The University of the State of New York

The State Education Department
State Review Officer
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No. 15-097

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Lewis Johs Avallone Aviles, LLP, attorneys for petitioners, Jennifer M. Frankola, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Theresa Crotty, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request for independent educational evaluations and to be reimbursed for their son's tuition costs at the Cooke Center for Learning and Development ("Cooke") for the 2013-14 school year and the costs of a privately-obtained evaluation. Respondent (the district) cross-appeals from the IHO's determinations adverse to it. The appeal must be sustained in part. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The student presents with global delays in the areas of academics, language development, social/emotional functioning, attention, and fine and gross motor skills (Dist. Exs. 12 at pp. 1-3; 16; 22; 24; 25; 26; Parent Ex. I). Before attaining school age, the student received special education and related services through the Early Intervention Program and the Committee on Preschool Special Education (CPSE) (Tr. pp. 760-62; Dist. Exs. 22 at pp. 1-2; 26 at p. 1; Parent Exs. B; I at p. 1). On March 4, 2013, a CSE convened to develop an IEP for the student for the 2013-14 (kindergarten) school year (Dist. Ex. 6; see Dist. Ex. 3). Finding that the student was eligible for special education and related services as a student with an other health-impairment, the CSE recommended a general education classroom with integrated co-teaching (ICT) services in math, English language arts, and social studies in a community school with a 1:1 crisis

management paraprofessional (Dist. Ex. 6 at pp. 1, 10-11).[1] In addition, the CSE recommended related services consisting of individual occupational therapy (OT), group OT, individual physical therapy (PT), individual speech-language therapy, and group speech-language therapy (id. at p. 10). The CSE also recommended modifications and resources to address the student's management needs, as well as 25 annual goals in the areas of academics, speech-language, OT, and PT (id. at pp. 3-9). Although the March 2013 IEP indicated that the student did not need a behavioral intervention plan (BIP), the district prepared a functional behavioral assessment (FBA) and BIP after the March 2013 CSE meeting (Dist. Exs. 6 at p. 3; 8; 9).

On June 4, 2013, the parents visited the public school site to which the district assigned the student to attend, and by letter dated June 7, 2013, the parents objected to the recommended educational placement and assigned public school site (Parent Ex. K at p. 1). The parents indicated that they expressed their concerns about the ICT services and related services recommendations during the March 2013 CSE meeting but that "nothing was changed" (id. at p. 2). With respect to the assigned public school site, the parents raised concerns that there were too many students in the ICT class setting, the student required a smaller student-to-teacher ratio to receive sufficient support, and that a paraprofessional would not be qualified to meet their son's needs (id. at p. 1). The parents objected to the larger student-to-teacher ratio during music, art, gym, lunch, and recess (id. at pp. 1-2). The parents also objected to the size of the overall student population (id. at p. 2). The parents asserted that the functional grouping in the ICT class they observed was inappropriate, and that the overall program would not meet the student's needs (id.). The parents further objected to the lack of a sensory gym at the assigned public school (id.). The parents requested another program recommendation and public school placement and stated that they would consider other public school programs and placements as long as they were appropriate (id.).

On June 17, 2013, the CSE reconvened and recommended the same program as set forth in the March 2013 IEP, with no substantive changes (Dist. Ex. 12).[2] The resulting IEP indicated that the CSE had also considered a special class placement but rejected it as "too restrictive" (id. at p. 15). By letter dated July 18, 2013, the parents objected to the educational placement recommendation in the June 2013 IEP and the assigned public school (Parent Ex. E at p. 1). The parents also set forth their belief that the student required a 12 month program in a smaller environment (id.). The parents also attached a "medical accommodation form for special education transportation" (id. at pp. 1-3).

By letter dated August 19, 2013, the parents rejected the IEP as inappropriate and advised the district that they had placed their son at Cooke and would be seeking tuition reimbursement (Parent Ex. C at p. 1). The parents also sought "door to door roundtrip transportation" (id.).

A. Due Process Complaint Notice

By due process complaint notice dated September 18, 2013, the parents requested an impartial hearing and alleged that the district denied the student a FAPE for the 2013-14 school

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

[2] However, although the June 2013 IEP continued to indicate that the student did not require a BIP, the summary of the IEP indicated that one had been developed (Dist. Ex. 12 at p. 15). Additionally, documents in the hearing record indicate a BIP was finalized on June 18, 2013 (Dist. Exs. 8; 9; 28 at pp. 1-2; 29 at p. 1).

year (Parent Ex. A at p. 1). The parents asserted that the March 2013 and June 2013 IEPs were both procedurally and substantively defective (id. at pp. 2, 8).[3] The parents alleged that the district failed to perform necessary and appropriate evaluations in order to accurately assess the student, relied solely on an inadequate social history and classroom observation report, and did not meaningfully consider private evaluations or the parents' concerns in the development of the IEP (id. at pp. 9, 11). The parents argued that the IEP did not identify or address the student's management needs or medical needs (id. at p. 7). The parents contended that the district failed to consider a New York State approved non-public school placement and that the recommendation for a general education placement with ICT services was inappropriate and a reflection of impermissible predetermination and district policy (id. at pp. 9, 11). The parents further alleged that the district failed to provide the student with assistive technology, supplementary aides and services, or program modifications or accommodations, testing accommodations, or supports for school personnel (id. at pp. 10-11). The parents next argued that the June 2013 IEP's goals were vague, did not include adequate evaluative criteria or methods of measurement, were not appropriate to meet the student's needs, and were not individually tailored to allow the student to make meaningful progress (id. at p. 10). The parents asserted that the district failed to complete an FBA and to develop an adequate BIP (id. at p. 11). The parents also argued that the related services recommendations contained in the IEP were not appropriate and that the IEP did not offer parent counseling and training (id. at pp. 10, 12). The parents asserted that the district failed to recommend a 12-month program which the student required to prevent regression (id. at p 10). The parents also alleged that the district failed to identify or address the student's need for special education transportation (id. at p. 11). The parents alleged that the assigned public school was inappropriate and would not provide the necessary amount of supervision or appropriately group the student (id. at pp. 6-8). Finally, the parents asserted that the district failed to provide them with appropriate prior written notice of the recommendation (id. at p. 11).[4] The parents invoked the student's right to pendency (stay put) services, sought reimbursement for the unilateral placement and private evaluations, requested special education transportation of the student to Cooke, and requested additional independent educational evaluations (id. at pp. 12-14).

B. Impartial Hearing Officer Decision

The parties convened for an impartial hearing which commenced on September 25, 2013 and concluded on April 25, 2014 after nine days of proceedings (Tr. pp. 1-874).[5] After testimony concluded and prior to the issuance of a final decision, the IHO recused himself and another IHO was assigned to the matter; the parties agreed that the hearing record was complete and that the

[3] As the June 2013 IEP superseded the March 2013 IEP, and the arguments raised against the IEPs were largely identical (compare Parent Ex. A at pp. 2-6, with Parent Ex. A at pp. 8-12), my analysis focuses on the June 2013 IEP.

