



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 14-045

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

#### **Appearances:**

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Brian J. Reimels, Esq., of counsel

The Law Offices of Neal H. Rosenberg, attorneys for respondents, Karen Newman, Esq., of counsel

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer respondents' (the parents') son an appropriate educational program and ordered it to reimburse them for the costs of the student's tuition at the Aaron School for the 2012-13 school year.<sup>1</sup> The appeal must be sustained.

### **II. Overview—Administrative Procedures**

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a 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

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

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**

On November 5, 2014, I was appointed to conduct this review. The parties' familiarity with the detailed facts and procedural history of the case and the IHO's decision is presumed and will not be recited here. On February 16, 2012, the CSE convened for an annual review of the student's program and to develop his IEP for the 2012-13 school year (see generally Dist. Exs. 3-4). The parents disagreed with the recommendations in the February 2012 IEP, as well as with the

particular public school site to which the district assigned the student to attend for the 2012-13 school year, and as a result, notified the district of their intent to unilaterally place the student at the Aaron School (Dist. Ex. 11; Parent Exs. A-B). In a due process complaint notice dated November 19, 2012, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (Dist. Ex. 1).

An impartial hearing convened on May 10, 2013 and concluded on December 10, 2013, after four days of proceedings (Tr. pp. 1-431). In a decision dated February 24, 2014, an IHO determined that the district failed to offer the student a FAPE, the Aaron School constituted an appropriate unilateral placement for the student, and that equitable considerations favored the parents' request for relief (IHO Decision at pp. 15, 17-18). As a remedy, the IHO directed the district to reimburse the parents for the costs of the student's tuition at the Aaron School for the 2012-13 school year (id. at pp. 18-19).

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

The following issues must be resolved on appeal in order to render a decision in this case:

1. Whether the IHO erred to the extent that he concluded that the February 2012 CSE lacked sufficient evaluative information in order to develop the student's IEP;

2. Whether the IHO erred in finding that the February 2012 IEP did not include annual goals to adequately address the student's needs in the areas of attention, social cognition, executive functioning, and anxiety;

3. Whether the IHO erred in determining that the February 2012 CSE's decision to recommend a 12:1+1 special class placement for the student for instruction in mathematics, English language arts (ELA), and science was not appropriate to address the student's needs;

4. Whether the IHO erred in concluding that the behavioral intervention plan (BIP) attached to February 2012 IEP was inadequate because it did not address all of the student's interfering behaviors;

5. Whether the IHO erred in finding that the assigned public school site could not implement the February 2012 IEP; and,

6. Whether the IHO erred in determining that the Aaron School constituted an appropriate unilateral placement for the student.

#### **V. Applicable Standards**

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at \*10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at \*7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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

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

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

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

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

## **VI. Discussion**

### **A. February 2012 CSE Process**

#### **1. Evaluative Information**

The district first contends that the February 2012 CSE possessed sufficient evaluative information on which to base its program recommendation. Conversely, the parents maintain that

the district did not conduct any of its own evaluations, and that the documentation before the February 2012 CSE supported a recommendation to place the student in a more supportive classroom. As explained more fully below, a review of hearing record supports the district's assertion.

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and the district must conduct one at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

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]). Subject to certain exceptions, a school district must obtain informed parental consent prior to conducting an initial evaluation or a reevaluation (34 CFR 300.300[c]; 8 NYCRR 200.5[b][1][i]; see Letter to Sarzynski, 51 IDELR 193 [OSEP 2008]) and provide adequate notice to the parent of the proposed evaluation (8 NYCRR 200.5[a][5]).

A CSE is not required to use its own evaluations in the preparation of an IEP and in the recommendation of an appropriate program for a student and is not precluded from relying upon privately obtained evaluative information in lieu of conducting its own evaluation (M.H. v. New York City Dept. of Educ., 2011 WL 609880, at \*9 [S.D.N.Y. Feb. 16, 2011]; Mackey v. Board of Educ., 373 F. Supp. 2d 292, 299 [S.D.N.Y. 2005]). In addition, as part of a CSE's review of a student, a CSE must consider any private evaluation report submitted to it by a parent provided the private evaluation meets the school district's criteria (34 CFR 300.502[c][1]; 8 NYCRR 200.5[g][1][vi][a]). Although a CSE is required to consider reports from privately retained experts, it is not required to follow their recommendations (see, e.g., G.W. v. Rye City Sch. Dist.,

2013 WL 1286154, at \*19 [S.D.N.Y. March 29, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at \*15; T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 2013 WL 1187479, at \*15 [S.D.N.Y. Mar. 21, 2013]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004]; see also Pascoe v. Washingtonville Cent. Sch. Dist., 1998 WL 684583 at \*6 [S.D.N.Y. Sept. 29, 1998]; Tucker, 873 F.2d at 567).

