



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 13-158

**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:**

Law Offices of Regina Skyer and Associates, attorneys for petitioners, Diana Gersten, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Ilana A. Eck, 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 their daughter's tuition costs at the Manhattan STAR Academy (STAR) for the 2012-13 school year. The appeal must be dismissed.

#### II. Overview—Administrative Procedures

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

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

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

### **III. Facts and Procedural History**

The CSE convened on June 15, 2012 to develop the student's IEP for the 2012-13 school year (Dist. Ex. 1 at pp. 1, 10). Finding that the student remained eligible for special education and related services as a student with multiple disabilities,<sup>1</sup> the CSE recommended a 12-month school year program in an 8:1+1 special classroom in a specialized school; related services to include: three thirty-minute sessions per week of individual speech-language therapy, three thirty-minute sessions per week of physical therapy (PT), and two thirty-minute sessions per

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<sup>1</sup> The student's eligibility for special education and related services as a student with multiple disabilities is not in dispute (see 34 CFR 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

week of occupational therapy (OT); and the services of a full-time health paraprofessional in a 1:1 ratio (Dist. Ex. 1 at pp. 1, 8, 11).

By letter dated June 19, 2012, the parents notified the district of their intention to place the student at STAR<sup>2</sup> for the 2012-13 school year, asserted that they had not yet received a copy of the June 2012 IEP, indicated that no offer of placement at a specific public school site had yet been made, claimed to have been denied the opportunity to meaningfully participate in the development of the student's IEP, and generally objected to the program recommended in the June 2012 IEP (Parent Ex. B).<sup>3</sup> The district sent the parents a final notice of recommendation (FNR) dated June 22, 2012 setting forth the special education program and related services recommended for the student for the 2012-13 school year and identifying the particular public school site to which the district assigned the student to attend (Dist. Ex. 10). In an e-mail exchange dated July 2, 2012 between the district and the parents, the district identified the school the student was assigned to for the 2012-13 school year and informed the parents that the district sent an FNR to the parents on June 22, 2012 (Dist. Ex. 9 at p. 1). The parents indicated that they had not received the FNR and requested that the district send another copy (*id.*).

The student attended STAR for the 2012-13 school year and received special education and related services on a 12-month basis (Parent Ex. D at p. 1).

#### **A. Due Process Complaint Notice**

By due process complaint notice dated October 11, 2012, the parents requested an impartial hearing asserting that the district denied the student a free appropriate public education (FAPE) for the 2012-13 school year (Parent Ex. C).

Regarding the development of the June 2012 IEP, the parents alleged that the CSE was not properly composed because no regular education teacher was present (Parent Ex. C at p. 4). Additionally, the parents asserted that they were denied a meaningful opportunity to participate in the June 2012 CSE meeting because the student's annual goals were not reviewed or discussed with them during the meeting (*id.*). They further alleged that the CSE did not have sufficient evaluative information to develop the student's present levels of performance, failed to conduct mandated evaluations, and failed to conduct an functional behavioral assessment (FBA) or develop a behavioral intervention plan (BIP) (*id.* at p. 3).

The parents next contended that the failure to include specific academic management needs in the June 2012 IEP amounted to a denial of a FAPE (Parent Ex. C at pp. 2-3). Regarding the annual goals contained in the June 2012 IEP, the parents asserted that they were inadequate to meet the student's needs because they did not include short term objectives and were ambiguous

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<sup>2</sup> The Commissioner of Education has not approved STAR as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d];, 200.7).

<sup>3</sup> The parents had previously sent a letter dated June 15, 2012—the same day as the CSE meeting—to the district which also provided notification of their intention to place the student at STAR for the 2012-13 school year, objecting to the program recommended in the student's July 2011 IEP, and indicating that no placement recommendation had yet been made for the 2012-13 school year (Parent Ex. A).

and unmeasurable (id. at pp. 3-4). The parents also asserted that the CSE failed to recommend that the student receive related services outside of the school day despite documentation supporting the student's need for related services outside of school to promote generalization and prevent loss of skills (id. at p. 2). The parents asserted that a special class in a specialized school would be inappropriate because it would not provide the student with a sufficiently supportive placement (id. at pp. 2, 5). Regarding the assignment of a public school site for the student, the parents contended that they never received a final notice of recommendation (FNR) from the district and that the district's failure to identify a specific school location rose to the level of a denial of a FAPE (id. at p. 5).

The parents asserted that their placement of the student at STAR for the 2012-13 school year in addition to the provision of outside related services was appropriate and that there were no equitable considerations that would bar reimbursement (Parent Ex. C at p. 5). The parents also added a "reservation of rights" statement in order to raise additional issues that arose during the impartial hearing and referenced possible challenges to the qualifications of district personnel, the district's ability to maintain an appropriate student-to-staff ratio throughout the school day, and the district's ability to provide the related services mandated in the IEP (id.). For relief, the parents requested reimbursement for the cost of the student's tuition at STAR and for the cost of outside related services for the 2012-13 school year (id. at p. 6).<sup>4</sup>

## **B. Impartial Hearing Officer Decision**

An impartial hearing convened on February 26, 2013 and concluded on June 17, 2013, after four non-consecutive hearing dates (Tr. pp. 1-282). In a decision dated July 16, 2013, the IHO found that the district offered the student a FAPE for the 2012-13 school year and denied the parents' request for tuition reimbursement (IHO Decision at pp. 9-12).

Initially, the IHO noted that even if the district developed the program recommendation for the student based on "availability," rather than the student's needs, the recommended program must still be analyzed based on whether it was appropriate to address the student's needs, regardless of why it was chosen (IHO Decision at p. 9). The IHO next found that a regular education teacher was not a required participant at the CSE meeting and that the lack of one did not impact the resulting IEP or offered program (id. at p. 11).<sup>5</sup> The IHO also found that although the district should have conducted assessments of the student's needs, its failure to do so did not impact the placement recommendation or impede the parents' ability to participate in the development of the student's IEP, as the data provided by STAR staff was detailed and thorough and was based on teacher assessments of the student's needs (id. at p. 10). The IHO rejected the parents' allegations regarding the adequacy of the management needs contained in the IEP, determining that management goals were incorporated into the IEP and would be addressed by the provision of a 1:1 paraprofessional, and finding that the CSE "explored the [student's] needs and functioning in detail" (id. at pp. 9-10). The IHO determined that an FBA was not required, noting that the

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<sup>4</sup> The parents waived their claims regarding outside related services during the hearing (Tr. pp. 123-24).

<sup>5</sup> The parents have not appealed the IHO's determination that a general education teacher was not a necessary member of the CSE. Accordingly this determination has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

student's behaviors were addressed by the inclusion of a 1:1 paraprofessional in the IEP and that STAR addressed the student's behaviors in the classroom without the need for an FBA (*id.* at p. 10). The IHO further determined that the goals contained in the IEP were adequate to meet the student's needs and were based on reports provided by STAR (*id.* at pp. 10-11). The IHO then determined that the recommended 8:1+1 classroom ratio with the addition of a full time 1:1 paraprofessional was sufficient to provide the student with an educational benefit and the parents were not denied an opportunity to participate in the placement recommendation (*id.* at p. 11). The IHO also dismissed the parents' arguments regarding the assigned public school placement because they were not included in the due process complaint notice and, in any event, were speculative (*id.*). The IHO also found that the parents had adequate notice of the proposed program and that no harm was caused by any failure to receive the FNR (*id.*). Lastly, although the IHO did not make a determination as to whether the parents' unilateral placement was appropriate, the IHO noted the weakness of the evidence regarding the student's progress at STAR (*id.*).

