



The University of the State of New York

The State Education Department

State Review Officer

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No. 12-055

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

Appearances:

Michael Best, Special Assistant Corporation Counsel, attorneys for petitioner, Ilana A. Eck, Esq., of counsel

Susan Luger Associates, Inc., attorneys for respondent, Michelle Siegel, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) son and awarded the parent the costs of her son's tuition and transportation at the Rebecca School for the 2011-12 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a school 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]; 34 CFR 300.151-300.152, 300.506, 300.511; Educ. Law § 4404[1]; 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 300.514[c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

In this case, the student's eligibility for special education programs and related services as a student with autism is not in dispute in this proceeding (34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]). The student demonstrates difficulties with self-regulation, behavior, social/emotional functioning, academics, pragmatic language, and motor planning (Tr. pp. 280-85; Dist. Exs. 4-8; Parent Ex. A). At approximately two years of age, the student received a diagnosis of a pervasive developmental disorder (PDD) and received services through early intervention consisting of school and home-based speech-language therapy, occupational therapy (OT), and physical therapy (PT) to address his speech-language and self-regulation difficulties (Tr. pp. 271-72, 280-85; Dist. Exs. 1 at p. 3; 6 at p. 1; 7 at p. 1; Parent Ex. A at p. 3).

On April 27, 2011, the CSE convened for the student's annual review to develop his IEP for the 2011-12 school year (Dist. Exs. 1; 10). The April 2011 CSE recommended, among other things, a 12-month educational program consisting of an 8:1+1 special class in a specialized school; a full-time 1:1 crisis management paraprofessional; and related services consisting of

speech-language therapy, counseling, and OT (Dist. Exs. 1 at pp. 1-2, 4-5, 15, 17; 10). The CSE also determined that the student's behavior seriously interfered with instruction and required additional adult support; therefore, the CSE revised the student's behavioral intervention plan (BIP) (Dist. Exs. 1 at pp. 4, 18; 10 at p. 2; see Parent Ex. A at p. 10).

On April 27, 2011, the district sent the parent a "notice of recommended deferred placement" (Parent Ex. E). The notice indicated that although the student had a right to an immediate placement in the recommended program, the CSE believed it may be in the best interest of the student to defer placement until June 15, 2011 because the IEP was developed for the 2011-12 school year (id.).

In a letter to the district dated May 31, 2011, the parent informed the district that she intended to sign an enrollment contract with the Rebecca School "to ensure a place for [the student] in case the [district] d[id] not offer an appropriate program/placement" to her son for the 2011-12 school year, but that she would enroll the student in an appropriate public program if one was offered by the district (Parent Ex. F at p. 1). She also informed the district that if it did not offer the student an appropriate program, she would have no alternative but to send the student to the Rebecca School for the 2011-12 school year and seek tuition reimbursement (id.). On June 1, 2011, the parent signed an enrollment contract with the Rebecca School for the student's 2011-12 school year, and remitted a partial payment of \$1,000 toward the school's non-refundable deposit (Parent Exs. K at pp. 1, 4-6; L at pp. 1-2; see Tr. p. 686).

By letter dated June 8, 2011, the district summarized the April 2011 CSE's recommendations and advised the parent of the particular school to which the district had assigned the student (Dist. Ex. 2; Parent Ex. G). By letter to the district dated June 21, 2011, the parent indicated that she had not received a response from the district about her request to visit the assigned school and therefore she was unable to determine if the recommended public program was appropriate (Parent Ex. H).¹ The parent reiterated that she would enroll the student at the Rebecca School for the 2011-12 school year if the district did not offer the student an appropriate program (id.).

On June 24, 2011, the parent paid the Rebecca School an additional \$500 toward her non-refundable deposit reserving her son's seat in the school for the 2011-12 school year (Parent Ex. L at pp. 1-3; see Tr. p. 686).

By letter to the district dated July 5, 2011, the parent informed the district that she intended to unilaterally place her son at the Rebecca School for the 2011-12 school year at public expense (Parent Ex. I at p. 1). According to the hearing record, the student has attended the Rebecca School, which has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities, since 2009, and attended an 8:1+3 special class with related services for the 2011-12 school year (Tr. pp. 288, 346-49, 372-79, 384-86, 466, 555, 710; Dist. Ex. 9 at pp. 1-2, 5; see 8 NYCRR 200.1[d], 200.7).

¹ The hearing record indicates that the parent visited the assigned school, but does not identify the specific date of her visit (see Tr. pp. 316-22, 638-42).

A. Due Process Complaint Notice

The parent filed a due process complaint notice dated July 14, 2011, alleging, among other things, that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year, that the Rebecca School was an appropriate placement for the student, and that equitable considerations supported her claims (Dist. Ex. 9 at pp. 2-5). Specifically, the parent alleged that: (1) the April 2011 CSE was improperly constituted because the special education teacher in attendance had only general knowledge about the recommended program and would not have been responsible for implementing the IEP; (2) the classroom observation of the student was completed six months prior to the April 2011 CSE meeting, therefore, giving an inadequate description of his needs; (3) "the CSE failed to do any other testing;"² (4) the student-to-teacher ratio of the recommended 8:1+1³ special class was inappropriate for the student and did not comport with the recommendations of the professionals who worked with the student; (5) the CSE failed to consider a more restrictive nonpublic school placement for the student; (6) the annual goals and short-term objectives contained in the April 2011 IEP did not address all of the student's unique educational and social/emotional needs; (7) and the CSE failed to conduct a functional behavioral assessment (FBA) before modifying the student's 2011-12 BIP (*id.* at pp. 3-5). As relief, the parent sought an award of the student's tuition and transportation expenses at the Rebecca School for the 2011-12 school year (*id.*).

