropriate to judge the August 2014 IEP on information post-dating the August 2014 CSE meeting (*id.* at pp. 32-33). Moreover, the IHO found that the August 2014 IEP was "based on sound and voluminous evaluative materials from numerous sources" and was reasonably calculated to offer the student a FAPE in the LRE for the 2014-15 school year (*id.*).

Although the IHO denied much of the relief requested by the parent, he ordered the district to "immediately and comprehensively reevaluate the student in all areas related to the suspected disabilities" and to reconvene a CSE meeting upon completion of the evaluations in order to develop a new IEP for the student, taking into consideration "all of the [student's] available evaluations and any related services that he should receive for the 2015-2016 school year" (IHO Decision at p. 34).

IV. Appeal for State-Level Review

The parent appeals and asserts that the IHO erred in concluding that the district offered the student a FAPE for the 2012-13, 2013-14, and 2014-15 school years. First, the parent contends that the IEPs at issue did not contain accurate statements of the student's present levels of performance.⁸ The parent further contends that the student needed a "full-time ABA program" to receive educational benefits and that the IHO erred in not addressing the recommendations from the student's private evaluators and finding that the student required at least 25 hours per week of 1:1 instruction using an ABA discrete trial methodology for his school program. Next, the parent asserts that the IEPs did not contain specific and measurable annual goals and short-term objectives. In addition, the parent argues that the IHO erred in failing to find that the FBAs and

⁸ This claim was not raised in the parent's due process complaint notice and so is not properly at issue on appeal. Further, the parent presents the claim about the present levels of performance in a manner that lack specificity or citation to the record (*see* 8 NYCRR 279.4[a]; 279.8[b]). However, because a discussion of the student's needs provides context for the issues properly pleaded, this contention will be reviewed briefly with regard to each of the school years at issue.

BIPs developed for the student were not appropriate and that the district failed to implement the student's BIPs in accordance with State regulations and "the principles and practices of ABA."

With respect to the 2012-13 school year, the parent argues that the IHO erred in finding that the district offered the student a FAPE because the IHO inappropriately relied on "retrospective" evidence in determining that the student made progress toward his annual goals and with regard to his behavioral needs. In addition, the parent argues that the CSE failed to conduct an FBA or develop a BIP for the student, despite the student's increasing maladaptive behaviors, and that the BIP developed in March 2013 was insufficient. The parent further argues that, despite the student's maladaptive behaviors, the May 2012 IEP contained only two social/emotional/behavioral goals, which the student did not meet.

In regard to the 2013-14 school year, the parent contends that the IHO erred in finding that the July 2013 IEP offered the student a FAPE because it contained only one social/emotional/behavioral goal that he did not achieve, and that the student's interfering behaviors increased over the course of the school year. The parent also contends that the IHO should have found that the BIP developed in January 2014 was inadequate to address the student's behavioral needs. Next, the parent contends that the IHO erred in finding that the student made progress and that the reduction in home-based ABA services was appropriate. The parent also argues that the CSE should have reconvened to increase the amount of ABA services the student received.

Turning to the 2014-15 school year, the parent argues that the IHO erred in finding that the August 2014 IEP offered the student a FAPE because it contained only one social/emotional/behavioral goal, despite the student's behavioral problems. The parent further contends that the IHO erred in finding that the decrease in ABA services was appropriate and that the hearing record contained no objective evidence of progress. The parent asserts that the student's interfering behaviors increased after the beginning of the school year and the CSE failed to reconvene or develop a BIP adequate to address his behaviors.⁹

As relief, the parent requests that the student be placed in a State-approved nonpublic school and receive "at least 15-20 hours of properly supervised and implemented ABA instruction." The parent also requests that the district fund IEEs in the areas of speech-language and sensory processing, and conduct an evaluation to determine the student's needs with regard to

⁹ The parent also asserts that the IHO erred in not finding a denial of a FAPE for the 2013-14 and 2014-15 school years despite finding that the district failed to timely develop and implement the student's IEPs for those school years. The district requests that an SRO "disregard" all allegations in the petition not raised in the parent's due process complaint notice, and a denial of a FAPE cannot be based on claims not raised in the parent's complaint (E.H. v. New York City Dep't of Educ., 2015 WL 2146092, at *2 [2d Cir. May 8, 2015]). Accordingly, this issue will not be further addressed in this decision.

assistive technology.¹⁰ In addition, the parent requests 1098 hours of home-based ABA services as compensatory services.

In an answer, the district responds to the parent's petition by denying the parent's material allegations and argues that the IHO correctly determined that it offered the student a FAPE for the 2012-13, 2013-14, and 2014-15 school years. The district also argues that the parent's allegations relating to events more than two years prior to the due process complaint notice should be "stricken" from the record.¹¹ The district further argues that the parent's petition was improperly served because the petition was served less than 10 days after service of the notice of intention to seek review.¹²

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v.

¹⁰ On appeal, the parent asserts that the IHO correctly ordered the CSE to "immediately and comprehensively" reevaluate the student in all areas of suspected disabilities. As the district has not cross-appealed this order, it has become final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6 [S.D.N.Y. Mar. 21, 2013]), and the district is directed to comply with the IHO's directives if it has not already done so. After the evaluations are complete, if the parent disagrees with the evaluations conducted by the district, she may request that the district provide her with IEEs at public expense (see 34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see also K.B. v Pearl River Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE [at public expense] is a disagreement with a specific evaluation conducted by the district"]). Accordingly, it is not appropriate to instruct the district to fund IEEs at this time.

¹¹ To the extent the parent references events occurring more than two years prior to the due process complaint notice, the factual allegations constitute historical evidence rather than claims beyond the applicable limitations period. The district does not assert that this evidence should have been precluded from the hearing record, and it is unclear how it is "prejudicial" to the district to permit it to be pleaded.