In this case, the hearing record shows that the February 2012 CSE considered a March 2011 neuropsychological evaluation, a July 2011 speech and language therapy progress report, a November 2011 Aaron School progress report, an October 2011 Aaron School occupational therapy (OT) plan, an October 2011 Aaron School speech and language therapy plan, a January 2012 classroom observation, and a February 2012 Aaron School mid-year report (Tr. pp. 17-18; Dist. Exs. 5-10; 15). The hearing record further suggests that the February 2012 CSE reviewed the student's IEP from the previous school year (see Tr. pp. 79, 119). Additionally, the parent and the student's Aaron School teacher participated in the February 2012 CSE meeting (Tr. pp. 14-17; Dist. Exs. 3 at p. 23; 4 at p. 1).

Over three nonconsecutive days in February and March 2011, a private neuropsychologist conducted a neuropsychological evaluation of the student to assess the student's strengths and weaknesses, assist with appropriate educational and treatment planning, and address concerns related to distracted, anxious and occasional oppositional behaviors (Dist. Ex. 5 at p. 1). The evaluator noted that during the assessment, the student appeared alert, socially-interested and cooperative, and further described the student as "eager and motivated to participate in each task that was presented to him" (*id.* at p. 3). However, the evaluator also found that despite the student's "solid effort," at times, the student exhibited some difficulties with maintaining attention (*id.*).

The March 2011 neuropsychological evaluation provided the February 2012 CSE with specific information with respect to the student's abilities in the areas of cognition, academics and adaptive, emotional and behavioral functioning (Dist. Ex. 5 at pp. 3-12). As part of the March 2011 neuropsychological evaluation, the evaluator administered standardized assessments to the student in the areas of cognition, verbal functioning, visual-motor/visual perceptual skills, working memory, processing speed, attention and concentration, memory and learning (*id.* at pp. 3-7). In addition, the evaluator administered selected subtests in reading, writing and mathematics to the student from the Woodcock-Johnson-III Tests of Achievement (WJ-III), which revealed that the student's skills were "quite strong overall" (*id.* at p. 5). In the area of social/emotional functioning, although the evaluator found that the student exhibited continued difficulty in pragmatic language, the evaluator described the student as "a sweet endearing boy," who at times, had the tendency to become anxious or feel overwhelmed during more novel activities (*id.* at p. 8). Although the parent reported that the student often worried and could easily become upset, the evaluator did not find that the student's anxiety reached significant levels (*id.* at p. 9). The evaluator also offered a number of recommendations to aid in the student's learning, including placement in a classroom with no more than 12 students, and the provision of preferential seating, visual aids and verbal cues (*id.* at pp. 11-12).

In addition to the March 2011 neuropsychological evaluation, the February 2012 CSE also considered a July 2011 Speech and Language Therapy Progress report from the student's private speech-language pathologist (Dist. Ex. 15). According to the report, while the student's discourse skills had improved, and he could often engage in short conversations of three or four speaking

turns, the student continued to experience significant challenges in the area of metalinguistics, which resulted in great difficulty explaining words and concepts, and using language to talk about his internal thoughts (id. at p. 1). The student's therapist also noted the student's desire for increased independence, and therefore, she suggested placement in a special education environment that would enable the student to grow in this area (id. at pp. 2-3). She recommended placement of the student in a small class, no larger than a 12:1+1 special class, with teachers specializing in special education who could address the student's complex needs and support his learning style (id. at p. 3).

The February 2012 CSE also reviewed the October 2011 speech-language and OT plans prepared by the student's Aaron School therapists (Dist. Exs. 7; 8). According to the student's speech-language therapy plan, the student's goals related to social thinking and problem solving, receptive language, and expressive language (Dist. Ex. 8). The student's occupational therapist indicated that the student's OT goals related to fine motor coordination, graphomotor skills, sensory processing, sensory regulation and daily living skills (Dist. Ex. 7).