B. Impartial Hearing Officer Decision

On October 19, 2011, an impartial hearing convened and concluded on January 11, 2012, after four days of proceedings. On February 14, 2012, the IHO issued a decision, determining, among other things, that the district failed to offer the student a FAPE for the 2011-12 school year, that the Rebecca School was an appropriate placement for the student, and that equitable considerations supported the parent (IHO Decision at pp. 20-28). Specifically, the IHO found that the district failed to offer the student a FAPE because: the April 2011 CSE failed to consider the recommendations set forth in a September 2009 private psychoeducational evaluation conducted by the student's neuropsychologist, including the recommendation for a social skills curriculum (*see* Dist. Ex. 8); the CSE erred in failing to conduct an FBA prior to modifying the student's 2011-12 BIP; "[t]he 8:1:1 program and placement recommended for the child at [the assigned school] contain[ed] no social skills curriculum as recommended by [the student's neuropsychologist];" the assigned school was inappropriate for the student because the building lacked elevator access and the student was unable to climb stairs; and the assigned 8:1+1 special class was inappropriate for the student because he would have been inappropriately grouped for instructional purposes with students having "severe aggressive tendencies" (*id.* at pp. 20-24, 28). The IHO also found that at the time of the April 2011 CSE meeting, there was no evidence that the student could function at the assigned school "or in any other 8:1+1 setting made available to the parent" (*id.* at p. 23).

² Although the parent alleged in her due process complaint notice that the classroom observation reviewed by the April 2011 CSE was conducted in October 2010, the hearing record reflects that the classroom observation was conducted in November 2010 (*compare* Dist. Ex. 4 at p. 1, *with* Dist. Ex. 9 at p. 3).

³ In its response to the due process complaint notice, the district erroneously indicated that it recommended a 6:1+1 special class in a specialized school for the student's 2011-12 school year (*compare* Dist. Ex. 1 at pp. 1-2, 5, 15, *with* Parent Ex. B at p. 2).

The IHO found that the Rebecca School was appropriate for the student for the 2011-12 school year, because, among other things, he received individualized attention in a class of eight students and four adults and his interfering behaviors had decreased (IHO Decision at pp. 24-28). In considering the equities, the IHO concluded that the parent "cooperated in good faith at all times with the [district]" during the review process and that the parent acted reasonably in signing an enrollment contract with the Rebecca School in the absence of an appropriate program recommendation from the district (*id.* at pp. 27-28). The IHO ordered the district to pay the student's tuition costs at the Rebecca School for the 2011-12 school year and reimburse the parent for transportation costs incurred (*id.* at pp. 28-29).

IV. Appeal for State-Level Review

The district appeals from the IHO's decision, arguing, among other things, that the IHO improperly raised issues *sua sponte* in the decision that were not raised by the parent in her due process complaint notice, namely, the lack of elevator accessibility at the assigned school and the alleged improper grouping of the student in the assigned 8:1+1 special class. The district further argues that the IHO erred in finding that the district failed to offer the student a FAPE for the 2011-12 school year, that the Rebecca School was an appropriate placement for the student for the 2011-12 school year, and that equitable considerations supported the parent's claims. Specifically, the district contends that the April 2011 CSE properly considered recent and appropriate evaluative information in developing the student's 2011-12 IEP, including the September 2009 private psychoeducational evaluation; the absence of an FBA did not render the April 2011 IEP procedurally inadequate; the recommended 8:1+1 special class was appropriate; and the assigned school did, in fact, offer the student a social skills curriculum, and would have been able to implement the student's April 2011 IEP.

The district also asserts that the Rebecca School was not an appropriate placement for the student for the 2011-12 school year because the school did not provide the student with related services at the levels recommended in the April 2011 IEP, and because the school did not offer State and local assessments enabling the student to earn a high school diploma.⁴ Lastly, the district maintains that equitable considerations weigh against awarding the parent tuition reimbursement because she never intended to enroll the student in public school and her 10-day notice letter to the district failed to identify her concerns with the district's recommended program.

The parent answers the district's petition, countering, among other things, that the IHO correctly determined that the district failed to offer the student a FAPE for the 2011-12 school year because the April 2011 CSE failed to consider appropriate evaluative data in developing the student's IEP, specifically, the September 2009 private psychoeducational evaluation. The parent also contends that the IHO correctly determined that the Rebecca School was appropriate for the student for the 2011-12 school year, because its program is individually tailored to meet the student's special education needs, the student progressed there, and the Rebecca School was not required to provide the student with the same levels of related services as those recommended in the April 2011 IEP. In addition, the parent asserts that the IHO properly determined that equitable considerations favored the parent.

⁴ The April 2011 CSE determined that the student was ineligible to participate in New York State alternate assessment (*see* Dist. Ex. 1 at p. 17).

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 v. T.A., 129 S. Ct. 2484, 2491 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is 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]; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; 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 P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v.

City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability enabling him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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

VI. Discussion

A. Scope of Impartial Hearing

As an initial matter, I will address the district's claim that the IHO improperly based his decision that the district failed to offer the student a FAPE in part on issues that were not asserted in the parent's due process complaint notice. A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Additionally, although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), it is impermissible for the IHO to raise issues that were not presented by the parties to the hearing and then base his or her determination on the issues raised sua sponte.

