The University of the State of New York

The State Education Department
State Review Officer
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No. 15-077

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

Appearances:
Naomi Maxine Abraham, Esq., attorney for petitioner

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Cynthia Sheps, 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 parent) appeals from a decision of an impartial hearing officer (IHO) who denied the parent's request to place the student in a State-approved nonpublic school. The district cross-appeals from that portion of the IHO's decision which found that it denied the student an appropriate program for the 2014-15 school year. The appeal must be sustained in part. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The student has received diagnoses of an attention deficit hyperactivity disorder (ADHD), an oppositional defiant disorder, and various learning disorders (Dist. Exs. 4; 6-8; Parent Exs. C; E). In a prior proceeding, by decision dated July 30, 2014, an IHO directed the district to convene a CSE meeting to consider "all teacher's reports and evaluations . . . and recommend an appropriate program including a behavior[al] intervention plan" (Dist. Ex. 3 at p. 10).[1]

[1] In the prior proceeding, the parent appealed from the IHO's failure to award certain requested relief; the parties reached a settlement while the appeal was pending (Tr. pp. 104-05; see Dist. Ex. 3).

On September 23, 2014, a CSE convened to develop an IEP for the 2014-15 school year (Dist. Ex. 14). Finding that the student remained eligible for special education and related services as a student with a learning disability, the CSE recommended a 12:1+1 special class placement in a community school (id. at pp. 1, 19-20, 23).[2] In addition, the CSE recommended related services consisting of individual counseling, group counseling, individual speech-language therapy, and group speech-language therapy (id. at p. 20). The CSE also recommended modifications and resources to address the student's management needs and 17 annual goals (id. at pp. 6-19). The September 2014 IEP also indicated that the student required a behavioral intervention plan (BIP); the CSE determined that it was not necessary to develop a new BIP and continued to use to use a BIP developed in March 2014 (Dist. Ex. 14 at p. 7; see Tr. pp. 61-63; Parent Ex. G).

By prior written notice dated September 24, 2014, the district summarized the special education and related services recommended in the September 2014 IEP (Dist. Ex. 15 at pp. 1-3). The notice indicated that the student would remain in the public school he had previously attended (id. at p.

A. Due Process Complaint Notice

By due process complaint notice dated December 24, 2014, the parent requested an impartial hearing and alleged that the district denied the student a free and appropriate public education (FAPE) for the 2014-15 school year (Dist. Ex. 1). The parent alleged that district failed to provide her, prior to the CSE meeting, with the assessments and evaluations of the student relied on by the September 2014 CSE, thereby preventing her from participating in the meeting (id. at p. 5). The parent also claimed that the September 2014 CSE predetermined its recommendations (id.). In particular, the parent contended that the September 2014 CSE did not consider or discuss private evaluation reports or discuss their recommendations for a private school placement (id. at pp. 3-4). The parent also contended that the CSE failed to discuss the student's current levels of functioning (id. at p. 5).

The parent alleged that neither a functional behavior assessment (FBA) nor a BIP was created or reviewed at the September 2014 CSE meeting (Dist. Ex. 1 at p. 6). The parent also alleged that the FBA and BIP developed in March 2014 were not discussed at the CSE meeting, were inappropriate to meet the student's needs, and were not in compliance with State regulations, and that the September 2014 IEP did not include a positive behavioral plan to address the student's behavioral needs (id. at pp. 6-7). The parent further claimed that the 12:1+1 special class placement recommendation was not appropriate because the student failed to make academic gains in the prior school year under the same educational program and the September 2014 IEP did not provide any additional supports (id. at pp. 3-4). The parent asserted that despite a lack of progress in previous academic years, the September 2014 IEP contained fewer math and reading supports than were provided to the student in prior IEPs and did not contain a recommendation for targeted and individualized reading and math instruction (id. at pp. 3, 8). For relief, the parent requested that the district be required to place the student in a State-approved nonpublic school "for students

[2] The student's eligibility for special education services and classification as a student with a learning disability is not in dispute in this proceeding (34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

with learning disabilities" (id. at pp. 8-9). The parent also requested that the district conduct an FBA and develop a BIP (id. at p. 9).