¹² A parent who seeks review of an IHO's decision by an SRO is required to serve a notice of intention to seek review upon the school district not less than 10 days before service of a copy of the petition for review upon such school district (8 NYCRR 279.2[a], [b]). Here, the notice of intention to seek review was served on the district on May 26, 2015, and the petition was served on the district less than 10 days later, on June 1, 2015. However, the purpose of the notice of intention to seek review is to facilitate the timely filing of the hearing record by the district with the Office of State Review (Application of a Student Suspected of Having a Disability, Appeal No. 12-014), and as both the hearing record and the answer to the petition in this matter were received by the Office of State Review in a timely manner, I decline to dismiss this appeal on this ground.

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]). 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).

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]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.116[a][2]; 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).

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]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). "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).

VI. Discussion

A. Methodology

On appeal, the parent contends that the student needed a "full-time ABA program" both in school and at home, and that the recommended BOCES program did not consistently provide instruction using ABA methodology. The parent further contends that the CSEs from the relevant school years failed to consider the recommendations from the private evaluators that the student receive at least 25 hours of "1:1 discrete trial ABA" services for his school program. A review of the evidence in the hearing record does not support the parent's contentions.

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]). However, "[c]onsideration does not require substantive discussion, that every member of the CSE read the document, or that the CSE accord the private evaluation any particular weight" (S.W. v. New York City Dep't of Educ., 2015 WL 1097368, at *10 [S.D.N.Y. Mar. 12, 2015]; see T.S. v. Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993]; G.D. v. Westmoreland Sch. Dist., 930 F.2d 942, 947 [1st Cir. 1991]). Moreover, the IDEA "does not require an IEP to adopt the particular recommendation of an expert; it only requires that that recommendation be considered in developing the IEP" (J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *11 [S.D.N.Y. Aug. 5, 2013]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [holding that a CSE's recommendation is not necessarily rendered inappropriate by "[t]he mere fact that a separately hired expert has recommended different programming"], aff'd, 142 Fed. App'x 9 [2d Cir. July 25, 2005]).

The hearing record reflects that the May 2012 CSE, July 2013 CSE, and August 2014 CSE considered a privately-obtained June 2011 neurodevelopmental evaluation report, which indicated that the student should receive an "[ABA]-based program" consisting of 25 hours of "1:1 discrete trial" ABA services at his school program and 15 hours of "1:1 discrete trial" ABA services at home on a weekly basis (Parent Exs. 4 at p. 4; 13 at p. 4; 21 at p. 3; 26 at p. 6). While the parent argues that the CSEs did not adopt the evaluator's recommendations, a CSE is not obligated to accede to recommendations made by private evaluators (J.C.S., 2013 WL 3975942, at *11; Watson, 325 F. Supp. 2d at 145). Nevertheless, consistent with the evaluator's recommendations,

the principal of the 8:1+2 BOCES program where the student was placed from September 2011 through August 2014 described the program as a verbal behavior/ABA program that followed ABA methodology throughout the school day and specialized in providing instruction to children "on the autism spectrum" (Tr. pp. 73-75).¹³ The principal described the verbal behavior model as a form of ABA that emphasized emulating a natural environment, where language was stressed consistently and there were socialization opportunities (Tr. pp. 75-76). The principal further testified that intensive teaching and discrete trials were used in verbal behavior, but not throughout the entire day (Tr. p. 76). However, the principal explained that lessons learned during discrete trial sessions were generalized to other activities during the school day (Tr. pp. 76-77).

Although the student's pediatric neurologist testified by affidavit that it was "medically necessary" for the student to receive "a minimum of 30 hours per week of ABA services," both at home and in school, the neurologist testified that he had no training in education and was not trained in ABA (Tr. pp. 741-44, 748; Parent Ex. 40 at pp. 6-9). The pediatric neurologist further testified that, although he was familiar with the ABA methodology, he was not familiar with the verbal behavior model of ABA (Tr. p. 766). The neurologist admitted that he had not witnessed the administration of instruction utilizing a discrete trial ABA methodology (Tr. p. 767). Moreover, the pediatric neurologist testified that he did not observe the student in school or at home, did not speak to any of the student's teachers, did not ask school personnel to complete rating scales, and was not familiar with the program the student was attending at the time he made his recommendation or the qualifications of the student's current providers (Tr. pp. 746-48, 755). Further, the hearing record contains no indication that the pediatric neurologist consulted with the student's home-based ABA providers. The hearing record also reflects that the student received ABA services to address medical needs (Tr. pp. 600, 604-05, 609-10; Dist. Ex. 49 at pp. 4-5), and the neurologist did not clarify whether his opinion regarding the student's medical need for ABA services overlapped with or was distinct from an educational need for such services.

To the extent the parent argues that the student required implementation of a specific variant of the ABA methodology in order to receive educational benefits, the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher's discretion absent evidence that a specific methodology is necessary (Rowley, 458 U.S. at 204; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 575-76 [2d Cir. Oct. 29, 2014]; A.S. v. New York City Dep't of Educ., 573 Fed. App'x 63, 66 [2d Cir. July 29, 2014], aff'g 10-cv-00009 [E.D.N.Y. May 26, 2011] [noting the "broad methodological latitude" conferred by the IDEA]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 86 [2d Cir. 2013]; R.E., 694 F.3d at 192-94; M.H., 685 F.3d at 257 [the district is imbued with "broad discretion to adopt programs that, in its educational judgment, are most pedagogically effective"]). Here, the parent testified by affidavit that the student did not receive educational benefit through instruction using the Treatment and Education of Autistic and Related Communication Handicapped Children (TEACCH) methodology during the 2005-06 and 2007-08 through 2010-11 school years (Parent Ex. 38 at pp. 3-5, 7). Further, the hearing record establishes the student benefited from the use of ABA methodology, but it does not establish that the student could not receive educational benefit other than through instruction using a 1:1 discrete trial ABA methodology. For example, the

¹³ The student was placed in the same 8:1+2 BOCES program for the 2014-15 school year, but in a different public school location (Tr. pp. 73-74; see Parent Ex. 4 at p. 2).

district supervisor of special education for out-of-district placements testified that the student exhibited growth from the time he entered the BOCES program (Tr. p. 478). She further testified that the student's home-based ABA service providers reported that the student was making progress (*id.*). Additionally, when the CSE convened in May 2012, teachers and service providers reported that the student had met most of the goals on his prior IEP and improvements had been seen in his behavior (Parent Ex. 21 at p. 2). Furthermore, the July 2013 CSE noted that the student made progress both in school and at home, and the August 2014 CSE minutes reflected that the student made gains with regard to his behavior (Parent Exs. 4 at p. 1; 13 at p. 2). In light of the above, the parent is correct that the evidence in the hearing record shows that the student benefitted from the use of ABA methodology; however, the hearing record does not support the parent's contention that the student required essentially full-time instruction utilizing a 1:1 discrete trial ABA methodology in order to receive educational benefit.