Among other things, the IHO found that the assigned school did not contain a social skills curriculum as recommended by the September 2009 private psychoeducational evaluation, that the assigned school was not appropriate because it lacked elevator accessibility to the assigned classroom, and that the assigned 8:1+1 special class was inappropriate because the student would have been inappropriately grouped for instructional purposes with students having "severe aggressive tendencies" and "significant behavior problems" (IHO Decision at pp. 22-23; see Dist. Exs. 1; 8; 10; Parent Ex. A). I find that the due process complaint notice does not allege facts regarding the parent's concerns about the lack of a social skills curriculum at the assigned school, the lack of elevator access at the assigned school, or the student's functional grouping in the

assigned 8:1+1 special class, and cannot be reasonably read to include such allegations (see Dist. Ex. 9). Moreover, there is no indication in the hearing record that the parent requested, or that the IHO authorized, a further amendment to the due process complaint notice to include these additional issues, and the hearing record reflects that during the impartial hearing, the district's counsel objected to the consideration of any issues not raised in the parent's due process complaint notice (see Tr. pp. 323-24).⁵ Thus, the IHO should have confined his determination to the issues raised in the parent's due process complaint notice and erred in reaching these issues (see 20 U.S.C. § 1415[c][2]; [f][3][B]; 34 CFR 300.508[b], [d][3]; 300.511[d]; 8 NYCRR 200.5[i][1][iv], [i][7]; [j][1][ii]; B.P. v. New York City Dep't of Educ., 2012 WL 33984, at *4-*5 [E.D.N.Y. Jan. 6, 2012]; M.R. v. South Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *12 [S.D.N.Y. Oct. 28, 2011]; C.D. v. Bedford Cent. Sch. Dist.; R.B. v. Dep't of Educ., 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at *8; Application of the Dep't of Educ., Appeal No. 11-156).⁶

B. Appropriateness of the April 2011 IEP

1. Consideration of Evaluative Information

Next I address the district's allegation that the IHO erred in concluding that the CSE did not consider all of the relevant evaluative information in developing the student's April 2011 IEP, namely the September 2009 private psychoeducational evaluation provided to it by the parent.

An evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other

⁵ Even assuming for the sake of argument that the parent's assertions were properly raised, in this case, the student did not attend the assigned school and therefore, a meaningful analysis of the IHO's finding would require a determination of what might have happened had the district been required to implement the student's April 2011 IEP. Even assuming that the student had attended the district's recommended program, the evidence in the hearing record nevertheless does not support the conclusion that the district would have deviated from the IEP in a material way in either the 8:1+1 special class or the related services at the assigned school and thereby deny the student a FAPE (Rowley, 458 U.S. at 206-07; A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; Cerra., 427 F.3d at 192; see Van Duyn v. Baker Sch. Dist., 502 F.3d 811 [9th Cir. 2007]; Houston Independent Sch. Dist. v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]; see also D.D.-S. v. Southold U.F.S.D., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]; A.L. v. Dep't of Educ., 2011 WL 4001074, at *9 [S.D.N.Y. Aug. 19, 2011]; Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D.D.C. 2007]).

⁶ I also note that the parent did not cross-appeal the IHO's decision to the extent that it did not address several allegations raised in the due process complaint notice, including that: the classroom observation report reviewed by the April 2011 CSE was outdated; the district failed to conduct additional evaluations prior to the April 2011 CSE meeting; the CSE failed to consider a more restrictive nonpublic school placement for the student; the CSE was improperly constituted; and the annual goals and short-term objectives contained in the April 2011 IEP were inadequate (see IHO Decision at pp. 18-28; see also Answer). A party who fails to obtain a favorable ruling with respect to an issue submitted to an IHO is bound by that ruling unless the party either asserts an appeal or interposes a cross-appeal (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). Raising additional issues in a respondent's answer without cross-appeal is not authorized by State Regulations and, in effect, deprives the petitioner of the opportunity to file responsive papers on the merits because State Regulations do not permit pleadings other than a petition and an answer except for a reply to "any procedural defenses interposed by respondent or to any additional documentary evidence served with the answer" (8 NYCRR 279.6; see Application of the Bd. of Educ., Appeal No. 11-050). Consequently, these issues will not be addressed in this decision.

things, the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *12 [S.D.N.Y. Nov. 9, 2011]; Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]), and evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]); see Application of the Dep't of Educ., Appeal No. 07-018). A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree (34 CFR 300.303[b][1]; 8 NYCRR 200.4[b][4]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). No single measure or assessment should be used as the sole criterion for determining an appropriate educational program for a student (8 NYCRR 200.4[b][6][v]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental, and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

In this case, the hearing record reflects that the April 2011 CSE referred to the following documents in developing the student's 2011-12 IEP: the September 2009 private psychoeducational evaluation (Dist. Ex. 8), a December 7, 2009 initial psychosocial history conducted by the district (Dist. Ex. 7), a January 11, 2010 clinical interview conducted by the district (Dist. Ex. 6), the student's 2010-11 IEP (Parent Ex. A), a November 10, 2010 classroom observation (Dist. Ex. 4), and a December 2010 Rebecca School interdisciplinary progress report (Dist. Ex. 5; see Tr. pp. 32, 83-89, 99-100, 125).⁷

In September 2009, a neuropsychologist conducted a psychoeducational evaluation of the student that was privately obtained by the parent (Dist. Ex. 8). According to the report, the student presented with language, social/emotional, and sensory processing delays from an early age (id. at pp. 2-3). The neuropsychologist interviewed the student's then-current teacher at the Rebecca School who indicated that the student performed within the average range in the area of academics (id. at p. 4). The Rebecca School teacher further indicated that the student developed a friendship with another student (id.). The Rebecca School teacher also indicated that the student exhibited low frustration tolerance and difficulties with emotional regulation (id.).

⁷ The hearing record reflects that the April 2011 CSE also reviewed a district OT evaluation dated February 28, 2010; however, testimony at the impartial hearing indicated that review of this document was limited to determining the level of the student's OT (3 times per week for 30 minutes per session in a 1:1 setting) (Tr. pp. 33, 83; compare Dist. Ex. 1 at p. 17, with Dist. Ex. 3 at p. 7).