B. Impartial Hearing Officer Decision

After a prehearing conference held on February 4, 2015, an impartial hearing commenced on March 16, 2015, and concluded on April 15, 2015, after two days of proceedings (Tr. pp. 1-200). By decision dated June 17, 2015, the IHO determined that the district failed to offer the student a FAPE (IHO Decision at pp. 9-11). Initially, the IHO determined that the district did not impede the parent's ability to participate in the development of the student's IEP and that the parent was fully engaged in the CSE process and agreed with the outcome (id. at pp. 9-10). The IHO also held that the September 2014 CSE reviewed and considered the private evaluations presented by the parent but was not required to adopt their recommendations (id. at p. 10). The IHO found that the September 2014 CSE did not discuss conducting an FBA or developing a BIP, and (id.). The IHO also found that the FBA conducted and the BIP developed in March 2014 were inadequate to address the student's needs, and that the evidence in the hearing record demonstrated that the student continued to engage in interfering behaviors that affected his academic performance after the March 2014 BIP was implemented (id. at pp. 10-11). The IHO found that although the September 2014 IEP mandated a BIP, the September 2014 CSE did not develop a new BIP, the district did not present evidence of the adequacy of the Mach 2014 BIP as of September 2014, and the district did not demonstrate that it consistently monitored the student's behaviors or implemented formal behavioral interventions (id. at p. 11). The IHO held that the district's failure to revise the student's BIP despite the deterioration in his behaviors denied the student a FAPE (id.). With regard to the program developed for the student, the IHO held that the recommendation for a 12:1+1 special class placement was appropriate to meet the student's needs, that he made some progress and that he would have received educational benefit from the IEP if his behaviors were adequately addressed (id. at pp. 9-10). The IHO further held that the September 2014 IEP was carefully crafted to meet the student's individual needs and provided supports for all of his extensive management needs (id. at p. 10). For relief, the IHO ordered the CSE to reconvene to conduct an FBA and develop a BIP including "specific directives for the teachers to follow for behavioral intervention including regular progress monitoring of the frequency, duration and intensity of the behavioral interventions at scheduled intervals for the child to address his current behavioral needs" (id. at p. 11).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred in not awarding the relief she requested. Initially, the parent asserts that the IHO misallocated the burden of proof regarding the adequacy of the September 2014 IEP and whether the district offered the student a FAPE for the 2014-15 school year. The parent alleges that the IHO erred in finding that the parent's opportunity to participate in the development of the IEP was not impeded and that the IHO failed to address the parent's allegations that the September 2014 CSE predetermined its recommendation. The parent also complains that the IHO erred in finding that the September 2014 CSE considered and reviewed certain evaluative information. The parent further alleges that the IHO erred in finding that the IEP was reasonably calculated to provide the student a FAPE, and that a 12:1+1 special class placement was not appropriate to meet the student's needs. The parent additionally claims the IHO failed to address her argument that the September 2014 IEP did not address the student's

need for specialized reading instruction. The parent requests that the student be placed in a particular State-approved nonpublic school and provided specialized reading instruction.

The district answers the petition, admitting and denying the parent's material allegations, and cross-appeals the IHO's decision. The district asserts the IHO properly determined that it did not impede the parent's opportunity to participate in the development of the September 2014 IEP and that the CSE considered the evaluative information available to it. The district also contends that the recommendation was not predetermined and was based on the student's needs. The district argues that the IHO correctly found that the recommended 12:1+1 special class was appropriate and that the September 2014 IEP met the student's needs and addressed his reading deficits. The district further argues that relief in the form of a nonpublic school placement would not be appropriate because such a placement would be too restrictive for the student. As a cross-appeal, the district argues that the IHO erred in finding that it denied the student a FAPE on the ground that the September 2014 CSE failed to revise the March 2014 BIP because the March 2014 BIP was appropriate to meet the student's behavioral needs at the time of the September 2014 CSE meeting. Further, the district contends it revised the March 2014 BIP in March 2015 after collecting data. The district attaches additional evidence in the form of a June 2015 FBA and BIP, purportedly developed in compliance with the IHO's order.[3]

The parent answers the district's cross-appeal, contending that the September 2014 CSE failed to develop a BIP in accordance with the July 2014 IHO decision and failed to monitor the student's progress under the March 2014 BIP and revise the BIP in accordance with State regulations. Further, the parent asserts that the district failed to appropriately address the student's interfering behaviors during the 2014-15 school year.

V. Applicable Standards

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

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

[3] Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]; see also A.W. v. Bd. of Educ., 2015 WL 1579186, at *3-*4 [N.D.N.Y. Apr. 9, 2015]). In her due process complaint notice, the parent sought the development of a new FBA and BIP (Dist. Ex. 1 at p. 9). On appeal, the parent seeks the student's placement in a nonpublic school and the provision of specialized reading instruction; she no longer requests the development of an FBA or BIP. Accordingly, the parent appears to have withdrawn this request and it is unnecessary to consider the June 2015 FBA and BIP in order to render a decision.

(Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; 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]). 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 [2d Cir. Aug. 16, 2010]).

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]). 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).

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]).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student, 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, 15-16 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70, 374 [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).

VI. Discussion

A. Preliminary Matter—Burden of Proof

Initially, the parent contends that the IHO improperly required the parent to establish the inappropriateness of the recommended program instead of placing the burden on the district to establish that the September 2014 IEP was reasonably calculated to enable the student to receive educational benefits. A review of the IHO's decision reveals that the IHO properly stated the district had the burden of establishing that it offered the student a FAPE (IHO Decision at p. 9). Additionally, the IHO found that the district "demonstrated that the IEP was reasonably calculated to provide the child with an educational benefit" but that because the district did not develop a BIP to address the student's behaviors, it had not established that it offered the student a FAPE (id. at pp. 9-10). The IHO's statement that "there was no credible evidence presented by the parent to challenge the adequacy of the IEP" (id. at p. 10) does not represent a shifting of the burden of proof; rather, it was a reiteration of the IHO's holding that the hearing record did not support the parent's contentions that the recommended program did not meet the student's needs (id. at p. 9). Furthermore, even assuming that the IHO misapplied the burden of proof, I have conducted an independent review of the entire hearing record and largely concur with the IHO's determinations.

B. CSE Process

1. Parent Participation/Predetermination

The parent contends that the district impeded her ability to participate in the September 2014 CSE meeting because she was not provided with progress reports that the CSE used to evaluate the student. The parent also claims that the student's educational placement was predetermined. As set forth below, the parent's ability to participate in the development of the September 2014 IEP was not significantly impeded. Furthermore, the hearing record does not support a conclusion that the September 2014 CSE predetermined the student's placement.

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see T.F. v. New York City Dep't of Educ., 2015 WL 5610769, at *5 [S.D.N.Y. Sept. 23, 2015]; A.P. v. New York City Dep't of Educ., 2015 WL 4597545, at *8, *10 [S.D.N.Y. July 30, 2015]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *17 [E.D.N.Y. Aug. 19, 2013] [stating that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; 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"]).When determining whether a district complied with the IDEA's procedural requirements, the inquiry focuses on whether the parents "had an adequate opportunity to participate in the development" of their child's IEP (Cerra, 427 F.3d at 192).

A district special education teacher, who was the student's English language arts (ELA) teacher during the 2014-15 school year, testified that the September 2014 CSE reviewed forms that the student's teachers had completed in the areas of math, reading, ELA, and vocational studies, outside testing, and psychological test results (Tr. pp. 43, 51, 54). The ELA teacher did not know if the district provided the parent with the teacher reports (Tr. p. 55). The witness testified that there was discussion with the parent regarding the student's behavior and different strategies to be used based on the September 2014 IEP (Tr. p. 51). The parent testified that she was not provided with any documents prior to the September CSE meeting (Tr. pp. 92-93). She further testified that the only document the district provided to her at the CSE meeting was an occupational therapy evaluation (Tr. p. 93). At the CSE meeting, the parent testified that she expressed her concerns regarding her son continuing his education at the public school and opined that a private school would be appropriate but the district members of the September 2014 CSE advised her that changes had been made at the public school and they were capable of helping the student learn (Tr. pp. 93-94). Furthermore, the district representatives informed the parent that a private school would be too restrictive for the student (Tr. pp. 97-98). The parent testified that the CSE discussed a private psychiatric report and reading strategies (Tr. p. 96).

