The University of the State of New York

The State Education Department
State Review Officer
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No. 13-042

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

Appearances:

Kule-Korgood, Roff & Associates, PLLC, attorneys for petitioners, Andrea M. Santoro, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Neha Dewan, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for the costs of the student's tuition at the Jewish Center for Special Education (JCSE) for the 2011-12 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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 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]).

III. Facts and Procedural History

The parties' familiarity with the detailed facts and procedural history of the case and the IHO's decision is presumed and will not be recited here. The Committee on Special Education (CSE) convened on May 20, 2011, to formulate the student's individualized education program (IEP) for the 2011-12 school year (see generally Dist. Ex. 4). The parents disagreed with the recommendations contained in the May 2011 IEP, as well as with the particular public school site to which the district assigned the student to attend for the 2011-12 school year and, as a result, notified the district of their intent to unilaterally place the student at JCSE (see Dist. Ex. 4; Parent Exs. A; D at p. 1; E at p. 1; F at p. 1; G at pp. 1-2). In a due process complaint notice, dated April 13, 2012, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year (see Parent Ex. A at p. 1).

An impartial hearing convened on June 18, 2012 and concluded on January 7, 2013, after three days of proceedings (Tr. pp. 1-308).[1] In a decision dated February 7, 2013, the IHO determined that the district offered the student a FAPE for the 2011-12 school year (IHO Decision at p. 12).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parents' petition for review and the district's answer thereto is also presumed and will not be recited here. The crux of the parties' dispute on appeal is whether the IEP adequately described the student's needs, whether the annual goals were measurable and adequately addressed the student's needs, whether the May 2011 CSE failed to conduct a functional behavioral assessment (FBA) of the student and develop a behavior intervention plan (BIP), and whether the recommended 12:1+1 special class placement at a community school was an appropriate placement for the student for the 2011-12 school year.

V. Applicable Standards

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

[1] On June 22, 2012, the IHO issued an interim order on the student's pendency (stay-put) placement, which directed the district to continue to fund the student's placement at JCSE retroactive to the date of the due process complaint notice, April 13, 2012 (see Interim IHO Decision at pp. 2-4).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 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, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8

NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

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

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

VI. Discussion

A. May 2011 IEP

1. Evaluative Information and Present Levels of Performance

Turning first to the issue of whether the present levels of performance in the May 2011 IEP were appropriate, the parents contend that the present levels of performance in the IEP were vague, based on teacher estimates which are an insufficient form of assessment, and did not include the results of the January 2011 progress report by the student's teacher, and the June 2010 psychoeducational evaluation of the student. Relatedly, the parents aver that the CSE failed to conduct sufficient evaluations of the student.

With respect to evaluations, 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 and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). 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]). Any 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 things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see 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]). An 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).

Concerning the CSE's development of an IEP, the IEP must include a statement of the student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1];8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

As discussed below, the evidence in the hearing record shows that the present levels of performance in the May 2011 IEP accurately described the student.

Initially and consistent with the IHO's decision, the hearing record reflects that the May 2011 CSE reviewed the following in the development of the May 2011 IEP: the student's file, reports from the student's teachers and related services providers from the nonpublic school, a classroom observation, and a psychoeducational evaluation report (Tr. pp. 29-30, 41, 42, 59-60; IHO Decision at p. 8; see Dist. Ex. 2; 5-9). The district school psychologist's testimony indicated, and the IEP reflects, that additional information was provided to the CSE by the parents at the meeting and by the student's teacher who attended the May 2011 CSE meeting via telephone (Tr. p. 29; see Dist. Ex. 4 at pp. 3, 7). Testimony by the district psychologist also indicated that the occupational therapy (OT) section of the student's present levels of health and physical development was completed prior to the CSE meeting by the student's occupational therapist and provided to the CSE with the occupational therapist's report (Tr. pp. 29, 47-48; see Dist. Ex. 4 at p. 6). Additionally, the IEP reflects that the physical therapy (PT) section of the student's present levels of health and physical development was developed based on information provided by the parent and from the PT report and that the academic present levels of performance was developed according to information provided by the student's teacher (Dist. Ex. 4 at pp. 3, 7).

A careful review of the May 2011 IEP reveals that information from the January 2011 progress report and the June 2010 psychoeducational evaluation was included in the May 2011 IEP. Specifically, information contained in the IEP is consistent with the January 2011 teacher's report with regard to the student's below-grade level performance in most academic areas, including phonological awareness and graphomotor skills; her need for "a lot of repetition to learn and retain information;" that she required much encouragement when faced with tasks that she perceived as difficult, as well as positive reinforcement to enhance her academic and attentional skills; and that she presented with muscular weakness, delays in receptive and expressive language, difficulty identifying and expressing emotions, and deficits in social interaction with peers (compare Dist. Ex. 4 at pp. 3, 4, 5, 6 with Dist. Ex. 5 at pp. 1-2).