The September 2009 psychoeducational report indicated that the student exhibited difficulty interpreting social cues and rigidity in his social interactions as well as demonstrated aggressive behaviors (Dist. Ex. 8 at p. 5). Behaviorally, the neuropsychologist noted that the student exhibited task persistence including demonstrating average attention although he fatigued easily (id. at p. 6). Administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) to the student yielded standard scores (percentile rank) of 102 (55) in verbal comprehension, 112 (79) in perceptual reasoning, 86 (18) in working memory, 91 (27) in processing speed, as well as a full scale IQ of 100 (50) (id.). The student exhibited average verbal reasoning skills and high average nonverbal reasoning skills (id. at p. 7). In the areas of processing speed and working memory, the student performed in the average and low average range respectively (id.).

With respect to academic achievement, results of the Wechsler Individual Achievement Test-Second Edition (WIAT-II) indicated that the student achieved standard scores (percentile rank) of 125 (95) in word reading, 106 (58) in reading comprehension, 112 (67) in pseudoword deciding, 73 (4) in numerical operations, 92 (30) in math reasoning, and 94 (34) in spelling (Dist. Ex. 8 at p. 13). The report indicated that the student exhibited fluent decoding skills and strong sight word vocabulary (id. at p. 8). According to the report, the student exhibited average reading comprehension skills and slightly below average spelling skills (id.). The report indicated that the student struggled with math calculations, but performed better with respect to math word problems (id.). The neuropsychologist recommended, among other things, that the student receive a 12-month placement in a "small, calm, structured classroom setting" with access to an explicit social skills curriculum and behavioral supports, that he receive OT and speech-language therapy, that the student be referred for a PT evaluation, that both the student and the parent consult with a psychotherapist to develop their coping skills, and that the student "not be placed with other [students] who have significant behavior problems as this will exacerbate some of these behaviors in him" (id. at p. 10).

On December 7, 2009, a district social worker prepared an initial psychosocial history report of the student that consisted of a parent interview and behavioral observation of the student (Dist. Ex. 7). The parent provided information regarding the student's early educational, developmental, and medical history (id. at pp. 1-3). With respect to his then-current experience at the Rebecca School, the parent indicated that the student appeared to be demonstrating progress in the area of social/emotional functioning, including developing friendships (id. at p. 3). Behaviorally, the social worker noted that the student was physically active during the parental interview, including spinning around in the desk chair for a "very long time" (id. at p. 4). Additionally, the social worker noted that the student exhibited a sense of humor and a command of language skills (id. at p. 5).

In January 2010, a school psychologist completed a clinical interview of the student at the Rebecca School (Dist. Ex. 6). The school psychologist reported that, upon her request, the student readily accompanied her to the interview room, but he subsequently exhibited inconsistent eye contact and engaged in "self-directed" play that was "aggressive in nature" (id. at p. 2). The school psychologist suggested that the student "experienced difficulty navigating social relationships" and that his awareness of this difficulty "may lead to feelings of anger and frustration," that "he appear[ed] to have trouble understanding cause and effect as it relates to social exchanges," that "[he] may experience feelings of confusion with regard to understanding what makes people feel the way that they do," and that he demonstrated "[f]eelings of hopelessness" (id.). In summary,

the report indicated that, although the student was fully engaged and responsive during preferred activities and possessed age appropriate cognitive and verbal skills, he experienced difficulty with reciprocal social interactions regarding non-preferred topics (id.).

The student's 2010-11 IEP dated June 3, 2010, noted that the student had received a diagnosis of a PDD, and that, although he exhibited spontaneous language, he demonstrated delays in verbal and nonverbal pragmatic language and social skills (Parent Ex. A at p. 3). The 2010-11 IEP indicated that the student's decoding and reading comprehension skills were at a third grade level, computation and problem solving skills at a second grade level, and his writing skills at a kindergarten to first grade level (id.). The 2010-11 IEP reflected that the student demonstrated age appropriate reading skills, but exhibited difficulties with writing, including punctuation and maintaining appropriate letter size and spacing (id.). The 2010-11 IEP also identified the student's sensory regulation difficulties, which he manifested especially during times of frustration and jealousy, and noted that the student occasionally cried, swore, punched, and exhibited suicidal ideation and self-injurious behaviors when dysregulated, and that these behaviors seriously interfered with instruction requiring the development of a BIP (id. at pp. 4, 18). With respect to health and physical development, the 2010-11 IEP noted the student's difficulties with attention, impulsivity, hyperactivity, fine motor skills, and auditory, visual motor, and visual perceptual skills (id. at p. 5). To address the student's special education needs, the June 2010 CSE recommended, among other things, a 10-month special education program including a 12:1+1 special class in a community school, a full-time 1:1 crisis management paraprofessional, and related services (id. at pp. 1-2, 15, 17-18).

On November 10, 2010, the district conducted a classroom observation of the student at the Rebecca School during "morning meeting" and "morning journal" (Dist. Ex. 4). The observation report indicated that during the observation, the student followed directions, responded to redirection, and participated in group discussions but sometimes lacked attention (id. at p. 2). The report indicated that the student as "very verbal," and assessed his handwriting as below age expectancy (id.). The observation report reflected that the student did not engage in disruptive behavior, and the evaluator noted that he exhibited the "potential to achieve academically" (id.).

According to the December 2010 Rebecca School interdisciplinary progress report, the student attended an 8:1+3 special class (Dist. Ex. 5 at p. 1). The report reflected that overall the student was regulated with the assistance of his special education teacher, and was able to maintain his attention during individual and group instruction, but became frustrated and dysregulated when jealous and angry, which sometimes resulted in the student crying loudly, swearing, threatening himself or others, punching, kicking, and throwing objects (id.). The progress report characterized these behaviors as "infrequent," but noted they continued to occur if the student was not redirected and supported as his behaviors escalated; sometimes, the progress report noted, the student self-regulated when frustrated, by "leaving the situation, taking a break, or telling a teacher" (id.).

