The University of the State of New York

The State Education Department
State Review Officer
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No. 14-067

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, Lisa R. Khandhar, Esq., of counsel

Thivierge and Rothberg, attorneys for respondents, Randi M. Rothberg, Esq., and Katharine Giudice, 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) that found that it denied respondents' (the parents') son an appropriate educational program and directed it to fund the costs of student's related services for the 2013-14 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

A party aggrieved by the decision of an IHO may appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR

279.12[a]). 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]).[1]

III. Facts and Procedural History

I was appointed to conduct a review of this matter on November 18, 2014. The parties' familiarity with the detailed facts and procedural history of the case is presumed and will not be recited here. Briefly, however, the hearing record indicates that the student has a diagnosis of an autism spectrum disorder and that his cognitive functioning is within the average range (Dist. Exs. 2 at pp. 1-2; 9). Socially, the hearing record reveals that the student's social skills are lacking, and that he can be silly, immature or aggressive, and that he does not know how to initiate or maintain a conversation (id. at p. 2). On April 19, 2013, the Committee on Special Education (CSE) convened to develop the student's individualized education plan (IEP) for the 2013-14 school year (see generally Dist. Ex. 2). Having found the student eligible for special education and related services as a student with autism, the April 2013 CSE recommended placement of the student in a 12:1+1 special class in a community school on a ten-month basis, with related services consisting of special education teacher support services (SETSS), counseling, occupational therapy (OT), speech-language therapy and the provision of full-time individual crisis management paraprofessional services (id. at pp. 11, 14-15).[2] In a letter dated June 26, 2013, the parents advised the district that they disagreed with the recommendations contained in the April 2013 IEP, as well as with the particular public school site to which the district had assigned the student to attend for the 2013-14 school year, and as a result, notified the district of their intent to unilaterally place the student at Derech HaTorah (Dist. Ex. 10; see Parent Ex. M). By due process complaint notice dated September 3, 2013, the parents alleged that the district did not offer the student a free appropriate public education (FAPE) for the 2013-14 school year (see Parent Ex. A).

On October 11, 2013, an impartial hearing convened, and concluded on March 19, 2014, after four days of proceedings (Tr. pp. 1-424).[3] In a decision dated April 1, 2014, an IHO determined that the district failed to offer the student a FAPE for the 2013-14 school year (IHO Decision at p. 13). Although the IHO also concluded that the evidence in the hearing record did not support a finding that the student's unilateral placement at Derech HaTorah was appropriate,

[1] The administrative procedures applicable to the review of disputes 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 are well established and described in broader detail in previous decisions issued by the Office of State Review (e.g., Application of the Dep't of Educ., 12-228; Application of the Dep't of Educ., Appeal No. 12-087; Application of a Student with a Disability, Appeal No. 12-165; Application of the Dep't of Educ., Appeal No. 09-092).

[2] The student's eligibility for special education program and related services as a student with autism is not in dispute in this appeal (Tr. p. 382; see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

[3] On December 10, 2013, the IHO issued an amended order on pendency, in which she directed the district to provide the student with 25 hours per week of SEIT services, four 30-minute sessions per week of individual speech-language therapy, and three 30-minute sessions of individual OT (IHO Interim Order on Pendency).

she found that the student's related services comprised of special education itinerant teacher (SEIT) services, speech-language therapy and OT were appropriate to address the student's educational needs, and that equitable considerations supported their claim for relief (id. at p. 15).[4]

IV. Appeal for State-Level Review

The district appeals and alleges that it offered the student a FAPE for the 2013-14 school year, and that equitable considerations do not support the parents' request for relief. In particular, the district claims that the parents meaningfully participated in the CSE process. The district further alleges that it conducted an appropriate functional behavioral assessment (FBA) of the student and subsequently created an appropriate behavioral intervention plan (BIP) that addressed the student's behaviors that interfered with his learning. Next, the district argues that the program recommendation was designed to confer educational benefits on the student in the least restrictive setting. The district further maintains that it was not obligated to develop a transition plan for the student to facilitate his transition to a district school. Lastly, the district contends that the April 2013 CSE's failure to memorialize the provision of parent counseling and training on the IEP did not rise to the level of a denial of a FAPE to the student. In addition, the district claims that equitable considerations weigh against the parents' claim for relief, because the parents failed to tender appropriate notice of their unilateral placement of the student. Lastly, the district alleges that the parents are not entitled to an award of direct funding for the costs of the student's related services.