The district is not required to provide a parent with all evaluative information so long as the CSE does not predetermine its recommendations and the parent is able to participate (A.P., 2015 WL 4597545, at *10 n.7). Therefore, even if the district's failure to provide the teacher evaluations concerning the student is a procedural violation, it did not impede the student's right to a FAPE, significantly impede the parents' meaningful participation in the CSE process, or cause a deprivation of educational benefits (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). In determining whether there has been a denial of a FAPE due to a procedural violation, it is not necessary that every member of the CSE read a document in order for the body to have collectively considered the document (T.S. v. Board of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993]). It is also not necessary that the document be physically present at the CSE meeting (F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 578-82 [S.D.N.Y 2013] [noting that the absence of an evaluation update at the CSE meeting did not support a finding that the update was not considered by the CSE]). Although it would have been prudent for the district to distribute copies of all available reports and evaluations to all CSE members at or prior to the CSE meeting, the failure to do so, in this instance, did not rise to the level of a denial of FAPE. The hearing record reflects that there was discussion regarding the student's reading needs, the student's behaviors, a private psychiatric report, and the parent's desire for a nonpublic school placement (Tr. pp. 51, 93-94, 96-98). Under these circumstances, although the district did not provide copies of the evaluations to the parent prior to the September 2014 CSE meeting, the district took appropriate steps to ensure the parent's participation in the CSE meeting and the parent was able to fully participate in the development of the student's IEP for the 2014-15 school year (P.G. v. City Sch. Dist. of New York, 2015 WL 787008, at *17 [S.D.N.Y. Feb. 25, 2015]).

With respect to the parent's allegation that the September 2014 CSE impermissibly predetermined the IEP, it is well established that 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] [noting that "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 [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]; 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. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [S.D.N.Y. 2009], aff'd, 366 Fed. App'x 239 [2d Cir. 2010]).

The hearing record reflects the September 2014 CSE discussed and considered other educational placements aside from the recommended 12:1+1 special class in a community school (Tr. pp 97-98; Dist. Exs. 14 at p. 24; 15 at p. 2). The parent was allowed to express her concerns regarding the recommendation and a discussion ensued regarding a private school placement (Tr. pp. 97-98). The September 2014 IEP is consistent with the parent's testimony that a private school placement was rejected because it was considered too restrictive (Dist. Exs. 14 at p. 24; 15 at p. 2). The student's teacher testified that the parent was in agreement with the educational placement recommendation and the related services recommendation (Tr. pp. 52-53). The evidence reveals that the CSE kept the requisite open mind during the September 2014 CSE meeting by considering

other educational settings and listening to the parent's request for a private school placement. Accordingly, the CSE did not impermissibly predetermine the recommendations made in the September 2014 IEP.

2. Consideration of Evaluative Information

The parent argues on appeal that the IHO erred in finding that the September 2014 CSE considered two "recent evaluations:" a July 2014 psychiatric evaluation and a September 2014 record review conducted by a private psychologist (Dist. Ex. 6; Parent Ex. A).[4] However, a review of the evidence in the hearing record reveals that the IHO correctly determined that the above evaluations were considered by the September 2014 CSE. In developing the recommendations for a student's IEP, the CSE must consider the results of the most recent evaluation of the student; 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]). However, neither the IDEA nor State law requires a CSE to "'consider all potentially relevant evaluations'" of a student in the development of an IEP or to consider "'every single item of data available'" about the student in the development of an IEP (T.G. v. New York City Dep't of Educ., 973 F. Supp. 2d 320, 340 [S.D.N.Y. 2013], quoting F.B., 923 F. Supp. 2d at 581-82; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *8 [S.D.N.Y. Mar. 21, 2013]). In addition, while the CSE is required to consider recent evaluative data in developing an IEP, so long as the IEP accurately reflects the student's needs the IDEA does not require the CSE to exhaustively describe the student's needs by incorporating into the IEP every detail of the evaluative information available to it (20 U.S.C. § 1414[d][3][A]; see M.Z., 2013 WL 1314992, at *9; D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at *7-*9 [S.D.N.Y. Oct. 12, 2011]). Furthermore, "[c]onsideration does not require substantive discussion, that every member of the CSE read the document, or that the CSE accord the private evaluation any particular weight" (S.W. v. New York City Dep't of Educ., 2015 WL 1097368, at *10 [S.D.N.Y. Mar. 12, 2015]; see T.S., 10 F.3d at 89-90; G.D. v. Westmoreland Sch. Dist., 930 F.2d 942, 947 [1st Cir. 1991]). Moreover, the IDEA "does not require an IEP to adopt the particular recommendation of an expert; it only requires that that recommendation be considered in developing the IEP" (J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *11 [S.D.N.Y. Aug. 5, 2013]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [holding that a CSE's recommendation is not