B. 2012-13 School Year

1. The Student's Present Levels of Performance

The parent argues on appeal that the May 2012 IEP did not accurately reflect the student's present levels of performance. As noted above, the parent did not assert this challenge in her due process complaint notice and, in any event, review of the hearing record does not support the parent's contention. 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]).

In developing the May 2012 IEP, the hearing record reflects that the May 2012 CSE had several evaluative reports available to it that indicated the student exhibited significant delays in cognitive functioning, academic achievement, language functioning, adaptive behavior, and fine motor skills, with test scores in all of these areas at or below the first percentile (*see* Parent Ex. 21 at pp. 3-5; *see generally* Parent Exs. 26; 27; 33).¹⁴ Moreover, the hearing record demonstrates that the May 2012 CSE described the student's present levels of academic achievement, social development, and physical development consistently with the evaluative information available to it (*compare* Parent Ex. 21 at pp. 5-6, *with* Parent Exs. 26, 27, and 33).

¹⁴ The May 2012 IEP listed several other reports that were available to the CSE; however, they were not included in the hearing record (*see* Parent Ex. 21 at p. 3). In addition, March 2012 and May 2012 reports from a behavioral analyst who provided home-based ABA services and supervised the student's home-based ABA program were included in the hearing record, but not listed on the May 2012 IEP; however, the behavioral analyst participated at the May 2012 CSE meeting (Parent Exs. 21; 22; 35).

In the area of academic achievement, the student's reading, writing, and mathematics skills were determined to be very low on standardized testing, and the May 2012 IEP indicated that the student's levels and abilities were below age expectations (compare Parent Ex. 26 at pp. 3-4, with Parent Ex. 21 at p. 5). Specifically, the IEP described the student as able to respond to his own name, greet others, respond to simple 1-2 step directions, rote count to 30, recite the days of the week, identify letters in his name, answer concrete "wh" questions from a story read to him, and write his first name independently (Parent Ex. 21 at p. 5).

In the area of social development, consistent with the evaluative information available to the May 2012 CSE that suggested delayed interpersonal skills, play skills, and coping skills, the IEP indicated that sharing remained a challenge for the student (compare Parent Ex. 26 at p. 5, with Parent Ex. 21 at p. 6). However, the IEP also described the student as even tempered and noted that he demonstrated increased interest in and interactions with peers and adults in the classroom, displayed appropriate behavior within group activities, and increased his ability to tolerate new and more challenging experiences in school and in the community (Parent Ex. 21 at p. 6).

With respect to physical development, previous testing results indicated low graphomotor integration skills and fine motor speed and the May 2012 IEP indicated that the student was able to color, cut, and glue with assistance and prompting to color within the lines, used a variety of writing utensils with an emerging pincer grasp, and needed to further improve fine motor skills (compare Parent Ex. 21 at p. 6, with Parent Ex. 26 at p. 4).

In sum, a review of the information considered by the May 2012 CSE as detailed above shows that the CSE accurately reflected the evaluative information available to it in the student's present levels of performance on the May 2012 IEP (P.G. v. New York City Dep't of Educ., 959 F. Supp. 2d 499, 511-12 [S.D.N.Y. 2013]).

2. Annual Goals and Short-Term Objectives

Next, the parent alleges that the May 2012 IEP did not contain appropriate annual goals and short-term objectives to address the student's needs that were both specific and measurable. 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 is required to 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 CSE (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]). Short-term instructional objectives or benchmarks—described as "measurable intermediate steps between the student's present levels of performance and the measurable annual goal"—are required for students who participate in alternate assessment (8 NYCRR 200.4[d][2][iv]; see 20 U.S.C. §1414[d][1][A][i][I][cc]; 34 CFR 300.320[a][2][ii]).

Here, a review of the May 2012 IEP reveals that the May 2012 CSE included 19 annual goals and corresponding short-term objectives aligned to the student's needs in the areas of reading, writing, mathematics, speech-language, social/emotional, fine motor, cognitive, and daily living skills (Parent Ex. 21 at pp. 8-12). For example, academic goals focused on the development of basic skills such as identifying the letter that matched the beginning sound of an object and single digit addition with manipulatives (*id.* at p. 8). Speech-language goals focused on increasing functional language by expanding vocabulary, answering concrete questions, and interacting verbally with peers (*id.* at p. 9). Social/emotional goals included identifying problem behaviors and socially appropriate substitutes for each behavior and displaying appropriate coping skills to deal with change or disappointment (*id.* at p. 10). Additionally, each annual goal included a method (i.e., writing samples), schedule (i.e., weekly), and criteria (i.e., 100% success on 5 consecutive occasions) to measure the student's progress toward the goal (*id.* at pp. 8-12).

Overall, the evidence in the hearing record supports a finding that the annual goals and short-term objectives in the May 2012 IEP targeted and appropriately addressed the student's identified areas of need and were measurable (see, e.g., *D.A.B. v. New York City Dep't of Educ.*, 973 F. Supp. 2d 344, 359-60 [S.D.N.Y. 2013]).¹⁵

3. Consideration of Special Factors—Interfering Behaviors

The parent also argues on appeal that the May 2012 CSE failed to conduct an FBA or develop a BIP for the student and the May 2012 IEP contained only two social/emotional/behavioral goals, despite the student's increasing maladaptive behaviors. As explained more fully below, the evidence in the hearing record does not support the parent's assertions.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also *E.H. v. Bd. of Educ.*, 361 Fed. App'x 156, 160-61 [2d Cir. Oct. 16, 2009]; *A.C.*, 553 F.3d at 172).