#### **IV. Appeal for State-Level Review**

The parents appeal the IHO's decision, asserting that the IHO erred in finding that the district offered the student a FAPE for the 2012-13 school year. The parents raise a number of arguments relating to the provision of a FAPE, including that: (1) the parents were denied the opportunity to meaningfully participate in the June 2012 CSE meeting, (2) the district failed to conduct mandated triennial evaluations, (3) an FBA and BIP were required to address the student's interfering behaviors, specifically the student's mouthing of non-food objects, (4) the June 2012 IEP did not include appropriate management needs, (5) the goals included in the IEP were generic, vague, and not measurable, (6) the recommended 8:1+1 classroom in a specialized school was inappropriate because it was not supportive enough to provide the student with an educational benefit, and (7) the district did not establish the appropriateness of the assigned public school site. The parents also assert that STAR was an appropriate placement for the student for the 2012-13 school year and that the student made progress while attending STAR. The parents further assert that their claim is supported by equitable considerations, in that they fully cooperated with the district and were willing to consider a district program but were unable to because they never received a copy of the FNR.

The district answers, denying the allegations raised in the petition, asserting that the IHO properly found that the district offered the student a FAPE for the 2012-13 school year, and asserting that STAR was not an appropriate placement for the student and that equitable considerations weigh against the parents' request for public funding of the unilateral placement.

#### **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.*, 557 U.S. 230, 239 [2009]; *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. 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., 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], aff'd, 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, 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, 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. Scope of Review**

The parents challenge the IHO's finding that the parents' claims regarding the appropriateness of the district's assigned school were not properly raised in the parents' due process complaint notice. The party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). However, a party

requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[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 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]; J.C.S. v Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at \*8-\*9 [S.D.N.Y. Aug. 5, 2013]; 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. S. 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 [Oct. 28, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at \*13 [S.D.N.Y. Sept. 22, 2011]; 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).

The parents allege that the IHO should have considered their claims relating to implementation of the June 2012 IEP at the assigned public school site because at the time the parents filed the due process complaint notice they had not yet received the FNR identifying the assigned school. Although the October 2012 due process complaint notice contains an allegation that the parents had not received a copy of the FNR, it does not raise any allegations that the district in fact failed to implement the student's IEP at the assigned district public school location (Parent Ex. C), nor could such a claim be plausibly asserted since the parents decided to unilaterally place the student at STAR before the time the district was obligated to implement the IEP.<sup>6</sup> While I understand that the parents were not in a position to assert claims relating to the assigned public school location prior to even receiving notice of the particular school site to which the student had been assigned, the parents could have sought agreement from the district or the IHO by moving to amend their due process complaint notice at the time they received all of the information they sought with respect to the particulars of the public school site (Dist. Exs. 9; 10).<sup>7</sup> However, a review of the hearing record indicates that the parents never sought such agreement from the district or permission from the IHO to amend their due process complaint notice or add additional claims (see Tr. pp. 1-282; Dist. Exs. 1-5; 7-10; Parent Exs. A-O). In fact, the district objected

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<sup>6</sup> The parents' October 11, 2012 due process complaint notice contains a provision seeking to reserve the right to raise additional issues including challenges to (1) the qualifications of district personnel, (2) the ability of the public school to maintain an appropriate student-staff teacher ratio, and (3) the ability of the public school to provide the related services mandated on the IEP (Parent Ex. C at p. 5). First, on appeal the parents are not challenging the assigned public school based on the preceding claims but rather only specifically challenge the ability of the assigned public school site to maintain a barrier free environment (Petition ¶76). Second, to allow the parents to raise additional issues without the district's agreement pursuant to a reservation of rights clause would render the IDEA's statutory and regulatory provisions meaningless (T.G. v. New York City Dep't of Educ., 2013 WL 5178300, at \*14-\*15 [S.D.N.Y. Sept. 16, 2013] [holding that "catch-all allegations" in a due process complaint notice are insufficient to bring an issue within the scope of an impartial hearing]; N.K. v New York City Dep't of Educ., 2013 WL 4436528, at \*6 [S.D.N.Y. Aug. 13, 2013] [rejecting the claims in an amended due process complaint pursuant to a unilateral reservation of rights where permission of the school district or the IHO was absent]; B.P. v. New York City Dep't of Educ., 2012 WL 33984, at \* 5 [E.D.N.Y. Jan 6, 2012] [rejecting the proposition that a general reservation of rights in a due process complaint notice preserves additional procedural arguments later in the proceeding]; see 20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]).

<sup>7</sup> The hearing record indicates that at the time the due process complaint notice was filed, the parents were aware of the assigned public school and the placement recommendation, but not the exact location of the assigned school (Tr. pp. 254, 256; Dist. Exs. 2 at p. 2; 9 at p. 1).



during the impartial hearing to the consideration of the parents' implementation claim, asserting that the district chose not to call any witnesses from the assigned public school based on the parents' allegations contained in the due process complaint notice (Tr. pp. 266, 273-74).

Where, as here, the parents did not seek the district's agreement to expand the scope of the impartial hearing to include their implementation claims or seek to include them in an amended due process complaint notice, I decline to review these issues. To hold otherwise inhibits the development of the hearing record for the IHO's consideration (see 20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]; see also B.P., 2012 WL 33984, at \*4-\*5 [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]"]; M.R., 2011 WL 6307563, at \*13). "By requiring parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children'" (R.B., 2011 WL 4375694, at \*6, quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995], itself quoting Hoelt v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir.1992]; see C.D., 2011 WL 4914722, at \*13).<sup>8</sup>

## **B. June 2012 CSE Meeting and IEP Development Process**

### **1. Parental Participation**

Turning to the merits of the appeal, I first address the parents' allegation that their opportunity to participate in the development of the student's IEP was significantly impeded. The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's CSE meetings or

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<sup>8</sup> Although I do not address them herein, I note that the parents' claims regarding the district's ability to implement the June 2012 IEP at the assigned school were speculative in any event. "The Second Circuit has been clear, however, that where a parent enrolls the child in a private placement before the time that the district would have been obligated to implement the IEP placement, the validity of proposed placement is to be judged on the face of the IEP, rather than from evidence introduced later concerning how the IEP might have been, or allegedly would have been, implemented" (A.M. v. New York City Dep't of Educ., 2013 WL 4056216, at \*13 [S.D.N.Y. August 9, 2013]; see R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at \*17 [S.D.N.Y. Sept. 27, 2013]; E.F. v. New York City Dept. of Educ., 2013 WL 4495676, at \*26 [E.D.N.Y. Aug. 19, 2013]; M.R. v. New York City Bd. of Educ., 2013 WL 4834856, at \*5 [S.D.N.Y. Aug. 14, 2013] [finding that arguments that an assigned school would not have been able to implement the IEP are often "entirely speculative"]; N.K. v. New York City Dep't of Educ., 2013 WL 4436528, at \*9 [S.D.N.Y. August 13, 2013] [rejecting challenges to placement in a specific classroom because "[t]he appropriate inquiry is into the nature of the program actually offered in the written plan"]). In this instance, the parents rejected the district's proposed placement prior to the time the district assigned the student to a particular public school site and the parents enrolled the student at STAR prior to the time for implementation of the student's IEP at the assigned public school site (Tr. pp. 185-86; Dist. Ex. 10; Parent Exs. A; B; D at p. 1). The parents cannot prevail on their claims that the district would have failed to implement the IEP at the public school site because a retrospective analysis of how the district would have executed the student's June 2012 IEP at the assigned school is not an appropriate inquiry under the circumstances of this case (R.E., 694 F.3d at 186; see K.L., 2013 WL 3814669 at \*6; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]).

are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation."]; Sch. for Language & Comm'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at \*7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice."]; Paolella v. District of Columbia, 2006 WL 3697318, at \*1 [D.C. Cir. Dec. 6, 2006]).