Next, the February 2012 CSE reviewed a November 2011 Aaron School progress report that described the student's academic skills and social/emotional functioning (Dist. Ex. 10 at pp. 1-6). The November 2011 report, completed by the student's Aaron School teachers described the student's functioning and progress, as well as provided information about the student's educational program (see id.). According to the November 2011 Aaron School report, the student was eager to participate in class activities and demonstrated a positive attitude (id. at p. 1). The report further described the student as responsive to strategies for remaining attentive during lessons and activities, and also noted an increase in the student's flexibility and problem solving skills (id.). Additionally, the November 2011 report reflected that the student's motivation to learn and be involved would benefit him throughout the school year (id.).

The February 2012 CSE also reviewed a January 2012 classroom observation of the student (Dist. Ex. 9). According to the January 2012 classroom observation, the student required the use of sensory tools during the activity and teacher check-in to participate in the class (id.). The evaluator also noted that after the student put on his ankle weights, the student raised his hand and shared his question with the class (id.). The evaluator found the student's statement to be thoughtful and appropriate (id.).

Additionally, the February 2012 CSE considered a February 2012 Aaron School mid-year report that described the student's progress in literacy, mathematics, writing/handwriting, language arts, science and social studies (Dist. Ex. 6 at pp. 1-6). According to the February 2012 mid-year report, the student was sweet and hardworking in the classroom; however, he required teacher facilitation to stay on topic and maintain reciprocal conversation with peers (id. at p. 7). The February 2012 mid-year report also noted that the student experienced difficulty maintaining attention in the classroom, and described the student's difficulty with social cognition and executive functioning (id. at p. 8). The report further noted that the student's difficulty with social cognition affected his ability to communicate his thoughts and feelings effectively (id. at p. 7). Additionally, the report noted that the student was most successful when the teacher facilitated problem solving, and that role playing activities, teacher assistance with perspective taking and practice of social thinking skills assisted the student in having more meaningful interactions with his peers and teachers (id.). Moreover, the report indicated that the student was easily distracted



by internal and external stimuli, and that the student required frequent "check-ins" to reflect on his understanding of instruction, repetition of information and directions, redirections to tasks and visual and verbal prompts to focus and answer questions (*id.*). The report further described the student's "extreme difficulty" remaining seated and keeping a safe body during structured times of the day, and recommended the provision of adaptive seating, sensory breaks, access to a personal sensory tool box, and an individualized sensory diet to help the student better self-regulate and be available for learning in a group (*id.*). Moreover, the report revealed that the student was most successful when provided with visuals, such as graphic organizers, as well as reminders, and that the student benefitted from interactive lessons and multisensory activities (*id.* at pp. 7-8).

A review of the hearing record reveals that the February 2012 IEP described the student's needs in the areas of cognition, academics, social/emotional functioning, language processing, sensory regulation, attention, gross and fine motor skills (Dist. Ex. 3 at pp. 1-2). Furthermore, the evidence in the hearing record establishes that the description of the student in the February 2012 IEP was consistent with the evaluative data that was before the February 2012 CSE (compare Dist. Ex. 3, and Dist. Ex. 4, with, Dist. Exs. 5 at pp. 3, 6, 8, 10, 14-15; 6 at pp. 1-5; 10 at pp. 2, 4; 9; 15 at p. 2).

Moreover, the hearing record establishes that the February 2012 CSE discussed with the student's Aaron School teacher the student's then-current present levels of academic performance social/emotional functioning and behavioral needs (Tr. pp. 19-22). For example, based on information from the student's Aaron School teacher, the February 2012 CSE determined that the student functioned on grade level in reading and mathematics (Tr. p. 19). Similarly, in accordance with the discussion with the parent and the student's teacher, the resultant IEP noted the student's difficulty with anxiety (Tr. p. 21; Dist. Exs. 3 at p. 2; 4 at p. 2). Moreover, the February 2012 CSE meeting minutes reflect the CSE's discussion of the student's academic, social/emotional, sensory and behavioral needs (Dist. Ex. 4). Overall, the evidence in the hearing record demonstrates that the February 2012 CSE thoroughly discussed the student's academic and social/emotional needs, and in developing its program recommendation, considered input from the parent and the student's teacher (Tr. pp. 32-33; Dist. Ex. 4).

In conclusion, the hearing record reflects that the February 2012 CSE considered information describing the student's needs in cognition, attention, academics, language, social skills, motor skills, and sensory regulation. The hearing record further shows that the February 2012 CSE incorporated this information into the recommended IEP (Tr. pp. 19-20; 32-33; compare Dist. Ex. 3, and Dist. Ex. 4, with, Dist. Exs. 5 at pp. 3, 6, 8, 10, 14-15; 6 at pp. 1-5; 10 at pp. 2, 4; 9; 15 at p. 2). I find that the February 2012 CSE considered sufficient evaluative information and note that a district may rely on information obtained from the student's private school personnel, including sufficiently comprehensive progress reports, in formulating the IEP (see D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 329-31 [S.D.N.Y. 2013]; G.W., 2013 WL 1286154, at \*23; S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at \*10 [S.D.N.Y. Nov. 9, 2011]).

