



The University of the State of New York

The State Education Department

State Review Officer

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No. 16-002

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

Appearances:

Law Offices of Martin Marks, attorneys for petitioner, Martin Marks, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Alexander M. Fong, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied his request to be reimbursed for the costs of the student's tuition at the Special Torah Education Program (STEP School) for the 2014-15 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The student has continuously attended the STEP School for approximately three years since fourth grade (see Tr. pp. 237-38; Dist. Ex. 9 at p. 1).¹ During the 2013-14 school year at the STEP School, the student attended a classroom with five other students, one teacher, and three paraprofessionals; the student also received related services consisting of speech-language therapy, occupational therapy (OT), and counseling (see Tr. p. 86; Dist. Exs. 1 at p. 1; 7 at p. 1; 9 at pp. 1-2).

¹ The Commissioner of Education has not approved the STEP School as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7)).

On May 12, 2014, a CSE convened to conduct the student's annual review and to develop an IEP for the 2014-15 school year (see Dist. Ex. 1 at pp. 1, 12).² Finding that the student remained eligible for special education and related services as a student with autism, the May 2014 CSE recommended a 12-month school year program in a 6:1+1 special class placement at a specialized school together with the following related services: one 30-minute session per week of individual counseling services, one 30-minute session per week of counseling services in a small group, one 30-minute session per week of individual OT, one 30-minute session per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a small group, and four 60-minute sessions per year of parent counseling and training services (id. at pp. 1, 8-10).³ The May 2014 CSE also recommended the services of a full-time, 1:1 crisis management paraprofessional for the student in the classroom (id. at p. 9). At that time, the May 2014 CSE indicated in the IEP that the student required "strategies, including positive behavioral interventions, supports and other strategies to address behaviors that impede[d] the student's learning or that of others" (id. at p. 3). The May 2014 CSE also indicated in the IEP that the student required a behavioral intervention plan (BIP) (id.). Finally, the May 2014 CSE created annual goals with short-term objectives to address the student's needs, and recommended that the student participate in alternate assessments (id. at pp. 4-8, 10-11).

In a prior written notice to the parent, dated June 5, 2014, the district summarized the special education and related services recommended in the May 2014 IEP (see Dist. Ex. 10 at pp. 1-2). In a school location letter to the parent, dated June 5, 2014, the district identified the particular public school site to which the district assigned the student to attend in order to implement the May 2014 IEP for the 2014-15 school year (see Dist. Ex. 11). The parent visited the public school site identified in the school location letter.⁴

A. Due Process Complaint Notice

By due process complaint notice dated April 29, 2015, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2014-15 school year (see Parent Ex. A at p. 1). More specifically, the parent alleged that the May 2014 CSE failed to recommend sufficient OT services to address the student's "sensory issues, fine motor, visual motor and visual perceptual delays and attention and focus" (id. at p. 2). The parent also alleged that the May 2014 CSE failed to recommend sufficient speech-language therapy services to address the student's receptive, expressive, and pragmatic language delays (id.). Next, the parent asserted that recommended counseling services did not address the student's "social and emotional delays" especially given the student's "diagnosis of autism" (id.). The parent also indicated that

² Based upon her chronological age, the student would have attended seventh grade during the 2014-15 school year (see Tr. pp. 191, 238; Dist. Ex. 1 at p. 1).

³ The student's eligibility for special education programs and related services as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

⁴ At the impartial hearing, the parent testified that he observed the assigned public school site "after the IEP meeting," and determined it was not appropriate (Tr. pp. 239-40). The parent further testified that he wrote a letter to the district "stating we didn't agree with it;" however, neither the district nor the parent entered this letter allegedly rejecting the assigned public school site into the hearing record as evidence (Tr. p. 240; see generally Tr. pp. 1-278; Dist. Exs. 1-5; 7-11; Parent Exs. A-G; IHO Ex. I).

the student's BIP was not "included with the packet sent to the parents" and they did not know whether the May 2014 CSE conducted a functional behavioral assessment (FBA) (id.). In addition, the parent alleged that "[a]side from two simple counseling goals" the IEP failed to address the student's "maladaptive" and "self[-]stimulatory" behaviors (id.).

Turning to the annual goals and short-term objectives, the parent alleged that the IEP included only one OT annual goal, the IEP failed to include annual goals to address the student's "sensory and personal space issues," and the short-term objective in the IEP related to "attending and activity . . . with minimal prompts [was] unrealistic" and not reasonably calculated to address the student's "deficits in attending and focusing stemming from her diagnosis of autism" (Parent Ex. A at p. 2). The parent also noted that the OT short-term objectives "only" focused on the student's writing skills (id.). Next, the parent asserted that the student "would require more time individually to achieve" the six annual goals addressing her speech-language needs (id.). In addition, the parent asserted that the IEP "only" included one annual goal for reading and one annual goal for mathematics—which were both "overly vague and lack[ed] grade levels"—and failed to address the student's "academic delays for an entire school year" (id.).

Finally, the parent alleged that the recommended 6:1+1 special class placement was "not appropriate" for the student (Parent Ex. A at p. 2). The parent also alleged that the May 2014 CSE considered only 6:1+1 and 12:1+1 placement options for the student, and the May 2014 CSE failed to consider deferring the student's placement to the Central Based Support Team (CBST) for placement in a State-approved nonpublic school with a student-to-teacher ratio of either 6:1+2 or 6:1+3 and with "appropriate behavioral methodologies and infrastructure and small learning environment" (id. at pp. 2-3). The parent also indicated that the assigned public school site was "overly large," and it was "not appropriate" for the student because it could not "offer the behavioral" and "sensory support" she required (id. at p. 3). In light of the foregoing, the parent indicated that he would enroll the student at the STEP School for the 2014-15 school year and seek an order directing the district to "reimburse" or "prospectively" pay for the costs of the student's tuition, related services, and transportation for the 2014-15 school year (id.).

B. Impartial Hearing Officer Decision

On June 15, 2015, the IHO conducted a prehearing conference, and on June 19, 2015, the parties proceeded to an impartial hearing (see Tr. pp. 1-149). On or about June 24, 2015, the parent sought to amend the due process complaint notice, which the IHO denied in an interim order dated July 9, 2015 (see July 9, 2015 Interim IHO Decision at pp. 2-3). The parent then prepared a second due process complaint notice regarding the same student and same school year, dated July 9, 2015, which the IHO later consolidated with the April 29, 2015 due process complaint notice (see Nov. 12, 2015 Interim IHO Decision at p. 1; IHO Ex. I at pp. 1-4). In the July 9, 2015 due process complaint notice, the parent reasserted many of the same issues alleged in the April 29, 2015 due process complaint notice, together with the following additional allegations: the FBA of the student was not "sufficient;" "[m]any sections" of the FBA were either "incomplete or left totally blank;" the May 2014 CSE failed to include the student's counselor in the "creation of the FBA and BIP;" and the FBA failed to include information regarding the "frequency, duration and intensity of behaviors, an assessment of the student's performance, functional hypothesis and an analysis of the setting, antecedent, behavior or consequences" (compare Parent Ex. A at pp. 1-3, with IHO Ex. I at pp. 1-3).

On November 18, 2015, the parties completed the impartial hearing after three days of proceedings (see Tr. pp. 150-278; see also Tr. pp. 1-149). In a decision dated November 30, 2015, the IHO concluded that the district offered the student a FAPE for the 2014-15 school year (see IHO Decision at pp. 4-9). First, the IHO found that the annual goals in the May 2014 IEP related to mathematics, reading, and writing were appropriate to address the student's needs in these areas based, primarily, upon the testimonial evidence provided by the STEP School's program director (director) (id. at pp. 4-6). The IHO also found that the STEP School implemented the May 2014 IEP during the 2014-15 school year, and the student made progress "toward her goals" (id. at p. 6). Next, the IHO indicated that no one attending the May 2014 CSE meeting—including the parent—objected to the annual goals in the May 2014 IEP or to any "other IEP recommendations" made at the CSE meeting; however, the IHO did note that the director testified that the recommended amount of speech-language therapy services was her "only concern" (id. at pp. 5-7).⁵ The IHO further found that the CSE meeting minutes demonstrated that the parent "agreed with all of the goals and did not have any further goals to add to the IEP" (id. at p. 7). Additionally, the IHO found that the parent had the opportunity to "fully participate" at the CSE meeting, and the parent relied upon the "recommendations of the STEP" staff attending the meeting (id.).

With regard to the parent's allegations pertaining to the FBA and the BIP, the IHO first determined that the district—consistent with the IDEA—prepared an FBA and developed a BIP (see IHO Decision at p. 8). The IHO noted that although sections of the FBA were "incomplete," the hearing record lacked evidence to conclude that any omissions in the FBA resulted in a finding that the district failed to offer the student a FAPE for the 2014-15 school year (id.). The IHO indicated that based upon the STEP School director's testimony, a student with a "very poor attention span and an inability to self-regulate"—such as this student—could not have a "behavior modification plan [with] more than a couple of goals" (id.). Relying upon the director's testimony, the IHO also indicated that "behavior modification plans [were] not static and [were] readdressed during the course of the year" (id.). Next, the IHO found that while neither the FBA nor the BIP identified the student's "talking to herself or singing to herself as a behavior needing support," the hearing record did not contain any evidence that "those behaviors needed to be addressed or that they impacted the student's ability to function in the classroom" (id.). The IHO also found, based upon the director's testimony, that "although the student was a flight risk, it would not have been appropriate to address the flight risk behavior on a behavior modification plan because the student lacked safety judgment and her full-time crisis management paraprofessional was available to address those issues" (id. at pp. 8-9). Finally, the IHO indicated that STEP School staff attending the May 2014 CSE meeting participated in the development of the student's BIP, and the "positive

⁵ The IHO noted that the following individuals attended the May 2014 CSE meeting: a district school psychologist (who also served as the district representative), a district special education teacher, the STEP School director, a STEP School principal, the student's then-current classroom teacher for the 2013-14 school year at the STEP School, and the parent (see IHO Decision at p. 6; see also Dist. Exs. 1 at p. 14; 4). The STEP School staff, as well as the parent, attended the May 2014 CSE meeting via telephone (see Dist. Ex. 1 at p. 14). The IHO also found that the May 2014 CSE relied upon the following to develop the May 2014 IEP: a psychoeducational evaluation report, a classroom observation report, progress reports from the student's "teachers," a speech-language therapy report, a counselor's report, and input provided by the STEP School staff attending the CSE meeting (IHO Decision at p. 6).

behavioral interventions, crisis management paraprofessional and supports recommended in the IEP were consistent with the requirements of the IDEA" (id. at p. 9).