In this instance, a review of the hearing record reflects that the parents' ability to participate in the development of the student's June 2012 IEP was not significantly impeded. The parents attended the June 2012 CSE meeting, along with a district school psychologist—acting as district representative—and a district special education teacher (Tr. pp. 20, 49, 248; Dist. Ex. 1 at p. 12). In addition, the student's teacher for the 2011-12 school year from STAR and STAR's coordinator of admissions participated in the meeting via telephone (Tr. pp. 20, 136, 177-79; Dist. Ex. 1 at p. 12).

Although the student's mother testified that the CSE did not discuss the development of a BIP and did not review specific annual goals, testimony from the student's teacher at STAR indicated that she had written out goals which she reviewed with the CSE at the June 2012 meeting and that she discussed the student's behaviors with the CSE, including what was being done in class to help the student (Tr. pp. 137, 139-40, 250-51). Additionally, although the student's mother testified that the CSE did not discuss the results of standardized testing, the hearing record indicates that the CSE reviewed progress reports from the student's related service providers and teacher from STAR, and all of the CSE participants agreed with the recommendations contained in those reports (Tr. pp. 25-28, 249-50; Dist. Ex. 2 at p. 2). Testimony from the district school psychologist indicated that the CSE also discussed the student's progress in reading, math, and writing, the student's related services, and how the student's health paraprofessional assisted her at STAR (Tr. pp. 23-24). The student's teacher indicated that the CSE discussed the recommended 8:1+1 special class placement and that she had an opportunity to object to the recommendation as being insufficiently supportive to meet the student's behavioral needs (Tr. pp. 143-44). The student's mother testified that the parents also raised concerns regarding the class size during the June 2012 CSE meeting and that the school psychologist responded that an 8:1+1 special class was the smallest class size the district could offer and the psychologist's view that "it would be great" for the student (Tr. pp. 252-53). The student's mother further testified that the parents were aware of the recommendation for a 1:1 paraprofessional, and that they agreed with that recommendation (Tr. pp. 251-52). Additionally, the district school psychologist testified that the parents were provided an opportunity to provide input regarding the program recommendation (Tr. p. 87). Moreover, a review of the June 2012 CSE meeting minutes reflects that the committee discussed the student's academic skills, behavioral issues, and the ways in which the private school was addressing the student's needs (Dist. Ex. 2).

Based upon the foregoing, while I understand that the parent may not have agreed with the conclusions reached by the CSE I find no reason to disturb the IHO's finding that the parents were provided a meaningful opportunity to participate in the development of the June 2012 IEP (T.P., 554 F.3d at 253; see J.L. v. City Sch. Dist. of the City of New York, 2013 WL 625064, at \*12

[S.D.N.Y. Feb. 20, 2013]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 333-34 [E.D.N.Y. June 13, 2012], aff'd, 725 F.3d 131 [2d Cir. 2013]; R.R., 615 F. Supp. 2d at 294). "Meaningful participation does not require deferral to parent choice" (Sch. for Language and Communication Dev. v New York State Dept. of Educ., 2006 WL 2792754 [EDNY Sept. 26, 2006]), and the IDEA 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).

## 2. Sufficiency of Evaluative Data

I next address the parents' assertion that the IHO erred in determining that the June 2012 CSE's failure to conduct a mandated reevaluation of the student did not impact the student's placement or the parents' ability to participate in the development of the IEP. 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 must conduct a reevaluation at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (34 CFR 300.303[b][2]; 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]). 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]), and 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).

No single measure or assessment should be used as the sole criterion for determining an appropriate educational program for a student (20 U.S.C. §§ 1412[a][6][B]; 1414[b][2][B]; 34 CFR 300.304[b][2]; 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]). Furthermore, although federal and State regulations require that an IEP report the student's present levels of academic achievement and functional performance, those regulations do not mandate or specify a particular source from which that information must come, and teacher

estimates may be an acceptable method of evaluating a student's academic functioning (S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at \*10 [S.D.N.Y. Nov. 9, 2011]). While permissible, there is no requirement that an IEP contain specific references to criterion referenced testing, achievement testing or diagnostic testing.

The hearing record does not provide a clear picture as to the date the district last conducted an evaluation of the student. The hearing record contains a referral form for placement in a specialized school that includes student IQ scores obtained from administration of standardized testing (Dist. Ex. 7). According to the school psychologist, the information on the referral form was taken from a September 2005 evaluation of the student's cognitive abilities that was contained in the student's file (Tr. pp. 46-47).<sup>9</sup> She stated that according to district records, it was the most recent cognitive testing that was done on the student (Tr. p. 47). The school psychologist later testified that she was not sure as to when the district last conducted a psychoeducational evaluation of the student; however, she acknowledged that the date of the testing as reflected on the referral form was incorrect (Tr. pp. 56-57). She suggested that the standardized testing may have been done as part of the evaluation that was conducted for the student to receive special education services in preschool (Tr. p. 57). The student's mother could not recall the last time the district formally evaluated the student, but suggested that it was when the student was one year old (Tr. pp. 248-49).<sup>10</sup> Regardless of the date, the hearing record does not indicate whether the CSE reviewed this evaluative data during or prior to the June 2012 CSE meeting.<sup>11</sup>

Although I agree with the parents that the district failed to demonstrate that it followed the proper procedures to reevaluate the student under the IDEA and State regulations, the hearing record does not support the conclusion that the district's failure in this regard constituted the denial of a FAPE to the student. For an IHO or SRO to find that the district's failure to comply with its procedural obligations under the IDEA constituted the denial of a FAPE, the procedural misstep must either have (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]). In this instance, the IHO was correct in rejecting the parents' argument that the lack of a district evaluation resulted in a per se denial of FAPE and in basing his analysis on whether the CSE had sufficient evaluative information available to it to develop an appropriate IEP for the student. To the extent that the lack of formal testing constituted

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<sup>9</sup> September 2005 is the student's birth month (Tr. p. 249; Dist. Exs. 1 at p. 1; 7).

<sup>10</sup> Although the parents testified that the district last conducted an evaluation of the student when she was one year old, the private school's director of admissions testified that the private school requires a neuropsychological evaluation at the time of application—which would have occurred when the student was four (Tr. pp. 135, 179).