## **B. February 2012 IEP**

### **1. Annual Goals**

Next, the IHO determined that the February 2012 IEP was deficient, because it did not adequately address the student's needs with respect to attention, social cognition, executive functioning and anxiety (see IHO Decision at p. 14). In particular, he concluded that the February 2012 IEP lacked annual goals designed to address these needs in the classroom (id.). On the contrary, as more fully explained below, the hearing record supports a finding that the February 2012 IEP contained annual goals aligned with the student's needs in these areas.

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

The February 2012 IEP indicated that the student struggled with attention, social cognition, and executive functioning (Dist. Ex. 3 at p. 1). Additionally, the February 2012 IEP stated that the student's language processing weaknesses affected his abstract thinking (id.). The February 2012 IEP further indicated that the student's difficulties with sustaining attention, processing directions and pacing his work impacted his participation in class (id. at p. 2). Moreover, the February 2012 IEP noted that the student exhibited difficulty with processing speed, self-regulation, self-stimulatory behaviors and pragmatic language, and further reflected the parent's concerns related to the student's sensory, developmental and attention needs (id.). According to the February 2012 IEP, "some anxiety [wa]s reported" (id.).

According to the district representative, the February 2012 CSE created the annual goals based on input from the student's teacher and information contained in the Aaron School progress report (Tr. pp. 40-42, 116-17, 133-34). A review of the February 2012 IEP reveals that it contained 25 annual goals that targeted the student's needs with respect to reading, reading comprehension, mathematics, OT, speech and language, counseling, and physical therapy (PT) (Dist. Ex. 3 at pp. 4-12). Although the recommended IEP annual goals were written in compound form, they contain sufficient specificity by which to guide instruction and intervention, evaluate the student's progress, gauge the need for continuation or revision, and contain adequate evaluative criteria (see Dist. Ex. 3 at pp. 4-12). The February 2012 IEP also indicates that the student's progress toward the annual goals would be measured over the course of a marking period or assessed at the end of the marking period and that there would be three reports of progress per year using a coding system included in the IEP (see id.).

Notwithstanding the IHO's finding that the February 2012 IEP lacked annual goals designed to address the student's identified needs within the classroom, a review of the IEP shows that the student's related services goals directly addressed the student's needs with respect to

attention, executive functioning and anxiety (Dist. Ex. 3 at pp. 9-11). Initially, I note that the February 2012 CSE designed the related services recommendations to be delivered as "separate location push in/pull out," which the district special education teacher explained encouraged an "interdisciplinary approach," in which the special education teacher and related service provider worked together (Tr. p. 29). He added that the February 2012 CSE designed the related services recommendation to give the provider the option of working with the student on an individual basis or in a small group, or to implement the skill within the classroom depending on the skill being addressed (Tr. pp. 29; see Tr. p. 60). More specifically, the February 2012 IEP included a speech-language goal that targeted the student's needs with respect to the student's attention, auditory and language processing skills as demonstrated by the student's ability to understand what it means to be focused ("whole body listening") and distracted, as well as his ability to use whole body listening skills and provide open ended 'why' 'what happened,' and 'what will happen next' questions related to simple stories read to him with minimal support (Dist. Ex. 3 at p. 11). The district special education teacher described whole body listening as a strategy used with students who had attention deficits, and he further explained that it included strategies to teach students to make eye contact when communication was established, and through whole body listening, students automatically knew where to place their hands and feet (Tr. pp. 25-26). He added that whole body listening also helped students to self-regulate (Tr. p. 26). In addition, the February 2012 IEP contained two annual goals directed at self-regulation, body awareness, attention and motor planning (Tr. pp. 26-27, 72). Specifically, the February 2012 IEP contained an annual goal designed to improve the following skills: the student's ability to use sensory information to effectively interact in his environment as demonstrated by his ability to implement sensorimotor strategies to modify his regulatory states to attain and maintain the appropriate level of alertness for a particular setting; his ability to follow two to three-step directions in the presence of competing, auditory and/or visual stimuli during OT sessions and class; and his ability to sustain visual attention to complete a task such as putting on socks and shoes with minimal verbal cues (Dist. Ex. 3 at p. 9). In addition, the February 2012 IEP included another OT goal designed to improve the following skills: improvement of body awareness and motor planning to enhance quality of movement and overall organization as demonstrated by his ability to maintain personal space during seated work, social activities and transitions; walking through the hallways or in the classroom without bumping into people or objects; catching a tennis ball with arms extended away from [his] torso with consistency when thrown directly to him; and the ability to regulate force and pressure appropriately in order to make both fine and gross motor body movements with control and precision and increasing independence (*id.* at pp. 9-10).<sup>2</sup> Lastly, to address the student's needs with respect to reading social cues and body awareness, the February 2012 CSE developed an annual goal in counseling which provided that given individual and group counseling utilizing role playing and modeling, the student would continue to work on developing his social skills when functioning in peer situations (Tr. p. 28; Dist. Ex. 3 at p. 11). The annual goal also targeted development of awareness of social boundaries along with increasing the student's understanding of nonverbal cues and maintaining appropriate physical self-control, and demonstrating positive social behavior with increasing independence (Dist. Ex. 3 at p. 11). The district special education teacher explained that this goal spoke to social boundaries, and was responsive to the student's difficulties reading social cues and with body awareness (Tr. p. 28). In