With respect to the assigned public school site, the IHO noted that a district school administrator (administrator) testified that the special education students at the site were located within "their own wing" and specifically "occup[ied] the second, third and fourth floors of the building" at that particular school site (IHO Decision at p. 7). Additionally, the administrator testified that given the "configuration of the building," it was "unlikely" that the special education students "would have any interaction with the mainstream students," therefore, the IHO found that the parent's concerns were "not an issue" (id.). The IHO also found that the hearing record lacked any evidence that the "learning environment" at the assigned public school site "would have had a negative effect on the student's academic development" (id.). Based upon the administrator's testimony, the IHO determined that the assigned public school site had a seat available for the student in a 6:1+1 special class that was "suitable" for the student; the assigned public school site's staff had training in applied behavior analysis (ABA); the assigned public school site's staff included Board Certified Behavior Analysts; the assigned public school site had a "related services room" to provide students with OT, physical therapy, and speech-language therapy, as well as "separate areas for counseling;" and the assigned public school site provided parent counseling and training services (id. at pp. 7-8). Given the evidence in the hearing record, the IHO concluded that the May 2014 CSE's recommended 6:1+1 special class placement at a specialized school "would have provided the student with a small, highly structured classroom environment and the student would have received individual instruction and that instruction would have been ABA based" (id. at p. 8).

Next, the IHO found that other than the parent's testimony at the impartial hearing that he visited the assigned public school site and that he did not "think it was appropriate" for the student due to the "size of the building and the number of students housed in the building," the hearing record failed to contain any evidence that the parent notified the district of any "dissatisfaction" with the May 2014 IEP, any objections to the assigned public school site, or his intention to unilaterally place the student at the STEP School for the 2014-15 school year (see IHO Decision at p. 7). Consequently, the IHO found that the "equities" did not "favor" the parent (id.).

Having found that the district offered the student a FAPE for the 2014-15 school year, the IHO denied the parent's request to be reimbursed for the costs of the student's tuition at the STEP School (see IHO Decision at p. 9). However, the IHO directed the district to reconvene a CSE meeting to "revise the FBA and the BIP to ensure that all of the student's behaviors [were] appropriately addressed" (id.).

IV. Appeal for State-Level Review

The parent appeals, and asserts that the IHO erred in concluding that the district offered the student a FAPE for the 2014-15 school year. Generally, the parent argues that the May 2014 IEP was not appropriate and resulted in an assigned public school site that was "overly large" and that could not "offer the behavioral and sensory support" the student required. The parent also asserts that the OT services recommended in the May 2014 IEP were not sufficient to address the student's "sensory issues, fine motor, visual motor and vision perception delays, attention and focus." The parent also contends that the May 2014 IEP failed to address the student's "deficits in

attending and focusing;" expressive, receptive, and pragmatic speech-language delays; and the May 2014 IEP failed to address the student's "sensory and personal space issues" in the annual goals. Next, the parent argues that the counseling services recommended in the May 2014 IEP did not address the student's social/emotional delays, "maladaptive behaviors or self[-] stimulatory behaviors."

Additionally, the parent asserts that the IHO erred in concluding that the omissions in the FBA did not result in a finding that the district failed to offer the student a FAPE. Relatedly, the parent argues that the IHO's order directing the district to reconvene a CSE to "revise" the FBA and the BIP to ensure that "all of the student's behaviors" were addressed was wholly inconsistent with this conclusion. Next, the parent contends that as a result of the "defective FBA," the BIP was also insufficient and did not address the student's behavior needs. The parent further argues that the IHO improperly shifted the burden of proof to the parent with respect to whether the district's assigned public school site "had a negative effect" on the student.

As to the parent's unilateral placement of the student at the STEP School, the parent contends that while the IHO did not reach this issue, the evidence in the hearing record supports a finding that the STEP School was appropriate. With respect to equitable considerations, the parent argues that the IHO improperly framed the issue and ignored the evidence adduced at the impartial hearing through the parent's testimony. As relief, the parent seeks to be reimbursed for the costs of the student's tuition at the STEP School for the 2014-15 school year.

In an answer, the district responds to the parent's allegations and generally argues to uphold the IHO's decision in its entirety.

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, 180-83, 206-07 [1982]).

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

that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the 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)).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

A. May 2014 IEP

1. Annual Goals

While not addressed by the IHO, the parent continues to press the argument that the annual goals in the May 2014 IEP failed to address the student's "sensory and personal space issues." The district rejects this contention, arguing that the annual goals addressed the student's sensory needs by focusing on her fine motor, visual perceptual, and visual motor skills. While the IHO should have ruled upon this IEP challenge and failed to do so, there is an adequate record to render a decision and I will, as a matter within my discretion, render a determination on appeal rather than prolong the dispute by remanding the matter to the IHO. Upon review, the evidence in the hearing record does not support the parent's contention.

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]). Short-term instructional objectives or benchmarks—described as "measurable intermediate steps between the student's present levels of performance and the measurable annual goal"—are required for students who participate in alternate assessment (see 8 NYCRR 200.4[d][2][iv]; see 20 U.S.C. § 1414[d][1][A][i][I][cc]; 34 CFR 300.320[a][2][ii]).

In this case, the evidence in the hearing record demonstrates that the May 2014 CSE relied upon the following to develop the May 2014 IEP: a January 2013 psychoeducational evaluation report (see Dist. Ex. 5 at pp. 1-3 [detailing testing results and summarizing parent interview]); a January 2014 classroom observation report (see Dist. Ex. 7 at pp. 1-2 [observing student at the STEP School during English language arts and mathematics lessons]); a May 2014 STEP School teacher progress report (see Dist. Ex. 8 at pp. 1-3 [describing the student's behavior profile and the student's present levels of performance in the areas of reading, writing, mathematics, language, and life skills]); an undated speech-language therapy progress report (see Dist. Ex. 12 at pp. 1-2 [describing the student's present levels of performance and including annual goals with short-term objectives]); a May 2014 OT progress report (see Dist. Ex. 13 [describing the student's present levels of performance and including annual goals with short-term objectives]); and input from the STEP School staff and the parent, all of whom attended the CSE meeting via telephone (see Tr. pp. 63-67; Dist. Exs. 1 at p. 14; 2 at p. 1; 3 at p. 3; 4).⁶ Except for the information in the January

⁶ At the impartial hearing, the district school psychologist who attended the May 2014 CSE meeting testified that the CSE also relied upon a "counselor's report" to develop the May 2014 IEP; the evidence in the hearing record does not, however, include a document referred to as a "counselor's report" (see generally Tr. pp. 1-278; Dist. Exs. 1-5; 7-13; Parent Exs. A-H; IHO Ex. I).

2014 classroom observation report, the May 2014 IEP reflected, verbatim, the information in the May 2014 STEP School teacher progress report, the undated speech-language therapy progress report, the May 2014 OT progress report, and portions of the January 2013 psychoeducational evaluation report within the present levels of performance and individual needs section of the IEP, and within the annual goals and short-term objectives related to OT and speech-language therapy (compare Dist. Ex. 1 at pp. 1-2, 4-6, with Dist. Exs. 5 at p. 2; 8 at pp. 1-3; 12 at pp. 1-2; 13).⁷

Upon review, the May 2014 IEP included approximately 13 annual goals with 32 corresponding short-term objectives to address the student's identified needs in the areas of OT (fine motor, visual perceptual, and visual motor skills; sustaining attention to task); speech-language (eye contact during conversations, using grammatically correct sentences, maintaining conversations, answering multiple choice comprehension questions, writing summaries of passages using a "web/graphic organizer," speech intelligibility); counseling (responsiveness and interactions with others, appropriate interactions); social interactions with peers (assisted by the 1:1 crisis management paraprofessional); reading (decoding and comprehension skills); writing (communicating through writing); and mathematics (improved skills) (see Dist. Ex. 1 at pp. 4-8).

At the impartial hearing, the district school psychologist who attended the May 2014 CSE meeting testified that the CSE primarily relied upon the annual goals as drafted by the student's "service providers" to develop the annual goals addressing the student's needs in the areas of her recommended related services: speech-language therapy, OT, and counseling (Tr. pp. 80-81). The district school psychologist testified that the CSE would "work off of those [annual] goals," and at the meeting, the CSE members would be "asked whether they were appropriate, [and] relevant;" then, if "everybody was in agreement [the CSE] would include them in the IEP" (Tr. p. 80).⁸ A review of the May 2014 CSE meeting minutes reflects that the CSE drafted the annual goals "at

⁷ The parent did not assert any challenges to the sufficiency of the evaluative information relied upon by the May 2014 CSE in the development of the IEP, and the parent also did not assert any challenges to the accuracy or adequacy of the description of the student's present levels of performance and individual needs as set forth in the May 2014 IEP (see Parent Ex. A at pp. 1-3; IHO Ex. I at pp. 1-3; see also Dist. Ex. 1 at pp. 1-3). According to the May 2014 CSE meeting minutes, the CSE reviewed the "[r]eports" and the "parent acknowledged that they were all appropriate descriptions of [the student's] functional levels" (Dist. Ex. 4).

⁸ With respect to the annual goals for the student's academic needs, the district school psychologist testified that if the "classroom teacher ha[d] provided the goals in draft form then [the CSE] work with that;" if, however, the classroom teacher did not provide a draft form of the annual goals, the CSE would "generate the goals at the meeting and go through each one and ask the participants at the meeting if those goals [were] appropriate and acceptable for the student's coming year of education" (Tr. pp. 80-81). In this case, the district school psychologist testified that all of the CSE members had an opportunity to contribute to the development of the annual goals to address the student's academic needs in the areas of reading, writing, and mathematics (see Tr. pp. 81-83). She further testified that the May 2014 CSE "went over these goals and determined that this was reasonable and appropriate" (Tr. p. 83).

the review based on school reports, CSE and parent input" and that the parent agreed to "all goals and said they did not have any further goals they would like to add to the IEP" (Dist. Ex. 4).⁹

Turning to the parent's assertion that the annual goals in the May 2014 IEP did not address the student's personal space issues, a review of the May 2014 IEP contradicts the parent's assertion. Notably, while none of the documents relied upon by the May 2014 CSE in the development of the IEP identified a specific need in this area, the CSE generated an annual goal addressing the student's social interaction with peers and a corresponding short-term objective specifically designed to improve the student's need to "wait her turn and be more sensitive to personal space with others" (compare Dist. Ex. 1 at p. 7, with Dist. Exs. 5; 7-8; 12-13). Therefore, a review of the annual goals and short-term objectives in the May 2014 IEP does not support the parent's assertion that the annual goals did not address the student's personal space issues, and the parent's assertion must be dismissed.