<sup>11</sup> Regarding the parents' claim that the district's change in recommendation from a special class in a community school to a special class in a specialized school required a reevaluation of the student, it should be noted that at the time of the June 2012 CSE meeting, the student did not have access to a general education setting as she was attending STAR, which is attended solely by special education students (Tr. pp. 129-32). Accordingly, the district was not recommending a significant change in the student's placement. Additionally the hearing record is unclear if the July 2011 CSE had recommended placement in a community school (Tr. pp. 55, 85-86; Dist. Ex. 8). While the school psychologist initially testified that she believed the prior CSE had recommended the student for placement in a special class in a community school, she later acknowledged that this was not reflected in the student's IEP for the previous school year (id.).

a procedural violation of the IDEA, in this instance—because the district had other current evaluative data available to adequately assess the student as described below—the district's failure to comply with its obligations under the IDEA did not impede the student's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process, or cause 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]).

The hearing record reflects that, in developing the June 2012 IEP, the CSE considered the student's July 2011 IEP, a May 2012 OT progress report, a May 2012 speech-language progress report, a June 2012 PT progress report, and a progress report from the student's then-current STAR teacher (Tr. pp. 20-22, 43; Dist. Exs. 3; 4; 5; 8).<sup>12</sup> The hearing record also indicated that the June 2012 CSE considered input from the parents and from the student's private school special education teacher (Tr. pp. 25, 142- 44, 168-69, 252). Together the reports and information from the private school staff provided a detailed description of the student's needs and present levels of performance as set forth in the June 2012 IEP (Dist. Exs. 1-5; 8).

The July 2011 IEP indicated that the student's academic functioning levels fell in the pre-kindergarten range based on teacher estimates; noted that she presented with significant communicative deficits, characterized by expressive and receptive language delays; indicated that the student was able to participate independently in school activities when given verbal directions; documented the student's need for a health paraprofessional to assist her with mobility, toileting, balance when going up and down stairs, and safety awareness; and also noted that the student wore a vest and bilateral foot and ankle orthotics to assist with balance when walking (Dist. Ex. 8 at p. 1).

The May 2012 OT progress report, completed by the STAR occupational therapist, described the student's performance with respect to motor skills, sensory processing, social and play skills, and activities of daily living (ADLs) (Dist. Ex. 4). In describing the student's motor skills, the occupational therapist reported that the student presented with fluctuating tone in her trunk and extremities; limited active movement in the joints of her arms, legs, and spine; and muscle weakness (*id.* at p. 1). The occupational therapist reported that these factors directly and significantly impacted the student's ability to perform motor skills in a smooth, coordinated fashion (*id.*). According to the occupational therapist, despite these difficulties the student demonstrated improvement in her fine motor skills, most notably her writing skills, as well as her balance and ability to transition from one position to another (*id.*). The occupational therapist reported that the student was able to hold a pencil in a modified tripod grasp and write most of the letters of the alphabet, although she sometimes reverted to a less mature grasp (*id.* at pp. 1-2). The occupational therapist noted that the student's letter production was inconsistent with respect to the size, shape and orientation of the letters (*id.* at p. 2). She further noted that the student had practiced using a tablet computer as an alternative to handwriting (*id.*). The occupational therapist stated that the student's fine motor skills continued to be delayed by more than one year (*id.*). The occupational therapist reported that the student had made great progress with respect to sensory processing and commented that although the student's sensory-seeking behaviors had been greatly reduced, they

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<sup>12</sup> The 2012 STAR progress report is not part of the hearing record; however, it was referred to in testimony by the district school psychologist and the private school teacher (Tr. pp. 21, 37, 137).

continued to be an issue for the student and an obstacle to her ability to function (id.). The occupational therapist explained that the student's tendency to smell and mouth objects, as well as seek out tactile input, decreased her ability to attend to classroom tasks, interfered with the availability of her hands for more appropriate tasks, and disrupted the student's social interactions with others (id.). With respect to socialization and play skills, the occupational therapist reported that the student had made progress in these areas and was social and engaged with her classmates and readily engaged with them during familiar classroom routines (id.). The occupational therapist noted that the student was able to engage in pretend play but tended to repeat play sequences unless facilitated to incorporate new play themes by an adult (id.). Regarding ADL skills, the occupational therapist reported that the student was able to feed herself using a spoon and fork, and also to drink from a cup (id. at p. 3). According to the occupational therapist, the student's ability to manage clothing fasteners was inconsistent (id. at p. 2). The student was able to take off and put on some clothing with verbal cues to complete the sequence but required assistance for some dressing/undressing skills that were difficult due to her physical limitations (id. at p. 3). The occupational therapist concluded that although the student had made good progress, she continued to demonstrate significant delays in her fine motor development, sensory processing, play, social skills, and ability to perform ADLs (id.). She recommended that the student continue to receive OT two times per week to address her needs in these areas (id.).

According to the May 2012 speech-language progress report, prepared by the student's STAR speech-language pathologist, the student presented with significant pragmatic deficits, as well as receptive and expressive language delays (Dist. Ex. 5 at pp. 1, 3). The speech-language pathologist reported that the student had been receiving speech-language therapy three times per week since entering the school and had demonstrated progress in her speech and language development, specifically in the areas of expressive and receptive vocabulary, ability to answer "wh" question forms, ability to use more spontaneous language, following two step directions, and improving symbolic play (id. at p. 1). The speech-language pathologist stated that the student required increased wait time to process questions and, due to a shortened attention span during adult-directed activities, the student required frequent verbal redirection to participate in most tasks (id. at pp. 1, 3). The speech-language pathologist noted that at times the student presented with hesitations and disfluencies, which were more prevalent following weekends and school vacations (id.). She further noted that the student did not appear to be bothered by the disfluencies (id. at pp. 2-3). With respect to receptive language, the speech-language pathologist reported that the student had difficulty processing verbal information, preferred to answer questions using single words and short phrases, and had difficulty answering questions that required more elaborate responses (id. at p. 1). According to the speech-language pathologist, the student was able to identify objects by their functions, inconsistently identify objects by category, comprehend some pronouns, and understand some quantitative concepts (id. at p. 2). The student had difficulty comprehending qualitative concepts, complex sentences, time/sequence concepts and modified nouns (id. at p. 2). She was able to inconsistently identify the beginning sound of words (id.). With respect to expressive language, the speech-language pathologist reported that the student primarily used single words and two to four word phrases to comment and request (id.). She noted that the student was able to initiate, but not maintain, a conversation (id. at p. 1). The speech-language pathologist reported that the student was able to express non-existence, recurrence, state, possession, internal state, location, action, and attribution (id. at p. 2). The student did not express quantity or use possessives, and could not retell an event from the immediate past in an organized manner, even if it related to highly routine and familiar activities (id.). The speech-language pathologist judged

the student's language structure to be significantly below age expectations (*id.* at p. 2). With respect to the student's disfluency, the speech-language pathologist reported that the student presented with interjections in the beginning and sometimes middle of utterances and that she also exhibited secondary characteristics (*id.* at p. 3). According to the speech-language pathologist the student sometimes changed topic, spoke off topic, or fidgeted in her seat (*id.* at pp. 2-3). The speech-language pathologist reported that the student was able to imitate oral motor movements modeled by the clinician and she characterized the student's intelligibility as "fair" (*id.*). In the progress report, the speech-language pathologist noted that the student sometimes took her glasses off or put items in her mouth or nose, and also that the student frequently smelled therapy materials and toys (*id.* at p. 1). She noted that these behaviors had significantly decreased during therapy through the use of behavioral modification techniques and verbal reminders (*id.*). The speech-language pathologist concluded that in order to address the student's significant speech and language deficits, she should continue to receive individual speech-language therapy three times per week with the goals of expanding the student's spontaneous expressive utterances to code and coordinate categories, increasing the student's descriptive language skills, improving the student's pragmatic language skills, and monitoring the student's fluency (*id.* at p. 3).