In an answer, the parents generally deny the district's allegations and seek to uphold the IHO's findings. The parents also assert that the petition should be dismissed for want of personal service in conformity with State regulation. Moreover, the parents allege that the petition was not verified in accordance with State regulation.

The district submitted a reply and alleges that due to its unsuccessful efforts to personally serve the parents, the SRO approved its request to effectuate an alternate method of service. Moreover, the district alleges that a review of the petition shows that it was verified in accordance with State regulation.[5]

[4] Neither party appeals the IHO's finding that the evidence in the hearing record did not demonstrate that Derech HaTorah was appropriate to address the student's special education needs, or that the student's related services were appropriate, therefore, the IHO's determinations are final and binding on the parties and will not be further addressed (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

[5] In this particular instance, the parents' claims relating to the petition and its service must fail. Initially, the district correctly submits that the petition was verified (8 NYCRR 279.7). Regarding their claims surrounding the method of service, on May 6, 2014, after previous attempts of personal service proved unsuccessful, the SRO authorized the district's request to proceed with an alternate form of service. In any event, even if I were to find that the district failed to properly serve the petition in this instance, I decline to dismiss the matter on such grounds, given that the parents responded to the allegations raised in the petition in an answer and there is no indication that they have suffered any prejudice as a result of the district's failure to effectuate personal service in accordance with State regulation.

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. April 2013 CSE Process

1. Predetermination

To the extent that the parties dispute that the district impermissibly predetermined the student's IEP, the consideration of possible recommendations for a student, prior to a CSE meeting, is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (see T.P., 554 F.3d at 253; Nack v. Orange City Sch. Dist., 454 F.3d 604, 610 [6th Cir. 2006] ["predetermination is not synonymous with preparation"]; Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 857-60 [6th Cir. 2004]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 333-34 [E.D.N.Y. 2012], aff'd, 725 F.3d 131 [2d Cir. 2013]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *10-11 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]; B.O. v. Cold Spring Harbor Cent. Sch. Dist., 807 F. Supp. 2d 130, 136 [E.D.N.Y. 2011]; A.G. v. Frieden, 2009 WL 806832, at *7 [S.D.N.Y. Mar 26, 2009]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 382-83 [S.D.N.Y. 2008]; Danielle G. v. New York City Dep't of Educ., 2008 WL 3286579, at *6 - *7 [E.D.N.Y. 2008]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 507 [S.D.N.Y. 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 147-48 [S.D.N.Y. 2006]; see also 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). A key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D.D-S., 2011 WL 3919040, at *10-*11; R.R., 615 F. Supp. 2d at 294). In addition, districts are permitted to develop draft IEPs prior to a CSE meeting "'[s]o long as they do not deprive parents of the opportunity to meaningfully participate in the IEP development process'" (Dirocco v. Board of Educ. of Beacon City School Dist., 2013 WL 25959, at *18 [S.D.N.Y. Jan. 2, 2013], quoting M.M., 583 F. Supp. 2d at 506). Districts may also "'prepare reports and come with pre[-]formed opinions regarding the best course of action for the [student] as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions'" (Dirocco, 2013 WL 25959, at *18).

Contrary to the parents' allegations that the district impermissibly predetermined the student's program, because at the time of the April 2013 CSE meeting, the April 2013 CSE advised the parent of the particular location at which the April 2013 IEP would be executed, the hearing record reflects a pattern of meaningful parent participation with respect to the creation of the IEP. More specifically, the parent attended the April 2013 CSE meeting, accompanied by the student's related services providers, who attended the meeting via telephone (Dist. Ex. 3). According to the district representative, all of the individuals attended for the duration of the April 2013 CSE meeting, and the parent and the student's providers gave the CSE information regarding the student's academic and social/emotional needs (Tr. pp. 67-68, 70-71, 252; see also Dist. Ex. 2 at pp. 1-2). In addition, the district representative testified that the April 2013 CSE read aloud each of the annual goals, to which none of the participants raised any objection, nor did anyone request the inclusion of additional annual goals (Tr. pp. 72-75, 352). The hearing record also establishes that the April 2013 CSE explained the program recommendation contained in the IEP to the parent (Tr. p. 350). Similarly, the district representative testified that the April 2013 CSE "went over the whole IEP – as people were talking and speaking" (Tr. p. 107). Furthermore, the hearing record also supports a finding that the April 2013 CSE maintained an "open mind" in formulating the IEP,