[4] The hearing record contains three documents produced by the private psychologist (Parent Exs. A-C). The first document is a neuropsychological evaluation conducted in April 2012 in which the psychologist assessed the student's intellectual functioning, academic achievement, language development, attending ability, executive functions, and visuomotor and memory skills (Parent Ex. C at pp. 3-6). Based on her assessment, the psychologist offered the following diagnoses of the student: mixed expressive-receptive language disorder, dyslexia, dysgraphia and dyscalculia (id. at p. 8). In addition, the psychologist made numerous recommendations to address the student's educational needs (id. at pp. 8-12). The second document produced by the private psychologist is an unaddressed letter dated April 15, 2013, in which she advocated for the student's attendance at an unspecified "school specifically designed for children with learning disabilities" (Parent Ex. B). The third document produced by the private psychologist is a record review dated September 16, 2014 (Parent Ex. A at pp.1-2). References in the hearing record to these three documents are at times vague and generally inconsistent with the IHO and parent often referring to each of the documents as an "evaluation" (see IHO Decision at p. 10; Tr. pp. 89-90, 92, 94).

necessarily rendered inappropriate by "[t]he mere fact that a separately hired expert has recommended different programming"], aff'd, 142 Fed. App'x 9 [2d Cir. July 25, 2005]).

In this case, the ELA teacher who attended the September 2014 CSE meeting stated that in developing the student's IEP the CSE considered and relied upon teacher reports, outside testing completed over the summer, the student's previous IEP and test results and notes from "the" psychologist (Tr. pp. 50-51, 54).[5] The present levels of performance section of the September 2014 IEP included evaluation results from an April 2012 neuropsychological evaluation, an August 2012 auditory processing evaluation, a March 2014 psychoeducational evaluation, a March 2014 classroom observation, teacher testing completed during the 2013-14 school year, a July 2014 visual processing evaluation, an August 2014 perceptual and cognitive development evaluation, and a September 2014 occupational therapy evaluation (Dist. Ex. 14 at pp. 1-2).

First, regarding the July 2014 psychiatric evaluation, the parent testified that the September 2014 CSE discussed the evaluation and specifically noted that in the discussion some members of the committee disagreed with the diagnosis of an oppositional defiant disorder offered by the evaluation (Tr. pp. 94-95). Additionally, a review of the September 2014 IEP's present levels of performance reveals that the July 2014 psychiatric evaluation was referenced; specifically, the IEP indicated that the evaluator offered diagnoses of an ADHD and an oppositional defiant disorder and recommended individual and group psychotherapy (Dist. Ex. 14 at p. 6; see Dist. Ex. 6 at pp. 2-3, 5).[6]

Turning next to the September 2014 record review, the parent testified that she provided the district with the record review conducted by the private psychologist prior to the September 2014 CSE meeting, but that the CSE did not review it (Tr. pp. 92, 94). However; the September 2014 record review did not include new testing conducted by the psychologist; rather, it noted that based on the September 2014 review, "the findings, diagnoses and recommendations made in the April 3, 2012 neuropsychological report still stand and should be used as a reference in providing appropriate services and interventions" (Parent Ex. A at pp. 1-2). The September 2014 IEP included the results of the April 2012 neuropsychological evaluation (Dist. Ex. 14 at p. 1). Moreover, a review of the September 2014 IEP shows that the majority of the recommendations made by the psychologist in her September 2014 record review were adopted by the CSE (compare Dist. Ex. 14 at pp. 1-26, with Parent Ex. A at p. 2). For example, to address the student's management needs, the September 2014 IEP included multimodal teaching approaches, remedial instruction, and tiered and flexible learning (compare Dist. Ex. 14 at pp. 6-7, with Parent Ex. A at p. 2). Also, the September 2014 IEP included a recommendation for a 12:1+1 special class, related services of individual and group speech-language therapy, and individual and group counseling services, providing the student with individualized instruction, a small class size, and the recommended speech-language therapy and social emotional intervention (compare Dist. Ex. 14 at pp. 19-20, with Parent Ex. A at p. 2). The ELA teacher testified that she did not recall that

[5] Although it is not clearly stated, it appears that the special education teacher is referring to the school psychologist who participated as a member of the September 2014 CSE and who conducted the March 2014 psychoeducational evaluation (Tr. pp. 50-51).

[6] The prior written notice indicated that the CSE reviewed a "[p]sychiatric" report dated October 1, 2014; since the notice was dated September 24, 2014, this is apparently a typographical error (Dist. Ex. 15 at p. 1).

anyone from the September 2014 CSE believed additional evaluations were needed in order to make an appropriate recommendation (Tr. p. 51).