In the area of socialization, the progress report reflected that the student maintained relationships with adults and peers in varied contexts regarding various topics, and noted that the student related to others best when he controlled the situation, engaged in preferred activities, and interacted with a preferred adult or peer (Dist. Ex. 5 at p. 2). The progress report indicated that the student consistently initiated interactions with adults and peers throughout the day using full sentences, and, relative to play skills, that he employed imaginative concepts during play with a peer, but experienced difficulty incorporating another student's idea into the play scenario (id. at p. 3). The progress report reflected that the student answered "why" questions in a variety of

settings and contexts throughout the school day and was able to connect ideas and explain actions logically; however, when he became frustrated or experienced a difficult emotion, he struggled to maintain a logical perspective and connect ideas, although he engaged in rational analysis, such as analyzing the theme of a story, when not emotionally connected to the situation (id. at p. 4).

Academically, the December 2010 progress report noted that the student read and understood chapter books and answered inferential questions on short stories at the fourth grade level, answered "wh" and "how" questions regarding a story, and made inferences regarding story characters and their motivations (Dist. Ex. 5 at p. 5). Administration of the Test of Word Reading Efficiency (TOWRE) to the student yielded a standard score of 118 in the area of sight word vocabulary regarding the timed assessment, and a standard score of 141 when assessed with no time limits (id.). Additionally, the student earned standard scores of 95 in the "nonsense" words timed exam and 130 in the nonsense words with no time limits (id.). Overall, the student read fluently and exhibited an interest in reading (id.). With respect to math, the student added and subtracted without regrouping, identified all coins, and read a clock by the minute (id. at p. 6). In the area of social studies, the student understood commonalities between himself and others (id.). The report also indicated that the student was "incredibly engaged" during science class (id. at p. 7).

Relative to related services, according to the December 2010 progress report, the student received three sessions of individual OT per week and two sessions of group OT per week, and demonstrated progress coping with his emotions; however, the student continued to experience difficulties with over-responsiveness to light touch, loud auditory input, visually busy environments, and vestibular input, especially during emotional situations (Dist. Ex. 5 at p. 7). The report noted that the student was under-responsive to proprioceptive input and benefited from deep pressure (id. at p. 8). The progress report also noted the student's aggressive tendencies when dysregulated and his continued low endurance and motor planning difficulties (id.). The progress report also indicated that the student received two sessions of speech-language therapy per week in a group of three, and further noted that at times he experienced difficulty with self-regulation when engaged in conflict with a peer or when asked to participate in a non-preferred activity, which sometimes culminated in verbal and physical aggression (id. at p. 9). The progress report also noted the student's difficulties with pragmatic language, including understanding verbal and nonverbal social cues and understanding the social boundaries of communication (id.). The report indicated that the student demonstrated average receptive and expressive language skills, articulation, and oral motor skills, and contained goals targeting the areas of reading, math, OT, speech-language, and social/emotional functioning (id. at pp. 10, 12-15).

In addition to the aforementioned evaluative data, the school psychologist testified that the April 2011 CSE received input at the meeting from the student's Rebecca School special education teacher regarding his current instructional academic levels in reading, writing, and math, and the CSE meeting minutes indicated that the student's special education teacher also described his academic management needs and annual goals in place at the Rebecca school (Tr. pp. 45-47, 51; Dist. Ex. 10 at p. 1). The school psychologist further testified that the April 2011 CSE considered the student's strengths and weaknesses when it developed his 2011-12 IEP, and discussed the student's current academic achievements and social/emotional/behavioral functioning (Tr. pp. 39, 41, 54-56). Furthermore, the hearing record indicates that the parent was a "pretty active" participant during the April 2011 CSE meeting, and she testified that she "participated on every

level, what I thought in collaboration with what they thought, so that we could work as a team" (Tr. pp. 301-02; Dist. Ex. 10 at p. 1; see Tr. pp. 655-58, 661-64, 672, 678-80).

The IHO found that there was no evidence that the 2009 psychoeducational evaluation was considered by the April 2011 CSE (IHO Decision at pp. 21-22). The CSE must consider private evaluations obtained at private expense, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, "consideration" does not require substantive discussion, that every member of the CSE read the document, or that the CSE accord the private evaluation any particular weight (T.S. v. Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993]; G.D. v. Westmoreland Sch. Dist., 930 F.2d 942, 947 [1st Cir. 1991]; see Michael P. v. Dep't of Educ., 656 F.3d 1057, 1066 n.9 [9th Cir. 2011]; K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 805-06 [8th Cir. 2011]; Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir.1988]; James D. v. Bd. of Educ., 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]). In this case, the school psychologist testified that she had read the entire September 2009 psychoeducational evaluation report prior to the CSE meeting and that the report "was on the table during the [April 2011 CSE] meeting," but she did not think the CSE "referenced it directly" (Tr. pp. 87, 88). When asked during the impartial hearing if the April 2011 CSE considered the recommendations contained in the September 2009 psychoeducational evaluation, the school psychologist responded that she "was aware of them," adding that "when we wrote [the April 2011] IEP we were relying mainly on information from [the student's Rebecca School special education] teacher, his parent," and what was happening with the student at the time of the CSE meeting (Tr. p. 89). She also testified that the September 2009 psychoeducational evaluation was a "good report," but was "from a year and a half prior and I think a lot had happened in [the student's] life in that time" (id.). I also note that, even if, as the hearing record suggests, the April 2011 CSE did not directly discuss the recommendations contained in the September 2009 psychoeducational evaluation, the hearing record reflects that these recommendations were incorporated into the student's June 2010 IEP, which the April 2011 CSE reviewed in developing the IEP at issue (Tr. pp. 87, 100, 125). While the district was required to consider the parent's privately obtained evaluation, it was not required to adopt the private evaluator's recommendations (M.H. v. New York City Dep't of Educ., 2011 WL 609880, at *12 [S.D.N.Y. Feb. 16, 2011]; Watson v. Kingston, 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004]; see also Marshall Joint Sch. Dist. No. 2 v. C.D., 616 F.3d 632, 641 [7th Cir. 2010]; Pascoe v. Washingtonville Cent. Sch. Dist., 1998 WL 684583, at *6 [S.D.N.Y. Sept. 29, 1998]). Nor is there any provision under the IDEA or the federal or State regulations requiring that each of the recommendations of an evaluator be included in an IEP.