as the CSE considered placements in other programs, such as a 6:1+1 special class placement for the student, but rejected this option, having deemed the student to be "higher functioning than the students in this … setting" (Dist. Ex. 2 at p. 15).[6] To the extent that the parents allege that the student's program was predetermined because the March 2013 psychoeducational evaluation identified the public school site to which the student was ultimately assigned, this does not support a finding of predetermination, because the parent explained that she presumed that the student would be assigned to this particular public school site, in light of its close proximity to their home and because it had previously been assigned to her older son (see Tr. pp. 350-51; see Dist. Ex. 7 at p. 1).[7] It does not suggest that the April 2013 CSE did not have an open mind with regard to the student's program recommendation or that the CSE was unwilling to consider other program options for him. Similarly, the district representative confirmed that the inclusion of the particular public school site in the psychoeducational evaluation resulted from a computer-generated program, based on the student's address (Tr. pp. 99-100).[8] Based upon the foregoing, the parents' assertions are not supported by the evidence in the hearing record and must be dismissed.

B. April 2013 IEP

1. Consideration of Special Factors – Interfering Behaviors

Turning next to the parties' contentions surrounding the appropriateness of the FBA and BIP, as explained more fully below, a review of the hearing record reveals that the April 2013 CSE properly considered special factors related to 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., 2009 WL 3326627, at *3 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M., 583 F. Supp. 2d at 510; F.L. v. New York City Dep't of Educ., 2008 WL 2736027, at *8; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]).

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[6] Regardless of the parent's testimony that she disagreed with the recommendation to place the student in a 12:1+1 special class, and suggested placement of the student in an 8:1+1 special class placement, to which the CSE rejected, school districts must provide an opportunity for parents to participate in the development of their child's IEP; however, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (Tr. p. 351; 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 & Commc'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, 210 Fed. App'x 1, 3, 2006 WL 3697318 [D.C. Cir. Dec. 6, 2006]).

[7] The parent clarified that the district representative did not officially offer the parents the assigned public school at the April 2013 CSE meeting (Tr. p. 351).

[8] State regulations provide that in accordance with the IDEA's LRE mandate, the assignment of a particular public school shall be as close as possible to the student's home, and unless the student's IEP requires some other arrangement, the student shall be educated in the school, he or she would have attended if not disabled (8 NYCRR 200.4[d[4][ii][b]).

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]; Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *30 [N.D.N.Y. Sept. 29, 2009] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K., 569 F. Supp. 2d at 380).

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 http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP," and if necessary, "a "student's need for a [BIP] must be documented in the IEP" (id.). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student (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

> 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
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> (ii) or her learning or that of others, despite consistently
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> (iii) implemented general school-wide or classroom-wide
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> (iv) interventions; (ii) the student's behavior places the student
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> (v) or others at risk of harm or injury; (iii) the CSE or CPSE
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> (vi) is considering more restrictive programs or placements as
>
> (vii) 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]).[9] 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

[9] 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]).

CSE or CPSE and shall be considered in any determination to revise a student's [BIP] or IEP" (8 NYCRR 200.22[b][5]).

In this instance, the district representative testified that everyone at the meeting, the school psychologist, the student's providers and the parent completed the FBA at the time of the April 2013 CSE meeting (Tr. p. 76; Dist. Ex 4). According to the district representative, the April 2013 CSE gathered information for the FBA from the parent and the student's providers, because of most of the information was based on what was going on at school; however, the April 2013 CSE also wanted "to know what's going on at home, like in the after school or on the weekends" (Tr. p. 81). She further explained that the school psychologist asked each question, "what observation data ha[d] been collected, what [we]re the targeted inappropriate behaviors…" and based on those answers, the April 2013 CSE typed that information into the resultant FBA (Tr. pp. 125-26, 128). Regardless of the district representative's testimony, although the student's teacher denied that "a plan" was created at the April 2013 CSE meeting, the student's teacher confirmed that the April 2013 CSE discussed behavioral interventions for the student, as well as his interfering behaviors (Tr. pp. 257, 267).[10] Similarly, the parent testified that while the April 2013 CSE did not conduct an FBA at the time of the CSE meeting, she discussed the student's behaviors with the committee (Tr. pp. 352, 375-76). Moreover, according to the district representative, after completing the FBA, the April 2013 CSE developed a BIP for the student (Tr. p. 81).[11] She explained that the FBA set forth what "[we]re the behaviors and the precipitating behaviors. And the BIP [wa]s developed from that" (id.). The district representative added that the CSE pulled out the targeted behaviors and the outcome, that is, "what you would hope to see changed or addressed" (Tr. pp. 81-82). She further testified that the April 2013 CSE discussed the methods and criteria for outcome measurement (Tr. p. 82).