The June 2012 PT progress report, completed by the student's physical therapist at STAR, stated that the student required close supervision when ambulating in the hallways and navigating the classroom, when running and ascending and descending stairs, and for safety in completing activities during adapted physical education (Dist. Ex. 3 at p. 1). According to the physical therapist, the student required some assistance when navigating playground equipment including climbing up a cargo ladder, sliding down a slide, and climbing a standard ladder (*id.*). The physical therapist identified the student's IEP goals and noted improvement in the student's jumping skills and balance (*id.* at p. 2). She reported that the student was able to negotiate all of the equipment in the physical therapy gym with supervision for safety (*id.*). The physical therapist stated that the student would continue to work toward improving her trunk and hip strength in order to improve her postural control and "in-toeing" (*id.*). The physical therapist recommended that the student continue to receive PT for three 30-minute sessions per week and further recommended that the student continue to perform activities that promoted increased strength in her trunk and hips, improved standing balance, and improved gross motor skills (*id.*).

In addition to the reports considered by the June 2012 CSE, the student's classroom teacher at STAR for the 2011-12 school year provided the CSE with information regarding the student's academic skills and behavioral needs (Tr. pp. 139-40, 142-44). The student's teacher testified that she participated in the CSE's discussion regarding the student's mouthing of objects, noting that the committee talked about ways for the student to keep her body safe and the student's negative behaviors (Tr. pp. 142-43). She also testified that she shared with the other members of the CSE the student's need for behavioral support, as well as her "constant" need for redirection of where her body was in her environment (Tr. pp. 143-44).

The minutes from the June 2012 CSE meeting also reflected discussion by the committee members regarding the student's academic skills, behavioral issues, and management needs (Dist. Ex. 2). Among other things, the meeting minutes indicated that the student recognized letters and sight words and knew shapes, colors, letters and numbers; however, she did not always demonstrate this knowledge (*id.* at p. 1). The meeting minutes further indicated that the student required redirection to participate, even in a 3:1 classroom, and that when frustrated the student

would take off her glasses and throw them (id.). According to the meeting minutes, the student understood school expectations and what was appropriate/inappropriate behavior (id. at pp. 1-2). The minutes characterized the student's impulse control as "not good" and noted that the school would "catch [the student] being good" and used positive behavior support with success (id. at p. 2). The meeting notes indicated that the student mouthed items for attention and knew what was edible and not edible (id.).

Based on the above, the hearing record shows that the CSE had before it sufficient evaluative information to develop an appropriate IEP for the student. Even assuming that the district did not comply with the procedural requirements for conducting a triennial evaluation, the evidence above supports the conclusion that such a procedural violation did not result in a denial of a FAPE to the student (see R.B., 2013 WL 5438605, at \*9-\*10). It should also be noted that a district is not required to conduct its own evaluations in developing an IEP and recommending an appropriate program, but may rely on appropriate privately obtained evaluations (M.H. v. The New York City Dep't of Educ., 2011 WL 609880 at \*9-10 [S.D.N.Y. Feb. 16, 2011]). The district may also rely on information obtained from the student's private school personnel, including sufficiently comprehensive progress reports, in formulating the IEP (see G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at \*23 [S.D.N.Y. March 29, 2013]; S.F., 2011 WL 5419847, at \*10; see also Application of a Student with a Disability, Appeal No. 12-165). The June 2012 IEP reflected the student's strengths and weaknesses as described in the STAR Academy progress reports and as discussed during the CSE meeting (Tr. pp. 24-25, 75; compare Dist. Ex. 1 pp. 1-2 with Dist. Exs. 3, 4, 5; see also Dist. Ex. 2).

## **C. June 2012 IEP**

### **1. Management Needs**

The parents assert that the student's management needs included in the student's June 2012 IEP were not specific enough to provide guidance to a "placement officer" or the educator responsible for implementing the IEP. The parents contend that without specific management needs regarding the student's deficits, her teacher and related services providers would not be able to modify instruction to meet the student's unique special education needs. They further argue that without academic management needs, a "placement officer" would not have sufficient information to appropriately place the student.

The management needs section of the June 2012 IEP identified several environmental and human or material resources needed to address the student's management needs, including: redirection to task, visual aids and cues, rephrasing of material, verbal cues, prompting, and allowance of wait time for response (Dist. Ex. 1 at p. 2).<sup>13</sup> The requirement for the identification of management needs on a student's IEP is set forth under State regulations, but there is no specific federal law corollary to this requirement (see 8 NYCRR 200.1[ww][3][i][d]). According to State

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<sup>13</sup> Some examples of environmental modifications include "consistency in routine; limited visual/auditory distractions; adaptive furniture"; human resources include "assistance in locating classes and following schedules; assistance in note taking"; and material resources include "instructional material in alternative formats" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 20, Office of Special Educ. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>)



guidance "[e]ach [CSE] must decide on a case-by-case basis the level of specificity needed to identify a student's management needs. . . . At this point in the IEP development process, the Committee is identifying needs, (e.g., limited audio/visual distractions, scheduled rest periods, consistency in routine, assistive technology to assist communication, assistance with transitions), not specific recommendations to address those needs" ("Questions and Answers on Individualized Education Program [IEP] Development, the State's Model IEP Form and Related Requirements," at p. 12 [April 2011], available at <http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf>). Although the management needs section in the IEP in this case did not describe in detail the manner in which the student's management needs presented, the description of the student in the present levels of performance included in the IEP more specifically detailed the student's management needs (id. at pp. 1-2). In particular, the present levels of performance noted the student's distractibility and difficulty sustaining attention and stated that the student required "[m]uch redirection" to stay on task (id. at p. 1). The present levels also indicated that the student required verbal and/or physical prompts to help process verbal information (id.). Furthermore, the present levels noted the student's attention seeking behavior and stated that school personnel used positive behavior support such as "catching her being good" to manage the student's behavior (id.). The present levels also noted that the student required increased time to process questions (id.). While the best way to have articulated the student's needs in the IEP is open to debate and, in the view of some, it may have been preferable to have placed certain statements from the IEP's present levels of performance in the management needs section of the IEP, at a minimum, federal regulations do not require the CSE to include information under one component of a student's IEP that is already contained in another component of the IEP (34 CFR 300.320[d][2]). Accordingly, I find that although the management needs section of the June 2012 IEP may not have been as detailed as desired by the parents, the student's management needs were overall adequately described within the present levels of performance section of the IEP, and the IEP read as a whole contained sufficient information to provide the student with educational benefits under the plan (Karl v. Bd. of Educ., 736 F.2d 873, 877 [2d Cir. 1984] [finding that although a single component of an IEP may be so deficient as to deny a FAPE, the educational benefits flowing from an IEP must be determined from the combination of offerings rather than the single components viewed apart from the whole]). Thus, any deficiency in the management needs component of the IEP in this instance did not rise to the level of a denial of a FAPE to the student.