In New York State, policy guidance explains that "the IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address," among other things, a student's interfering behaviors, "in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 22, Office of Special Educ. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP," and if necessary, "a "student's need for a [BIP] must be documented in the IEP" (*id.*). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student (8 NYCRR 200.4[d][3][i], 200.22[a], [b]). The Second Circuit has explained that when required, "[t]he failure

¹⁵ The parent asserted specific claims only with regard to the student's behavioral goals, discussed in detail below.

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

With regard to a BIP, the special factor procedures set forth in State regulations provide in relevant part that the CSE shall consider the development of a BIP for a student with a disability when the student exhibits behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions; or the student's behavior places the student or others at risk of harm or injury (8 NYCRR 200.22[b][1]). If the CSE determines that a BIP is necessary for a student, the BIP is required to identify: the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors; the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behaviors and alternative acceptable behaviors; and a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR 200.22[b][4]).¹⁶ Neither the IDEA nor its implementing regulations require that the elements of a student's BIP be set forth in the student's IEP ("Student Needs Related to Special Factors," Office of Special Educ. [April 2011], available at <http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf>). However, once a student's BIP is developed and implemented, "such plan shall be reviewed at least annually by the CSE" (8 NYCRR 200.22[b][2]). Furthermore, "[t]he implementation of a student's [BIP] shall include regular progress monitoring of the frequency, duration and intensity of the behavioral interventions at scheduled intervals" and "[t]he results of the progress monitoring shall be documented and reported to the student's parents and to the CSE . . . and shall be considered in any determination to revise a student's [BIP] or IEP" (8 NYCRR 200.22[b][5]).

In this case, it is undisputed that the May 2012 CSE did not conduct an FBA or develop a BIP for the student (see Parent Ex. 21 at p. 7). However, a review of the information available to the May 2012 CSE indicates that the student's behavioral needs did not rise to the level that an FBA or a BIP was warranted at that time. The district school psychologist who participated in the May 2012 CSE meeting, testified that at the time the May 2012 IEP was developed, the student did not exhibit "problem behavior[s]" in school rising to the level that required a BIP to address (Tr. pp. 263-64). The school psychologist further testified that school staff kept in contact and collaborated with the parent and outside service providers and the student's problem behaviors remained at "low levels" during the 2011-12 school year and were handled when they occurred (Tr. pp. 235-36, 254). Although the behavioral analyst who provided home-based ABA services to the student and supervised his home-based program (behavioral analyst) testified that the student had a BIP in place "the whole time" he received home-based services from her agency, she also

¹⁶ The Official Analysis of Comments to the federal regulations explains that the decision regarding whether a student requires interventions such as a BIP rests with the CSE and is made on an individual basis (Consideration of Special Factors, 71 Fed. Reg. 46683 [Aug. 14, 2006]).

testified that school staff informed her that they did not observe these problem behaviors in the school setting (Tr. pp. 532-34, 589, 616).

Additionally, the May 2012 IEP reflected that although the student needed strategies and supports to address his behavior, a BIP was not necessary because his behavior was controlled through behavioral interventions and the support of a teaching assistant (Parent Ex. 21 at p. 7). The May 2012 IEP also provided environmental, human, and material resources to address the student's unique needs, including a small student-to-teacher ratio with minimal distractions, visual cues, verbal and physical prompts, refocusing and redirection, multiple repetitions over time, skills broken down into small increments, visual manipulative materials, varied materials across environments, high rates of positive reinforcement, multisensory instruction, a daily schedule, and a teaching assistant throughout the day as needed (*id.* at pp. 6-7, 13).

Further, a review of the hearing record reveals that, at the time of the May 2012 CSE meeting, the student's teachers and service providers reported that the student had made improvements in his behavior and met most of the goals on his IEP from the prior school year (Parent Ex. 21 at p. 2). Additionally, March 2012 and May 2012 annual reports from the behavioral analyst indicated that, even though the student continued to present with delays in all areas of functioning, he: made progress in all areas, including behavior management; made specific gains in his ability to communicate more effectively; improved his play skills by extending his attention to tasks and expanding his play repertoire; improved his social skills, turn-taking skills, and ability to wait for preferred activities; gained independence with daily living skills; gained academic skills; and improved cognitive skills (Parent Exs. 22 at pp. 1, 4-7; 35 at pp. 2-4). Furthermore, the behavioral analyst reported that several problem behaviors had been extinguished, while other behaviors occurred infrequently or at varying rates and intensities (Parent Exs. 22 at pp. 1-4; 35 at pp. 1-2). Moreover, the parent testified by affidavit that, while the student still exhibited tantrums and aggression at home during the 2011-12 school year, he also showed behavioral progress, which she attributed to the home-based ABA services (Parent Ex. 38 at pp. 12, 13). Specifically, the parent noted that the student was better able to wait for a desired item and, when frustrated, was able to independently ask for breaks (*id.* at p. 12). Additionally, according to the student's report card for the 2011-12 school, the student put forth effort, was eager to participate in work sessions, and was working towards most standards (Dist. Ex. 53).

Based upon the foregoing, the evidence in the hearing record supports a finding that the student's behavioral needs did not impede his learning or that of other students to the extent the May 2012 CSE was required to conduct an FBA or develop a BIP for the student.

To the extent the parent argues that the May 2012 IEP contained only two social/emotional/behavioral goals, the school psychologist testified that the social/emotional needs identified on the home-based provider's report were not included in the IEP because the student was not demonstrating the interfering behaviors in school (Tr. pp. 318-19). Nevertheless, the May 2012 IEP otherwise addressed the student's behavioral needs by placing him in 8:1+2 special class which utilized ABA methodology throughout the day, and provided high rates of reinforcement for on-task behavior (Parent Ex. 21 at pp. 2, 6-7, 12). In addition, the May 2012 IEP included social/emotional and speech-language goals that addressed behavior such as developing coping skills, identifying appropriate socially acceptable behaviors, and sharing materials with peers, and provided the student with a 1:1 teaching assistant as needed throughout the day, weekly small

group counseling, and 15 hours per week individual home-based ABA services (Tr. pp. 74, 79; Parent Ex. 21 at pp. 9, 10, 12).