A review of the FBA reveals that it was developed on the same date that the CSE convened to formulate the April 2013 IEP (Dist. Ex. 4 at p. 1). The FBA listed the observational data that had been collected including a recent psychoeducational evaluation, school progress reports and an interview with the student's classroom teacher, parent and program director (id.) The FBA also set forth the targeted inappropriate behaviors including atypical self-stimulatory behaviors and poor eye contact (id.). In addition, the FBA noted the frequency, duration, intensity and settings for the targeted behavior (id.). Furthermore, the FBA described the "triggers" or actions that occurred immediately before the targeted behavior, such as when nervous, the student was reported

[10] Although the student's teacher did not recall the discussion regarding the FBA that took place at the time of the April 2013 CSE meeting, she confirmed that the information contained in the FBA was consistent with information provided in the report that she drafted (Tr. p. 259; see Parent Ex. J). Accordingly, even if I were to find that the April 2014 CSE did not conduct a formal FBA at the time of the April 2013 CSE meeting, there is no evidence to show that the lack of a formal FBA would 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]; 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]).

[11] Although they are included in the hearing record as separate exhibits, the FBA and BIP would be attached to the April 2013 IEP (Tr. p. 82).

to cry, pick his nails and stare at his nails, and that the student tended to remain quiet when feeling uncomfortable (id.). The FBA also described being bored and left unoccupied and in a group setting as the environmental conditions that might affect the targeted behavior (id. at p. 2). The FBA included the presumed purposes of each behavior, such as avoidance and attention seeking and noted what the student would gain or lose as an immediate result of the targeted behavior (id.). Next, the FBA detailed interventions that were attempted and considered helpful but not for all situations, such as positive reinforcement, and further noted that the use of time out was attempted and considered ineffective (id.). The FBA included interventions that were attempted and considered very positive and effective in modulating the student's targeted behaviors, and listed interventions that should be planned, such as redirection and the provision of clear explanation of rules and the review of expected behaviors (id.). Next, the FBA listed items that the student viewed as positive reinforcement, such as the use of the computer (id.). The FBA also detailed the expected behavior changes for the student, such as that the student was expected to demonstrate improved classroom behavior by following given directions/class routines, accepting or complying with limits and redirections, sustaining attention to teacher during group instructions, listening to a story, as well as attempting high language demand activities 70 percent of the time with prompting, redirection, guidance and support from adults (id. at pp. 2-3). Lastly, the FBA noted the methods/criteria for outcome measurement, including teacher/provider observations and a behavior checklist (id. at p. 3).

Regarding the appropriateness of the BIP, the BIP identified the following as targeted behaviors: 1) being socially inappropriate in class, especially during group instruction (Dist. Ex. 5 at p. 1). The student had a predisposition to be frustrated when faced with, high language demand tasks; 2) exhibiting a low frustration tolerance and being aggressive when aggravated; and 3) exhibiting atypical stereotypical behaviors, poor eye contact and lacking appropriate socialization skills (id.). Additionally, the BIP specified that the classroom and assistant teachers and the crisis management paraprofessional were the individuals responsible to implement the plan (id.). The BIP also provided that the student's progress must be assessed and communicated with the parents every ten weeks (id.). Expected behavior changes included the following: 1) improved classroom behavior by following given directions/class routines, accepting or complying with limits and redirections, sustaining attention to teacher during group instructions, listening to a story, as well as attempting high language demand activities, 70 percent of the time with prompting, guidance and support from adults; 2) increased self-control and displaying socially acceptable behaviors by complying with rules, verbally expressing himself in an appropriate manner, as well as refraining himself from responding in a physically aggressive manner (i.e., hitting, pinching, biting and throwing items), 70 percent of the time with prompting, redirection, guidance and support from adults; 3) demonstrating socially appropriate interactive skills and increasing social communication skills by decreasing facial grimaces, perseverating and self-stimulatory behaviors, reducing the inappropriate noises and sounds, maintaining eye contact, initiating and maintaining conversation and play with peers, as well as verbally expressing his feelings appropriately, 70 percent of the time with prompting, redirection, guidance and support from adults (id. at pp. 1-2). Lastly, the BIP included the following methods/criteria for outcome management: teacher/provider observations; behavior checklist; behavior progress sheet; and that the student should display the expected behaviors, 70 percent of the time with prompting, redirection, guidance and supports from adults (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 a baseline measure for the problem behaviors, it fails to conform to State regulations (see 8 NYCRR 200.22 [b][4][i][iii]; Dist. Ex. 5).