Based on the foregoing, I find that the evidence contained in the hearing record does not support the IHO's conclusion that the April 2011 CSE did not adequately consider the September 2009 private psychoeducational report such that it denied the student a FAPE for the 2011-12 school year. Moreover the hearing record reflects that the evaluative data considered by the April 2011 CSE and the direct input from the student's special education teacher from the Rebecca School provided the CSE with sufficient functional, developmental, and academic information about the student and his individual needs to enable it to develop his 2011-12 IEP (D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at *8 [S.D.N.Y. Oct. 12, 2011]; Application of the Dep't of Educ., Appeal No. 11-147; Application of a Student with a Disability, Appeal No. 11-041; Application of a Student with a Disability, Appeal No. 10-100; Application of a Student with a Disability, Appeal No. 08-015; Application of the Dep't of Educ., Appeal No. 07-098; Application of a Child with a Disability, Appeal No. 94-2).

Moreover, assuming for the sake of argument that the evaluative information available to the CSE was insufficient, the procedural deficiency of failing to consider evaluative data during a CSE meeting does not constitute a per se denial of a FAPE, but instead it must be established that the deficiency also impeded the parent's participation in the IEP's development or denied the student educational benefits (see Luo v. Baldwin Union Free Sch. Dist., 2012 WL 728173, at *4-*5 [E.D.N.Y. Mar. 5, 2012]; Davis v. Wappingers Cent. Sch. Dist., 2011 WL 2164009, at *2 [2d Cir. 2011]). Here, given the evidence discussed above that the parent had the opportunity to meaningfully participate in the development of the student's IEP, and because the adequacy of the student's present levels of performance as described in the April 2011 IEP are not at issue in this appeal (see Tr. pp. 664-71), I decline to find that any procedural deficiencies regarding the extent to which the CSE considered the evaluative information impeded the student's right to a FAPE, impeded the parent's ability to participate in the decision making process, or deprived the student of educational benefits.

2. Consideration of Special Factors—Interfering Behaviors

The district appeals the IHO's determination that its recommended program for the 2011-12 school year was inappropriate because the CSE did not conduct an FBA of the student (see IHO Decision at pp. 20-21). As set forth in greater detail below, I find that the April 2011 CSE properly considered special factors relating to the student's behavioral concerns that impeded his learning, and developed an appropriate BIP for the student in accordance with State regulations.

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 [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. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]; Application of a Student with a Disability, Appeal No. 09-101; Application of a Student with a Disability, Appeal No. 09-038; Application of a Student with a Disability, Appeal No. 08-028; Application of the Dep't of Educ., Appeal No. 07-120). To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]; Piazza v. Florida Union Free Sch. Dist., 2011 WL 1458100, at *1 [S.D.N.Y. Apr. 7, 2011]; Gavriety v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *30 [N.D.N.Y. Sept. 29, 2009] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 380 [S.D.N.Y. 2008]; see also Schreiber v. East Ramapo Central Sch. Dist., 700 F. Supp. 2d 529, 556 [S.D.N.Y. 2010] [noting that when defending a unilateral placement as appropriate under the IDEA, a parent in some circumstances may also be required to demonstrate that appropriate "supplementary aids and services" are provided to the student]).

In New York State, policy guidance explains that "the IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address one or more of the following needs in order for the student to receive a [FAPE]" ("Guide to Quality Individualized

Education Program [IEP] Development and Implementation," at p. 25, Office of Special Educ. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP," and if necessary, "[a] student's need for a [BIP] must be documented in the IEP" (*id.*). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student in certain non-disciplinary situations (8 NYCRR 200.4[d][3][i], 200.22[a], [b]). An FBA is defined in State regulations as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and "include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it" (8 NYCRR 200.1[r]). According to State regulations, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]). Although State regulations call for the procedure of using an FBA when developing a BIP, the failure to comply with this procedure does not automatically render a BIP deficient (*A.H.*, 2010 WL 3242234, at *2).

With regard to a BIP, the special factor procedures set forth in State regulations further 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]). Once again, "[i]f a particular device or service, including an intervention, accommodation or other program modification is needed to address the student's behavior that impedes his or her learning or that of others, the IEP shall so indicate" (8 NYCRR 200.22[b][2]). 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])."⁸ 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 [---

⁸ 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 \[August 14, 2006\]\).](http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-</p></div><div data-bbox=)

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]).

In this case, the parties do not dispute that the district did not conduct an FBA prior to modifying the student's BIP (Tr. pp. 115, 303-04).⁹ However, as noted above, the district's failure to conduct an FBA prior to modifying the student's 2011-12 BIP did not, by itself, automatically render the BIP deficient (A.H., 2010 WL 3242234, at *4). 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., 2006 WL 3102463 [2d Cir. Oct. 27, 2006] [noting that it may be appropriate 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]).