[4] The parents' due process complaint notice raised additional claims that they do not assert on appeal, including that the district failed to inform the parents of their right to request independent educational evaluations, recommend a social skills group, or provide the student with a transition plan (Parent Ex. A at pp. 9-11).

[5] The first four days of proceedings were devoted to the student's placement during the pendency of the impartial hearing and other procedural matters; the IHO issued an interim determination on pendency, dated November 15, 2013, which denied the parents' request for Cooke to serve as the student's pendency placement (Interim IHO Decision; Tr. pp. 1-106).

newly-assigned IHO would issue a decision on the hearing record already developed (IHO Decision at p. 4; Tr. pp. 878-81).[6]

The IHO found that the district offered the student a FAPE for the 2013-14 school year (IHO Decision at p. 12). The IHO determined that the IEP reflected the student's need and abilities and provided appropriate goals (id. at p. 12). With respect to the student's interfering behaviors, the IHO found that the CSE's recommendation for the 1:1 crisis management paraprofessional was made to address the student's behavioral needs and therefore the lack of a valid FBA or BIP did not deny the student a FAPE (id. at pp. 9-10). With regard to the parents' argument that the district erred in failing to recommend a continuation of the student's preschool program, the IHO found that the CSE was not required to mirror the recommendations set forth in the student's preschool IEP and the CSE considered the student's performance when making its recommendation (id. at pp. 11-12). The IHO also rejected the parents' claim of predetermination, finding that the recommendation for ICT services and related services, along with an individual paraprofessional, was appropriate (id. at p. 12). The IHO found that the lack of 12-month services in the June 2013 IEP did not deny the student a FAPE because the student received services during the summer of 2013 through his preschool IEP and there was no evidence that the student exhibited the substantial regression required to be entitled to 12-month services (id. at p. 11). Having found that the district offered the student a FAPE, the IHO denied the parent's claim for relief (id. at p. 14). With respect to alternative findings, the IHO found that the unilateral placement met the student's needs and equitable considerations did not bar the parents' request for reimbursement (id. at pp. 12-13).

IV. Appeal for State-Level Review

The parents appeal, contending that the IHO erred in finding that the district provided the student a FAPE for the 2013-14 school year. Initially, the parents contend that the district's recommendation was predetermined and based on district policy. The parents allege that the district failed to provide them with prior written notice. The parents also assert that the multiple procedural violations had the cumulative effect of a denial of a FAPE. With regard to the program developed by the CSE, the parents assert that the IEP did not evaluate or address all of the student's needs and failed to provide appropriate goals. With respect to the student's interfering behaviors, the parents argue that while the IHO was correct in finding that the district failed to develop a valid FBA or BIP, the IHO erred in finding that a 1:1 paraprofessional was an appropriate substitute to address the student's behavioral needs and that the IEP did not address the student's needs. With respect to the educational placement recommendation, the parents argue that the IHO erred in determining that a general education placement with ICT services and a 1:1 crisis management paraprofessional was appropriate for the student because the student required more instructional support than could be offered in such a placement and would not have made progress in such a placement. The parents claim that IHO erred in finding that the student did not require a 12-month program because the student's needs, history, and the potential for substantial regression supported the necessity for such services. The parents assert that the student requires special education transportation. The parents also allege that the IHO failed to address all of the issues presented.[7] With respect to the assigned public school site, the parents assert that the school was inappropriate

[6] All further references to "the IHO" are to the IHO assigned after recusal of the initial IHO assigned to the case.

[7] To the extent the parents do not raise arguments regarding issues not reached by the IHO, they have effectively waived their right to have these issues considered on review by not identifying them with specificity or asserting any basis on which their claims reflect a denial of a FAPE to the student.

because it would have been too large and overstimulating for the student.[8] The parents assert that the IHO's decision with respect to the appropriateness of the unilateral placement and equitable considerations should be upheld. The parents seek relief in the form of tuition funding, special education transportation, after school speech-language services, and reimbursement for independent educational evaluations already obtained and funding for further evaluations.

The district answers the parents' petition and interposes a cross-appeal. The district asserts that it was not required to provide the parents with prior written notice and any failure to provide any such notice did not impede the student's right to a FAPE, significantly impede the parents' opportunity to participate in the decision making process, or cause the deprivation of education benefits. The district argues that it offered an appropriate program and an IEP that reflected the student's needs and abilities. The district specifically contends that the June 2013 IEP contained appropriate goals that were developed based on the information contained in provider reports. The district alleges that the parents' allegations regarding the assigned public school should be rejected as impermissibly speculative. With respect to the parents' claim for special education transportation, the district asserts that the parents made no request for special education transportation at the CSE meeting and the hearing record did not establish a need for the same. The district contends that the parents' request for IEEs at public expense must be rejected because the parents did not adhere to the legal prerequisites to obtain public funding for IEEs. The district cross-appeals the IHO's finding that the FBA and BIP were inappropriate, asserting that the FBA was developed based on appropriate information in response to the parents' concerns. The district also contends that the FBA and BIP adequately addressed the student's behavioral needs.

The parents answer the district's cross-appeal, responding to the district's allegations and reasserting their arguments with respect to the FBA and BIP and their demand for relief.

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.

[8] The parents also contend that the school was inappropriate because it did not contain a sensory gym, did not provide adapted physical education, and did not provide after-school speech-language services; these claims were not raised in the due process complaint notice and will not be further addressed.

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. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20 [2d Cir. Aug. 19, 2008]).

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

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic,

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

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

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

VI. Discussion

A. CSE Process

1. Parent Participation/Predetermination

The parents contend that the district impermissibly offered an educational program based on a policy to maintain a student in "zone schools" and not based on the student's needs. The parents contend that the district denied the student a FAPE by denying him access to other educational options in the continuum of services. The parents also claim that the district significantly impeded their opportunity to participate in the decision making process, depriving the student of a FAPE.

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see T.F. v. New York City Dep't of Educ., 2015 WL 5610769, at *5 [S.D.N.Y. Sept. 23, 2015]; A.P. v. New York City Dep't of Educ., 2015 WL 4597545, at *8, *10 [S.D.N.Y. July 30, 2015]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *17 [E.D.N.Y. Aug. 19, 2013] [stating that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; P.K. v.

Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation"]; Sch. for Language & Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]). When determining whether a district complied with the IDEA's procedural requirements, the inquiry focuses on whether the parents "had an adequate opportunity to participate in the development" of their child's IEP (Cerra, 427 F.3d at 192).