With respect to the parent's assertion that the annual goals in the May 2014 IEP did not address the student's sensory issues, it must be noted that—similar to above—the documents relied upon by the May 2014 CSE in the development of the IEP did not include any information either identifying or describing sensory needs as a particular area of need for the student, other than one statement in the May 2014 OT progress report offering a general characterization of the student's sensory processing skills (see generally Dist. Exs. 5; 7-8; 12-13). A comparison of the May 2014 OT progress report with the May 2014 IEP reveals that the CSE copied the description of the student's "Present level of performance" from the progress report directly into the IEP to describe the student's present levels of physical development (compare Dist. Ex. 13, with Dist. Ex. 1 at p. 2). Consistent with the May 2014 OT progress report, the IEP reflected that the student made "functional gains" in the following areas: transitioning from "one activity to another with less verbal prompts," her ability to "manipulate writing material" with "moderate verbal prompts to maintain a tripod grasp," maintaining eye contact when spoken to, her ability to perform activities of daily living (ADL) skills with "minimal assistance and verbal cues," and the student's "attention span ha[d] increased" and her ability to "stay on task" had similarly "increased" (compare Dist. Ex. 13, with Dist. Ex. 1 at p. 2). Also consistent with the final statement in the May 2014 OT progress report, the IEP noted that the student's "ability to participate in [the] above mentioned areas fluctuate[d] due to poor sensory process[ing] skills" (id.).

Given the May 2014 CSE's decision to include this particular statement about the student's poor sensory processing skills in the May 2014 IEP, a question arose at the impartial hearing during cross-examination about whether it would be appropriate, then, to address the student's sensory processing skills in the annual goals (Tr. pp. 139-40; see Dist. Ex. 1 at p. 2). The district school psychologist testified that the annual goal in the May 2014 IEP for OT did address this need, regardless of whether the wording of the annual goal, itself, included the word "sensory" (Tr. pp.

⁹ While a parent's agreement with IEP goals at the time a CSE meeting does not, standing alone, foreclose a later challenge to the adequacy of the IEP goals at the time they were drafted, the consensus of the parent with the rest of the CSE is a factor that may be considered in assessing whether the CSE's plan, including the goals, was "reasonably calculated to enable the [student] to receive educational benefits" at the time it was formulated (Rowley, 458 U.S. at 206-07 [emphasis added]; R.E., 694 F.3d at 186).

139-40; see Dist. Ex. 1 at p. 4).¹⁰ The district school psychologist explained that based upon her own understanding, the term "sensory" related to a student's "ability to integrate information that c[ame] through their senses" (Tr. pp. 137-39). She further testified that "visual perceptual and visual-motor skills" were all a part of "sensory integration" (Tr. p. 140; see Dist. Exs. 1 at p. 4; 13). Turning to one of the short-term objectives corresponding to the OT annual goal in the May 2014 IEP, the district school psychologist testified that "copying words and sentences" could address a student's sensory needs because the "task of copying information involve[d] seeing the information, being able to control the pen, being able to replicate what [was] seen visually, and to sustain one's attention to task" (id.). She also explained that this particular short-term objective addressed the student's sensory processing skills because it "tap[ped] into all of the student's sensory ability," which included "[s]timulating, triggering, [and] refining some aspects of sensory integration like visual perceptual skills, visual integration, spatial relation, [and] visual-motor skills" (Tr. pp. 140-41; see Dist. Exs. 1 at p. 4; 13).¹¹ The district school psychologist also testified that the May 2014 CSE relied upon the annual goal as drafted in the May 2014 OT progress report to generate the OT annual goal in the IEP in order to support the student's development in these areas (see Tr. p. 141; Dist. Exs. 1 at p. 4; 13). A comparison of the May 2014 OT progress report with the IEP reveals that the CSE copied, verbatim, the one annual goal and four short-term objectives from the May 2014 OT progress report directly into the IEP (compare Dist. Ex. 13, with Dist. Ex. 1 at p. 4). Therefore, in light of the foregoing, the evidence in the hearing record supports

¹⁰ At the impartial hearing, the STEP School director who attended the May 2014 CSE meeting testified that the student received the following OT services at the STEP School during the 2014-15 school year: one 30-minute session per week of individual OT pursuant to the recommendation in the May 2014 IEP and additional "push in" OT services in the classroom—"[d]epending on the weekly schedule, either once or twice weekly" (Tr. pp. 169-70, 179, 181-82, 184-86, 207; see Dist. Ex. 1 at pp. 9, 14). According to the director, the "push-in" OT services specifically addressed the student's "sensory integration issues and poor writing skills and self-regulation deficiencies" (Tr. pp. 182, 185). While the director testified that the student received additional push-in OT services during the 2014-15 school year at the STEP School, the hearing record contains no other evidence that conclusively established the duration or frequency of the push-in OT services, and an "Itemized breakdown of Cost" for related services for the 2014-15 school year reflected tuition charges for only one 30-minute session per week of individual OT services, as mandated by the student's IEP, but did not itemize tuition charges for any push-in OT services (Tr. pp. 185-86, 215, 228-29, 244-46; Parent Ex. D; see generally Tr. pp. 1-278; Dist. Exs. 1-5; 7-13; Parent Exs. A-H; IHO Ex. I). The hearing record lacks any evidence to determine whether the student received push-in OT services to address similar issues during the 2013-14 school year (see generally Tr. pp. 1-278; Dist. Exs. 1-5; 7-13; Parent Exs. A-H; IHO Ex. I).

¹¹ As part of the student's "Daily Schedule" at the STEP School for the 2014-15 school year, two 30-minute periods per week were designated as "Fine Motor," which the director described as a "time to encourage proper sizing and spacing, to work on fine motor strengths, and integrate sensory integration as well, using a rice table and a sand table" (Tr. p. 189; Parent Ex. E). The hearing record lacks evidence to determine whether the student received "Fine Motor" sessions to address similar issues during the 2013-14 school year (see generally Tr. pp. 1-278; Dist. Exs. 1-5; 7-13; Parent Exs. A-H; IHO Ex. I).

a finding that the annual goals in the May 2014 IEP addressed the student's sensory issues, and the parent's assertion must be dismissed.¹²

Next, a review of the evidence in the hearing record does not support the parent's assertions that the May 2014 IEP failed to address the student's "deficits in attending and focusing," or the student's expressive, receptive, and pragmatic speech-language delays. According to the May 2014 CSE meeting minutes, the CSE discussed the student's "progress including academic, cognitive, physical, social, [and] communication/language" (Dist. Ex. 4). The CSE meeting minutes also indicated that the CSE "reviewed" the progress reports submitted by the STEP School, and the parent "acknowledged that they were all appropriate descriptions of [the student's] functional levels" (*id.*; *see* Dist. Exs. 8; 12-13; *see also* Tr. p. 71). Consistent with the May 2014 STEP School teacher progress report, the May 2014 IEP indicated that the student lacked "consistent focusing" in reading (*compare* Dist. Ex. 8 at p. 1, *with* Dist. Ex. 1 at p. 1). Also consistent with the May 2014 STEP School teacher progress report, the May 2014 IEP noted that the student was "easily distracted and require[d] redirection" and further, that the following strategies had been used to address these issues: "[p]eer modeling, discussions, and shorter increments of time spent on a given activity, as well as positive reinforcement and praise" (*compare* Dist. Ex. 8 at p. 1, *with* Dist. Ex. 1 at p. 2). Moreover, the May 2014 IEP indicated—as documented in the teacher progress report—that the student's "attention span" and "ability to stay on task" had both "increased" (*id.*). To address the student's identified needs in the areas of attending and focusing, the May 2014 CSE recommended OT and included an annual goal to improve her ability to sustain attention on task, which further included a corresponding short-term objective that targeted the student's ability to "attend to [a] given activity for periods of 20-30 minutes when provided with minimal verbal prompts" (Dist. Ex. 1 at pp. 4, 8-9).

With regard to the student's expressive, receptive, and pragmatic speech-language delays, the May 2014 IEP reflected her present levels of performance and progress in all of these areas as reported in the undated speech-language therapy progress report available to the CSE (*compare* Dist. Ex. 1 at p. 2, *with* Dist. Ex. 12 at p. 1). For example, the May 2014 IEP noted the student's ability to maintain conversations with "many prompts," her ability to maintain eye contact while requesting an item with a "single prompt," her ability to name details in a story with "some prompts," and the student's ability to describe six-step sequence pictures using full sentences with prompts (*id.*). In addition, the May 2014 IEP noted that the student could "follow one-step

¹² To the extent that the STEP School director testified at the impartial hearing that an occupational therapist worked on "sensory goals" with the student during the 2014-15 school year, the hearing record is devoid of evidence describing the "sensory goals" or what needs the "sensory goals" were designed to address (Tr. p. 205; *see generally* Tr. pp. 1-278; Dist. Exs. 1-5; 7-13; Parent Exs. A-H; IHO Ex. I). Moreover, the hearing record lacks evidence to determine whether the student worked on "sensory goals" during the 2013-14 school year at the STEP School and further lacks evidence establishing that the evaluative information available to the May 2014 CSE indicated that the student worked on sensory goals (*see generally* Tr. pp. 1-278; Dist. Exs. 1-5; 7-13; Parent Exs. A-H; IHO Ex. I). Here, even if one could reasonably infer from the STEP School director's testimony at the impartial hearing that the student worked on sensory goals to address sensory processing skills during the 2014-15 school year, such retrospective evidence could not be used to attack the appropriateness of the annual goals in the May 2014 IEP (*see C.L.K. v. Arlington Sch. Dist.*, 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [finding that "a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]).

directions accurately;" she could "express her needs and wants, but in a stilted manner;" and overall, the student demonstrated "improved communication efforts" during the past school year (Dist. Ex. 1 at p. 2). To address the student's continuing needs in all of these areas, the May 2014 CSE recommended speech-language therapy and incorporated the 6 annual goals and 12 corresponding short-term objectives as drafted in the undated speech-language therapy progress report directly into the May 2014 IEP (compare Dist. Ex. 1 at pp. 4-6, with Dist. Ex. 8 at pp. 1-2). As noted briefly above, the annual goals and short-term objectives in the May 2014 IEP specifically targeted the student's ability to maintain eye contact during conversations, her ability to use grammatically correct sentences, maintaining conversations, answering multiple choice comprehension questions, writing summaries of passages using a "web/graphic organizer," and speech intelligibility (Dist. Ex. 1 at pp. 4-6).