While the September 2014 CSE did not adopt all the specific recommendations included in the September 2014 record review (most notably, a private school placement), the evidence in the hearing record supports the IHO's finding that the September 2014 CSE reviewed and considered the most recent evaluations of the student; including the July 2014 psychiatric evaluation and the September 2014 record review.[7]

C. September 2014 IEP

1. Special Factors—Interfering Behaviors

In its cross-appeal the district argues that the March 2014 BIP adequately and appropriately addressed the student's behavioral needs as of the time of the September 2014 CSE meeting. The IHO found that the district failed to demonstrate that it consistently monitored the student's behaviors and failed to consider whether it was necessary to revise the March 2014 BIP at the September 2014 CSE meeting or anytime during the 2014-15 school year despite overwhelming evidence of the student's deteriorating behaviors, resulting in a denial of a FAPE (IHO Decision at p. 11). Based on a review of the hearing record, I affirm the IHO's decision in this respect and dismiss the cross-appeal.

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 R.E., 694 F.3d at 190-91; A.C., 553 F.3d at 172). 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 conducting an FBA and developing a BIP 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" (8 NYCRR 200.1[r]), and provide that an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must include "a baseline of the student's problem behaviors with regard to 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]). The Second Circuit has explained that, when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because

[7] Furthermore, although the September 2014 record review indicated that the student's reading level had dropped since administration of academic testing in April 2012 (Parent Ex. A at p. 1), a comparison of the student's standard scores and percentile rankings on subtests administered during both the April 2012 neuropsychological evaluation and the March 2014 psychoeducational evaluation indicates that the student's letter-word identification and passage comprehension skills had increased relative to his peers (compare Dist. Ex. 4 at p. 3, with Parent Ex. C at p. 14).

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.; see E.H. v. New York City Dep't of Educ., 611 Fed. App'x 728,730-31 [2d Cir. May 8, 2015]; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 169 [2d Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 80 [2d Cir. 2014]; F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 6-7 [2d Cir. Jan. 8, 2014]; M.W. v. New York City Dep't of Educ., 725 F.3d 131, 140-41 [2d Cir. 2013]; A.C., 553 F.3d at 172-73).

With regard to a BIP, the special factor procedures set forth in State regulations require that, "[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 is required to identify: the baseline measure of the problem behavior; the intervention strategies to be used to prevent the occurrence of the behavior and provide consequences for the targeted behavior; and a schedule to measure the effectiveness of the interventions (8 NYCRR 200.22[b][4]). Once a student's BIP is developed and implemented, "such plan shall be reviewed at least annually by the CSE" (8 NYCRR 200.22[b][2]). Furthermore, implementation of a BIP requires regular progress monitoring which must be documented and reported to the student's parents and to the CSE for consideration in any determination to modify a student's BIP or IEP (8 NYCRR 200.22[b][5]).

In March 2014, the district conducted an FBA and developed a BIP (Parent Exs. F; G). The March 2014 BIP identified the student's target behavior as "engag[ing] in side conversations with his peers during instructional class time" and indicated that as a consequence for the occurrence of this target behavior the student would visit the guidance counselor's office or participate in a one-to-one conference with the teacher (Parent Ex. G at pp. 2-3). In response to the student exhibiting desired behaviors the plan called for verbal praise, extra free time with a friend, lunch with a favored staff member, a positive phone call home, time to assist a coach for a sport, or extra points "toward something special" (id. at p. 2). Regarding progress monitoring, the March 2014 BIP directed the team identified in the plan to meet to analyze data and evaluate the BIP no later than two weeks after the initiation of the plan and thereafter every four to six weeks to measure the effectiveness of the plan (id. at pp. 3-4).

According to the ELA teacher, the March 2014 BIP was in effect "coming into" the 2014-15 school year and at the time of the September 2014 CSE meeting the student's March 2014 BIP was "in place" (Tr. pp. 59, 61). She further explained that the September 2014 CSE did not create a new BIP because the student's behaviors had remained the same (Tr. p. 61).

While the September 2014 IEP included anecdotal evidence that the student was improving behaviorally (i.e., "made improvement in his writing behavior," had made "small improvement in terms of his behavior" in math class, was "doing a bit better as he is more mature and able to be redirected and refocused," and was "not running away from the speech provider when called on"), the September 2014 IEP also stated that the student became verbally hostile, walked out of classes, and skipped classes (Dist. Ex. 14 at pp. 2, 3, 7). In addition, the September 2014 CSE had information that the student continued to demonstrate interfering behaviors at the beginning of the

school year, as the ELA teacher stated that school staff was "seeing some of the behaviors of [the student] coming a little late to class and things of that nature" (Tr. p. 63). Also, a September 2014 math progress report—available to the September 2014 CSE—indicated that the student called out of turn, left his seat to talk to peers, and arrived late for class (Dist. Ex. 9 at p. 2-3). Except for the lone identified target behavior of "engaging in side conversations," none of the above interfering behaviors are included in the FBA or BIP adopted by the September 2014 CSE (see Parent Exs. F; G). Moreover, there is no evidence in the hearing record that the district met its obligation to conduct progress monitoring every four to six weeks.