Here, the record reflects that the parents were afforded an opportunity to participate in the development of the March 2013 and June 2013 IEPs. According to the school social worker (who also served as the district representative), school psychologist, and the parent, the parents were able to provide private evaluations to the CSE, namely, a November 2012 psychological evaluation and a February 2013 developmental pediatric report, and the CSE considered the private evaluations (Tr. pp. 138-39, 371-73, 819-820). Further, the CSE reviewed the evaluative information and answered any questions the parents raised (Tr. pp. 159-61, 166-72). According to the district representative, the CSE reconvened in June 2013 to address the parents' objections to the March 2013 IEP and to explain the CSE's reasoning for its recommendation (Tr. p. 164). The school psychologist testified that the annual goals were discussed and the parents had an opportunity to provide input on each (Tr. pp. 375-78). The parents testified that they were able to express their concerns regarding 12-month services, the student's behaviors, and the educational placement recommendation (Tr. pp. 786-87, 796, 834; Dist. Ex. 12 at p. 1-2). Although the CSE may not have incorporated some of the parents' suggestions into the IEP for the 2013-14 school year, the record sufficiently demonstrates that the parents had an opportunity to express their concerns and have input in the development of the IEP. Accordingly, the hearing record does not support the parents' contention that the district significantly impeded their opportunity to participate in the drafting of the June 2013 IEP (see S.W. v. New York City Dep't of Educ., 92 F. Supp. 3d 143, 158 [S.D.N.Y. 2015]; J.L. v. City Sch. Dist. of the City of New York, 2013 WL 625064, at *12 [S.D.N.Y. Feb. 20, 2013]).

With respect to the parents' assertion that the CSE predetermined the student's program recommendation, courts have determined that a key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *10-*11 [E.D.N.Y. Sept. 2, 2011]; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [E.D.N.Y. 2009], aff'd, 366 Fed. App'x 239 [2d Cir. 2010]).

The district representative testified that the CSE felt that a general education program with ICT services would be appropriate and provide sufficient support for the student (Tr. pp. 155-156, 176). The school psychologist also testified that the educational placement recommendation with the 1:1 paraprofessional was sufficiently supportive for this student (Tr. 409). The June 2013 IEP indicated "[g]eneral education does not meet [the student's] academic needs. An integrated co-teaching program, speech services, physical and occupational therapies along with a 1:1 paraprofessional to assist [the student] throughout the school day will help to address global delays. A special class in a special school is too restrictive" (Dist. Ex. 12 at p. 15). Once the CSE determined that a general education placement with ICT services along with a 1:1 paraprofessional and related services was appropriate, the district was not obligated to consider a placement with a smaller class size as the parents suggest (see, e.g., G.B. v. New York City Dep't of Educ., 2015 WL 7351582, at *10-*11 [S.D.N.Y. Nov. 5, 2015]; F.B. v. New York City Dep't of Educ., 2015 WL 5564446, at *9 [S.D.N.Y. Sept. 21, 2015]; B.K. v. New York City Dep't of Educ., 12

F.Supp.3d 343, 359 [E.D.N.Y. 2014] [indicating that "once the CSE determined that a 6:1:1 placement was appropriate for [the student], it was under no obligation to consider more restrictive programs"]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676 at *15 [explaining that "under the law, once [the district] determined . . . the least restrictive environment in which [the student] could be educated, it was not obligated to consider a more restrictive environment"]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *8 [S.D.N.Y. Mar. 19, 2013] [finding that "[o]nce the CSE determined that [the public school setting] would be appropriate for the [s]tudent, it had identified the least restrictive environment that could meet the [s]tudent's needs and did not need to inquire into more restrictive options "]; T.G. v. New York City Dep't of Educ., 973 F. Supp. 2d 320, 341-42 [S.D.N.Y. 2010]). Accordingly, the hearing record does not support the parents' contention that the program offered to the student was impermissibly predetermined.

2. Prior Written Notice

The parents allege that the district did not provide them with prior written notice in accordance with federal and State regulations. Although the failure to provide a prior written notice is a procedural violation, there was no denial of a FAPE in this instance.

Both State and federal regulations require a district to provide prior written notice any time a district proposes or refuses to "initiate or change the identification, evaluation, or educational placement of [a] child or the provision of FAPE to the child" (34 CFR 300.503[a]; 8 NYCRR 200.5[a]). In addition, a district must provide prior written notice of determinations made, the reasons for the determinations, and the parent's right to request additional assessments (8 NYCRR 200.5[a][3]; see 34 CFR 300.305[c], [d]; see also 34 CFR 300.503[b]). Prior written notice must also provide parents with a description of the actions proposed or refused by the district, an explanation of why the district proposed or refused to take the actions, a description of other options that the CSE considered and the reasons why those options were rejected, a description of other factors that were relevant to the CSE's proposal or refusal, a statement that the parent has protection under procedural safeguards and the means by which the parent can obtain a copy of the procedural safeguards, and sources for the parent to contact to obtain assistance in understanding these safeguards (8 NYCRR 200.5[a][3]; see 34 CFR 300.503[b]; 8 NYCRR 200.1[oo]). Although, the failure to provide a prior written notice is a procedural violation, procedural violations warrant tuition reimbursement only if the he parent can "articulate how a procedural violation resulted in the IEP's substantive inadequacy or affected the decision-making process" by impeding the student's right to a FAPE, significantly impeding the parent's opportunity to participate in the decision-making process, or caused a deprivation of educational benefits (M.W. v. New York Dept. of Educ., 725 F.3d 131, 139 [2d Cir. 2013]; R.E., 694 F.3d at 190).

Here the parents set forth the assertion that the district failed to provide them with a prior written notice without articulating how this alleged violation caused a substantive inadequacy in the student's IEP or affected their participation in the decision making process and the development of the IEP. Nonetheless, as set forth in the sections below, the June 2014 IEP provided a FAPE to the student and therefore the parent cannot establish that the district denied the student a FAPE or the June 2014 IEP caused a deprivation of educational benefits. Further the district provided the parents the opportunity to participate in the CSE process and have their objections heard. The hearing record reflects that after the March 2013 CSE meeting, the parents raised objections in a June 7, 2013 letter regarding the proposed educational placement and assigned public school site (Parent Ex. K at pp. 1-2). The CSE reconvened in June 2013 and maintained the recommendations set forth in the March 2013 IEP (Dist. Exs. 6; 12). In accordance with the regulations, the district

should have prepared a prior written notice with its reasoning for refusing to take action on the parent's objections and concerns at the June 2013 CSE meeting. However, while the failure to provide prior written notice is a procedural violation, it did not in this instance impede the student's right to a FAPE, significantly impede the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or cause a deprivation of educational benefits (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). The CSE reconvened in June 2013 in response to the letter from the parents in which they indicated that they felt the recommended placement and ICT setting were not appropriate for the student (Parent Ex. K at p. 1-3). The hearing record reflects that the June 2013 CSE discussed the parents' objections and concerns, and explained the district's reasoning for its recommendations (Tr. pp. 164-70). The hearing record further indicates that the parents brought counsel to the June 2013 CSE meeting and were able to express their concerns (Tr. pp. 795-98). The record reflects that the parents were afforded an opportunity to participate in the decision making process despite the lack of a prior written notice and as discussed below the student was not deprived of educational benefit.