The April 2011 BIP indicated that the student, who was attending the Rebecca School at the time of the CSE meeting, swore, yelled, and screamed when frustrated; cried when dysregulated or unable to understand the actions of others; reacted "explosively" to situations regardless of their severity; spoke about hurting himself and others; and behaved aggressively toward others (Dist. Ex. 1 at p. 18). The BIP provided several goals for the student targeting these behaviors, including increasing his frustration tolerance, identifying the severity of a problem and reacting accordingly, developing coping strategies, eliminating suicidal ideation and aggression toward others, and reducing his feelings of self-loathing (id.). Strategies to achieve these goals contained in the BIP included provision of a safe and supportive setting, provision of written solutions to conflicts to increase positive problem-solving behavior, increasing coping strategies, provision of a quiet space, offering praise, provision of access to sensory input, movement breaks throughout the day, and adult support, including the discussion of alternative positive behaviors (id.). Among the supports provided in the BIP were a 1:1 crisis management paraprofessional, counseling services, speech-language therapy, OT, and the classroom special education teacher (id.). The hearing record also reflects that the counseling and OT services were recommended to the student for the purpose of addressing his sensory processing and social/emotional/behavioral functioning difficulties (see Tr. pp. 57, 69-70; Dist. Ex. 1 at pp. 10-14).

In addition to the behavior management strategies identified in the BIP, the CSE also addressed the student's behaviors in the April 2011 IEP, which indicated that the student's behavior seriously interfered with instruction (Dist. Ex. 1 at pp. 3-4). The April 2011 IEP recommended behavioral supports consisting of: a 1:1 crisis management paraprofessional to facilitate the student's engagement and negotiation with peers; visual and writing supports; presentation of

⁹ With the exception of an additional behavior management strategy added to the student's April 2011 BIP – the provision of adult support to remind the student of previous behaviors and to discuss possible alternative outcomes – the student's June 2010 and April 2011 BIPs are otherwise identical (compare Dist. Ex. 1 at p. 18, with Parent Ex. A at p. 18).

choices to assist the student to negotiate situations; access to sensory materials; sensory input and movement breaks; co-regulation of the student, including providing him with verbal support in a soothing tone; counseling services; the incorporation of free time into his schedule to assist with regulation and increased demands; and adult explanation and verbal mediation to address the student's perceptions of unfairness (*id.* at p. 4). The April 2011 IEP also provided additional supports, including preferential seating, redirection, division of tasks and assignment of tasks on an individual basis, sensory input, body breaks, verbal praise, additional time, and clear expectations, which would facilitate his learning and reduce the student's classroom frustration (*id.* at p. 3).¹⁰

The school psychologist testified that the April 2011 CSE "discussed the functions of [the student's] behaviors at the meeting. They were fairly well understood and they're included in the IEP," and that the CSE addressed them through the behavioral strategies and supports ultimately included in the April 2011 IEP and in the modified BIP, such as the 1:1 crisis management paraprofessional, which, she advised, was recommended to address the student's "behaviors of concern . . . potential for aggression, the threatening behaviors. These warrant individual support" (Tr. pp. 57, 75, 116; Dist. Ex. 1 at pp. 4, 12-13, 15, 17-18). She also indicated that the student's then-current special education teacher from the Rebecca School collaborated with the April 2011 CSE in developing the behavioral strategies and supports contained in the student's 2011-12 IEP, that the student's 2010-11 BIP served as the foundation upon which the April 2011 CSE modified the student's 2011-12 BIP, that both the special education teacher and the parent actively contributed to the modifications made to the student's BIP, and that their contributions were reflected in the BIP (Tr. pp. 57, 74-75; *see* Dist. Ex. 1 at p. 18; Parent Ex. A at p. 18). The parent testified that the student's behavioral needs were discussed during the April 2011 CSE meeting, including the input of the student's special education teacher from the Rebecca School, and added that "[his] behavioral issues are always discussed . . . we talked [at] length about how it's a concern and how much support he needs because of those behavioral issues" (Tr. pp. 302-03). The parent also indicated that she participated in the CSE discussion regarding the modification of the student's 2011-12 BIP (Tr. pp. 678-80).

Based upon the foregoing, the hearing record does not support a finding that the student was denied a FAPE, where the April 2011 CSE addressed the student's behavioral needs and formulated a BIP based on information and documentation provided by the student's providers, and developed management needs designed to target the student's interfering behaviors (*C.F.*, 2011 WL 5130101, at *9-*10; *W.S. v. Nyack Union Free Sch. Dist.*, 2011 WL 1332188, at *10 [S.D.N.Y., Mar. 30, 2011]; *Connor v. New York City Dep't of Educ.*, 2009 WL 3335760, at *4 [S.D.N.Y. Oct. 13, 2009]).

3. 8:1+1 Special Class

In her due process complaint notice, the parent alleged that the 8:1+1 student-to-teacher ratio recommended in the April 2011 IEP was inappropriate for the student, and maintained that the student required a more restrictive class setting (Dist. Ex. 9 at p. 4). In the decision, the IHO's

¹⁰ While the IDEA does not preclude a CSE from initially formulating a BIP, it is not unusual for a classroom teacher or other special education provider to formulate or modify a BIP over the course of a school year when a BIP is called for in the implementation of the student's IEP (*see, e.g., Application of a Child with a Disability*, Appeal No. 05-107). As noted above, if the district creates a BIP for the student, the CSE is thereafter required to review the BIP at least annually (8 NYCRR 200.22[b][2]).

finding relative to this issue was limited to his determination that "[a]t the time of the April 27, 2011 CSE meeting there was no evidence presented that would demonstrate that the [student] could function successfully in the [assigned school] setting or in any other 8:1:1 setting made available to the parent" (IHO Decision at p. 23). On appeal, the district asserts that the IHO erred in his determination, and contends that, after considering alternative programs, the April 2011 CSE reached a consensus that the 8:1+1 special class with a 1:1 crisis management paraprofessional and related services was appropriate for the student. The parent argues that the IHO's determination was correct and should be upheld.