Information in the IEP is also consistent with that contained in the June 2010 psychoeducational evaluation regarding the student's expressive and receptive language functioning, including her articulation deficits and intelligibility, her deficits related to graphomotor skills, and her need for repetition of directions (compare Dist. Ex. 4 at p. 4 with Dist. Ex. 2 at p. 1). While the student's academic functioning was also reflected in the 2010 psychoeducational evaluation by the student's performance on the Kaufman Survey of Early Academic and Language Skills (K-SEALS), the teacher estimates reflected in the IEP provided a more current and accurate description of the student's academic functioning at the time of the May 2011 CSE meeting when compared to the student's scores on the K-SEALS (see Dist. Exs. 2 at pp. 2, 3; 4 at p. 3).

Based on the above, although the May 2011 IEP did not reflect all of the information included in the 2011 progress report and the 2010 psychoeducational evaluation, the student's present levels of performance as described in the IEP were gleaned from multiple evaluative sources which provided assessments of the student's needs, as described above, and provided an adequate description of the student that included sufficient details about the student's functioning

upon which to develop an appropriate program for the student (compare Dist. Ex. 4 at pp. 3-5 with Dist. Exs. 2; 5).

2. Annual Goals

Next, the parents contend that the annual goals on the May 2011 IEP were vague, insufficient, and inappropriate to meet the student's needs. 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]).

In this case, the May 2011 IEP included a range of annual goals addressing the student's areas of need. With regard to her academic functioning, the IEP included goals related to increasing the student's reading comprehension skills, phonetic and structural analysis skills, critical thinking skills, and vocabulary and word recognition skills, as well as an annual goal with four corresponding short-term objectives that focused on improving the student's expressive writing skills (Dist. Ex. 4 at pp. 8-9). While the parents reference the critical thinking goal in the IEP as an example to support their contention that the annual goals were vague and did not delineate what skills were to be developed, the IEP clearly indicates the specific skills that the student will increase for each goal, and in this specific example, indicated that the student would increase her critical thinking skills by gathering information to draw conclusions and by formulating new endings to open-ended stories and given situations (Dist. Ex. 4 at p. 8). With regard to math skills, the IEP included annual goals to improve the student's proficiency in completing addition and subtraction problems both with and without regrouping, and included an annual goal with four corresponding short-term objectives to address improving her knowledge of money and time concepts (Dist. Ex. 4 at p. 9). The May 2011 IEP also included four annual goals to address the student's social/emotional skills; six annual goals addressing speech-language skills, including oral motor skills, categorization, the concept of same and different, articulation skills, and using words depicting emotions appropriately (Dist. Ex. 4 at pp. 14-15, 17). In addition, the IEP included two annual goals with four corresponding short-term objectives that addressed skills related to the student's OT needs and three annual goals with corresponding short-term objectives related to the student's PT needs (Dist. Ex. 4 at pp. 10-12).

Notwithstanding the foregoing, however, and consistent with the IHO's finding, the annual goals in the May 2011 IEP do not fully comply with the requirements set out by State regulations with regard to measurability (IHO Decision at p. 10). A review of the annual goals reveals that except for the student's speech-language skills annual goals, many of the remaining annual goals failed to include the level of performance required in order for the student to meet the annual goals, and thus, are not measurable. In addition, except for two of the math annual goals, the remaining academic goals do not delineate the criteria for mastery (Dist. Ex. 4 at p. 8-9). With regard to OT, while the short-term objectives include mastery criteria, the annual goals do not; with regard to

PT, all of the annual goals and most of the short-term objectives do not include criteria for mastery; and finally, none of the social/emotional annual goals include the required criteria of mastery (id. at pp. 10-12, 15, 17). However, although the absence of the levels of performance or criteria for mastery constitutes a procedural violation, the IHO properly concluded that such procedural inadequacy, under the circumstances, did not rise to the level of a denial of a FAPE (IHO Decision at p. 10). Additionally, although the May 2011 IEP did not provide for criteria for mastery of each annual goal, it did include a recommendation to provide four reports of progress during the course of the school year, which would provide the parents with information regarding the student's performance and progress toward each annual goal (see id. at pp. 8-16).

3. Consideration of Special Factors—Interfering Behaviors

With regard to the issue of whether the student's behavior was such that it required the completion of an FBA and the development of a BIP, the parents contend that the IHO erred in finding that it did not. 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. E. 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]; Gavrity 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. E. Ramapo Cent. 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 pp. 25-26, 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. at p. 25). 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]). State regulations define an FBA as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and

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

(8 NYCRR 200.1[r]). According to State regulations, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]). 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).[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]). Neither the IDEA nor its implementing regulations require that the elements of a student's BIP be

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

set forth in the student's IEP ("Student Needs Related to Special Factors," Office of Special Education [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]).