B. 2013-14 School Year

1. Evaluative Information and Present Levels of Performance

The parents contend on appeal that the March 2013 and June 2013 IEPs did not adequately describe the student's level of intellectual functioning or expected rate of progress.[9] A review of the June 2013 IEP in conjunction with the evaluative information available to the June 2013 CSE demonstrates that the CSE carefully and accurately described the student's present levels of academic achievement, social development, and physical development, and further, that the description of the student's needs was consistent with the evaluative information.[10]

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 of the student; the student's strengths; the concerns of the parents; and 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 special factors set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

A review of the hearing record indicates that in developing the IEP for the 2013-14 school year, the CSE had available to it and considered a January 2012 student progress report, a

[9] The parents did not challenge the present levels of performance in their due process complaint notice other than to allege that the district failed to identify the student's management needs and medical needs, and the claim as raised in the petition is not properly before me (E.H. v. New York City Dep't of Educ., 611 Fed. App'x 728, 730 [2d Cir. May 8, 2015]; F.B. v. New York City Dep't of Educ., 2015 WL 5564446, at *18-*20 [S.D.N.Y. Sept. 21, 2015]). A brief discussion of the evaluative information available to the CSE and the student's needs is provided as illustrative for purposes of the remainder of this decision.

[10] When the CSE reconvened in June 2013, it adopted the present levels of performance and goals developed by the March 2013 CSE (compare Dist. Ex. 6 at pp. 1-9, with Dist. Ex. 12 at p.1-9). There were no new evaluations conducted or progress notes issued between March and June 2013, and the hearing record does not show the June 2013 CSE considered evaluative information that was unavailable to the March 2013 CSE.

November 2012 classroom progress report, a November 2012 private psychoeducational evaluation, a November 2012 PT progress report, a November 2012 speech-language progress report, a December 2012 OT progress report, a December 2012 social history update, a January 2013 classroom observation, a January 2013 parent survey, and a February 2013 developmental pediatric report (Tr. pp. 138-39, 342, 371-72, 422; Dist. Exs. 4; 16; 17; 21; 22; 23; 24; 25; 26; 28 at p. 2-3; Parent Ex. I). A district social worker, who attended both the March 2013 and June 2013 CSE meetings, also testified that the parents provided updated medical information (Tr. p. 139; Dist. Exs. 7; 13).[11]

The description of the student in the present levels of performance of the June 2013 IEP was largely drawn from the November 2012 classroom progress report, completed by the student's preschool classroom teacher (compare Dist. Ex. 16, with Dist. Ex. 12 at pp. 1-3). Specifically, the June 2013 IEP indicated that the student presented with global delays, limited attention to task, decreased safety awareness, and poor motor planning and that he required a 1:1 paraprofessional to provide adult facilitation and assistance throughout the day (compare Dist. Ex. 16 at p. 1, with Dist. Ex. 12 at p. 1). In accordance with the November 2012 classroom progress report, the June 2013 IEP indicated that the student exhibited many emerging academic skills; however, he continued to have difficulty with understanding patterns and sequence (id.). Also consistent with the November 2012 classroom progress report, the June 2013 IEP described that the student: identified all capital letters; consistently tracked objects and numbers while counting; rote counted up to 30 independently with minimal errors; displayed one-to-one correspondence with manipulatives; understood "all" and "none"; identified and matched colors; understood size concepts; identified basic shapes; identified functions and categories of objects; answered "yes/no" questions pertaining to objects; spelled his name; and identified days of the week and months of the year (id.). Furthermore, with regard to literacy, the June 2013 IEP, reflected the student's abilities as outlined in the November 2012 classroom progress report, notably, that the student exhibited strong skills, and was able to anticipate and repeat recurring events in a story; utilize props and answer simple "wh" questions about the story; point out objects and characters; and "read" stories by recall independently (id.). The June 2013 IEP, consistent with the November 2012 classroom progress report, also indicated that the student required "constant repetition reinforcement and one-to-one guidance when participating in all activities," that he had difficulty in unstructured activities to maintain and follow directions; and that he often exhibited impulsive behaviors, but was easily calmed (id.). The June 2013 IEP also indicated that the student needed adult facilitation and models to attend and play appropriately during unstructured play (id.). As noted in the November 2012 classroom progress report, the June 2013 IEP, stated that the student had strong recall skills, and that when presented with a new book, game, song, or play scheme, would "re-enact the newly learned skills the next day" (id.). In addition, the June 2013 IEP also indicated that the student used photographs and songs to transition throughout the day (id.).

The June 2013 IEP present levels of performance, in accordance with the November 2012 classroom progress report, indicated that the student's play skills were improving (compare Dist. Ex. 12 at p. 2, with Dist. Ex. 16 at p. 2). Specifically, the IEP indicated that the student would participate in multi-step pretend play skills with adult facilitation; act out a play schema of up to three steps; and would play alongside peers but needed assistance in sharing and trading (id.). Additionally, the June 2013 IEP, indicated that the student could play simple games and would

[11] The district social worker attended both the March 2013 and the June 2013 CSE meetings as the district representative (Dist. Exs. 7; 13).

pretend to sing into a microphone and talk into a phone (id.). As noted in the November 2012 classroom progress report, the June 2013 IEP indicated that the student's play skills were self-directed and he did not yet initiate play, and that he needed "maximum encouragement for parallel or interactive play" as well as adult facilitation for "passing or taking turns with toys he likes" (id.). Furthermore, the June 2013 IEP also indicated that the student made significant progress with regard to his language skills, that the student was inquisitive and would ask questions about the day's schedule, and he could follow simple one or two step directions with repetitions of the directions (id.).

With regard to the student's social/emotional skills, the June 2013 IEP, consistent with the November 2012 classroom progress report, described the student as "an excitable and curious delight to have in class," that he had a "sweet and humorous disposition," and he "look[ed] forward to greeting the school and peers every morning" (compare Dist. Ex. 12 at p. 2, with Dist. Ex. 16 at p. 2). The June 2013 IEP further indicated, that the student would "cry when he is in pain or when someone t[ook] away his favorite guitar"; however, he was easily consolable with simple verbal or physical affection (id.). Additionally, the June 2013 IEP described that the student did not tantrum or protest, and instead would calmly verbalize "no thank you," and that when told "no" the student would immediately apologize (id.). The June 2013 IEP indicated that the student could identify all basic emotions, including his own (id.).

Consistent with the November 2012 PT progress report, the June 2013 IEP indicated that the student had shown improvement in attending to motor tasks within the OT/PT gym (compare Dist. Ex. 24 at p. 1, with Dist. Ex. 12 at p. 2). Additionally, the June 2013 IEP reflected that the student significantly increased his use of language during PT sessions, and continued to demonstrate appropriate eye contact (id.). Further, the June 2013 IEP noted based on the November 2012 PT progress report that the student had shown significant progress in his gross motor skills; however, he continued to display significant delays which were affected by his decreased strength, graded muscle control, balance, and motor coordination (id.).

Moreover, the June 2013 IEP also reflected the parents' concerns regarding the student's global deficits in all academic areas, his need for constant supervision for focus, safety and impulsivity, and the need for a 1:1 paraprofessional to assist with physical transitions because the student had been known to "run off on his own" (Dist. Ex. 12 at p. 2).[12]

As set forth above, the June 2013 CSE reviewed appropriate and relevant evaluative information and ascertained the student's present levels of performance in order to develop an appropriate program based on the student's individual needs; therefore, the parents' contention that the IEP failed to provide an adequate description of the student's needs is without merit.