Notwithstanding the above conclusion that the student did not require a FBA or BIP to address his behavioral needs during the 2012-13 school year, as noted previously the hearing record shows that, in March 2013, the district conducted an FBA and developed a BIP for the student at the parent's request (see generally Parent Exs. 17; 18). The FBA specified that the student's behaviors were believed to be more serious at home than in school and that the parent sought more coordination between school and home providers (Parent Ex. 17 at p. 1). The FBA identified the student's problem behaviors as whining, crying, yelling (or "loud talking"), biting self, and engaging in perseverative language (*id.*). The FBA described the frequency (nine days with an average daily frequency close to zero), duration (under five minutes with the exception of one episode that lasted 30 minutes), and intensity (infrequent and mild with the exception of the one episode noted to be intense) of behavior incidents observed since September 2012 and offered a hypothesis as to the motivation underlying the behaviors (demands made or access denied) (*id.* at pp. 1-2). The resulting March 2013 BIP again emphasized the "low rates of problem behavior(s) at school" but, nonetheless, included the following strategies to ensure the student's positive behaviors: half-hour instructional blocks to maintain the student's engagement and motivation; low student-to-teacher ratio to allow for staff to monitor the student; error correction teaching procedures to allow immediate feedback to the student if the student performs or answers incorrectly; visual supports and schedules to aid in routine predictability; positive reinforcement paired with praise; provision of choices of desirable items or activities; and variation in instructional tasks (Parent Ex. 18 at p. 1). The BIP also noted that the student no longer underwent "Pairing and Manding" sessions each morning because he was able to spontaneously request desired items whether or not they were present (*id.*). While the March 2013 FBA and BIP may have lacked complete conformity with State regulation, this does not, in and of itself, result in a finding of a denial of a FAPE in this instance, particularly given the above conclusion that the student's behavioral needs did not impede his learning or that of other students and given the supports and goals included in the student's IEP to otherwise address any interfering behaviors (see *R.E.*, 694 F.3d at 190).

Based on the foregoing, the hearing record supports the IHO's conclusion that the May 2012 IEP was reasonably calculated to address the student's needs and enable him to receive educational benefits.¹⁷

C. 2013-14 School Year

1. The Student's Present Levels of Performance

The parent argues on appeal that the July 2013 IEP did not accurately reflect the student's present levels of performance. As noted above, the parent did not assert this challenge in her due

¹⁷ With respect to the parent's contention that the IHO utilized "retrospective" testimony to support his conclusion that the May 2012 IEP offered the student a FAPE, any error is harmless in this instance because the hearing record contains sufficient permissible evidence supporting the IHO's conclusion (see *K.L.*, 530 Fed. App'x at 85; *P.K. v. New York City Dep't of Educ.*, 526 Fed. App'x 135, 141 [2d Cir. May 21, 2013]).

process complaint notice and, in any event, review of the hearing record does not support the parent's contention.

In addition to information about the student reviewed during the May 2012 CSE meeting, described above, the hearing record indicates that the July 2013 CSE reviewed several reevaluation reports dated March 2013, including an OT evaluation, a speech-language evaluation, and a psychological evaluation, the results of which continued to reflect significant delays in all areas of development, as well as a June 2013 report of the student's progress toward the annual goals contained on the May 2012 IEP (Parent Ex. 13 at pp. 3-6; see Dist. Exs. 1; 18; 24; Parent Ex. 14).¹⁸ Although the student's evaluators and teachers indicated that the student's functioning remained significantly below average, the evaluative information indicated that he was gaining skills and making progress across most areas of instruction (Dist. Exs. 1 at p. 2; 24 at pp. 3-4; Parent Ex. 14).

A review of the evidence in the hearing record reveals that the evaluative information available to the July 2013 CSE and the present levels of performance contained in the July 2013 IEP provided a consistent description of the student's academic achievement, social development, and physical development. For example, consistent with the March 2013 psychological evaluation that noted the student was an early learner who was functioning at a kindergarten level in reading, the present levels of performance on the IEP indicated that the student was learning the sounds associated with letters and was able to blend sounds slowly, but needed to continue blending sounds and learn to recognize and read word families (compare Dist. Ex. 24 at p. 4, with Parent Ex. 13 at pp. 6-7). In the area of speech-language, consistent with the 2013 speech-language evaluation that noted the student was able to match spoken words to images of objects and name objects in pictures but had difficulty understanding prepositions and basic linguistic concepts, the present levels of performance indicated that the student was able to label simple actions and identify common objects, but needed to learn to identify prepositions and pronouns (compare Dist. Ex. 18 at pp. 1-2, with Parent Ex. 13 at pp. 6-7). The results of a March 2013 administration of the Vineland Adaptive Behavior Scales, Second Edition indicated the student's communication skills, daily living skills, and social skills were within the low adaptive range (Dist. Ex. 24 at pp. 2-4). The present levels of performance on the IEP reflected that the student was able to hang up his coat and return his notebook to the designated area with minimal prompting, transition to work areas throughout the day, cooperate in a group setting, take turns and respond to questions when prompted, greet peers when prompted, use language spontaneously to ensure his needs were met, maintain eye contact, and interact with staff (Parent Ex. 13 at pp. 6-7). The student was noted to occasionally engage in self-injurious and self-stimulatory behaviors when anxious, but the behaviors were not displayed consistently (Parent Ex. 13 at p. 7). Based on the above, the evaluative information regarding the student reviewed by the July 2013 CSE was accurately reflected in the present levels of performance on the July 2013 IEP (P.G., 959 F. Supp. 2d at 511-12).

2. Annual Goals and Short-Term Objectives

The parent asserts that the July 2013 IEP did not contain appropriate annual goals and short-term objectives to address the student's needs that were both specific and measurable. As

¹⁸ Additional reports and evaluations available to the July 2013 CSE and reflected in the July 2013 IEP were not included in the hearing record (Parent Ex. 13 at p. 3).

set forth below and in light of the legal standards previously set forth, the evidence in the hearing record does not support the parent's contentions.