In addition—and consistent with the May 2014 STEP School teacher progress report—the May 2014 IEP identified social conversations and communications as areas of need related to the student's social development (compare Dist. Ex. 1 at p. 2, with Dist. Ex. 8 at p. 1). Here, the May 2014 CSE described the student as having "good language skills;" the CSE also noted that the student needed "prompts and reminders to initiate conversations or join social group settings," and she continued to "work on maintaining eye contact when speaking to others, greeting her classmates in the morning, and answering the first time she [was] spoken to" (id.). In addition to the annual goals and corresponding short-term objectives described above, the May 2014 IEP also included annual goals and short-term objectives to further address these identified needs by targeting the student's ability to improve her "responsiveness and interaction with others," increasing her "interpersonal interactions" with others through playing games and sustaining "reciprocal interactions," and improving her social interactions with peers (Dist. Ex. 1 at pp. 6-7). Therefore, based upon a review of the hearing record, the evidence supports a finding that the May 2014 IEP addressed the student's expressive, receptive, and pragmatic speech-language delays, and the parent's assertion must be dismissed.

2. Consideration of Special Factors—Interfering Behaviors: The FBA

Turning to the dispute over interfering behaviors, the parent initially argues that the hearing record lacked evidence to establish that the May 2014 CSE had either the FBA or the BIP available to the CSE members or to otherwise assist in the preparation of the IEP. The parent also argues that the IHO erred in concluding that the omissions in the FBA did not result in a finding that the district failed to offer the student a FAPE. The parent argues that nearly half of the FBA remained blank and the completed portions of the FBA contained "extremely general and limited" information, which rendered the document "virtually meaningless." The parent also contends that the IHO erred in finding that the hearing record lacked evidence to establish that the student's "talking to herself and singing to herself" did not need to be addressed since these behaviors did not affect the student's ability to function in the classroom. Regarding the development of the FBA, the parent asserts that the May 2014 CSE failed to compile the necessary information.

In response, the district generally argues that the IHO properly concluded that any deficiencies in the FBA did not result in the district's failure to offer the student a FAPE for the 2014-15 school year. Alternatively, the district asserts that even if it failed to complete an FBA and develop a BIP, it was not a denial of a FAPE because the May 2014 IEP otherwise addressed the student's behavior needs.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ., 2009 WL 3326627, at *3 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at *8; W.S., 454 F. Supp. 2d at 149-50). 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 includes, 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 regulation, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]).

Although State regulations call for the procedure of using an FBA when developing a BIP, the 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 addresses the student's problem behaviors (id.).

Initially, a review of the evidence in the hearing record does not support the parent's assertions that the omissions in portions of the FBA resulted in a finding that the district failed to offer the student a FAPE. In this case, the evidence in the hearing record includes an FBA of the student, dated May 12, 2014—the same date the May 2014 CSE convened to conduct the student's

annual review (compare Dist. Ex. 2 at p. 1, with Dist. Ex. 1 at pp. 1, 12).¹³ At the impartial hearing, the district school psychologist who attended the May 2014 CSE meeting confirmed that the CSE did not complete the "statement of functional hypothesis" section of the FBA (compare Tr. pp. 110-11, with Dist. Ex. 2 at p. 3).

Consistent with the district school psychologist's testimony, a review of the FBA reveals that it failed to include a narrative "Statement of Functional Hypothesis" (compare Tr. pp. 110-11, with Dist. Ex. 2 at p. 3). Notwithstanding this omission, a review of the FBA does not support the IHO's findings that other omissions also existed, namely that the FBA did not include information where the FBA requested a "description of the antecedent behavior" or that the section of the FBA entitled "Diagram of Functional Hypothesis" was not completed (compare IHO Decision at p. 8, with Dist. Ex. 2 at pp. 2-3).¹⁴

Pursuant to State regulations, the May 2014 CSE described the student's antecedent behaviors in the FBA, in part, as "[c]hanges in schedule, changes in personnel, [and] frustration" (compare 8 NYCRR 200.2[r]; 200.22[a][3], with Dist. Ex. 2 at p. 2). In the same section of the FBA, the May 2014 CSE further indicated that the student's problem behaviors (identified, in part, as running out of the classroom or out of the school building; difficulty transitioning from activity to activity; becoming resistant to teacher direction) occurred "[t]hroughout the day" and that "[c]hanges in routine or personnel as well as unknown triggers" immediately preceded the student's inappropriate behaviors (compare 8 NYCRR 200.2[r]; 200.22[b][3], with Dist. Ex. 2 at pp. 1-2). Next, in the section of the FBA entitled "Diagram of Functional Hypothesis," the May 2014 CSE identified "[c]hanges in routine either staff or activity" as both the "Setting Events (Conditions that increase[d] likelihood of behavior[s])" and "Antecedent (What occur[red] before?)" (Dist. Ex. 2 at p. 3). In the "Diagram of Functional Hypothesis," the May 2014 CSE identified "[o]ut of seat and off task behavior culminating in leaving the classroom or school" as the student's "Target Problem Behavior[s] (Observable/Measurable)" (id.). And finally within the same section of the FBA, the May 2014 CSE identified both the "[c]onsequence" of the student's behaviors (i.e., the teacher

¹³ While the student's need for a BIP must be documented in the IEP, and prior to the development of the BIP, an FBA either "has [been] or will be conducted" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 25 [emphasis in original]), it does not follow that in every circumstance an FBA must be conducted and a BIP developed at the same time as the IEP (see Cabouli v. Chappaqua Cent. Sch. Dist., 202 Fed. App'x 519, 522 [2d Cir. 2006] [noting that it may be appropriate in some circumstances to address a student's behaviors in an IEP by noting that an FBA and BIP will be developed after a student is enrolled at the proposed district placement]). Therefore, to the extent that the parent asserts that the May 2014 CSE did not contemporaneously create the FBA or BIP on the same date as the CSE meeting, or that the CSE did not have these documents available to the CSE members or use these documents to develop the May 2014 IEP, these assertions are not persuasive and would not lead to the conclusion, here, that the district failed to offer the student a FAPE for the 2014-15 school year. Moreover, under the circumstances of this case where the evidence in the hearing record indicates that at the time of the May 2014 CSE meeting, the student was attending the STEP School, conducting an FBA to determine how the student's behavior related to the student's school environment at the STEP School would have—at the very least—diminished, or nearly inconsequential value, whereas here, the May 2014 CSE was charged with identifying an appropriate publicly funded placement for the student (see 8 NYCRR 200.1[r]; Cabouli, 202 Fed. App'x at 522; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *13 [S.D.N.Y. Aug. 5, 2013]).

¹⁴ Similarly, a review of the FBA does not support the parent's contention that approximately half of the entire FBA was left blank (compare Pet. ¶¶ 28-29, with Dist. Ex. 2 at pp. 1-3).

stopped class to contain the student) and the "[f]unction" of the student's behaviors (i.e., to avoid tasks or to avoid the discomfort of "managing change of routine") (*id.*). Thus, with the exception of the Statement of Functional Hypothesis, the required elements set forth in regulation appeared in the FBA, even if they were not located in the box that one might expect. Such technical details are at most a procedural irregularity and do not amount to a denial of a FAPE.

Having found that the narrative "Statement of Functional Hypothesis" comprised the only omission found in the FBA, the next inquiry focuses on whether this omission constitutes a procedural violation that impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or 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]; *see R.E.*, 694 F3d at 190). In defining an FBA, State regulation indicates that an FBA "shall be developed consistent with the requirements in section 200.22(a) of this Part, and shall include, but is not limited to . . . 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]). As noted above, State regulation also requires that an FBA must include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day" (8 NYCRR 200.22[a][3]). In the district's FBA form, the narrative "Statement of Functional Hypothesis" appears to gather information already reported in other sections of the FBA (such as describing the antecedent to the problem behaviors, identifying the problem behaviors, noting the consequence and function of the student's behaviors) (*compare* Dist. Ex. 2 at p. 3, *with* Dist. Ex. 2 at pp. 1-2). However, the narrative "Statement of Functional Hypothesis" section of the district's FBA form also appears to require information regarding a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day" of the student's behaviors, as required by State regulation (*compare* Dist. Ex. 2 at p. 3, *with* 8 NYCRR 200.22[a][3]).