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<sup>2</sup> The district representative noted that the parent had concerns regarding the student's ability to judge social space (Tr. pp. 26-27).

view of the foregoing, the evidence in the hearing record establishes that the annual goals included in the February 2012 IEP addressed the student's identified areas of need, and therefore, the IHO's finding must be reversed.

## **2. Consideration of Special Factors—Interfering Behaviors**

Turning next to the parties' claims surrounding the adequacy of the BIP attached to the February 2012 IEP, as explained more fully below, a review of the hearing record reveals that the February 2012 IEP appropriately considered special factors in the development of the student's IEP, and that the IEP, as a whole, addressed the student's behaviors that impeded his learning.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ., 361 Fed. App'x 156, 161, 2009 WL 332662 [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., 777 F. Supp. 2d 669, 673 [S.D.N.Y. 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 "the IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address," among other things, a student's interfering behaviors, "in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 22, Office of Special Educ. [Dec. 2010], available at [\[publications/iepguidance/IEPguideDec2010.pdf\]\(http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf\)\). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP," and if necessary, "a "student's need for a \[BIP\] must be documented in the IEP" \(id.\). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having a functional behavioral assessment \(FBA\) conducted and a BIP developed for a student \(8 NYCRR 200.4\[d\]\[3\]\[i\], 200.22\[a\], \[b\]\). State regulation defines an FBA as the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and](http://www.p12.nysed.gov/specialed/</a></p></div><div data-bbox=)

include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the

behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it

(8 NYCRR 200.1[r]).

According to State regulations, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]).

Although State regulations call for the procedure of using an FBA when developing a BIP, the Second Circuit has explained that, when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F3d at 190). The Court also noted that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE," but that in such instances particular care must be taken to determine whether the IEP addresses the student's problem behaviors (id.).

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

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

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

Once again, "[i]f a particular device or service, including an intervention, accommodation or other program modification is needed to address the student's behavior that impedes his or her learning or that of others, the IEP shall so indicate" (8 NYCRR 200.22[b][2]). If the CSE determines that a BIP is necessary for a student the BIP shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . . ; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR

200.22[b][4]).<sup>3</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 ("Student Needs Related to Special Factors," Office of Special Educ. [April 2011], available at <http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf>). However, once a student's BIP is developed and implemented, "such plan shall be reviewed at least annually by the CSE or CPSE" (8 NYCRR 200.22[b][2]). Furthermore, "[t]he implementation of a student's [BIP] shall include regular progress monitoring of the frequency, duration and intensity of the behavioral interventions at scheduled intervals, as specified in the [BIP] and on the student's IEP. The results of the progress monitoring shall be documented and reported to the student's parents and to the CSE or CPSE and shall be considered in any determination to revise a student's [BIP] or IEP" (8 NYCRR 200.22[b][5]).