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 addition of an individual crisis management paraprofessional, as well as the strategies recommended to address the student's management needs and the annual goals in the April 2013 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 April 2013 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 April 2013 CSE, as well as multiple academic, social/emotional, and health and physical management strategies for use in the classroom (see Dist. Ex. 2 at pp. 2-3). The April 2013 CSE also included the provision of individual crisis management paraprofessional services on a full-time basis (id. at p. 11). According to the district representative, the April 2013 CSE gave the student the paraprofessional to assist the student to succeed in classroom situations (Tr. pp. 76, 110). The April 2013 IEP also included annual goals related to the student's needs in the areas of counseling, attention, and academic needs, in addition to an annual goal associated with the individual crisis management paraprofessional (Dist. Ex. 2 at pp. 6-8, 10).

Accordingly, in this case, the April 2013 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 2013-14 school year because the April 2013 CSE otherwise recommended the provision of individual crisis management paraprofessional services in addition to appropriate management needs designed to target the student's interfering behaviors to adequately and appropriately address the student's social/emotional needs and behaviors.

2. 12:1+1 Special Class Placement – LRE Considerations

Next, the district asserts that the IHO erred to the extent that she determined that the evidence did not demonstrate that the student could learn absent the provision of individual applied behavioral analysis (ABA) instruction. The parents claim that the April 2013 CSE's recommendation to place the student in a 12:1+1 special class was not appropriate for the student,

and that the student would not have received sufficient instructional support. As explained more fully below, the parents' allegations lack support in the hearing record.

To the extent that the parties dispute the appropriateness of the 12:1+1 special class, 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]).

In this case, the CSE considered the following evaluative material to develop the April 2013 IEP: a March 2013 district-obtained psychoeducational evaluation, a March 2013 physician's report, a March 2013 social history, a March 2013 SEIT progress report, a January 2013 speech-language progress report, and a January 2013 OT progress report (Tr. pp. 57-58, 67-68; Dist. Exs. 7-9; Parent Exs. J; K; L).[12]

Based on the information before it at the time of the April 2013 CSE meeting, the April 2013 CSE recommended placement of the student in a 12:1+1 special class within a community school in the following subject areas: sciences, English language arts (ELA), mathematics, social studies and sciences (Dist. Ex. 2 at pp. 11, 15). The April 2013 CSE also recommended the provision of five periods per week of SETSS, which the district representative explained was added "to reinforce the academics" (Tr. p. 84). The district representative added that the April 2013 CSE recommended placement in a 12:1+1 special class for kindergarten, because the student "scored exactly where he should be for kindergarten," and he would be with children of his own age group (Tr. pp. 84-85). She further noted that the April 2013 CSE considered placement of the student in a 6:1+1 special class in a specialized school; however, the CSE rejected this option, because the student was "way higher functioning than the children in that class," and she also noted that the students in that classroom tended to be nonverbal and were not toilet trained (Tr. p. 86; Dist. Ex. 2 at p. 15). According to the district representative, students enrolled in the 6:1+1 special class exhibited "more self stimming issues than [the student] had, that are on a more severe level" (Tr. p. 86). Furthermore, although the student was receiving 25 hours per of individual SEIT services, the district representative testified that the CSE opted against placing the student in a 1:1 setting, because the April 2013 IEP provided him with individual paraprofessional services, which gave him individual supports to assist the student to be successful in a classroom setting, and the April 2013 IEP also included related services (Tr. p. 110). Specifically, in addition to the crisis management paraprofessional, the April 2013 IEP included the provision of two 30-minute sessions per week of counseling in a group of three, two 30-minute sessions per week of individual OT, three 30-minute sessions of individual speech-language therapy sessions, and two 30-minute sessions of speech-language therapy in a group of three (Dist. Ex. 2 at p. 11).

Additionally, the April 2013 IEP included environmental and human or material resources to address the student's identified needs, including placement in a small, structured, self-contained class with the support of SETSS to address the student's academic delays, as well as a full-time paraprofessional for redirection and refocusing (Dist. Ex. 2 at p. 2). The April 2013 IEP also provided that in order to address delays, the student required the following strategies: praise and

[12] The parties do dispute the sufficiency of the evaluative data or accuracy of the April 2013 IEP's present levels of performance on appeal.

encouragement, positive reinforcement, counseling, redirection, consistent and firm limit setting, and a clear explanation of rules and a review of what behavior was expected of him (id.). The April 2013 IEP further indicated that related services were required for language, fine motor and social/emotional development (id.). Lastly, the April 2013 IEP included 27 annual goals that addressed the student's academic, social, OT, speech-language and social/emotional needs (id. at pp. 4-10). Based on the foregoing, the hearing record supports a finding that the April 2013 CSE's recommendation to place the student in a 12:1+1 special class was reasonably calculated to confer educational benefits on him.