As discussed above, the evaluative information available to the April 2011 CSE identified the student's delays in self-regulation, behavior, social/emotional functioning, academics, pragmatic language, and motor planning (Tr. pp. 280-85; Dist. Exs. 4-8; Parent Ex. A). Consistent with the student's needs as described in detail above, the April 2011 CSE recommended placement in an 8:1+1 special class in a specialized school with a 1:1 crisis management paraprofessional (Dist. Ex. 1 at pp. 1, 17). Related services recommendations included the provision of four 30-minute sessions of individual counseling per week, one 30-minute session of counseling per week in a group of two, three 30-minute sessions of individual OT per week, and two 30-minute sessions of speech-language therapy per week in a group of two to address the student's needs in the areas of social/emotional/behavioral functioning, self-regulation, pragmatic language, and motor planning (Tr. pp. 57, 69-70; Dist. Ex. 1 at p. 17). Additionally, the CSE recommended a 12-month program for the student to promote the student's stability (Tr. pp. 36-37; Dist. Ex. 1 at p. 17).

Testimony by the school psychologist supports that the CSE's recommendation of an 8:1+1 special class and 1:1 crisis management paraprofessional was based on the student's needs as portrayed in the evaluations before it and which were reflected in the resultant IEP (Tr. pp. 34, 37-38). The CSE considered a 12:1+1 special class for the student, but based on the input from the student's teacher at the Rebecca School, determined that such a placement would be insufficient to support the student with respect to his behavioral needs (Tr. p. 38; Dist. Ex. 1 at p. 16). The CSE also rejected both an 8:1+1 special class without a 1:1 crisis management paraprofessional due to lack of behavioral support for the student and a 6:1+1 special class because the student could benefit from peer and social interactions (Dist. Ex. 1 at p. 16). According to the school psychologist, the CSE was in agreement regarding the 12-month placement in an 8:1+1 special class (Tr. pp. 37-38). Although the hearing record is unclear regarding what student-to-teacher ratio the student's Rebecca School teacher believed was appropriate for the student, the April 2011 CSE meeting minutes indicate that the student's "classroom teacher stated 12:1:1 ratio is appropriate and 8:1:1 [was] discussed later and agreed upon" (Dist. Ex. 10 at p. 1). The school psychologist testified that an 8:1+1 special class would provide the structure, organization, and support required to address the student's needs (Tr. p. 34).

Based on the foregoing, the evidence contained in the hearing record establishes that the district's recommended 8:1+1 special class in a specialized school was reasonably calculated to enable the student to receive educational benefits for the 2011-12 school year. Consequently, I find that the IHO erred to the extent that he determined that the district's recommended 8:1+1 special class was not appropriate for the student for the 2011-12 school year, and I reverse that portion of the his decision.

I also find that the hearing record does not support the IHO's finding that the student's April 2011 IEP denied the student a FAPE because it did not specifically reference the neuropsychologist's recommendation for a social skills curriculum. The student's April 2011 IEP

included a description of the student's needs related to social skills as well as the provision of annual goals, related services, and accommodations in the area of socialization (Dist. Ex. 1 at pp. 3-4, 9-15, 17). The IEP reflected that the student engaged in spontaneous communication and consistently initiated interactions with both adults and peers (id. at pp. 3-4). The IEP also reflected that the student exhibited difficulties with verbal and nonverbal pragmatic language and social skills (id. at p. 3). The IEP indicated that the student may not respond when asked to engage in a non-preferred activity or asked to respond to a difficult topic of conversation (id. at p. 4). The IEP also indicated the student would become dysregulated when engaged in social interactions (id.). To address the student's social skills, sensory regulation needs, and pragmatic language skills, the IEP provided the student with counseling and speech-language services as well as a 1:1 crisis management paraprofessional to "facilitate engagement and negotiation with peers" (id. at pp. 4, 17). The IEP also provided strategies to address the student's social skills and related sensory regulation needs including provision of choices, access to sensory materials, sensory inputs, body breaks, additional time, and clear expectations (id. at pp. 3-4). The IEP included annual goals geared to improve the student's social skills and language skills as well as his ability to self-regulate (id. at pp. 9-15). Based upon the foregoing, I find that the April 2011 IEP addressed the student's needs in the area of social skills.

VII. Conclusion

In summary, I find that the IHO's determination that the district failed to offer the student a FAPE for the 2011-12 school year must be reversed as it is not supported by the hearing record. I find that the hearing record demonstrates that the April 2011 CSE considered appropriate evaluative data in developing the student's 2011-12 IEP, and that the district's recommended program, consisting of an 8:1+1 special class in a specialized school, a full-time 1:1 crisis management paraprofessional, and related services, was reasonably calculated to enable the student to receive educational benefits, and thus, the district has offered the student a FAPE in the LRE for the 2011-12 school year (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). It is therefore unnecessary to reach the issue of whether the Rebecca School was appropriate for the student or whether equitable considerations support the parent's claim, and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; C.F., 2011 WL 5130101, at *12; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]).

I have considered the parties' remaining contentions and find them unnecessary to address in light of my determinations herein.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated February 14, 2012, is modified by reversing those portions which found that the district failed to offer the student a FAPE for the 2011-12 school year, and directing the district to pay for the student's tuition and transportation costs at the Rebecca School for the 2011-12 school year.

Dated: Albany, New York
May 21, 2012

STEPHANIE DEYOE
STATE REVIEW OFFICER