Here, the district special education teacher testified that the district school psychologist reviewed the FBA with the February 2012 CSE (Tr. pp. 21-22; see also Tr. p. 347). According to the February 2012 CSE meeting minutes, the school psychologist read the student's previous behavior plan, and the committee discussed that "transitions continue[d] to be an issue," for the student (Dist. Ex. 4 at p. 2). The meeting minutes further indicated that the student chewed on his shirt, which the school psychologist characterized as "more of [a self-stimulatory behavior," in which "anxiety seem[ed] to play a part" (id.). According to the FBA, it was developed on the same date as the CSE meeting (Dist. Ex. 3 at p. 20). The FBA noted the following as the "observational data" that had been collected, school reports and teacher observations (id.). The FBA identified disruptive and self-stimulatory behavior (chewing clothing and shredding his shirt) as the targeted inappropriate behavior (id.). According to the FBA, the frequency of the behavior was intermittent, and that the duration and intensity of the behavior varied (id.). In addition, the FBA noted that the behavior occurred across all school environments (id.). The FBA further noted that anxiety that arose when the student was faced with unchallenging tasks (id.). The FBA identified self-stimulation to alleviate anxiety as the presumed purpose of each behavior (id.). It was unknown what the student would gain or lose as an immediate result of the targeted behavior (id.). The FBA also listed "teacher design behavior modification strategies" as previously attempted interventions (id.). Next, the FBA included the following interventions: use of consistent verbal praise and prompts; attempts to redirect; and a reinforcement system (id.). The FBA further noted that the student viewed computer time as a positive reinforcement (id.). Expected behavior changes included that the frequency and intensity of behaviors would diminish (id. at pp. 20-21). The FBA also included methods/criteria for outcome measurement, such as weekly checklists and teacher observations (id. at p. 21).

With respect to the BIP, the hearing record reflects that the information gleaned from the FBA was incorporated into the resultant BIP (see Tr. p. 22). The BIP identified the student's self-stimulatory behaviors, which included shredding his shirt and chewing on his clothing as the target behavior (Dist. Ex. 3 at p. 22). The BIP further identified the classroom teachers, school staff and providers as the individuals responsible for implementing the plan (id.). The BIP also indicated that the student's progress must be assessed and communicated with the parents every ten weeks

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<sup>3</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]).

(id.). Expected behavior changes included a decrease in self-stimulatory behaviors (id.). Finally, the BIP included checklists and teacher observations as the methods/criteria for outcome measurement (id.).

Based upon the foregoing and contrary to the parents' assertion that the BIP was insufficient, the FBA—and the BIP—accurately described the student's behaviors, including the antecedents to those identified behaviors. However, because the BIP did not include positive behavioral supports and interventions for the student to address his behaviors, it fails to conform to State regulations; similarly, the BIP did not comply with procedures for including a baseline measure of the student's problem behaviors, as required by State regulation (see 8 NYCRR 200.22 [b][4][i][iii]; Dist. Ex. 3).

Notwithstanding all of the foregoing, the absence of an appropriate FBA or BIP might not result in a denial of FAPE if the CSE addressed the student's interfering behavior and created an IEP based upon information provided by the student's teachers, providers, parents and classroom observation conducted by the district (see R.E., 694 F.3d at 190-91; T.Y., 584 F.3d at 419; see also M.Z., 2013 WL 1314992, at \*5, \*8 [finding that, even in the absence of both an FBA and a BIP, provision of a 1:1 paraprofessional can render an IEP adequate where there is evidence that the 1:1 paraprofessional would provide "significant benefits . . . in addressing the problematic behaviors"]). In this case, the strategies recommended to address the student's management needs and the annual goals in the February 2012 IEP cure any inadequacies in either the FBA or the BIP, and any deficiencies therein would not result in a finding that the district failed to offer the student a FAPE for the 2012-13 school year (see A.C., 553 F.3d at 172-73 [concluding that the failure to conduct a FBA did not make the IEP legally inadequate because the IEP noted (1) the student's attention problems, (2) the student's need for a personal aid to help the student focus during class, and (3) the student's need for psychiatric and psychological services]; see also M.W. v. New York City Dep't of Educ., 725 F.3d 131, 140 [2d Cir. 2013]).

Additionally, the February 2012 IEP included a description of the student's social/emotional present levels of performance and health and physical development, based on the documentation available to the February 2012 CSE, as well as multiple academic, social/emotional, and health and physical management strategies for use in the classroom (see Dist. Ex. 3 at pp. 2-3). The February 2012 IEP also included annual goals that addressed the student's attention, body awareness, social awareness, and related academic needs (id. at pp. 4-12). In addition, as set forth in detail above, the February 2012 IEP contained accommodations and strategies to target the student's social/emotional, behavioral and related academic needs, which adequately addressed these needs (see id. at p. 3).