2. Annual Goals

Turning to the annual goals, the parents allege that the June 2013 IEP failed to provide appropriate goals, and that the annual goals were vague and not individually tailored to the student's identified needs. However, a review of the hearing record showed that the June 2013

[12] In addition to the foregoing evaluative information, the June 2013 CSE was in possession of evaluative information indicating the student made progress with regard to his speech-language development, attention and focus, and fine and gross motor skills, and exhibited age-appropriate math and reading skills (Dist. Exs. 16 at pp. 1-2; 21 at p. 1; 22 at p. 4; 23 at p. 1; 25 at p. 1; 26 at p. 2).

CSE developed appropriate annual goals by which to address the student's identified needs, and that the annual goals included the requisite evaluative criteria, evaluation procedures, and schedules to measure progress.

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]).

Upon review of the evidence in the hearing record, and as identified in the June 2013 IEP, the student exhibited needs in the areas of academics, social/emotional functioning, attention, fine and gross motor skills, language development, and play skills (Dist. Exs. 12 at p. 1-3; 16 at pp. 1-2; 21 at pp. 1-2; 22 at pp. 1-4; Parent Ex. I at pp. 1-8). The June 2013 contains approximately 25 annual goals which were developed to improve the student's academic, attention, turn-taking, language, oral motor, play, fine motor, and gross motor skills (Dist. Ex. 12 at pp. 4-9). Each goal provided criteria for measurement to determine if the goal had been achieved (e.g., 80% accuracy), the method of how the student's progress would be measured (e.g., teacher/provider observations), and a schedule of when progress toward the goals would be measured (e.g., one time per quarter) (id.).[13] Specifically, with regard to academics, the June 2013 IEP contains annual goals designed to improve the student's ability to sort objects; complete a five piece picture sequence; complete an "A/B pattern strip"; give or select objects upon request; match pictures to the corresponding number; match sounds to letters; identify capital and lowercase letters; show one-to-one correspondence of words when reading large print books; and identify characters and setting (id. at pp. 4-6). Additionally, the June 2013 IEP contained academic goals designed to improve skills related to focus and attention, completing arrival procedures independently and participating in turn-taking activities (id. at p. 6). With regard to speech and language, the June 2013 IEP contained goals designed to improve the student's oral musculature, symbolic play skills, expressive language content, pragmatic language skills, and his attention to "ongoing verbal events" (id. at pp. 7-8).[14] The June 2013 IEP contained goals designed to improve the student's fine motor skills by improving his ability to use a static tripod grasp, to cut across a standard sheet of paper and to remain seated to perform table top tasks (id. at p. 8). Finally, the June 2013 IEP contained goals designed to improve the student's gross motor skills by improving his ability to jump forward with his feet together, jump down from a 16 inch high bench, descend one flight of stairs, balance on one foot for four seconds, and rise onto his tiptoes with his hands held overhead (id. at pp. 8-9).

[13] One of the PT goals did not include appropriate criteria for measurement (Dist. Ex. 12 at p. 9); however, this minimal procedural violation does not rise to the level of a denial of a FAPE in this instance, where the goal was targeted at an acknowledged need and the IEP otherwise addressed the student's needs through appropriate goals (J.L., 2013 WL 625064, at *13).

[14] A comparison of the speech and language annual goals contained in the June 2013 IEP and the November 2012 speech language pathology report shows that the goals were taken from the progress comments sections under each suggested annual goal (compare Dist. Ex. 12 at pp. 7-8, with Dist. Ex. 25 at pp. 1-2).

With regard to the parents' claim that the June 2013 IEP did not contain specific goals to address the student's interfering behaviors, a review of the IEP present levels of performance indicates that the student's inappropriate behaviors consisted primarily of limited attention to task, difficulty with focusing, and decreased safety awareness (Dist. Exs. 12 at p. 1; 16 at p. 1). Further review of the June 2013 IEP shows that the CSE developed approximately five annual goals designed to improve the student's social/emotional functioning, pragmatic language skills, and ability to attend and focus (see Dist. Ex. 12 at pp. 6-8). Specifically, the June 2013 IEP contains goals designed to improve the student's ability to focus and attend to a teacher with minimal redirection, to complete arrival procedures with no reminders, to participate in turn-taking activities with fading teacher prompts, to improve his attention to ongoing verbal events in academic contexts and in play, and to remain seated to perform table top tasks for 7 to 10 minutes with auditory distractors (id.).

As the hearing record demonstrates that the June 2013 CSE developed annual goals that met the student's academic, social/emotional, attention, fine and gross motor, language, and play skills needs, the parents' contentions with respect to the annual goals are without merit.

3. Special Factors—Interfering Behaviors

Next, I turn to the parents' contention that the June 2013 IEP did not address the student's interfering behaviors and that the district should have conducted an FBA and developed an BIP.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also R.E., 694 F.3d at 190-91; A.C., 553 F.3d 165 at 172).

To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]). In New York State, policy guidance explains that "the IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address," among other things, a student's interfering behaviors, "in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 22, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP," and if necessary, "a "student's need for a [BIP] must be documented in the IEP" (id.). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student (8 NYCRR 200.4[d][3][i], 200.22[a], [b]).

State regulation defines an FBA as the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and

> include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it

(8 NYCRR 200.1[r]).

According to State regulations, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]). The Second Circuit has explained that, when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F3d at 190). The Court also noted that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE," but that in such instances particular care must be taken to determine whether the IEP adequately addresses the student's problem behaviors (id.).

With regard to a BIP, the special factor procedures set forth in State regulations further provide that the CSE shall consider the development of a BIP for a student with a disability when:

> (i) the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions; (ii) the student's behavior places the student or others at risk of harm or injury; (iii) the CSE . . . is considering more restrictive programs or placements as a result of the student's behavior; and/or (iv) as required pursuant to" 8 NYCRR 201.3

(8 NYCRR 200.22[b][1]).

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]).[15] Neither the IDEA nor its implementing regulations require that the elements of a

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

student's BIP be set forth in the student's IEP ("Student Needs Related to Special Factors," Office of Special Educ. [Apr. 2011], available at http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf). However, "[t]he implementation of a student's [BIP] shall include regular progress monitoring of the frequency, duration and intensity of the behavioral interventions at scheduled intervals," and "[t]he results of the progress monitoring shall be documented and reported to the student's parents and to the CSE . . . and shall be considered in any determination to revise a student's [BIP] or IEP" (8 NYCRR 200.22[b][5]).