Here, the IHO correctly determined that the student's behavior did not warrant the completion of an FBA or the development of a BIP (IHO Decision at p. 9). A review of the hearing record shows that although the student exhibited noncompliant behavior, such behavior did not interfere with her educational program and was not significantly disruptive (Tr. p. 32; Dist. Ex. 9 at p. 2). The classroom observation report noted that the student was "usually compliant and well behaved" (Dist. Ex. 9 at p. 2). In addition, although at times the student attempted to avoid tasks, exhibited attention-seeking behaviors, and attempted to copy silly behaviors such as laughing, touching objects, or walking around the room, the student was responsive to positive reinforcement (id.). However, even if the student demonstrated more significant behaviors, the May 2011 IEP otherwise provided supports for behavior, including management strategies such as positive reinforcement of appropriate behavior and positive reinforcement to enhance the student's academics and attentional skills, repetition and rephrasing, and preferential seating (Dist. Ex. 4 at pp. 3, 5, 7). Additionally, the May 2011 IEP provided the student with counseling services and annual goals to address the student's behaviors (id. at pp. 15, 17, 22).

4. 12:1+1 Special Class Placement

In this case, a review of the hearing record reveals that the IHO correctly determined that the May 2011 CSE's recommended 12:1+1 special class placement at a community school was an appropriate placement for the student for the 2011-12 school year (IHO Decision at pp. 10-11). Based on the student's needs as described at the time of the May 2011 CSE meeting, the student fit the description, as per State regulation, of "students whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students," and for which State regulation dictates "the maximum class size shall not exceed 12 students" (8 NYCRR 200.6[h][4][i]; see Tr. pp. 30-33, 37-38, 63; Dist. Exs. 2; 4 at pp. 3-7; 5-9). Furthermore, the May 2011 CSE's recommended 12:1+1 special class placement was also consistent with the June 2010 psychoeducational evaluation recommendation for "a small, structured program to provide more one to one attention than available in the general education setting" (Dist. Ex. 2 at p. 3). While the parents believed that a 12:1+1 special class was not appropriate for the student because it did not provide sufficient individualized instruction, attention, and support, and because the student required "a systematic approach" to instruction, testimony by the district psychologist indicated that the teacher in a small class—and particularly in a small class with a teacher assistant—worked with students individually during academic instruction (Tr. p. 37). With regard to systematic teaching, while testimony by the student's private school teacher and the director of the school indicated that the student required this approach to instruction, according to the student's private school teacher, in order to teach in

a systematic way, each skill is broken apart into very small components and then you build up on each skill, based on the skill before it (Tr. pp. 209-10, 162, 173, 177-78, 185-86, 191-92, 194, 230, 232-33, 239). Her testimony also indicated that a special education teacher breaks up skills so students can better understand, and she noted that this concept is included in the training to become a special education teacher (Tr. pp. 209-10). Based on the teacher's testimony, the systematic approach to instruction is not a specialized form of instruction but rather a typical strategy taught to and utilized by special education teachers in general, and the hearing record did not include evidence indicating that the district special education teachers would be unable to implement this strategy.

Additionally, with regard to the parents' claim that the management needs in the May 2011 IEP were insufficient, State regulations define management needs as "the nature of and degree to which environmental modifications and human or material resources are required to enable the student to benefit from instruction" (8 NYCRR 200.1[ww][3][i][d]). A review of the May 2011 IEP reveals that, while the IEP could have included a more extensive list of strategies to address the student's management needs, the strategies included in the IEP were appropriate to address the student's needs in that area. Notably, testimony by the program director of the private school indicated that all of the academic management needs on the IEP were accurate (Tr. p. 253).

Based on the above, the 12:1+1 special class placement recommendation was reasonably calculated to provide the student with meaningful educational benefits.

B. Challenges to the Assigned Public School Site

With respect to the parents' claims relating to the assigned public school site, the IHO properly found that the parents' assertions were without merit. The parents' claims regarding grouping, speech-language therapy, the pace of the curriculum, social skills instruction, leisure time, and the overall large and overwhelming school environment (see Parent Exs. A at p. 3), turn on how the May 2011 IEP would or would not have been implemented, and as it is undisputed that the student did not attend the district's assigned public school site (see Parent Ex. G at p. 2), the parents cannot prevail on such speculative claims (R.E., 694 F.3d at 186-88; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9, 2014 WL 53264 [2d Cir. Jan. 8, 2014]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL 3814669 [2d Cir. July 24, 2013]; P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141, 2013 WL 2158587 [2d Cir. May 21, 2013]; see also C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. Mar. 4, 2014]; C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]).

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determination that the district offered the student a FAPE for the 2011-12 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether JCSE was an appropriate unilateral placement or whether equitable considerations weighed in favor of the parents' request for relief. I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
October 23, 2014

CAROL H. HAUGE
STATE REVIEW OFFICER