Under the circumstances of this case, although the May 2014 CSE's failure to include this baseline information in the FBA violated State regulation, the evidence in the hearing record does not support a finding—nor does the parent set forth any particular argument—that this procedural violation, alone, impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (*see generally* Tr. pp. 1-278; Dist. Exs. 1-5; 7-13; Parent Exs. A-H; IHO Ex. I). A review of the evidence in the hearing record also does not support the parent's contention that the information included in the FBA was "extremely general and limited in nature," which rendered the document "virtually meaningless" (*id.*). Rather, despite the absence of a baseline of the student's behaviors—and consistent with State regulations noted above—the FBA identified the student's targeted problem behaviors, it described what occurred prior to and what triggered the student's targeted problem behaviors, and the FBA also described antecedents to the targeted problem behaviors (*see* Dist. Ex. 2 at pp. 1-2; *see also* 8 NYCRR 200.1[r]; 200.22[a][3]). In addition, the FBA included a diagram of the functional hypothesis of the student's targeted problem behaviors ("[t]ask avoidance or discomfort of managing change of routine") (Dist. Ex. 2 at p. 3; *see* 8 NYCRR 200.1[r]). The FBA further identified "Behavioral Supports & Interventions Previously Tried" with the student ("[s]tar charts and rewards") as well as "Behavioral Supports & Interventions Currently in Place" for the student ("[s]mall group setting, star charts, verbal prompting to manage change") (Dist. Ex. 2 at p. 3; *see* 8 NYCRR 200.22[a][2]-[3]). With regard to describing or listing the "Student's Interests and

Possible Reinforcers (Refer to Assessment of Student Preferences, IEP, Staff/Parent/Student Interview as appropriate)," the FBA identified the following: music, computer, and exercise as the "student's interests or preferences" (*id.*). The May 2014 CSE also noted, however, that although these interests or preferences were "[i]nconsistently effective" for the student, in contrast, an "[i]nconsistent responsiveness to consequences" was not reinforcing or motivating for the student (*id.*). Finally, the FBA denoted the "Replacement Behavior(s)" and "Strategies for Teaching New Behaviors" as the student "[r]emaining in [her] seat until permission given to leave" and "[r]emaining in [the] classroom until escorted out" (*id.*).

Next, the parent argues that the IHO erred in finding that the hearing record lacked evidence to establish that the student's "talking to herself and singing to herself" did not need to be addressed since these behaviors did not affect the student's ability to function in the classroom. In support of this contention, the parent points to the STEP School director's testimony at the impartial hearing, which described how the student presented "socially and emotionally" at the start of the 2014-15 school year (Tr. pp. 200-01). According to the director, the student was a "very energetic young lady, with a tendency to self-stimulate" and she exhibited "a lot of difficulty with self-regulation" (*id.*). Due to the student's "inability to focus" and "short attention span," the director further testified that "within minutes" the student would be "either self-stimming or involved in echolalic patterns or singing to herself" (Tr. pp. 201-02). To address some of these "behaviors" during the 2014-15 school year, the STEP School implemented "behavior modification techniques, including a behavior chart" with goals for the student to demonstrate, in part, "self-control in regard to singing to herself during class" (Tr. pp. 202-03; Parent Ex. F at p. 3). The director testified that the student's "Behavior Modification Plan" for the 2014-15 school year at the STEP School—which directly targeted the student's "singing to herself" during class—indicated that the student would earn "stickers as tokens for accomplishing these behaviors" (Tr. pp. 202-03; *see* Parent Ex. F t p. 3). When the student completed her "chart," she would receive a reward, such as buying a "special snack" or receiving "extra time on the computer" (Parent Ex. F at p. 3).

At the impartial hearing, the STEP School director explained that behavior modification plans were "not static" and were "readdressed during the course of the year" (Tr. pp. 222-23). She further testified about the student's "Behavior Modification Plan" for the 2014-15 school year, indicating that "if the teacher found that the most disturbing behaviors of [the student] at the beginning of the year were singing to herself and her inability to take part in a typical conversation, those would have been the two goals that were set to begin with" (*id.*; *see* Parent Ex. F at p. 3). She also testified that if the student did not demonstrate improvement or master the goals, then "these behavior modification goals were reevaluated, reset, or then chosen to be addressed through an ABA technique" (*id.*).

To the extent that the STEP School selected the student's singing to herself during class as a behavior to address in its own "Behavior Modification Plan" during the 2014-15 school year, the parent cannot use such retrospective evidence to attack the May 2014 CSE's omission of this behavior as a behavior to address through its FBA or to attack the appropriateness of either the FBA or the BIP, as it seeks to "alter the information available to the CSE" (*cf.* C.L.K., 2013 WL 6818376, at *13 [finding that "a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]). A review of the evaluative information relied upon by the May 2014 CSE in developing the FBA and the BIP—including the

verbal input from the STEP School staff and parent—does not support a finding that the student's singing or talking to herself impeded her learning or that of others (8 NYCRR 200.4[d][3][i], 200.22[a]-[b]). For example, aside from the May 2014 STEP School teacher progress report noting that the student had "good language skills but often speaks and sings to herself," the teacher progress report did not relay any further consequence of the behavior or more particularly, that the behavior impeded the student's learning or that of others (see generally Dist. Ex. 8). Moreover, at the impartial hearing the district school psychologist acknowledged that although she observed the student engage in "some stereotypy in terms of her self-stimulatory behavior and other behaviors that would indicate that she [was] autistic," she also observed the STEP School staff effectively address these behaviors when the paraprofessional "prompted" or helped focus the student and that the student was "responsive to [this] redirection" (Tr. pp. 84-86). The district school psychologist also testified that within the January 2014 classroom observation report, she noted "three specific times" that the paraprofessional assisted the student in this manner (Tr. p. 86; see Dist. Ex. 7 at pp. 1-2).

According to the January 2014 classroom observation report, the district school psychologist documented that the student engaged in "some dramatic self-stimulating behaviors such as suddenly standing up and jumping up and down until she was helped by the para[professional] to return to her seat"—and further, that the student's classmates "tended to ignore her and did not seem to notice" (Dist. Ex. 7 at p. 1). In addition, the classroom observation report indicated that, at times, the student rocked back and forth in her seat "until asked to stop doing that," and while seemingly engaged in the ongoing lesson, the student exhibited "facial grimacing and some echolalia" (id.). However, when the "teacher prompted [the student] with a reminder that she would receive a prize if she sat and attended quietly [the student] immediately complied" (id.). Near the conclusion of the classroom observation, the district school psychologist observed that the student "sprung up from her seat dramatically and almost leapt out the classroom door" when the other students in the class "stood up to go to lunch" (id.). Again, however, the district school psychologist observed that the student complied with redirection to "walk on the line" (id.).

Here, the evidence in the hearing record reveals that while the student may have engaged, at times, in singing to herself (as noted in the May 2014 STEP School teacher report) or in talking to herself (echolalia, as noted in the January 2014 classroom observation report), the evidence also demonstrates that the STEP School staff easily addressed these behaviors through prompting, reminders, or redirection and the student complied with these management strategies (see Dist. Ex. 7 at p. 1). The evidence further indicates that these behaviors did not impede the student's ability to learn, or that of others, in the classroom (id.). Thus, the evidence in the hearing record supports the IHO's finding that the student's "talking to herself and singing to herself" did not need to be addressed in either the FBA or the BIP (see I.B. v. New York City Dep't of Educ., 2016 WL 1069679, at *13 [S.D.N.Y. Mar. 17, 2016] [finding no procedural violation despite the absence of both an FBA and a BIP], citing T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 169 [2d Cir. 2014] [finding that characteristics of "distractibility, inattentiveness and difficult remaining on-task, non-contextual vocalizations, finger twirling [did not] impede [the student's] learning or that of others."] and R.E., 694 F.3d at 183, 195 [finding that a history of biting her hands and hitting herself was "not severe enough to warrant an FBA"]).

Finally, the parent argues that the May 2014 CSE failed to obtain the necessary information or documentation to develop the FBA. The evidence in the hearing record does not support the parent's argument. According to State regulation, an FBA shall be based on multiple sources of data including, but not limited to, "information obtained from direct observation of the student, information from the student, the student's teacher(s) and/or related service provider(s), a review of available data and information from the student's record and other sources including any relevant information provided by the student's parent" (8 NYCRR 200.22[a][2]). An FBA must also be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). At the impartial hearing, the district school psychologist testified that when she conducted a classroom observation of the student in January 2014, she did not conduct an FBA of the student at that time (see Tr. pp. 86-87; Dist. Ex. 7 at p. 1).¹⁵ Rather, the district school psychologist testified that because an FBA was "based on the student's ongoing problematic behaviors," one classroom observation of the student would not form a "legitimate" basis upon which to complete an FBA (Tr. p. 87). She further testified that to develop an FBA, the "information" must come from the "school that's been working with the student over a period of time" in order to describe "what trigger[ed] a student's behaviors, what cause[d] the behaviors, and what [were] the most critical behaviors"—and therefore, an FBA would be developed at a "review" (id.; see Tr. p. 97).

In developing the FBA, the district school psychologist testified that the May 2014 CSE relied, in part, upon information verbally communicated to the CSE by the STEP School staff attending the meeting (see Tr. pp. 87-88, 96-98, 100-01, 111-13; see also Tr. pp. 102-09). In addition, the May 2014 CSE relied upon information in the student's STEP School progress reports provided to the CSE, including a counselor's report, to develop the FBA; the district school psychologist also acknowledged, however, that the student's STEP School counselor did not attend the May 2014 CSE and did not, therefore, personally assist in the development of the FBA (see Tr. pp. 98, 102-09; Dist. Exs. 8; 12-13). At the impartial hearing, the district school psychologist confirmed that—as reflected in the FBA—the May 2014 CSE relied upon teacher reports (i.e., both verbal and written reports) as sources of "Direct Data" to create the FBA—but the CSE did not use any other sources of "Direct Data" identified on the FBA form, including the antecedent, behavior, and consequence (ABC) charts; frequency charts; duration charts; intensity scale; latency documentation; or an assessment of student preferences (compare Tr. pp. 99-100, 102-09, with Dist. Ex. 2 at pp. 2-3).

Although the May 2014 CSE did not use information derived from all of the possible sources of "Direct Data" listed on the FBA form, the evidence in the hearing record supports a conclusion that the CSE sufficiently complied by relying upon multiple sources of information to develop the FBA, consistent with State regulation.¹⁶ A review of the FBA, itself, reveals that the

¹⁵ Throughout her testimony, the district school psychologist frequently needed to review documents in order to refresh her recollection to respond; at times, the district school psychologist could not recall information to provide responses (see, e.g., Tr. pp. 65, 67-70, 85-88, 98, 105-06, 108, 110-13, 125, 129, 133-35, 137).

¹⁶ Other than requiring the use of "multiple sources" of data, State regulations do not prescribe that districts must use any of the particular sources of data listed on the district's FBA form under "Direct Data" to develop an FBA, notwithstanding the form's requirement that such "data measures . . . must be considered" (compare Dist. Ex. 2 at p. 2, with 8 NYCRR 200.22[a][2]).