The ELA teacher stated that the CSE was "reminded at the September meeting to make sure that we did update [the BIP]" (Tr. p. 60). However, the parent testified that there was no discussion at the September 2014 CSE meeting regarding specific behavioral strategies which would be utilized with the student and that there was no review of the March 2014 FBA or BIP at the meeting (Tr. pp. 93, 95-96). The ELA teacher acknowledged that the September 2014 CSE did not have a discussion regarding revising the BIP (Tr. p. 63).

Because the hearing record indicates that the district failed to implement progress monitoring of the frequency, duration and intensity of the behavioral interventions at scheduled intervals and failed to review or consider revising the BIP at the September 2014 CSE meeting, the hearing record supports the IHO's determination that the district denied the student a FAPE for the 2014-15 school year. Furthermore, although not relevant to the adequacy of the September 2014 IEP, as mentioned below the hearing record indicates that the district continued to fail to address the student's behavioral needs during the 2014-15 school year and I remind the district of its obligation to monitor the student's progress under the BIP at regular intervals as specified in the student's BIP and IEP, and report the results to the parent and the CSE, to be considered in any determination whether it is necessary to make any modifications to the BIP (8 NYCRR 200.22[b][2], [b]).[8]

Turning to the 2014-15 school year, the hearing record shows that the student exhibited a broad range of interfering behaviors and that the district did not review the effectiveness of or implement the BIP adopted by the September 2014 CSE. For example, the hearing record includes a September 2014 through March 2015 attendance log which indicated that the student was absent from school, late for class, or cut classes multiple times each week and in some cases multiple times a day (Parent Ex. J at pp. 1-3). In addition, the hearing record includes a September 2014 through March 2015 behavior log which documented the student's interfering behaviors (i.e., standing and shouting at the teacher, aggressive posturing, fighting with another student during lunch, leaving his seat to talk with other students during class time, disrespecting teachers/peers, kicking the door of a classroom, barging into another classroom to say hello to peers, and screaming profanity at a teacher) (Parent Ex. K at pp. 1-6). However, the hearing record does not contain evidence that the team conducted, documented, or reported regular progress monitoring of any of the above behaviors or the March 2014 BIP's specified target behavior at the scheduled intervals indicated in the plan (see Tr. 1-200, Parent Exs. K; R). According to the ELA teacher,

[8] To the extent the parent raises a claim regarding the adequacy of the recommended counseling services to address the student's behavioral needs in her memorandum of law, no such claim was raised in her due process complaint notice and it is not properly before me (see 20 U.S.C. § 1415[c][2][E][i][II], [f][3][B]; 34 CFR 300.508[d][3][i]-[ii], 300.511[d]; 8 NYCRR 200.5[i][7][i][b], [j][1][ii]).

school staff noticed that the student's behaviors had changed in mid-October, yet she stated the team did not revisit the BIP or modify the consequences for interfering behaviors (Tr. pp. 62-63). The student's math teacher stated that since the student's behaviors "didn't happen that often," she was not "charting as consistently as [she] should have been" or "as frequently as [she] wanted to," and that she only began charting his behaviors in December and January (Tr. pp. 158-59).[9]

In addition, although during the 2014-15 school year the student's then-current math teacher may have used strategies recommended in the March 2014 BIP, such as using verbal praise or a reward for desired behaviors and one on one conversations in response to occurrences of the targeted behavior, the math teacher also explained that many of the student's teachers, including herself, employed strategies not included in the BIP and would take away activities that the student liked such as gym time or computer time as a consequence (Tr. pp. 76-78, see Parent Ex. G at p. 2). Furthermore, the 2014-15 behavior log included additional instances in which staff employed strategies not included in the BIP, such as attempting to provide the student with positive reinforcements and incentives such as snacks, a laptop on which the student played games, and permission to leave class (Parent Ex. K at pp. 1, 4).