The July 2013 IEP included a total of 21 annual goals and corresponding short-term objectives that addressed the student's identified needs in the areas of reading, mathematics, speech-language, social/emotional, fine motor, and cognitive skills (Parent Ex. 13 at pp. 9-14). The student's academic goals focused on early reading and mathematics skills such as producing sounds associated with symbols; blending a sound with an ending to produce a rhyming word; decoding sound-regular words; differentiating all from none; receptively identifying and labelling examples of addition; representing a number of objects with a written numeral; and saying the next number in a sequence (*id.* at pp. 9-10). To address the student's speech-language needs, the IEP included goals directed at answering questions using statements of at least five words; requesting materials from a peer to accomplish a task; labeling categories for groups of everyday items; identifying and using basic linguistic concepts (small/large, first/last) by identifying and labeling pictures; using adjectives to describe objects; matching items; and describing actions using the correct pronoun and preposition (*id.* at pp. 11-13). Additionally, to address the student's social/emotional needs, the CSE included a goal that focused on identifying and appropriately using a coping skill to maintain appropriate school behavior when the student expressed negative emotions at school (*id.* at p. 12). Furthermore, each annual goal included a method (i.e., checklist completion, work samples), schedule (i.e., weekly), and criteria (i.e., 3 out of 5 trials) to measure the student's progress toward the goal (*id.* at pp. 9-14).

Based on the above, the hearing record supports a finding that the annual goals and short-term objectives in the July 2013 IEP targeted and appropriately addressed the student's identified areas of need and were measurable (see, e.g., *D.A.B.*, 973 F. Supp. 2d at 359-60).

3. Consideration of Special Factors—Interfering Behaviors

On appeal, the parent argues that the district failed to adequately address the student's behavioral needs because it did not conduct an FBA or develop and implement a BIP pursuant to State regulations and that the July 2013 IEP did not contain sufficient social/emotional/behavioral goals. A review of the hearing record does not support the parent's contentions.

Initially, the minutes of the June 2013 CSE meeting reflect that the student was making progress and was "not a behavior problem" in his BOCES program (Parent Ex. 13 at p. 2). The student was reported to be able to accept limits set for him, did not demonstrate aggressive behavior towards others at school, and was able to be easily redirected and refocused (*id.*). When the CSE reconvened in July 2013, it noted that although the student was demonstrating maladaptive behaviors at home, his overall behavior had improved and he was not demonstrating behaviors as frequently (*id.*). Consequently, the July 2013 CSE determined that the student did not require a BIP because his behavior was controlled through behavioral interventions and the support of a teaching assistant (*id.* at p. 8). In any case, the district school psychologist testified that the same strategies that were implemented in the student's home-based program were used in school, such as being alert to signs of problem behaviors, offering the student a break, moving things away from him, and having him sit in a chair until calm (Tr. pp. 217-19). Furthermore, the psychologist testified that the student engaged in a minimal level of interfering behaviors during the 2012-13 school year (Tr. pp. 249-50). The parent also testified by affidavit that, while the

student's tantrums persisted in severity in the home during the 2012-13 school year, they decreased in frequency and the student exhibited less aggression and engaged in fewer self-injurious behaviors (Parent Ex. 38 at pp. 14, 15-16).

To address the student's social/emotional and behavioral needs, the July 2013 CSE recommended an 8:1+2 special class placement which provided a small teacher to student ratio with minimal distractions, utilized ABA methodology throughout the day, provided high rates of reinforcement for on-task behavior, and constant repetition, modeling, and consistency (Tr. p. 74; Parent Ex. 13 at pp. 8, 14). Although the parent is correct that the July 2013 IEP contained only one social/emotional/behavioral goal, which addressed identifying and appropriately using coping skills to maintain acceptable school behavior, and a speech-language goal that addressed sharing materials with peers, the July 2013 IEP included additional supports to address the student's needs including a 1:1 teaching assistant as needed throughout the day, weekly small group counseling, and 10 hours per week of home-based ABA services (Parent Ex. 13 at pp. 14-15).

To the extent that the parent alleges that the district did not adequately address the increase in the student's behavioral needs during the 2013-14 school year, as noted previously, the hearing record shows that, in January 2014, the district developed a BIP for the student (Dist. Ex. 33). The January 2014 BIP—consistent with State regulations mentioned above and contrary to the parent's allegations—identified the following interfering behaviors: hitting tables or objects (property destruction), possibly hitting people (aggression), and throwing objects; self-injurious behaviors including biting his hand and hitting his head; vocal tantrums; and atypical visual behavior consisting of looking at items out of the side of his eyes, accompanied by vocalizations and hand movements (*id.* at pp. 2-4). The January 2014 BIP further noted that because the school day was highly structured and programmed, the student transitioned to many activities that led to desirable outcomes for him (*id.* at p. 1). It was also noted that due to the relatively low frequencies and number of days on which the student exhibited serious behavior problems in school, non-contingent reinforcement was used on an informal basis in school (*id.*).

Based on the foregoing, the hearing record supports the IHO's conclusion that the July 2013 IEP adequately addressed the student's behavioral needs.

4. Home-Based ABA Services

The parent claims that the IHO erred in finding that it was appropriate for the July 2013 CSE to recommend a reduction in the student's home-based ABA services from 15 hours to 10 hours per week because the student made progress.

Initially, progress, although an important factor in determining whether a student is receiving educational benefit, is not dispositive of all claims brought under the IDEA (see *M.S. v. Bd. of Educ.*, 231 F.3d 96, 103-04 [2d Cir. 2000], abrogated on other grounds by *Schaffer v. Weast*, 546 U.S. 49 [2005]). The goal of the IDEA is to provide opportunities for students with disabilities to access special education and related services that are designed to meet their needs and enable them to access the general education curriculum to the extent possible (20 U.S.C. §§ 1400[d]; 1414[d][1][A]). The IDEA provides no guarantee of any specific amount of progress, so long as the district offers a program that is reasonably calculated to enable the student to receive

educational benefits (Rowley, 458 U.S. at 206-07; R.E., 694 F.3d at 189-90; M.H., 685 F.3d at 245; Cerra, 427 F.3d at 192).