May 2014 CSE relied upon the January 2014 classroom observation report and "teacher reports" as sources of "Direct" and "Indirect Data" to "identify and support [the] functional hypothesis" (Dist. Ex. 2 at p. 1; see Dist. Exs. 8; 12-13). The May 2014 CSE obtained additional "Indirect Data" through parent and staff interviews, information from the present levels of performance in the IEP, and from a summary of the results of a January 2013 psychoeducational evaluation report (Dist. Ex. 2 at p. 1; see Dist. Exs. 1 at pp. 1-3; 5 at pp. 1-3; 8; 12-13). As a result, the parent's contention that the May 2014 CSE failed to obtain the necessary information or documentation to develop the FBA must be dismissed.

3. Consideration of Special Factors—Interfering Behaviors: The BIP

With respect to the BIP, the parent contends that because the May 2014 CSE failed to obtain the necessary information to develop the FBA, the resulting BIP was incomplete and "equally devoid of useful information." In particular, the parent contends that the BIP failed to include a narrative "Statement of Functional Hypothesis (From FBA)" and the "Global/Broad Influences Related to Targeted Problem Behavior(s) (Setting Events) (From FBA)." The parent also argues that the IHO erred in finding that it would not have been appropriate to address the student's "flight risk" behavior in the BIP in light of the student's lack of "safety judgment" and because the 1:1 crisis management paraprofessional would address that behavior.

In response, the district generally argues that the IHO properly concluded that any deficiencies in the BIP did not result in the district's failure to offer the student a FAPE for the 2014-15 school year. Alternatively, the district asserts that even if it failed to complete an FBA and develop a BIP, the May 2014 IEP otherwise addressed the student's behavior needs.

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

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

(8 NYCRR 200.22[b][1]). If the CSE determines that a BIP is necessary for a student the BIP shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . . ; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness

of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR 200.22[b][4]).¹⁷

In this instance, the hearing record includes a BIP for the student, dated May 12, 2014—the same date the May 2014 CSE convened to conduct the student's annual review (compare Dist. Ex. 3 at p. 1, with Dist. Ex. 1 at pp. 1, 12). At the impartial hearing, the district school psychologist confirmed that the BIP did not include a "statement of functional hypothesis" or a summary of the "influencing factors" (setting events) (compare Tr. pp. 120-25, with Dist. Ex. 3 at pp. 1-2). Consistent with the district school psychologist's testimony, a review of the BIP reveals that the May 2014 CSE did not create a narrative "Statement of Functional Hypothesis—the same omission in the FBA—and the CSE also did not enter a description of the "Global/Broad Influences Related to Targeted Problem Behavior(s) (Setting Events) (From FBA)" into the BIP (id.).

A review of the BIP also reveals, however, that it did include a "Functional Hypothesis (From FBA)," consistent with the requirement set forth in State regulation that a BIP, "at a minimum, includes . . . , global and specific hypotheses as to why the problem behavior occurs" (compare Dist. Ex. 3 at p. 1, with 8 NYCRR 200.1[mmm]). Within the "Functional Hypothesis" section of the BIP, the May 2014 CSE identified the "Setting Events (Conditions that increase the likelihood of the problem behavior);" the "Antecedent (What occurs before?);" the "Target Problem Behavior(s) (Observable/Measurable);" and the "Maintaining Consequence/Function (What happens after? What does student get and/or avoid?)" (Dist. Ex. 3 at p. 1). In particular, the May 2014 CSE described the consequence of the student's targeted problem behaviors as the teacher stopping the class in order to "ensure [the student's] and other students' safety" (id.). The CSE identified "[i]ncreased individualized attention and avoiding undesirable tasks" as the function of the student's targeted problem behaviors (id.). Therefore, while the BIP did not include a narrative "Statement of Functional Hypothesis," the information within the "Functional Hypothesis" indicates that the student engaged in the targeted problem behaviors (that is, becoming "[o]ff task, out of seat, leaving [the] classroom, [or] becoming physically agitated") when changes in "routine or personnel" occurred or when the student experienced "frustration of [her] wants" so that the student could receive increased individualized attention or to avoid undesirable tasks (id.).

Similar to the analysis regarding the absence of a narrative "Statement of Functional Hypothesis" in the FBA, this same specific section of the BIP called for information already reported in other sections of the BIP on the very same page of the BIP (such as describing the antecedent to the problem behaviors, identifying the problem behaviors, noting the consequence

¹⁷ The Official Analysis of Comments to the federal regulations explains that the decision regarding whether a student requires interventions such as a BIP rests with the CSE and is made on an individual basis (Consideration of Special Factors, 71 Fed. Reg. 46683 [August 14, 2006]). However, neither the IDEA nor its implementing regulations require that the elements of a student's BIP be set forth in the student's IEP ("Student Needs Related to Special Factors," Office of Special Educ. [April 2011], available at <http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf>). However, once a student's BIP is developed and implemented, "such plan shall be reviewed at least annually by the CSE or CPSE" (8 NYCRR 200.22[b][2]). Furthermore, "[t]he implementation of a student's [BIP] shall include regular progress monitoring of the frequency, duration and intensity of the behavioral interventions at scheduled intervals, as specified in the [BIP] and on the student's IEP. The results of the progress monitoring shall be documented and reported to the student's parents and to the CSE or CPSE and shall be considered in any determination to revise a student's [BIP] or IEP" (8 NYCRR 200.22[b][5]).

and function of the student's behaviors) (see generally Dist. Ex. 3 at p. 1). Similar to the narrative "Statement of Functional Hypothesis" section of the district's FBA form, the district's BIP form also appears to require information regarding a baseline measure of the student's problem behaviors, including the "frequency, duration, intensity and/or latency" of the targeted behaviors "across activities, settings, people and times of the day" as required by State regulation (compare Dist. Ex. 3 at p. 1, with 8 NYCRR 200.22[b][4][i]). While the omission of this baseline information in the FBA resulted in finding a procedural violation, a further review of the BIP reveals that the BIP included a "Baseline Measure of the Target Problem Behaviors(s)" (Dist. Ex. 3 at p. 1). Here, the May 2014 CSE identified the "frequency, duration, intensity and/or latency" of the targeted problem behaviors as "[w]eekly to bi weekly [sic], duration varies, [and] intensity varies from mild to moderate" (id.). Thus, while the descriptors used are not so specific as to leave no room at all for interpretation, it provides some guideposts as to frequency, duration, intensity and/or latency and, thus, the BIP does not suffer from the same omission of this information as the FBA (compare Dist. Ex. 3 at p. 1, with Dist. Ex. 2 at p. 3).

With respect to the omission of the "Global/Broad Influences Related to Targeted Problem Behavior(s) (Setting Events) (From FBA)" in the BIP, State regulations governing a BIP do not require the reporting of such information in the BIP; rather, State regulations require this information in the FBA (compare 8 NYCRR 200.1[r]; 200.22[a][3], with 8 NYCRR 200.22[b][4][i]-[iii]). The FBA included this information (see Dist. Ex. 2 at p. 2). According to the FBA, the setting events that increased the likelihood of the student's problem behaviors included the student being diagnosed as having autism, her "difficulty communicating" and becoming "highly active and impulsive when her schedule change[d] or when she bec[ame] frustrated" (id.). Even if the May 2014 CSE erred by failing to transfer this information to the BIP, the evidence in the hearing record does not support a finding—nor does the parent set forth any particular argument—that such a defect, alone, impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (see generally Tr. pp. 1-278; Dist. Exs. 1-5; 7-13; Parent Exs. A-H; IHO Ex. I).

Next, a review of the evidence in the hearing record does not support the parent's bare assertion that the BIP was devoid of useful information (see generally Tr. pp. 1-278; Dist. Exs. 1-5; 7-13; Parent Exs. A-H; IHO Ex. I). Consistent with FBA, the BIP identified the student's targeted problem behaviors as being "[o]ff task, out of seat, leaving [the] classroom, [and] becoming physically agitated" (compare Dist. Ex. 2 at pp. 1-3, with Dist. Ex. 3 at p. 1).¹⁸ Consistent with State regulation, the BIP included information about the "Baseline Measure of the Target Problem Behaviors(s)" (compare Dist. Ex. 3 at p. 1, with 8 NYCRR 200.22[b][4][i]). The BIP also identified the classroom teacher and a paraprofessional as individuals responsible for implementing the BIP (see Dist. Ex. 3 at pp. 2-3). Next, the BIP included a "Functional Hypothesis (From FBA)" and "Intervention Strategies," consistent with State regulation (compare Dist. Ex. 3 at pp. 1-2, with 8 NYCRR 200.1[mmm]; 200.22[b][4][ii]). As part of the "Intervention Strategies,"

¹⁸ Since the May 2014 CSE identified the student's targeted problem behaviors, in part, as "out of seat" behavior and "leaving [the] classroom" and recommended intervention strategies to address or modify these behaviors in the BIP, it is unclear how the parent's argument that the IHO erred in finding that it would not have been appropriate to address the student's "flight risk" behavior in the BIP affects an analysis of the appropriateness of the BIP in this case.

the May 2014 CSE described the "Behavior Teaching Strategies," which further identified the "Replacement Behaviors" ("[r]edirection to task") and how the student would be taught the new behavior ("[r]einforcement of prosocial behaviors with identifiable rewards such as preferred activities") (Dist. Ex. 3 at p. 2). Also consistent with State regulation, the BIP indicated a "Progress Monitoring" schedule requiring the district to initially report progress about the student's targeted problem behaviors to the parent "no later than 2 weeks after initiation of the plan," and then, "[w]eekly to biweekly" thereafter through teacher reports by the classroom teacher (compare Dist. Ex. 3 at p. 3, with 8 NYCRR 200.22[b][4]-[5]). In summary, although some of the language used in the BIP could be characterized as vague, such imprecision or vagueness does not outweigh the BIP's overall consistency with State regulations and providing the information as required by State regulations (see generally Dist. Ex. 3; 8 NYCRR 200.22[b][4]-[5]). There were also no inconsistencies between the statements in the BIP and the evaluative information before the CSE. Therefore, the parent's assertion must be dismissed.