a. LRE Considerations

Turning next to the parties' claims surrounding whether the April 2013 CSE's recommendation to place the student in a 12:1+1 special class constituted the student's LRE, the district maintains that the April 2013 IEP comported with the IDEA's LRE requirements. Conversely, the parents argue on appeal that the April 2013 CSE's recommendation to place the student in a 12:1+1 special class constituted an overly restrictive setting for the student and that the provision of 1:1 instruction allowed the student to access the general education environment. As set forth in greater detail below, a review of the hearing record establishes that the April 2013 CSE offered the student a program that satisfied that IDEA's LRE mandate.

The IDEA requires that a student's recommended program must be provided in the 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 P. v. Newington Bd. of Educ., 546 F.3d 111, 111 [2d Cir. 2008]; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 132 [2d Cir. 1998]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; M.W. v. N.Y.C. Dep't of Educ., 725 F.3d 131, 144 [2d Cir. 2013]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. N. Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobol, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 CFR 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 CFR 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 CFR 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and the continuum makes provision for supplementary services (such as resource

room or itinerant instruction) to be provided in conjunction with regular class placement (34 CFR 300.115[b]).

To apply the principles described above, the Second Circuit adopted a two-pronged test for determining whether an IEP places a student in the LRE, considering (1) whether education in the general classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given student, and, if not, (2) whether the school has mainstreamed the student to the maximum extent appropriate (Newington, 546 F.3d at 119-20; see M.W., 725 F.3d at 143-44; J.S., 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048-50 [5th Cir. 1989]). A determination regarding the first prong, (whether a student with a disability can be educated satisfactorily in a general education class with supplemental aids and services), is made through an examination of a non-exhaustive list of factors, including, but not limited to "(1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class" (Newington, 546 F.3d at 120; see M.W., 725 F.3d at 144; J.S., 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50). If, after examining the factors under the first prong, it is determined that the district was justified in removing the student from the general education classroom and placing the student in a special class, the second prong requires consideration of whether the district has included the student in school programs with nondisabled students to the maximum extent appropriate (Newington, 546 F.3d at 120).

In fashioning a test to assess a student's placement in the LRE, the Court acknowledged that the IDEA's "'strong preference'" for educating students with disabilities alongside their nondisabled peers "'must be weighed against the importance of providing an appropriate education'" to students with disabilities (Newington, 546 F.3d at 119, citing Walczak, 142 F.3d at 122, and Briggs v. Bd. of Educ. of Conn., 882 F.2d 688, 692 [2d Cir. 1989]; see Lachman v. Ill. State Bd. of Educ., 852 F.2d 290, 295 [7th Cir. 1988]).[13] In recognizing the tension created between the IDEA's goal of "providing an education suited to a student's particular needs and its goal of educating that student with his non-disabled peers as much as circumstances allow," the Court explained that the inquiry must be fact specific, individualized, and on a case-by-case analysis regarding whether both goals have been "optimally accommodated under particular circumstances" (Newington, 546 F.3d at 119-20, citing Daniel R.R., 874 F.2d at 1044).[14]

With respect to the first prong, the hearing record supports the April 2013 CSE's determination that the student required removal from the general education setting for at least some

[13] In 1994, the Office of Special Education (OSEP) for the United States Department of Education issued a policy memorandum to provide guidance regarding the IDEA's LRE requirement, which opined that the "overriding rule in placement [was] that each student's placement must be individually-determined based on the individual student's abilities and needs" (OSEP Memorandum 95-9, 21 IDELR 1152 [Nov. 23, 1994]; see Letter to Vergason, 17 IDELR 471 [OSERS 1991] [emphasizing that a student's "educational placement . . . must be determined by the contents of that child's IEP"]; Letter to Lott, 16 IDELR 84 [OSEP 1989] [same]).

[14] The Second Circuit left open the question of whether costs should be taken into account as one of the relevant factors in the first prong of the LRE analysis (Newington, 546 F.3d at 120 n.4).

portion of the student's programming. According to the March 2013 social history, although she reported that the student had progressed in his then-current program, the parent did not believe that the student was ready to attend a regular classroom at that time (Dist. Ex. 8). Similarly, the district representative testified that a typical general education program with 25 students would overwhelm the student (Tr. p. 86).[15] Accordingly, the hearing record supports a finding that the April 2013 CSE was justified in its determination to remove the student from the general education environment.