Here, the hearing record supports a determination that the 10 hours per week of home-based services recommended in the July 2013 IEP was reasonably calculated to enable the student to receive educational benefits. First, an April 2013 progress report from the behavioral analyst indicated specific gains in overall language, cognitive and executive functioning, social and adaptive skills, and in the student's abilities to communicate, remain in play for extended periods of time, and expand repertoire of play (Parent Ex. 16 at p. 5). Next, the report of the student's progress toward the goals and objectives contained in the May 2012 IEP indicated that the student had made some progress toward or achieved most of his goals (Parent Ex. 14 at pp. 2-11). Additionally, the parent testified by affidavit that the student showed overall improvement (Parent Ex. 38 at p. 17).

The district supervisor of special education for out-of-district placements testified that home-based services were put in place to enable the student to be successful in school, and the goal of home-based services was for the parent and student to become independent (Tr. pp. 477-78). The April 2013 progress report from the behavioral analyst identified the student's maladaptive behaviors in the home as the "main area of concern" targeted by the home-based ABA services, as well as "generalization of the school academic goals to the home environment" (Parent Ex. 16 at p. 1).

In this regard, and while it is understandable that the parents may desire greater educational benefits through the auspices of special education, a district is not obligated to provide for services to maximize a student's educational opportunity (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Moreover, several courts have held that the IDEA does not require school districts as a matter of course to design educational programs to address a student's difficulties in generalizing skills to other environments outside of the school environment, particularly in cases in which it is determined that the student is otherwise likely to make progress in the classroom (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1152-53 [10th Cir. 2008]; Gonzalez v. Puerto Rico Dep't of Educ., 254 F.3d 350, 353 [1st Cir. 2001]; Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1293 [11th Cir. 2001]; JSK v. Hendry County Sch. Bd., 941 F.2d 1563, 1573 [11th Cir. 1991]; see also Walczak, 142 F.3d at 132 [stating that the "norm in American public education is for children to be educated in day programs while they reside at home and receive the support of their families"]; Application of the Dep't. of Educ., Appeal No. 12-086). Here, while the home-based ABA services were originally added to the student's educational program at the parent's behest and in response to her concerns about the student's lack of progress in the district TEACCH program (see Parent Ex. 38 at pp. 6-7), as the district ultimately acceded to the parent's request for a school program that utilized the ABA methodology (albeit, not the 1:1 discrete trial variation that the parent preferred) and increased the weekly hours of the home-based ABA on what was originally intended to be an "interim" basis in response to the parent's concerns (see Parent Exs. 21 at p. 2; 23 at p. 2), and as the student was achieving progress in the school environment, as described above, it was reasonable for the CSE to decrease the number of hours of home-based ABA services in such a gradual manner. Thus, the evidence in the hearing record supports the IHO's finding that the student would be receive educational benefits from 10 hours per week of home-based ABA services included in the July 2013 IEP.

D. 2014-15 School Year

1. The Student's Present Levels of Performance

The parent also argues that the August 2014 IEP did not accurately reflect the student's present levels of performance. As noted above, the parent did not assert this challenge in her due process complaint notice and, in any event, review of the hearing record does not support the parent's contention.

In addition to having access to the previously mentioned reports from the student's 2012-13 and 2014 school years, the August 2014 CSE reviewed several 2014 progress reports from the student's teachers and providers, the results of which continued to reflect significant delays in all areas of development (Parent Exs. 4 at pp. 3-6; 10).¹⁹ Based on a review of the hearing record, the behavioral analyst participated in the CSE's discussion regarding the student's academic functioning and social development reflected in the present levels of performance and management needs sections of the August 2014 IEP, and also in the discussion regarding the student's progress toward his annual goals and the appropriateness of the recommended goals for the 2014-15 school year (Parent Ex. 4 at pp. 1-2). According to annual progress report for the student's goals, the student met or made progress toward the majority of his goals during the 2013-14 school year (Parent Ex. 6). In addition, the student's home-based ABA providers indicated that although he exhibited deficits in many areas of development, he continued to make progress (Parent Ex. 10 at p. 1).

With respect to the student's then-current academic skills, the August 2014 IEP reflected the student was functioning on a kindergarten level in reading and mathematics (Parent Ex. 4 at p. 1). The present levels of performance indicated that the student receptively identified and labeled upper and lower case letters, identified sounds associated with letters, possessed a small Dolch sight word vocabulary, counted out a given amount of objects and separated out a given amount from a larger set, added two numbers without carrying, identified coins and bills, and wrote his first and last names independently (id. at p. 7).

The social development section of the IEP indicated that the student was pleasant and engaging, worked cooperatively with staff, maintained eye contact when interacting, and made spontaneous requests (Parent Ex. 4 at p. 8). Although the student was noted to engage in brief self-stimulating activities such as eye gazing and grimacing, he responded to verbal redirecting (id.). Additionally, the IEP reflected that over the course of the school year the student had "behavioral incidents" on ten days, during which his BIP was implemented, and he was usually redirected within a few minutes (id. at p. 1). Based on progress reports, the student made gains in behavior, and was responsive and easily redirected (id.).

Thus, based on the above, the evaluative information reviewed by the August 2014 CSE was accurately reflected in the student's present levels of performance on the student's August

¹⁹ Additional reports and evaluations available to the August 2014 CSE were not included in the hearing record (Parent Ex. 4 at p. 3).

2014 IEP (compare Parent Ex. 4 at pp. 6-8, with Parent Ex. 6, and Parent Ex. 10 at pp. 1-2)²⁰ (P.G., 959 F. Supp. 2d at 511-12).

2. Annual Goals and Short-Term Objectives

The parent asserts that the August 2014 IEP did not contain appropriate annual goals and short-term objectives to address the student's needs that were both specific and measurable. As set forth below and in light of the legal standards previously set forth, the evidence in the hearing record does not support the parent's contentions.