Finally, the parent contends that the IHO erred in finding that it would not have been appropriate to address the student's "flight risk" behavior in the BIP given the student's lack of "safety judgement" and because a 1:1 crisis management paraprofessional would address that behavior. As noted previously, the STEP School director described how the student presented "socially and emotionally" at the start of the 2014-15 school year (Tr. pp. 200-01). At the time of her cross-examination at the impartial hearing, the STEP School director testified that based upon of the student's behavior of "jump[ing] up and run[ning]," she characterized those particular behaviors as constituting a "flight risk" (Tr. pp. 220-21, 223-24). Despite acknowledging that the student was a "flight risk," the STEP School director testified that she did not "believe that would have been a proper behavior modification goal" because the student did not have "control over it, due to her poor safety judgment, [and] due to her classification" (Tr. pp. 224-25; see Parent Ex. F at pp. 1-3). The director also testified that that was "why [the student] had a full-time crisis para[professional] to deal with those situations as they came up" (id.). Additionally, the director testified that at the STEP School, the student's crisis management paraprofessional was "able to address [the student's] safety issues and those types of behaviors, [such as] the bolting, the jumping behavior" (Tr. pp. 230-31). Upon review and consistent with the director's testimony, neither the STEP School's "Student Behavioral Profile" nor the "Behavior Modification Plan" for the 2014-15 school year identified the student's jumping up and running out of the classroom as a behavior to address or modify; in addition, neither of these documents characterized the student as a "flight risk" (Parent Ex. F at pp. 1, 3).

It is unclear, however, how the STEP School's decision to not address the student's "flight risk" behavior in its own behavior plan affects a determination about the appropriateness of the BIP developed by the May 2014 CSE, when the district's FBA and BIP identified and addressed the student's "flight risk" behavior. The FBA noted that the student was "highly active" and could "run out of the classroom and out of the school building without provocation or permission" (Dist. Ex. 2 at p. 1). In addition, the BIP identified one of the student's targeted problem behaviors as "leaving the classroom" as well as being "out of [her] seat," and that the paraprofessional would "intervene" (Dist. Ex. 3 at pp. 1-2). Based upon the foregoing, the evidence in the hearing record supports a conclusion the BIP accurately and adequately identified and described the student's

interfering behaviors at the time of its development—including the student's "flight risk" behavior—and the parent's assertions must be dismissed.¹⁹

4. Related Services

The parent argues that the OT services recommended in the May 2014 IEP were not sufficient to address the student's "sensory issues, fine motor, visual motor and vision perception delays, attention and focus." The parent also asserts that the counseling services recommended in the May 2014 IEP did not address the student's social/emotional delays, "maladaptive behaviors or self[-] stimulatory behaviors." Upon review, the evidence in the hearing record does not support the parent's assertions.

At the impartial hearing, the district school psychologist testified that the May 2014 CSE based its decision to recommend one 30-minute session per week of individual OT services for the student upon the May 2014 OT progress report and a "discussion at the meeting of what would be an appropriate level of service based on her gains" (see Tr. pp. 132-34, 136-37; Dist. Ex. 13; see also Tr. p. 208; Dist. Ex. 4). According to the May 2014 OT progress report, the student made "functional gains" in her ability to transition from "one activity to another with less verbal prompts," her ability to "manipulate writing material" with "moderate verbal prompts to maintain a tripod grasp," maintaining eye contact when spoken to, her ability to perform ADL skills with "minimal assistance and verbal cues," and the student's "attention span ha[d] increased" and her ability to "stay on task" had similarly "increased" (Dist. Ex. 13). In addition, the May 2014 OT progress report included a recommendation to "continue with [the] present mandate" (id.).

A review of the May 2014 CSE meeting minutes indicates that the CSE discussed "[e]ach" of the student's related services, and considered "modifications" of the related services "mandates" (Dist. Ex. 4). In particular, the meeting minutes documented the May 2014 CSE's decision to "maintain[]" the student's related services' recommendations for counseling, OT, and a crisis management paraprofessional "at previous service levels" (Dist. Ex. 4). Therefore, when reading the May 2014 CSE meeting minutes together with the May 2014 OT progress report, it appears that the CSE decided to continue to recommend one 30-minute session per week of individual OT services for the 2014-15 school year because the student made progress in her identified areas of need during the previous school year with the same level of OT services (compare Dist. Ex. 4,

¹⁹ While not argued by the parent, alternatively, the absence of an appropriate FBA or BIP might not result in a denial of FAPE if the CSE addressed the student's interfering behavior and created an IEP based upon information provided by the student's teachers, providers, parents and classroom observation conducted by the district (see R.E., 694 F.3d at 190-91; T.Y., 584 F.3d at 419; see also M.Z., 2013 WL 1314992, at *5, *8 [finding that, even in the absence of both an FBA and a BIP, provision of a 1:1 paraprofessional can render an IEP adequate where there is evidence that the 1:1 paraprofessional would provide "significant benefits . . . in addressing the problematic behaviors"]). In this case, the recommendation for the services of a full-time, 1:1 crisis management paraprofessional, in conjunction with the related services' recommendations and annual goals and short-term objectives in the May 2014 IEP, rescued any inadequacies in either the FBA or the BIP, and any deficiencies therein would not result in a finding that the district failed to offer the student a FAPE for the 2014-15 school year (see A.C., 553 F.3d at 172-73 [concluding that the failure to conduct a FBA did not make the IEP legally inadequate because the IEP noted (1) the student's attention problems, (2) the student's need for a personal aid to help the student focus during class, and (3) the student's need for psychiatric and psychological services]; see also M.W. v. New York City Dep't of Educ., 725 F.3d 131, 140 [2d Cir. 2013]).

with Dist. Ex. 13). In addition, the May 2014 CSE meeting minutes reveal that the "[s]chool and parent were in agreement with the level of related services" (Dist. Ex. 4).

At the impartial hearing, the STEP School director testified that she "only" disagreed with the CSE's decision with respect to the recommended level of speech-language therapy services for the student for the 2014-15 school year (Tr. pp. 208-09). And while the parent testified at the impartial hearing that he did not think that one 30-minute session per week of OT services was "enough," the parent's disagreement with the recommendation is not sufficient to conclude—as the parent argues—that the recommended level of OT services was insufficient to address the student's "sensory issues, fine motor, visual motor and vision perception delays, attention and focus." As articulated by one district court, "[a]lthough past progress is not dispositive, it does 'strongly suggest that' an IEP modeled on a prior one that generated some progress was 'reasonably calculated to continue that trend'" (S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *10 [S.D.N.Y. Dec. 8, 2011], quoting Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153-54 [10th Cir.2008]; see Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 530 [3d Cir. 1995]; D. D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *12 [E.D.N.Y. Sept. 2, 2011]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F.Supp.2d 606, 650 [S.D.N.Y.2011]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *16 [S.D.N.Y. Sept. 29, 2008]). In this case, as described above, the student made progress in her identified areas of need during the previous school year with one 30-minute OT session per week, which suggests that continuation of that level of OT services was appropriate, and the remaining evidence in the hearing record does not otherwise lead to the conclusion that the May 2014 CSE's recommendation for one 30-minute session per week of individual OT services was insufficient to meet the student's needs.

Similarly, the hearing record does not contain sufficient evidence to conclude that the counseling services recommended in the May 2014 IEP did not address the student's social/emotional delays, "maladaptive behaviors or self[-]stimulatory behaviors." The May 2014 CSE recommended that the student receive one 30-minute session per week of individual counseling services and one 30-minute session per week of counseling services in a small group (see Dist. Ex. 1 at p. 9). In addition, the May 2014 CSE created two annual goals with corresponding short-term objectives to address the student's social/emotional needs, and, in part, the behavior needs as identified in the present levels of performance and individual needs section of the IEP (compare Dist. Ex. 1 at pp. 6-7, with Dist. Ex. 1 at p. 2). For example, in describing the student's social development the May 2014 IEP reflected that the student demonstrated "little or no interest" in interacting with others (Dist. Ex. 1 at p. 2).²⁰ One annual goal in the May 2014 IEP was designed to improve her "responsiveness and interaction with others" (id. at p. 6). The same annual goal included two corresponding short-term objectives, one of which targeted the student's "responsiveness to classroom directives, through greater compliance" (id.). The second short-term objective indicated that the student would engage in a "2-level reciprocal interaction" (id.). The

²⁰ A review of the evaluative information relied upon by the May 2014 CSE and the May 2014 IEP itself reveals that the student's social/emotional delays primarily manifested in her social interactions (see Dist. Exs. 1 at pp. 1-2; 5; 7-8; 12-13). While the annual goals for counseling did address some of the student's identified needs in this area, the annual goals and short-term objectives related to speech-language therapy further addressed the student's social interactions by targeting her communication needs (see Dist. Ex. 1 at pp. 4-6). In addition, the student's 1:1 crisis management paraprofessional was also expected to assist the student with her social interactions (id. at p. 7).

second annual goal related to counseling services expected the student to "increase appropriate interpersonal interactions" (*id.* at p. 7). This annual goal also included two short-term objectives, one of which targeted the student's ability to "play a game with pre-established rules and roles," and the other short-term objective worked on the student ability to "wait her turn while playing a game and sustain reciprocal interaction until the game [was] completed" (*id.*).

At the impartial hearing, when asked whether the annual goals for counseling addressed the student's "trying to escape from the classroom setting," the district school psychologist pointed to the "first annual goal" together with the short-term objective to "improve [the student's] responsiveness to classroom directives through greater compliance" (Tr. p. 142). She noted that "greater compliance with teacher directives [was] significant," even if the annual goal and short-term objective did not "specifically address that particular issue" (Tr. pp. 142-43). However, even if the recommended counseling services or the annual goals for counseling did not address the student's "flight risk" behavior—or "trying to escape from the classroom setting"—the FBA and BIP did address this behavior, as explained previously.

With regard to the parent's contention that counseling failed to address the student's "maladaptive and self[-]stimulating behaviors," it must be noted that the parent did not specifically identify what specific behaviors needed to be addressed through the counseling services or otherwise (Pet. ¶ 5). To the extent that the student's "flight risk" behavior constitutes a maladaptive behavior, the FBA, BIP, and annual goals related to the student's counseling services addressed this behavior (*see* Dist. Exs. 1 at pp. 6-7; 2-3). In addition, to the extent that the student's echolalia, rocking back and forth in her seat, and singing or talking to herself constituted either maladaptive behavior or self-stimulating behaviors, the May 2014 IEP reflected the use of several management strategies to address these behaviors, including prompting, reminders, positive reinforcement and motivation, the use of hands-on and "exiting activities," redirection to task, peer modeling, discussions, praise, and using shorter increments of time spent on a given activity" (Dist. Ex. 1 at p. 2; *see* Dist. Ex. 4 [documenting the successful use of management strategies to address the student's maladaptive or self-stimulating behaviors during the January 2014 classroom observation of the student]). Consequently, the parent's assertion is not supported by the evidence in the hearing record, and it must be dismissed.