In this instance, the district psychologist testified that the FBA and BIP were developed during the March 2013 CSE meeting due to parental concerns, and were based on information provided by the student's parents and then current teacher (Tr. pp. 384, 433, 466-67, 471-72, 522). The hearing record indicated that the parents' were concerned about the student's toileting skills and his decreased safety awareness; namely, running off (Tr. p. 384-86; 472, 522, 526-27, 767-68, 835-37).[16] Furthermore, the district psychologist testified that the FBA and BIP were created in response to the parents' concerns regarding the student's toileting, safety in school and his "tendency to run away," and as additional support to be utilized by the 1:1 paraprofessional and teacher (Tr. p. 383-86). The FBA identified "running away both at home and in the community with no regard for his own safety," and limited attending and impulsivity as the targeted inappropriate behaviors (Dist. Ex. 8 at p. 1).[17] Although it noted that the student's impulsivity and difficulty following directions acted as triggers prior to the target behavior occurring, and that unstructured tasks and activities may affect the targeted behaviors, the FBA did not indicate a presumed purpose for the target behaviors other than to opine that it is difficult for the student to maintain himself throughout the school day without adult support (id.). Additionally, the FBA indicated that the student would lose time with desired activities or lose stickers on a chart as a result of a targeted behavior (id.). However, the FBA did not specify what interventions were previously attempted, and did not include a detailed "baseline of the student's problem behaviors with regard to frequency, duration, intensity and/or latency across activities, settings, people and times of the day," as required by State regulation (8 NYCRR 200.22[a][3]).

The resultant BIP indicated that the student's 1:1 crisis management paraprofessional would be responsible for implementing the plan, and that it should be reviewed at least every 10 weeks (Dist. Ex. 9). Consistent with the FBA, the BIP identified that running out of the building or classroom as a target behavior; however, inconsistent with the FBA, the BIP identified "not potty trained" as a targeted behavior (compare Dist. Ex. 8 at p. 1, with Dist. Ex. 9). According to the BIP, the expected behavior changes were to stop the running behavior and that the student would be able to verbalize when he had to use the bathroom (Dist. Ex. 9). Nevertheless, the BIP did not conform to State regulation in that it did not include a baseline measure of the student's problem behaviors or identify intervention strategies to alter antecedents, and provide consequences for the targeted inappropriate behaviors or alternative behaviors (8 NYCRR 200.22[b][4][i]-[iii]).

[16] The student's mother testified that the student had eloped from his preschool classroom during his first year there; however, his behavior had improved significantly and she felt this behavior was under control during the student's second year in preschool (Tr. pp. 835-38).

[17] The FBA identified impulsivity as both a targeted behavior and a trigger for the targeted behavior (see Tr. p. 524).

However, the district's failure to conduct an FBA and develop a BIP in conformity with State regulations does not, in and of itself, automatically render the IEP deficient, as the June 2013 IEP must be closely examined to determine whether it otherwise addressed the student's interfering behaviors (see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 80 [2d Cir. 2014]; F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 6-7 [2d Cir. 2014]; M.W., 725 F.3d at 139-41; R.E., 694 F.3d at 190). Specifically, the present levels of performance in the June 2013 IEP described the student as presenting with limited attention to task, decreased safety awareness, and poor motor planning which required adult facilitation throughout the day (Dist. Ex. 12 at p. 1). Additionally, the present levels of performance indicated that the student would often show impulsive behaviors, but was easily calmed down; that the student understood everyday routines and transitions clearly; and that as long as the student was aware of what happened next, his transitions were smooth (id. at pp. 1-2). Furthermore, the June 2013 IEP indicated that the student would express his toileting needs and would independently feed himself (id.). The present levels of performance in social development indicated that the student was able to follow a variety of one and two step directions; however, he needed directions repeated (id. at p. 2). The IEP also described that the student was easily consoled with simple verbal or physical affection (id.). Additionally, the June 2013 IEP present levels of performance indicated that the student presented with limited attention span, fleeting eye gaze, and decreased safety awareness, and that he needed a highly structured environment with consistency and repetition for skills acquisition and maintenance (id.). The June 2013 IEP further noted the parents' concerns regarding the student's overall global deficits in academic areas; that he required constant supervision to focus on lessons and tasks, as well as for his safety; his impulsivity; and that the student required a 1:1 paraprofessional to assist with transitions because he had been known to "run off" (id.).

Moreover, as discussed above, the June 2013 IEP contained approximately five annual goals designed to improve the student's social-emotional, pragmatic, and focus and attention skills (see Dist. Ex. 12 at pp. 6-8). Specifically, the June 2013 IEP contains goals designed to improve the student's focus and attention to a teacher with minimal redirection, to complete arrival procedures with no reminders, to participate in turn-taking activities with fading teacher prompts, to improve his attention to ongoing verbal events in academic contexts and in play, and to remain seated to perform table top tasks for 7 to 10 minutes with auditory distractors (id.). The June 2013 IEP further addressed the student's inappropriate behaviors through the support of a 1:1 crisis management paraprofessional as well as with related services, preferential seating, frequent short motor breaks, adult facilitation and modeling (Dist. Ex. 12 at pp. 1-3, 11). Accordingly, in this case, the June 2013 CSE's failure to comply fully with State regulations regarding the conducting of an FBA and development of a BIP did not result in a denial of a FAPE for the 2013-14 school year, as the June 2013 CSE otherwise identified and addressed the student's problem behaviors with appropriate supports and strategies (see E.H. v. New York City Dep't of Educ., 611 Fed. App'x 728, 730-31 [2d Cir. May 8, 2015]; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 169 [2d Cir. 2014]; C.F., 746 F.3d at 80; F.L., 553 Fed. App'x at 6-7; M.W., 725 F.3d at 140-41; R.E., 694 F.3d at 190; A.C., 553 F.3d at 172-73).

4. Integrated Co-Teaching Services with 1:1 Paraprofessional

The parents argue that the student required more instructional support and a balance of academic instruction with behavioral interventions than a general education classroom with ICT services could provide. However, a review of the hearing record indicates that the ICT services in a general education setting with related services, along with the support of a 1:1 paraprofessional,

were appropriate to meet the student's needs and reasonably calculated to enable the student to receive an educational benefit. State regulations define ICT services as "specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). The "maximum number of students with disabilities receiving integrated co-teaching services in a class, shall not exceed 12 students" (8 NYCRR 200.6[g][1]). In addition, State regulations require that school personnel assigned to a classroom providing ICT services shall "minimally include a special education teacher and a general education teacher" (8 NYCRR 200.6[g][2]).

The June 2013 IEP recommended placement in a general education classroom with ICT services, related services, and a 1:1 crisis paraprofessional (Dist. Ex. 12 at pp. 10-11). According to the district social worker, the evaluative information available to the CSE indicated that the student was making significant progress and responding to classroom intervention (Tr. pp. 152-53).[18] The district social worker further testified that according to the then-current classroom teacher, the student was in the average range in terms of overall performance (Tr. p. 149). The district psychologist testified that the general education classroom with ICT services was an appropriate recommendation based on the evaluative information shared at the CSE meeting, which indicated that the student had made a lot of progress and had "pretty good" academic readiness skills (Tr. pp. 405-06).