## **2. Special Factors and Interfering Behaviors**

The parents challenge the IHO's determination that the district was not required to conduct an FBA or develop a BIP because the student's behaviors were being addressed in the student's classroom at STAR without a BIP. A review of the hearing record supports the IHO's conclusion. 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 E.H. v. Board 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]). 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]).

In New York State, policy guidance explains that "[t]he IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address [among other things, a student's interfering behaviors,] in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 22, Office of Special Educ. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP" and, if necessary, the "student's need for a [BIP] must be documented in the IEP" (id.).<sup>14</sup> State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student (8 NYCRR 200.4[d][3][i]; 200.22[a], [b]). 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]). State regulations require that 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 \*4). Nevertheless, the Second Circuit has explained that when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F.3d at 190). The Court also noted that "[t]he failure to conduct an FBA will not

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<sup>14</sup> 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. 22 [emphasis added]), 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, at \*3 [2d Cir. Oct. 27, 2006]).

always rise to the level of a denial of a FAPE, but that in such instances particular care must be taken to determine whether the IEP address the student's problem behaviors" (*id.*).

The special factor procedures set forth in State regulations further require 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 (regarding disciplinary action taken against a student as a result of conduct that was a manifestation of the student's disability) (8 NYCRR 200.22[b][1]). As noted above, "[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]).<sup>15</sup> Neither the IDEA nor its implementing regulations require that the elements of a student's BIP be set forth in the student's IEP ("Questions and Answers on Individualized Education Program [IEP] Development, the State's Model IEP Form and Related Requirements," at p. 16, Office of Special Educ. [April 2011], available at <http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf>). However, once a student's BIP is developed and implemented, "such plan shall be reviewed at least annually by the CSE or CPSE" (8 NYCRR 200.22[b][2]). Furthermore, "[t]he implementation of a student's [BIP] shall include regular progress monitoring of the frequency, duration and intensity of the behavioral interventions at scheduled intervals, as specified in the [BIP] and on the student's IEP. The results of the progress monitoring shall be documented and reported to the student's parents and to the CSE or CPSE and shall be considered in any determination to revise a student's [BIP] or IEP" (8 NYCRR 200.22[b][5]).

An independent review of the hearing record reflects that, notwithstanding the lack of a formal FBA or BIP, the CSE included sufficient information regarding the student's interfering behaviors and management needs in the June 2012 IEP (Dist. Ex. 1 at pp. 1-2). The student's behavioral needs were described in the reports reviewed by the June 2012 CSE, further discussed at the CSE meeting, and are reflected in the resultant IEP (Tr. pp. 28-29, 60-61, 139-40, 143, 187-88; Dist. Exs. 1 at pp. 1-2; 2; 4 at p. 2; 5 at p. 1). The hearing record shows that, at the time of the CSE meeting, the student was impulsive, had a short attention span, and engaged in sensory seeking and/or attention seeking behaviors that interfered with her ability to learn (Tr. pp. 28, 64,

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<sup>15</sup> 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]).

139-40; Dist. Exs. 2; 4 at p. 2; 5 at p. 1). The student's attention and sensory seeking behaviors included putting non-edible and potentially unsafe objects in her mouth, flinging her glasses when frustrated, smelling objects before and during play, and scratching her legs as a means of obtaining tactile input (Dist. Exs. 1 at pp. 1-2; 2; 4 at p. 2; 5 at p. 1).

The school psychologist testified that she was familiar with FBAs and BIPs and opined that, at the time of the CSE meeting, the student did not require an FBA or BIP; however, she could not recall if STAR staff voiced an opinion as to whether or not the student needed a BIP to address her interfering behaviors (Tr. pp. 29-31).<sup>16</sup> The school psychologist testified that she did not believe the CSE had a discussion about "not" developing a BIP, because the "team" believed that the student's behaviors could be addressed through the assignment of a health paraprofessional in addition to regular classroom management (Tr. p. 63). The student's special education teacher from STAR testified that STAR had not conducted an FBA of the student, did not have a written BIP, and the student's behaviors were handled within the classroom (Tr. pp. 162-63).

The hearing record shows that at the time of the CSE meeting STAR staff managed the student's behavior through the assignment of a 1:1 paraprofessional, redirection, verbal reminders and classroom management strategies such as the use of a reward chart, verbal praise, and "catching her being good" (Tr. pp. 32, 61-62, 156-58). The staff had also created a system involving sensory items where the student could choose items such as a squish ball or lotion that required her to appropriately engage her hands (Tr. p. 188). The related services reports considered by the CSE noted a reduction in the student's sensory seeking behaviors and the student's speech-language pathologist reported that the student's tendency to put potentially unsafe objects in her mouth had significantly decreased through the use of behavior modification techniques and verbal reminders (Dist. Ex. 4 at pp. 1-2; 5 at p. 1). Still, the student continued to demonstrate sensory seeking behaviors (Dist. Ex. 4 at p. 1).

The significant classroom supports and strategies utilized at STAR to address the student's behaviors were recommended by the June 2012 CSE and reflected in the student's IEP. Notably, the IEP indicated that the student required redirection to remain on task and cited behavioral interventions, such as "catching her being good" and the use of verbal reminders to address unsafe behaviors, as particular behavior management strategies (Dist. Ex. 1 at pp. 1-2). The June 2012 IEP also included additional supports recommended by the CSE including the use of visual and verbal cues, rephrasing of material and the allowance of "wait time" to respond, which the student's STAR special education teacher confirmed the student required due to her high distractibility (Tr. pp. 159-60; Dist. Ex. 1 at p. 2). The district school psychologist explained how the management needs included in the IEP could aid the student in focusing and attending to tasks (Tr. pp. 68-69). Most importantly, she testified that the student was assigned a 1:1 health paraprofessional on her IEP who would implement a goal to refrain from putting nonfood objects in her mouth and improve safety awareness (Tr. pp. 24, 33-34; Dist. Ex. 1 at pp. 7-8). Accordingly, I find that the student's interfering behaviors were sufficiently addressed by the June 2012 IEP itself, particularly through the inclusion of a full time 1:1 health paraprofessional and therefore, any failure in this instance to

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<sup>16</sup> The school psychologist also testified that she checked "no" on the special factors section of the IEP related to a student's need for positive behavioral interventions because she thought the question was speaking to more intensive remediation. (Tr. p. 67). She stated that she did not think the student required a more intensive behavior plan because "[w]hat the school was doing with her was working" (Tr. p. 67).

develop an FBA or BIP did not deny the student a FAPE (see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*5, \*8 [S.D.N.Y. Mar. 21, 2013] [even in the absence of both an FBA and a BIP, provision of a 1:1 paraprofessional can render an IEP adequate where there is evidence that the 1:1 paraprofessional would provide "significant benefits . . . in addressing the problematic behaviors"], quoting T.Y., 584 F.3d at 419).