The August 2014 IEP included a total of 18 annual goals and corresponding short-term objectives that addressed the areas of reading, writing, mathematics, speech-language, social/emotional, and motor development (Parent Ex. 4 at pp. 9-13).

Academic goals focused on skills such as increasing sight word repertoire, spelling 2-3 letter words, capitalizing the first word in a sentence and the first letters in his name, understanding subtraction, and counting to 100 by tens (Parent Ex. 4 at pp. 9-11). Speech-language goals focused on expanding utterances and responses to questions, comprehending and using possessive and personal pronouns, using correct speaker-listener responsibilities during conversational speech, and using vocabulary related to grade level content area curriculum (id. at pp. 11-12). Motor goals focused on printing with correct size, spacing and orientation to the line, and operating a computer or other communication device to perform a variety of functions to assist in communication (id. at p. 13). To address the student's social/emotional needs, a goal was included that focused on identifying and appropriately using coping skills to maintain appropriate school behavior when the student expressed negative emotions at school (id. at p. 12). Additionally, each annual goal included a method (i.e., work samples), schedule (i.e., by the end of each marking period), and criteria (i.e., 85% success on 3 consecutive occasions) to measure the student's progress toward the goal (id. at pp. 9-13).

Based on the above, and in the absence of any specific arguments asserted by the parent, the hearing record supports a finding that the annual goals and short-term objectives in the August 2014 IEP targeted and appropriately addressed the student's identified areas of need and were measurable (see, e.g., D.A.B., 973 F. Supp. 2d at 359-60).

3. Consideration of Special Factors—Interfering Behaviors

Although the parent argues that the August 2014 IEP only included one social/emotional goal which was insufficient to address the student's behavioral needs, the goal addressed the development of appropriate school behavior (Parent Ex. 4 at pp. 12-13). In addition, to address the student's behavioral needs the August 2014 IEP included a BIP; sensory breaks when needed to maintain attention and focus; direct assistance to maintain attention, engage in tasks, and negotiate social situations; weekly small group counseling; and a teaching assistant available as needed throughout the school day (id. at pp. 8, 9, 14). The August 2014 IEP also indicated that

²⁰ The hearing record includes a 2013-14 report showing the progress the student made toward his IEP annual goals for all four quarters of the school year, which appears to be the document reflected as the June 26, 2014 progress report that was used to develop the August 2014 IEP (compare Parent Ex. 4 at p. 3, with Parent Ex. 6).

the student required a BIP to address his aggressive, self-injurious, and vocal/visual behaviors (id. at p. 9).

Next, the parent argues that the student's January 2014 BIP, described above, was "utterly ineffective" and not implemented in accordance with the principles of ABA. When the CSE convened in August 2014, it was noted that the BIP was implemented when behavioral incidents arose, and the student was usually redirected within a few minutes (Parent Ex. 4 at p. 1).

The behavioral analyst described necessary components of a BIP that would comport to the principles of ABA (Tr. pp. 580-83). The school psychologist testified that the district developed the January 2014 BIP with input from the behavioral analyst so that the interventions being used in the home would also be used in school (Tr. pp. 215-16; Dist. Ex. 33). He stated that the BIP that was developed was effective at handling the student's problem behaviors, which is reflected in a May 2014 behavioral summary, which cited low frequencies of behavior and 78 percent of days with no episodes of problem behavior, as well as indicating that the student's aggressive behaviors toward others had ceased in school (Tr. p. 213; Dist. Ex. 31 at pp. 1-2). The parent indicated that the student's behaviors increased substantially during the 2014-15 school year (see Parent Ex. 38 at pp. 20). However, the IDEA guarantees access to an appropriate education, not specific results (see Rowley, 458 U.S. at 192; M.H., 685 F.3d at 245; Cerra, 427 F.3d at 195; Walczak, 142 F.3d at 132) and based on the foregoing, the student's IEP and BIP were appropriate for the student at time they were developed and implemented without substantial or material deviation from their content (see A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010]).

Accordingly, the hearing record supports a conclusion that the January 2014 BIP, together with the supports and annual goal contained in the August 2014 IEP, were sufficient to address the student's interfering behaviors.

4. Home-Based ABA Services

On appeal the parent claims that the IHO erred in finding that it was appropriate to reduce the student's home-based ABA services to six hours per week because the student made progress during the 2013-14 school year. However, the hearing record supports a determination that six hours per week of home-based ABA services recommended in the August 2014 IEP were reasonably calculated to enable the student to receive educational benefits. First, the May 2014 assessment report from the behavioral analyst indicated that although the student exhibited deficits in many areas of development, he continued to make progress within his program (Parent Ex. 10 at p. 1). For example, the student was able to wait up to 24 hours for a highly desired item or activity with the use of visual schedules (id.). Next, the student's 2013-14 progress report for goals and objectives indicated that the student had made some progress or achieved most of his goals (Parent Ex. 6 at pp. 1-8). A January 2014 behavioral summary report indicated that the student had two or fewer instances of problem behaviors on 95 percent of school days, and exhibited no problem behaviors on 76 percent of school days (Dist. Exs. 31 at p. 1; 32 at p. 2). A May 2014 behavioral summary report indicated that problem behaviors continued to be low in frequency, with three or fewer episodes per day, and no problem behaviors on 78 percent of school days (Dist. Ex. 31 at p. 1). Thus, as the goal of the home-based ABA services was in part to enable the student to be successful in school (Tr. pp. 477-78), and for the additional reasons described above with

respect to the 2013-14 school year, the evidence in the hearing record does not support a finding that the student would be precluded from receiving educational benefits as a consequence of the further reduction in the April 2014 IEP of home-based ABA services.

VII. Conclusion

In summary, the evidence in the hearing record supports a finding that the district offered the student a FAPE for the 2012-13, 2013-14, and 2014-15 school years.

I have considered the parties' remaining contentions and find that I need not address them in light of my findings herein.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
July 3, 2015**

SARAH L. HARRINGTON
STATE REVIEW OFFICER