The June 2013 IEP present levels of performance, reflected, among other things, that the student had "many emerging skills" with strong literacy and recall skills (Dist. Ex. 12 at p. 1). Additionally, the IEP indicated that the student was at a preschool level for both math and ELA (id. at p. 14). Furthermore, the November 2012 psychoeducational evaluation showed that the student demonstrated "generally age appropriate pre-academic reading and math skills" (Dist. Ex. 22 at p. 4). Additionally, the November 2012 private psychoeducational evaluation reported that the student's single word vocabulary skills were in the average range, and he showed adaptability and was responsive to redirection (id.). The November 2012 classroom progress report indicated that the student had made progress with regard to his academic, communication, social/emotional, motor, and activities of daily living skills (Dist. Ex. 16 at pp. 1-2). The December 2012 OT progress report indicated that the student had made progress in his behavior, activities of daily living, sensory processing, attention, self-regulation, and fine motor skills (Dist. Ex. 23 at p. 1). The November 2012 PT progress report indicated that the student had made progress in attending to motor tasks and performing gross motor skills, decreased his impulsive movements, and increased his use of language during PT (Dist. Ex. 24 at p. 1). The November 2012 speech language pathology progress report indicated that the student had made progress in his speech and language development, in the length of simple utterances, maintaining a clinician initiated conversation, his attention and participation in conversations, and he is beginning to combine ideas in more complex utterances successfully and is expanding his grammar at the word level (Dist. Ex. 25 at p. 1). The December 2012 social history update, which was provided through parent report, indicated that the student had improved with respect to his ability to chew food, fine and gross motor skills, expressive and receptive language skills, ability to follow directions, and social skills (Dist. Ex. 26 at pp. 1-2).

[18] During the 2012-13 school year the student attended a 12:1+2 special class, where he received the support of a dedicated 1:1 paraprofessional (Dist. Ex. 16; Parent Ex. I at p. 1).

As detailed above, the hearing record indicates that the student had grade appropriate academic skills and made significant progress across all domains in his preschool 12:1+2 special class placement; however, he continued to need adult supervision and facilitation to assist him with his attention, focus, and safety skills (Tr. pp. 152-53, 155-56, 384-86, 405-06, 408-09, 472, 522, 526-27, 767-68, 835-37; Dist. Exs. 8, 9, 12 at pp. 1-3; 16; 22, 23, 24, 25). Therefore, a general education classroom with ICT services along with related services and the support of a 1:1 crisis management paraprofessional was appropriate to meet the student's identified needs and reasonably calculated to provide him with educational benefit.[19]

5. 12-Month School Year Services

I next turn to the parents' allegation that the IHO erred in finding that a 10-month program was appropriate for the student. The parents claim that the student requires a 12-month program in a small specialized school with a small classroom ratio and related services in order to receive a FAPE, and that the student would regress without summer services.

In this instance, the lack of a recommendation for a 12-month school year program in the June 2013 IEP did not deny the student a FAPE because the student was a preschool student with a disability through August 2013 (see Educ. Law §§ 3202[1]; 4410[1][i]). As the student was not eligible for services through the CSE until September 2013, and the CPSE was responsible for providing the student with services through August 2013 (Educ. Law § 4410; 8 NYCRR 200.1[mm]; 200.16), the CSE's failure to recommend services prior to that time cannot contribute to a denial of FAPE. Additionally, a March 2013 CPSE IEP provided services for summer 2013 (Parent Ex. B at p. 1, 19), and the parents concede that the student attended the recommended program during summer 2013. Accordingly, as the student received services for summer 2013, it is unnecessary to address the issue of substantial regression.[20]

6. Challenges to Assigned Public School

The parents contend that the assigned public school site was inappropriate because it was too large and overstimulating for the student, had no sensory gym, no adapted physical education classes, and offered no after school services. The parents also allege that the district paraprofessional would not be appropriately trained to address the student's interfering behaviors.

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

[19] Given the determination that the June 2013 offered an appropriate educational program and related services recommendation that was reasonably calculated to enable the student to receive educational benefits, it is unnecessary to specifically address the parents' contention that the student required additional after-school speech-language services to receive educational benefits. However, the hearing record reflects that the district consented to provide the services during the pendency of the due process proceedings (Interim IHO Decision at p. 8).

[20] Although the parents reference additional evidence in the form of the IEPs developed for the student for the 2014-15 and 2015-16 school years, they did not submit this additional evidence with their petition for consideration by a State Review Officer. In any event, the district's subsequent recommendation for 12-month school year services is irrelevant to a determination of whether its recommendation was appropriate in this instance.

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

However, the Second Circuit has held that although a district's assignment of a student to a particular public school site is an administrative decision, it must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to assign the student to a school that cannot implement the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244-45 [2d Circuit 2015]; R.E., 694 F.3d at 191-92; T.Y. 584 F.3d at 419-20; see C.F., 746 F.3d 68 at 79). In particular, the Second Circuit has stated that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (M.O., 793 F.3d at 244; see T.F. v. New York City Dep't of Educ., 2015 WL 5610769, at *6-*7 [S.D.N.Y. Sept. 23, 2015] [finding claims regarding the assigned public school site speculative when the parents did not provide "any definitive evidence that [the student] would not have received the services set forth in her IEP"]; Y.F. v. New York City Dep't of Educ., 2015 WL 4622500, at *6 [S.D.N.Y. July 31, 2015] [noting that the "the inability of the proposed school to provide a FAPE as defined by the IEP [must be] clear at the time the parents rejected the placement"]; M.C. v. New York City Dep't of Educ., 2015 WL 4464102, at *6-*7 [S.D.N.Y. July 15, 2015] [noting that claims are speculative when parents challenge the willingness, rather than the ability, of an assigned school to implement an IEP]; S.E. v. New York City Dep't of Educ., 2015 WL 4092386, at *12-*13 [S.D.N.Y. July 6, 2015] [noting the preference of the courts for "'hard evidence' that demonstrates the assigned [public school] placement was 'factually incapable' of implementing the IEP"]; see also N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at *12-*13 [S.D.N.Y. June 16, 2014]).

In light of the foregoing, the parents cannot prevail on their claims regarding the credentials of staff or the environment at the assigned public school site. It is undisputed that the parents rejected the district-recommended program and instead chose to enroll the student in a nonpublic school of their choosing (see Parent Ex. K at p. 1). Furthermore, the hearing record is devoid of any evidence to indicate that the assigned school could not implement the IEP. While the parents assert that they rejected the assigned school based, in part, upon the parents' observations, the hearing record contains no support for the proposition that the assigned school was incapable of implementing the student's IEP. The parents' purported observations during their visit provide support only for what the parents believed might occur at the assigned school, rather than evidence

that the assigned school was incapable of implementing the student's IEP. This is made clear by the language of the parents' letter to the CSE following their visit to the assigned school, expressing their opinions regarding the adequacy of the level of support in a general education class with ICT services, allegations regarding the methods of instruction utilized at the school, and vague concerns regarding the parents' impressions of students in the class they observed (id. at pp. 1-3). Accordingly, the parents' claims based on their visit to the assigned school site regarding the environment at the assigned public school site generally, rather than with respect to the implementation of the student's IEP, cannot provide a basis for a finding of a denial of a FAPE in this instance (see R.B., 589 Fed. App'x at 576 [holding that a parent's observations during a visit to an assigned school constituted speculative challenges that the school would not implement the student's IEP]).