I also note that, at the time of the June 2012 CSE meeting, the student was already attending STAR, and conducting an FBA to determine how the student's behavior related to the student's environment at STAR would have diminished value where, as here, the CSE did not have the option of recommending that the student be placed at STAR and was charged with identifying an appropriate publicly funded placement for the student (see 8 NYCRR 200.1[r]; see also Cabouli v. Chappaqua Cent. Sch. Dist., 2006 WL 3102463, at \*3 [2d Cir. Oct. 27, 2006] [stating that it may be appropriate in some circumstances to address a student's behaviors in an IEP by noting that an FBA and BIP will be developed after a student is enrolled at the proposed district placement]; J.C.S., 2013 WL 3975942, at \*13).

Although I conclude that the district did not fail to offer the student a FAPE in this instance, I emphasize the Second Circuit's point in R.E. that it is important for districts to appropriately follow the process for developing an IEP and BIP in a manner consistent with State regulations. In circumstances like Cabouli in which conducting an FBA in the public school environment was not possible at the time the IEP was first developed due to a unilateral parental placement (2006 WL 3102463, at \*3), a CSE may need to document the efforts made to gain insight into the student's interfering behaviors at the time of the CSE meeting and make arrangements in the IEP for a procedurally compliant FBA to be conducted and a BIP developed at the first reasonable opportunity. Depending on the results of the FBA, it may become necessary to revise the student's IEP.

### **3. Annual Goals**

The parents contend that some of the annual goals were immeasurable and others were too generic because they were based on the student's age rather than her actual functioning. 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 CSE (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

The student's June 2012 IEP contained 18 annual goals including goals related to academics, speech and language skills, motor development, sensory processing, ADL skills, and safety awareness (Dist. Ex. 1 at pp. 3-7). A review of the evidence contained in the hearing record demonstrates that the English language arts (ELA), PT, OT, math, and speech-language annual goals included in the student's IEP were created based on skills and needs identified in the June 2012 PT progress report, the May 2012 OT report, the May 2012 speech-language progress report,

a teacher progress report, and input from the student's then-current STAR special education teacher (Tr. pp. 35-38, 137, 168-70; compare Dist. Ex. 1 at pp. 3-7, with Dist. Exs. 3; 4; 5; see Tr. p. 136; Dist. Ex. 2). The school psychologist testified that during the June 2012 CSE meeting the committee members discussed the student's abilities and needs, as well as annual goals, and no objections were raised to the goals (Tr. pp. 25-29, 35-38).

A review of the academic goals recommended by the June 2012 CSE shows that they were consistent with the student's identified needs and contained sufficient specificity to guide instruction. The IEP specified the student's academic instructional levels in reading and math and provided annual goals to address her needs in these areas, including three goals for ELA and two for math (Dist. Ex. 1 at pp. 1, 6-7, 11). The ELA goals targeted the student's ability to gain meaning from text by correctly responding to at least ten comprehension questions that reflect the main idea, facts or details in "how" or "why" question form; strengthen her phonic awareness skills by making letter-sound associations for single consonants and single vowels, as well as digraphs; and writing ten complete and correct sentences that contained either a subject and a predicate or a subject, predicate, and object (Dist. Ex. 1 at p. 6). In addition, the math goals focused on the student's need to improve her calculation skills through correctly adding and subtracting single digit numerals, and to strengthen her basic math skills through understanding the concepts of more/less and some/few/many (Dist. Ex. 1 at p. 7). The student's STAR teacher testified that the academic goals that she had written for the student and recommended at the CSE meeting were not the same as the goals included in the June 2012 IEP (Tr. 137-38). However, she later acknowledged that although the goals included in the IEP were not the same as the goals she had written, they were similar (Tr. pp. 171-72).<sup>17</sup> While the teacher testified that at the time of the CSE meeting, the student was not yet ready to work on writing complete sentences and already demonstrated an understanding of quantitative concepts, she also confirmed that the student was working on the other three academic goals and that the student began working on writing complete sentences during the 2012-13 school year (Tr. pp. 168-70, 172-76).

In addition to the academic goals, the June 2012 IEP included four OT goals, four speech-language therapy goals, three PT goals, one goal for adapted physical education, and a goal related to independence and safety awareness (Dist. Ex. 1 at pp. 3-7). The PT goals directly reflected the goals and objectives contained in the June 2012 STAR PT report (compare Dist. Ex. 3 at pp. 1-2, with Dist. Ex. 1 at pp. 3-4). Like the academic goals, the PT goals provided a significant amount of detail regarding the skills the student was expected to achieve (Dist. Ex. 1 at pp. 3-4). Among other things, the goals indicated that the student would improve her standing balance by walking forward five reciprocal steps on a balance beam without stepping off, improve her trunk and hip flexibility by kicking a ball three feet, and improve her gross motor skills by jumping over a two inch hurdle (Dist. Ex. 1 at pp. 3-4). The OT goals contained in the June 2012 directly related to the student's fine motor, sensory processing, play and self-care needs as described in the May 2012 STAR OT report (compare Dist. Ex. 1 at pp. 4-5 with Dist. Ex. 4). While some of the recommended OT goals were more broadly written than the academic and PT goals, other OT goals provided more detailed information regarding the skills to be achieved (Dist. Ex. 1 at pp. 4-5). A review of the recommended speech-language goals shows that, although they were

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<sup>17</sup> The school psychologist admitted that the ELA goal for writing ten complete sentences and the math goal for calculation skills may have been based on the student's age level rather than the teacher's report (Tr. p. 75-77).

consistent with the student's needs as described in the May 2012 STAR speech-language evaluation, they were less detailed than the majority of the other annual goals (Dist. Ex. 1 at pp. 5-6). For example, one of the speech-language goals indicated that the student would improve her pragmatic language skills, while another indicated that she would improve her speech fluency and articulation (Dist. Ex. 1 at p. 6). The adapted physical education goal is also somewhat broad, stating that the student would be prepared and in appropriate attire and complete tasks asked of her (Dist. Ex. 1 at p. 4). The final annual goal identifies skills the student is to achieve with the assistance of the health paraprofessional, including independence in toileting, improved safety awareness, and the ability to refrain from putting non-food objects in her mouth (Dist. Ex. 1 at p. 7). Each of the annual goals included evaluative criteria, evaluation procedures and a schedule to be used to measure progress (Dist. Ex. 1 at pp. 3-7).

While I agree with the parents that some of the annual goals are generic and vague, in reviewing and considering the goals contained in the IEP and the services provided by the IEP as a whole, the deficiencies in the annual goals do not rise to the level of a denial of FAPE (Karl, 736 F.2d at 877; see J.L., 2013 WL 625064, at \*13; see also Bell v. Bd. of Educ., 2008 WL 5991062, at \*34 [D.N.M. Nov. 28, 2008] [explaining that an IEP must be analyzed as a whole in determining whether it is substantively valid]; Lessard v. Wilton-Lyndeborough Co-op. Sch. Dist., 2008 WL 3843913, at \*6-\*7 [D.N.H. Aug. 14, 2008] [noting that the adequacy of an IEP is evaluated as a whole while taking into account the child's needs]; W.S., 454 F. Supp. 2d at 146-47 [upholding the adequacy of an IEP as a whole, notwithstanding its deficiencies]).

#### **4. 8:1+1 Special Class Recommendation**

The parents challenge the appropriateness of the 8:1+1 special class recommendation asserting that an 8:1+1 special class would not have provided the student with sufficient support.