Accordingly, in this case, the February 2012 CSE's failure to completely comply with State procedural regulations regarding the development of the FBA and the BIP did not result in a failure to offer the student a FAPE for the 2012-13 school year because the February 2012 CSE otherwise recommended appropriate management needs designed to target the student's interfering behaviors to adequately and appropriately address the student's social/emotional needs and behaviors.

### 3. 12:1+1 Special Class Placement

Turning next to the parties' dispute regarding the appropriateness of the February 2012 CSE's recommendation to place the student in a 12:1+1 special class in a community school, as explained more fully below, the hearing record supports a finding that it was appropriate based on the information that was before the CSE at the time that it formulated the IEP.

State regulations provide that a 12:1+1 special class placement is designed for students "whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students" (8 NYCRR 200.6[h][4][i]). Consistent with State regulation, the February 2012 CSE deemed the student eligible for special education and related services as a student with autism and recommended placement of the student in a 12:1+1 special class in a community school, for all academic subjects, in addition to related services comprised of two weekly 30-minute sessions of individual speech-language therapy, two weekly 30-minute sessions of speech-language therapy in a group of two, one weekly 30-minute session of individual physical therapy (PT), one weekly 30-minute session of PT in a group of two, two weekly 30-minute sessions of individual OT, one weekly 30-minute session of OT in a group of three, two weekly 30-minute sessions of individual counseling, and one weekly 30-minute session of counseling in a group of three (Dist. Ex. 3 at pp. 12-13, 17).<sup>4</sup>

Moreover, the February 2012 IEP included numerous environmental modifications and human/material resources to address the student's academic management needs, as follows: preferential seating; multisensory approach; small group instruction; support and encouragement; verbal redirection; clear rules and expectations and teacher-made behavior plan; behavior intervention plan to address self-stimulatory behavior; teacher visual, verbal and tactile prompts; frequent check-ins; scaffolding for challenging tasks; teacher modeling; guided practice; practice and review; repetition of task items due to distractibility; graphic organizers; homework list; E-Z reader strip; highlighters; reminders prior to transitions; role playing and teacher assistance with perspective taking; counseling to facilitate the development of social skills; verbal praise and positive reinforcement; and sensory tools and breaks (Dist. Ex. 3 at pp. 2-3). Additionally, to address the student's needs related to physical development, the February 2012 IEP recommended that the student continue with OT and PT, in addition to the provision of sensory breaks (*id.* at p. 2).

Furthermore, the evidence in the hearing record supports the district's claim that the management needs incorporated in the February 2012 IEP were designed to address the student's identified areas of need – namely, his difficulties with attention and language processing. According to the district special education teacher, given the parent's concern with the student's attention needs, the February 2012 CSE developed a list of management needs employed at the Aaron School, which were incorporated into the IEP (Tr. p. 40). For example, the district special education teacher explained that the February 2012 CSE included the provision of preferential seating due to the student's attention concerns (Tr. p. 32). He added that the February 2012 IEP provided for small group instruction, which was feasible in a 12:1+1 special class placement, and

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<sup>4</sup> The student's eligibility for special education programs and related services as a student with autism is not in dispute in this proceeding (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).



he further explained that these were based on recommendations from the student's Aaron School teacher and reports that would help the student's teacher develop an instructional program (Tr. pp. 32-33). Additionally, the district special education teacher noted that the February 2012 IEP provided for clear rules and instructions in response to the student's language processing difficulties (Tr. p. 33). To further address the student's language processing difficulties, the February 2012 IEP included visual prompts (Tr. p. 34). The February 2012 CSE also included a provision for a teacher-made behavior plan, which the special education teacher described as a behavior plan that could be informal, and did not have to be submitted by a psychologist or social worker, and that could be individualized and change depending on what continued to work for the student (Tr. pp. 33-34). In addition, the February 2012 CSE included the provision of sensory tools and breaks to help the student remain focused and more attentive (Tr. p. 35).

In addition, a review of the February 2012 IEP shows that the district afforded the student a number of testing accommodations, which included, as follows: extended time (double time); tests administered in a small, quiet room, the provision of adaptive or special equipment, such as a bumpy cushion; directions read and reread aloud; the use of highlighters; and answers to record in any manner (Dist. Ex. 3 at p. 15).