With respect to the qualifications of staff at the assigned school, the parents do not assert that the district would not comply with State regulations regarding the qualifications of staff. Rather, the parents merely asserted that the district did not establish to their satisfaction that the staff working with her child would be adequately qualified (Parent Ex. K at p. 1). As noted by several district courts, claims regarding qualifications of staff are inherently speculative when a student never attends the assigned public school, as there is no guarantee that a student will receive services from a specific teacher or provider (J.D. v. New York City Dep't of Educ., 2015 WL 7288647, at *16 [S.D.N.Y. Nov. 17, 2015]; R.B. v. New York City Dep't of Educ., 15 F. Supp. 3d 421, 436 [S.D.N.Y. 2014], aff'd, 603 Fed. App'x 36; B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 371-72 [E.D.N.Y. 2014]; M.S. v. New York City Dep't of Educ., 2 F. Supp. 3d 311, 331-32 [E.D.N.Y. 2013]).

C. Transportation

The parents assert that the IHO erred in failing to address the issue of special education transportation for the student. The parents claim that the district's failure to provide the same was a denial of FAPE. The district argues that the record is not clear that the parents requested special education transportation at either the March 2013 or June 2013 CSE meetings. The district further contends that the parents have not demonstrated the student's entitlement to special education transportation.

The IDEA specifically includes transportation, as well as any modifications or accommodations necessary in order to assist a student to benefit from his or her special education, in its definition of related services (20 U.S.C. § 1401[26]; see 34 CFR 300.34[a], [c][16]). In addition, State law defines special education as "specially designed instruction . . . and transportation, provided at no cost to the parents to meet the unique needs of a child with a disability," and requires school districts to provide disabled students with "suitable transportation to and from special classes or programs" (Educ. Law §§ 4401[1]; 4402[4][a]; see Educ. Law § 4401[2]; 8 NYCRR 200.1[ww]). Specialized transportation must be included on a student's IEP if required to assist the student to benefit from special education (Application of a Child with a Disability, Appeal No. 03-053). If a CSE determines that a student with a disability requires transportation as a related service in order to receive a FAPE, the district must ensure that the student receives the necessary transportation at public expense (Transportation, 71 Fed. Reg. 46576 [Aug. 14, 2006]; see 8 NYCRR 200.1[ww]).

The State Education Department has indicated the CSE should consider a student's mobility, behavior, communication, physical, and health needs when determining whether or not

a student requires transportation as a related service, and that the IEP "must include specific transportation recommendations to address each of the student's needs, as appropriate" ("Special Transportation for Students with Disabilities," VESID Mem. [Mar. 2005], available at http://www.p12.nysed.gov/specialed/publications/policy/specialtrans.pdf). Other relevant considerations may include the student's age, ability to follow directions, ability to function without special transportation, the distance to be traveled, the nature of the area, and the availability of private or public assistance (see Donald B. v. Bd. of Sch. Commrs., 117 F.3d 1371, 1375 [11th Cir. 1997]; Malehorn v. Hill City Sch. Dist., 987 F. Supp. 772, 775 [D.S.D. 1997]). When reviewing the transportation provisions made for a student by a district, the relevant question "is whether the transportation arrangements [the district] made for [the student] were appropriate to his needs" (Application of a Child with a Disability, Appeal No. 03-054).

In this case, the district is correct that the hearing record contains no evidence of the student's need for special education transportation at the time of the March 2013 and June 2013 CSE meetings. There is no indication in the record that the parents requested special education transportation at either CSE meeting. The parents' request for special education transportation postdated the June 2013 CSE meeting and accompanied their rejection of the June 2013 IEP (Parent Exs. C at pp. 1-2; E at pp. 1-3; F). A request for transportation of special education student dated September 9, 2013 indicated the reason for the request was "asthma like symptoms with a cold" (Parent Ex. F at p. 1). In the request for medical accommodation, the student's pediatrician recommended limited travel time and air conditioning (Parent Exs. C at pp. 1-2; E at pp. 1-3). Notwithstanding the bases the parents asserted in their request for special education transportation, at the time of the CSE meetings the assigned public school was within approximately one block from the student's home (Tr. p. 856; see Parent Exs. A at p. 1; E at p. 1). Given the very short distance the student would have had to travel from his home to the assigned public school, the hearing record does not support a finding that the district denied of the student a FAPE due to the lack of provision for special education transportation in the June 2013 IEP.[21]

D. Reimbursement for Independent Educational Evaluations

The parents appeal the IHO's failure to address their request for reimbursement of a privately-obtained psychoeducational evaluation and neuropsychological, psychoeducational, psychological, behavioral, and assistive technology independent educational evaluations (IEEs).[22] The district argues that the parents never objected to a district evaluation or requested an IEE at public expense.

The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses

[21] This does not constitute a determination regarding the student's entitlement to transportation as available to regular education students, and the hearing record indicates that the district provided the student with transportation to Cooke during the 2013-14 school year (Tr. p. 44).

[22] The parents originally requested reimbursement for the cost of the privately-obtained February 2013 development pediatric report; they have apparently abandoned this request on appeal.

disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, ensure that either an IEE is provided at public expense or initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). However, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]).

Although the district is technically correct that the parent did not meet the regulatory prerequisites for reimbursement of an IEE by objecting to a district evaluation, the district school psychologist testified that the district did not conduct any testing of the student (Tr. p. 428). There is no evidence in the record as to when the district last evaluated the student prior to the classroom observation conducted in January 2013 in preparation for the March 2013 CSE meeting. Further, the district reviewed the private psychoeducational evaluation in the development of the March 2013 and June 2013 IEPs (Tr. pp. 192, 422). In this case, the hearing record indicates the district failed to perform an appropriate evaluation and instead used the private evaluation to meet its statutory obligations. The district may not permissibly shift the costs of determining the student's needs to the parents, and they are therefore entitled to reimbursement of the November 2012 psychoeducational evaluation relied upon by the CSE (see Letter to Anonymous, 55 IDELR 106 [OSEP 2010]).

However, with respect to the parents' request for additional evaluations, given that the June 2013 CSE offered an appropriate program based on sufficient evaluative information as set forth above, additional evaluations are unnecessary based on this record. I remind the district of its obligation, consistent with State and federal regulations, to evaluate the student with appropriate assessments based on the student's needs and to identify all of the student's special education needs (34 CFR 300.303-300.305; 8 NYCRR 200.4[b]).

VII. Conclusion

Having determined that the evidence in the hearing record demonstrates that the district offered the student a FAPE for the 2013-14 school year, there is no need to consider whether the student's unilateral placement at Cooke was appropriate or whether equitable considerations support the parents' requested relief (see Burlington, 471 U.S. at 370; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]). Furthermore, despite the district committing several procedural violations of the IDEA, they did not either singly or cumulatively impede the student's right to a FAPE or the parents' ability to participate in the development of the student's program. However, because the district failed to fully evaluate the student's needs, the parents are entitled to reimbursement for the costs of the privately-obtained psychoeducational evaluation.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the district shall reimburse the parents for the cost of the November 2012 private psychoeducational evaluation.

Dated: **Albany, New York**
December 24, 2015

CAROL H. HAUGE
STATE REVIEW OFFICER