Turning to the second prong, notwithstanding testimony from the parent that the district offered the student "a placement that did not offer that mainstreaming component," the hearing record indicates that the district included the student in school programs with nondisabled students to the maximum extent possible (Tr. p. 360). Specifically, the April 2013 IEP specifies that the student attend a 12:1+1 special class for all academic subjects (Dist. Ex. 2 at p. 11). The April 2013 IEP further indicates that the student could participate in all appropriate school activities with nondisabled students (id. at p. 13). In addition, the district representative testified that the April 2013 CSE opined that with supports, the student could function in a community school setting, and be exposed, within a building to typical children (Tr. p. 86). Similarly, the April 2013 IEP indicated that the student could function in a 10-month community school with support services (Dist. Ex. 2 at p. 15). According to the April 2013 IEP, the student needed to be in a setting with exposure to typically developing students and positive role models (id.). The district representative explained that the student tended to emulate other children, and in a community school setting, students were together for lunch, gym, and auditorium, and exposure to other children (Tr. p. 87). She clarified that placement of the student in a specialized school would not necessarily offer that to the student (id.). Under the circumstances, the hearing record supports a finding that the April 2013 CSE offered the student sufficient mainstreaming opportunities in accordance with the IDEA's LRE mandate.

[15] While I understand the parents' concerns that the student have access to appropriate peer models and at the same time remain in a small class, the district is responsible to exercise reasonable efforts to accommodate the student in a general education classroom with supports, not to create the particular type of general education class desired by the parents (see, e.g., T.M. v. Cornwall Cent. Sch. Dist., 900 F.Supp.2d 344, 352 [S.D.N.Y. 2012] [holding that a district "is not obligated to create [a particular program] simply to satisfy the LRE requirements of the IDEA"]). In addition, although small class size alone does not constitute special education within the meaning of the IDEA, courts have considered it in analyzing the appropriateness of a recommended program and, as detailed above, in this instance there was sufficient evidence in the hearing record to support the CSE's determination that in order to make progress the student required a smaller class size than what would have been available in a general education kindergarten classroom (see Frank G. v. Board of Educ., 459 F.3d 356, 365 [2d Cir. 2006] [declining to determine whether small class size alone constituted special education]; T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., [S.D.N.Y. March 21, 2013] [evidence in hearing record supported SRO's decision that student could have obtained an educational benefit in a class size as set forth in the IEP]; T.M., 900 F.Supp.2d at 354-55 [finding that class size alone does not necessarily outweigh other considerations with regard to whether a student was offered a FAPE]; D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at * 10-*11 [S.D.N.Y. October 12, 2011] [in analyzing LRE the court found that although a class size of 30 students may not have been preferred, it fulfilled the student's educational needs while mainstreaming him in a regular education class to the maximum extent possible]).

3. Parent Counseling and Training

Turning next to the parents' claim that the omission of parent counseling and training from the April 2013 IEP resulted in a denial of a FAPE to the student, State regulations require that an IEP indicate the extent to which parent counseling and training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). Parent counseling and training is defined as: "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]). State regulations further provide for the provision of parent counseling and training for the parents of students with autism to enable them "to perform appropriate follow-up intervention activities at home" (8 NYCRR 200.13[d]). However, Courts have held that a failure to include parent counseling and training on an IEP does not constitute a denial of a FAPE where a district provided a "comprehensive parent training component" that satisfied the requirements of the State regulation (see R.E., 694 F.3d at 191; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 509 [S.D.N.Y. 2008]). The Second Circuit has explained that "because school districts are required by [8 NYCRR] 200.13(d) to provide parent counseling, they remain accountable for their failure to do so no matter the contents of the IEP. Parents can file a complaint at any time if they feel they are not receiving this service" (R.E., 694 F.3d at 191; see M.W. v. New York City Dep't of Educ., 725 F.3d 131, 141-42 [2d Cir. 2013]). The Second Circuit further explained that "[t]hough the failure to include parent counseling in the IEP may, in some cases (particularly when aggregated with other violations), result in a denial of a FAPE, in the ordinary case that failure, standing alone, is not sufficient to warrant reimbursement" (R.E., 694 F.3d at 191; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 7 [2d Cir. Jan. 1, 2014]).

In this instance, it is undisputed that the April 2013 CSE did not include a provision for parent counseling and training in the resultant IEP (Dist. Ex. 2). In any event, I find that although the April 2013 CSE's failure to recommend parent counseling and training in the student's IEP constituted a violation of State regulation, such a violation is not sufficient in this case—either alone or cumulatively—to support a finding that the district failed to offer the student a FAPE (F.L., 553 Fed. App'x at 7; M.W., 725 F.3d at 141-42; R.E., 694 F.3d at 191).