B. Challenges to the Assigned Public School Site

Finally, the parent argues that the May 2014 IEP was not appropriate and resulted in an assigned public school site that was "overly large" and that could not "offer the behavioral and sensory support" the student required. The parent also contends that the IHO improperly shifted the burden of proof to the parent, which must "invalidate" the IHO's conclusions that the 6:1+1 special class placement at the assigned public school site would have provided the student with a "small highly structured classroom environment" and the student would have received "individual instruction and that instruction would have been ABA based."²¹ The parent also argues that the IHO applied an incorrect legal standard to determine the appropriateness of the district's recommended placement, and that the district failed to provide sufficient evidence to demonstrate that the assigned public school site could appropriately implement the IEP. The district rejects

²¹ A review of the IHO's decision does not reflect that the IHO improperly shifted the burden of proof to the parent on this issue (*see* IHO Decision at pp. 7-9).

these contentions, arguing that the assigned public school site could have implemented the IEP. Upon review, the evidence in the hearing record does not support the parent's contentions regardless of the legal standard applied by the IHO on this issue.

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. v. New York City Dep't of Educ., 2015 WL 2146092, at *3 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 2015 WL 1244298, at *3 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]).²² Since the R.E. decision, however, several courts—including the Second Circuit—have continued to wrestle with and define what constitutes permissible prospective challenges to an assigned public school site and a district's "capacity" to implement an IEP, as well as which party bears the burden of proof on this issue (see, e.g., M.O. v. New York City Dep't of Educ., 793 F.3d 236, 243-46 [2d S.D.N.Y. 2014]; J.M. v. New York City Dep't of Educ., 2016 WL 1092688, at *8-*11 [S.D.N.Y. Mar. 21, 2016]; Q.W.H. v. New York City Dep't of Educ., 2016 WL 916422, at *7-*12 [S.D.N.Y. Mar. 7, 2016]; C.S. v. New York City Dep't of Educ., 2016 WL 815235, at *6-*7 [S.D.N.Y. Feb. 29, 2016]; N.M. v. New York City Dep't of Educ., 2016 WL 796857, at *8-*9 [Feb. 24, 2016]; M.E. v. New York City Dep't of Educ., 2016 WL 703843, at *10-*14 [S.D.N.Y. Feb. 23, 2016]; N.K. v. New York City Dep't of Educ., 2016 WL 590234, at *5-*7 [S.D.N.Y. Feb. 11, 2016]; W.W. v. New York City Dep't of Educ., 2016 WL 502025, at *4-*8 [S.D.N.Y. Feb. 8, 2016]; Y.F. v. New York City Dep't of Educ., 2015 WL 4622500, at *7 [S.D.N.Y. July 31, 2015]).

In this instance, even if the IHO applied the correct legal standard and discerned whether the parent's objections to the assigned public school site were permissible or impermissible, the parent's argument must fail. Here, the parent's objection to the "overly large" size of the assigned public school site in the due process complaint notice—and continued now on appeal—does not challenge the district's capacity to implement the student's IEP or directly contradict the IEP and, therefore, it is not permissible (see M.O., 793 F.3d at 245; J.M., 2016 WL 1092688, at *8-*11; Y.F., 2015 WL 4622500, at *7). Similarly, the parent's objection to the assigned public school site's alleged lack of ability to "offer the behavioral and sensory support" that the student required is also impermissible, as it appears to be based solely on the parent's speculative "personal belief" that the assigned public school site was not appropriate (see M.O., 793 F.3d at 245; J.M., 2016 WL 1092688, at *10-*11; Q.W.H., 2016 WL 916422, at *9).

²² The Second Circuit has held that a district's assignment of a student to a particular public school site is an administrative decision that must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 419-20; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014] [holding that while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). The district is required to implement the IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan (20 U.S.C. §§ 1401[9][D]; 1414[d][2]; 34 CFR 300.17[d]; 300.323; 8 NYCRR 200.4[e]).

Even if the parent's objections to the assigned public school site were permissible, the district presented sufficient evidence to conclude that the assigned public school site could implement the student's IEP. At the impartial hearing, the parent testified that after visiting the assigned public school site, they "wrote a letter stating we didn't agree with it" (Tr. pp. 239-40). The parent did not further elaborate during the direct examination about any objections to the assigned public school site, nor was the letter from the parent regarding the alleged objections entered into evidence at the impartial hearing by either party (see generally Tr. pp. 235-42; Dist. Exs. 1-5; 7-13; Parent Exs. A-H; IHO Ex. I). During cross-examination, the parent testified about his concerns with the assigned public school site, including that it was a "much larger building" and "for a kid with sensory issues, having all that noise around them definitely wouldn't help her" (Tr. pp. 243, 248-49). Relatedly, the parent testified that because the assigned public school was so large, he had "safety concerns" for the student (Tr. p. 249). In particular, the parent explained that at the STEP School "everybody in the school" knew the student, and therefore, at the assigned public school, "not every teacher" would know the student or where the student belonged (id.).

In addressing the parent's objections at the impartial hearing, the district presented the assigned public school site's special education administrator/assistant principal (principal) as a witness (see Tr. pp. 41-61). The principal testified that at the assigned public school site, he was responsible for overseeing "approximately 135 students," 50 to 60 staff members, the overall coordination of assessments within the building, and the implementation of "school policies and procedures" (Tr. pp. 42-43). He further explained that while the assigned public school site was "housed within a larger public school," the students within the assigned public school site were housed within their "own location" or "wing" of the building on the "second, third, and fourth floor[s]" (Tr. pp. 47-48). Moreover, the special education students did not eat lunch or have recess with or otherwise interact with or share spaces with the regular education students within the same building (see Tr. p. 48).²³

The principal also testified that the assigned public school site served students with special needs for kindergarten through eighth grade (Tr. p. 43). For sixth through eighth grades, the school site had five classrooms available for students with autism, any of which would have been appropriate for the student (see Tr. pp. 43-44, 49). He also testified that as of July 2014—as well as of September 2014—the school site had "space" available in its 6:1+1 special classes (Tr. p. 44; see Tr. pp. 50-51). In addition, the assigned public school site could provide students with related

²³ I can appreciate the attractiveness that the parent appears to feel for STEP as a small, segregated special education setting where everyone knows the student and noise and size concerns are minimized to the greatest extent possible, as well as the testimony offered by the principal that suggests many of the same benefits could be realized in a fully segregated setting in the public school. At the same time, I note that federal authorities continue to increasingly emphasize that great effort should be made to avoid unnecessary reliance on public programs that result in the segregation of students with disabilities from their nondisabled peers, not only under the IDEA's LRE requirements but increasingly under the American with Disabilities Act as well (see Letter to Deal and Olens, [U.S. Dept. of Justice 2015], located at http://www.ada.gov/olmstead/documents/gnets_lof.pdf; see also T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 167 [2d Cir. 2014] [holding that a district violated an LRE requirement to provide a summer mainstream program with nondisabled peers even though the district itself did not already operate such a summer program]). Thus even when both the parents of a disabled child and a school district are amenable to providing special education in settings that do not include the typical distractions of school environments having nondisabled peers, one or both statutes may nevertheless mandate that the public agency adhere to requirements to place the student with nondisabled peers.

services of speech-language therapy, OT, physical therapy, counseling, and parent counseling and training (*id.*). The assigned public school site could also provide students with crisis management paraprofessionals throughout the 12-month school year (*see* Tr. pp. 44-45). The principal also testified that upon reviewing the student's IEP, the assigned public school site could have provided the services in "accordance with its mandates" during the 2014-15 school year (Tr. p. 45).

On cross-examination, the principal confirmed that the assigned public school staff had training in ABA, and further, that the school site employed Board Certified Behavior Analysts (BCBAs) (*see* Tr. pp. 51-52).²⁴ During the 2014-15 school year, the assigned public school site's staff included approximately five speech-language therapists, three occupational therapists, one physical therapist, and two counselors (*see* Tr. pp. 54-55). He also testified that during the 2014-15 school year, the assigned public school site offered parent counseling and training approximately four times, but it "depend[ed] on the need of the parents" (Tr. p. 56). The principal also confirmed that some of the special education students at the assigned public school site had FBAs and BIPs, and that some students exhibited "escape behaviors" and tried to "elope from the classroom" (Tr. pp. 57-58). For students who exhibited these behaviors, the assigned public school site developed a "flight risk plan" at the beginning of the school year, which was separate and apart from a student's IEP (Tr. pp. 58-59).

Therefore, based upon the foregoing, the hearing record includes sufficient evidence that the assigned public school site could have implemented the student's IEP during the 2014-15 school year.

VII. Conclusion

In summary, having determined that the evidence in the hearing record demonstrates that the district sustained its burden to establish that it offered the student a FAPE in the LRE for the 2014-15 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether the student's unilateral placement at the STEP School was an appropriate placement or whether equitable considerations weighed in favor of the parent's requested relief (*see Burlington*, 471 U.S. at 370; *M.C. v. Voluntown Bd. of Educ.*, 226 F.3d 60, 66 [2d Cir. 2000]).

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
March 31, 2016**

**JUSTYN P. BATES
STATE REVIEW OFFICER**

²⁴ Notwithstanding this testimony, neither party solicited testimony from the principal regarding whether the student, herself, would receive "individualized instruction" or that "that instruction would have been ABA based" (*see generally* Tr. pp. 41-61). To the extent that the IHO reached this conclusion, the evidence in the hearing record does not support it (*see generally* Tr. pp. 1-278; Dist. Exs. 1-5; 7-13; Parent Exs. A-H; IHO Ex. I). Indeed, the IHO did not cite to any evidence in the hearing record to support this conclusion (*see* IHO Decision at pp. 7-8). The matter is beside the point, as the IEP does not indicate that the student requires instruction using ABA, nor was that a claim raised by the parent.