In this instance, the CSE recommended an 8:1+1 special class, which State regulations define as being designed for students "whose management needs are determined to be intensive, and requir[e] a significant degree of individualized attention and intervention (8 NYCRR 200.6[h][4][ii][b]). In addition to the 8:1+1 classroom, the district recommended that the student receive the supplemental service of a 1:1 health paraprofessional and related services including individual OT, PT, and speech-language therapy (Dist. Ex. 1 at p. 8). The school psychologist testified that the June 2012 CSE team chose an 8:1+1 special class placement due to the student's needs relating to attention, concentration, and impulsivity, combined with the student's needs in OT, PT, and speech-language therapy (Tr. pp. 40-41). She also testified that placement in an 8:1+1 special class greatly increased the chance each student would receive more individualized attention, from which the student benefitted (*id.*) According to the school psychologist, the 8:1+1 ratio also provided students with the opportunity "to still be in a classroom as opposed to a one to one setting" (*id.*). She noted that related services providers were better able to push in as well as pull out and therefore students received more of an opportunity for individualized instruction while deriving the benefit of a class structure (*id.*). Although the student was in a classroom with only four students during the 2011-12 school year, the student's private school classroom at the beginning of the 2012-13 school year contained six students (Tr. pp. 136, 147). Furthermore, at times the private school classroom could contain up to eight students during special events (Tr. p. 149). The student's teacher for the 2011-12 school year opined that an 8:1+1 classroom would

have been too large of an environment for the student; however, she also testified that she felt student benefitted from the increase in class size in the 2012-13 school year (Tr. p. 147).

Based upon the foregoing, and particularly considering the level of individual attention available in an 8:1+1 classroom, I find that the evidence contained in the hearing record supports the IHO's conclusion that the district's recommendation of an 8:1+1 special class in a specialized school with the supplemental support of a 1:1 health paraprofessional and individual related services was reasonably calculated to provide the student with educational benefits (Rowley, 458 U.S. at 206-07; R.E., 694 F.3d at 190).

#### **D. Notification of Assigned Public School Site**

The parents argue that the district failed to notify the parents of the district's recommended placement because the district did not deliver a written copy of the FNR to the parents. However, as the IHO correctly noted, the parents were provided with notice of the district's recommended placement at the time of the June 2012 IEP meeting and the parents rejected the placement prior to the start of the 2012-13 school year. The IDEA requires that a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; Tarlowe, 2008 WL 2736027, at \*6 [stating a district's delay does not violate the IDEA so long as a placement is found before the beginning of the school year]). There is no legal authority requiring districts to produce an IEP at the time that the parents demand, districts must only ensure that a student's IEP is in effect by the beginning of the school and that the parents are provided a copy (J.G. v. Briarcliff Manor Union Free School Dist., 682 F. Supp. 2d 387, 396 [S.D.N.Y. 2010]). When determining how to implement a student's IEP, moreover the assignment of a particular school is an administrative decision, provided it is made in conformance with the CSE's educational placement recommendation (see K.L.A. v. Windham Southeast Supervisory Union, 2010 WL 1193082, at \*2 [2d Cir. Mar. 30, 2010]; T.Y., 584 F.3d at 420; White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 [5th Cir. 2003]; see Veazey v. Ascension Parish Sch. Bd., 2005 WL 19496 [5th Cir. Jan. 5, 2005]; A.W. v. Fairfax Co. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]; Tarlowe, 2008 WL 2736027, at \*6). The Second Circuit has established that "'educational placement' refers to the general educational program—such as the classes, individualized attention and additional services a child will receive—rather than the 'bricks and mortar' of the specific school" (T.Y., 584 F.3d at 419-20; see R.E., 694 F.3d at 191-92; K.L.A., 2010 WL 1193082, at \*2; Concerned Parents, 629 F.2d at 756; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 504 [S.D.N.Y. 2011]). While statutory and regulatory provisions require an IEP to include the "location" of the recommended special education services (20 U.S.C. § 1414[d][1][A][i][VII]; 34 CFR 300.320[a][7]; 8 NYCRR 200.4[d][2][v][b][7]), it does not follow that an IEP must identify a specific school site (R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 419-20; A.L., 812 F. Supp. 2d at 504; Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006] [noting that "school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement"]).

Although the parents were not provided with a copy of the June 2012 IEP directly after the meeting, the parents were provided with a copy of the meeting minutes which included a detailed



description of the offered placement—including the 8:1+1 classroom, the full time 1:1 health paraprofessional, the related services recommendations of OT, PT, and speech-language therapy, adaptive physical education, and the recommendation for a barrier free site (Tr. pp. 253-54; Dist. Ex. 2 at p. 2). The parents promptly rejected the offered placement recommendation by two letters within the week after the June 2012 CSE meeting (Parent Exs. A; B). In this instance, because the parents rejected the recommended placement prior to the time the district was required to implement the student's IEP and the district was not required to identify a specific public school location within the IEP itself, any failure on the part of the district to deliver an FNR to the parents after they had rejected the placement recommendation did not impact the parent's opportunity to participate in the decision making process regarding the provision of FAPE to the student (see T.Y., 584 F.3d at 419-20; S.F., 2011 WL 5419847, at \*11-\*12 [finding that even if the FNR was untimely, it did not interfere with the provision of a FAPE to the student because the district was not obligated to afford parents an opportunity to visit assigned school]; A.S. v. New York City Dep't of Educ., No. 10-cv-00009, slip op. at 18-19 [E.D.N.Y. May 25, 2011] [holding that "the parents' right to participate in the development of their child's IEP does not extend to the [district]'s decision regarding the particular school site that their child would attend"]; see also Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at \*5 [E.D.N.Y. Mar. 21, 2013] [noting that a parent "does not have a procedural right in the specific locational placement of his child, as opposed to the educational placement"]; J.L., 2013 WL 625064, at \*10 [holding that the parents' rights to participation "extend only to meaningful participation in the child's 'educational placement'," not to selection of a particular school building]; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at \*16 [S.D.N.Y. Aug. 23, 2012]; C.F., 2011 WL 5130101, at \*8-\*9; A.L., 812 F. Supp. 2d at 504; S.H. v. New York City Dep't of Educ., 2011 WL 666098, at \*5 [S.D.N.Y. Feb. 15, 2011]).

## **VII. Conclusion**

In summary, I concur with the IHO's decision that the district offered the student a FAPE for the 2012-13 school year. As described above, the hearing record contains evidence showing that the June 2012 CSE had sufficient evaluative data available to it to adequately describe the student's needs and the June 2012 IEP—which recommended placement of the student in a twelve month 8:1+1 special class in a specialized school with the services of full time 1:1 health paraprofessional, OT, PT, and speech-language therapy—was reasonably calculated to enable the student to receive educational benefits. Thus, I find the district offered the student a FAPE for the 2012-13 school year (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). Having reached this determination, it is not necessary to reach the issue of whether STAR was appropriate for the student or whether equitable considerations support the parents' 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., 2011 WL 3919040, at \*13).

I have considered the parties' remaining contentions and find that they are either without merit or that I need not consider them in light of my determinations herein.

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
October 15, 2013**

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**JUSTYN P. BATES  
STATE REVIEW OFFICER**