4. Transition Plan

The parents next assert that the IHO properly determined that the district's failure to develop a transition plan to facilitate his transition into the 12:1+1 special class placement contributed to a denial of a FAPE to the student. Conversely, the district alleges that the IDEA does not impose any legal requirement to develop a transition program for a student attending a new public school. A review of the evidence in the hearing record fails to support the parents' contention.

Initially, to the extent that the parents contend that the absence of a transition plan in the April 2013 IEP to assist the student's transitions from environment to environment or from one school to another resulted in a failure to offer the student a FAPE, the IDEA does not require such a "transition plan" as part of a student's IEP (see A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *8 [S.D.N.Y. Mar. 19, 2013]; F.L. v. New York City Dep't of Educ., 2012 WL

4891748, at *9 [S.D.N.Y. Oct. 16, 2012], aff'd, 2014 WL 53264 [2d Cir. Jan. 8, 2014]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 505 [S.D.N.Y. 2011]; E.Z-L. v. New York City Dep't of Educ., 763 F. Supp. 2d 584, 598 [S.D.N.Y. 2011], aff'd sub nom. R.E., 694 F.3d 167; see R.E., 694 F.3d at 195).

Notwithstanding the above, the parents do not point to any specific difficulties the student experienced with transitions in support of their argument. Moreover, there is sparse evidence in the hearing record to suggest that the student exhibited any particular difficulty with transitions (Dist. Ex. 2 at pp. 1-2). Rather, according to the March 2013 psychoeducational evaluation report, the student easily separated from the parent and readily accompanied the evaluator to the testing site (Dist. Ex. 7 at p. 1). The evaluator further noted that the student responded "very well to refocusing" (id.). Although the hearing record suggests that the student displayed difficulty in transitioning within activities and peers, the student's SEIT included reinforcement and the implementation of a behavioral plan to target specific listening and attention skills within a classroom environment, two interventions incorporated into the April 2013 IEP (compare Parent Ex. J at pp. 2-3, with Dist. Ex. 2 at p. 2-3, and Dist. Ex. 5). The April 2013 IEP also included an annual goal that targeted the student's ability to demonstrate greater compliance with classroom routines and activities within the classroom and greater compliance with engaging in these tasks with increased frequency (Dist. Ex. 2 at p. 10). The annual goal further provided that the student will also learn to initiate and maintain cooperative play and interactions with peers, maintain eye contact and decrease inappropriate targeted behaviors (id.). The district representative also explained that the role of the crisis management paraprofessional was to work with the student, assist him in the classroom, to be successful in the classroom and refocus and redirect the student, help him initiate a conversation and ensure that the student was in the right place at the right time, and provide the student with any additional support he required in order to be successful in the classroom (Tr. p. 76). Accordingly, to the extent that the student exhibited difficulty in transitions, the April 2013 IEP contained strategies designed to address those needs.

Based upon the foregoing, the evidence in the hearing record does not support the parents' assertion that the district failed to offer the student a FAPE for the 2013-14 school year because the April 2013 CSE failed to recommend a transition plan.

C. Assigned Public School Claims

Finally, the parents raise a number of claims pertaining to the appropriateness of the assigned public school site. In particular, they contend that the student would not have been appropriately grouped within the 12:1+1 special class placement, and that the assigned public school lacked sufficient mainstreaming opportunities. 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 turn on how the April 2013 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 Ex. D), 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

A review of the evidence in the hearing record supports a conclusion that the April 2013 IEP offered the student a FAPE in the LRE for the 2013-14 school year. Therefore, it is not necessary to reach the issue of whether equitable considerations support the parents' claim (M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; E.E. v. New York City Dep't of Educ., 2014 WL 4332092, at *10 [S.D.N.Y. Aug. 21, 2014]; D.D-S. v. Southold Union Free School Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80 [2d Cir. Dec. 26, 2012]).

I have considered the parties' remaining contentions and find that it is not necessary to address them in light of my determinations.

THE APPEAL IS SUSTAINED.

IT IS ORDERED THAT the IHO's April 1, 2014 decision is reversed to the extent that she determined that the district did not offer the student a FAPE during the 2013-14 school year and further directed it fund to the student's privately obtained related services.

Dated: **Albany, New York**
January 5, 2015

KRISTEN G. CASEY
STATE REVIEW OFFICER