According to the district special education teacher, the February 2012 CSE recommended placement of the student in a 12:1+1 special class placement in a community school, on a ten-month basis, because despite some social concerns, difficulty reading social cues, and concerns with executive functioning and attention, the student was academically on grade level (Tr. p. 23).<sup>5</sup> He added that, within the 12:1+1 setting, there would be an additional adult in the classroom, yet, the class would remain small (*id.*). The February 2012 CSE determined that an additional adult in the classroom would benefit the student in light of the self-regulation concerns gleaned from the discussion with the parent and the student's teacher, as well as information in the Aaron School reports (Tr. pp. 23-24). The hearing record further shows that the February 2012 CSE considered placement of the student in a collaborative team teaching (CTT) classroom; however, this particular setting was not deemed supportive enough for the student, and as set forth in the February 2012 CSE meeting minutes, a CTT classroom had too many students (Tr. p. 30; Dist. Ex. 4 at p. 2).

Regarding the parents' contention that the 12:1+1 special class placement was not appropriate or sufficiently supportive for the student, because a paraprofessional was not an adult trained to implement behavior strategies, and the student required teachers trained to work with his particular needs, the district special education teacher explained that the purpose of the paraprofessional was to address the student's self-regulation concerns and to help implement the student's BIP (Tr. p. 30). Here, the March 2011 private neuropsychological evaluation recommended placement of the student in a small class setting with no more than 12 children, and further noted that the student required the support of two teachers (Dist. Ex. 5 at p. 11). These descriptions of the student's need for two teachers in the classroom aligns with the types of support that is permissibly provided by supplementary school personnel, and do not indicate a need for an additional adult in the classroom capable of providing independent instruction. Therefore, the

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<sup>5</sup> The district special education teacher indicated that the February 2012 CSE deemed a 10-month school year program to be sufficient for the student's needs because of his academic levels (Tr. p. 134).

hearing record indicates that the support the student required could have been provided by one teacher and one supplementary school personnel (see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 8-9 [2d Cir. Jan. 8, 2014]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 85-86 [2d Cir. July 24, 2013]; B.K., 2014 WL 1330891, at \*18-\*20; M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at \*10-\*11 [S.D.N.Y. Mar. 31, 2014]).

Based on the foregoing, the evidence in the hearing record supports a finding that the February 2012 CSE recommendation to place the student in a 12:1+1 special class, in conjunction with the recommended related services and program accommodations, was reasonably calculated to enable the student to receive educational benefits for the 2012-13 school year.

### **C. Challenges to the Assigned Public School Site**

The parents also contend that the assigned public school site could not implement the February 2012 IEP and, further, was too large for the student. For the reasons set forth in other State-level administrative decisions resolving similar disputes (e.g., Application of the Dep't of Educ., Appeal No. 14-025; Application of the Dep't of Educ., Appeal No. 12-090; Application of a Student with a Disability, Appeal No. 13-237), I find these assertions without merit. The parents' claims regarding the size of the assigned public school and the availability of speech-language services within the building (see Dist. Ex. 1 at p. 2) turn on how the February 2012 IEP would or would not have been implemented. Because it is undisputed that the student did not attend the district's assigned public school site (see Parent Exs. A; B), the parents cannot prevail on these speculative claims (R.E., 694 F.3d at 186-88; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9, 2014 WL 53264 [2d Cir. Jan. 8, 2014] [citing R.E. and explaining that "[s]peculation that [a] school district will not adequately adhere to [an] IEP is not an appropriate basis for unilateral placement" and that the "appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a [FAPE] 'because necessary services included in the IEP were not provided in practice'"]; K.L., 530 Fed. App'x at 87, 2013 WL 3814669; P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141, 2013 WL 2158587 [2d Cir. May 21, 2013]; see also C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. Mar. 4, 2014]; C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at \*13 [S.D.N.Y. Dec. 23, 2013]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]).

## **VII. Conclusion**

Having determined that the evidence in the hearing record demonstrates that the district sustained its burden to establish that it offered the student a FAPE in the LRE for the 2012-13 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether the student's unilateral placement at the Aaron School was an appropriate placement or whether equitable considerations weighed in favor of the parents' request for tuition reimbursement (Burlington, 471 U.S. at 370; see M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]). I have considered the parties' remaining contentions and find that it is not necessary to address them in light of my above determinations.

**THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the IHO's decision dated February 24, 2014 is modified by reversing those portions which determined that the district failed to offer the student a FAPE for the 2012-13 school year and which directed the district to pay for the costs of the student's tuition at the Aaron School for the 2012-13 school year.

**Dated:**           **Albany, New York**  
                          **December 4, 2014**

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**KRISTEN G. CASEY**  
**STATE REVIEW OFFICER**