Moreover, a speech therapy log documenting student attendance and productivity described a productive student up until an entry dated November 3, 2014, in which it was reported that the student was "cutting class" (Parent Ex. CC at pp. 1-20). With few exceptions, from that date forward the log included entries such as "messing around," "cutting class," "very uncooperative," "not in school," and "fooled around a lot" (id. at pp. 20-21, 23, 25, 30, 53-55, 57-58, 61). In addition, a counseling log documenting student attendance and productivity included an entry on December 5, 2014, which stated that the student's "attitude has changed drastically" (Parent Ex. BB at p. 18). A December 19, 2014 entry in this log stated that the student's "actions and behaviors have not changed and are affecting his grades tremendously" (id. at p. 20). There is no evidence in the hearing record to indicate that the CSE met to discuss these behaviors or review the effectiveness of the March 2014 BIP.

According to the ELA teacher, the March 2014 BIP was ultimately revised in March 2015 because staff noticed from data collected, "that the rewards were not working as well as we had hoped" (Tr. p. 60). However, the hearing record does not contain evidence to indicate that the district properly implemented, monitored, or reviewed the March 2014 BIP before the September 2014 CSE meeting or any time during the 2014-15 school year up until March 2015, which was over six months through the school year. In this case it is undisputed that at the time of the September 2014 CSE meeting and continuing into the 2014-15 school year the student exhibited persistent behaviors—i.e. engaging in side conversations with peers during instructional time, yelling across the classroom, coming to class late, leaving class without permission, and displaying physical and verbal aggression—which impeded his learning and required interventions (Tr. p. 48-50, 86-87; Dist. Ex. 14 at pp. 2, 7; Parent Exs. BB at p. 18; CC at pp. 20-62).

[9] While the math teacher testifies that she began charting the student's behaviors at the "[e]nd of November, early December," the math classroom behavior chart introduced into evidence included behavior observation charting only for January and February 2015 (Tr. p. 160-61; see Parent Ex. R at pp. 1-3).

2. 12:1+1 Special Class Placement

Next, I turn to the parent's contention that the IHO erred in finding that the 12:1+1 special class placement recommended by the September 2014 CSE was appropriate and failed to address whether the program could address the student's interfering behaviors. Based on the evidence in the record, I find that the recommended educational program was reasonably calculated to offer the student educational benefits.

State regulations provide that a 12:1+1 special class placement is designed to address 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]). Management needs for students with disabilities are defined as "the nature of and degree to which environmental modifications and human or material resources are required to enable the student to benefit from instruction" (8 NYCRR 200.1[ww][3][i][d]).

A 12:1+1 special class offers the support of a teacher and one supplementary school personnel (8 NYCRR 200.6[h][4][i]). State regulation provides that a special education teacher is one "certified or licensed to teach students with disabilities" (8 NYCRR 200.1). In addition, supplementary school personnel "means a teacher aide or a teaching assistant" (8 NYCRR 200.1[hh]; "'Supplementary School Personnel' Replaces the Term 'Paraprofessional' in Part 200 of the Regulations of the Commissioner of Education," VESID [Aug. 2004], available at http://www.p12.nysed.gov/specialed/publications/policy/suppschpersonnel.pdf). While a teacher aide may assist teachers in nonteaching duties such as "attending to the physical needs" of students or "supervising students," teaching assistants may provide "direct instructional services to students" while under the supervision of a certified teacher (see 8 NYCRR 80-5.6[b], [c]; see also 34 CFR 200.58[a][2][i] [defining paraprofessional as "an individual who provides instructional support"]).[10]

To support the student within the 12:1+1 special class and to address his identified management needs, the September 2014 IEP included a number of recommendations for modifications and resources such as: instruction modified to the student's learning rate and style; redirection; use of manipulatives in math; multisensory reading instruction; repetition of instructions; preferential seating; and clearly defined limits and expectations (Dist. Ex. 14 at pp. 6-7). The September 2014 IEP included the following testing accommodations: extended time; revised test format and directions; preferential seating; use of a calculator; separate location; and breaks (id. at p. 21).

The September 2014 IEP also included annual goals to address the student's needs in the areas of speech-language, reading, writing, math, frustration, self-image, and time management

[10] To the extent the parent asserts that the student's teachers were not adequately qualified to address his needs, the IDEA requires that services must be provided by appropriately certified or licensed personnel, but the only further relevant inquiry is whether the personnel are able to implement the IEP, not whether they have specific training in teaching students with the student's disabilities (Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *11 [W.D.N.Y. Sept. 26, 2012], adopted at 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *12 [S.D.N.Y. Dec. 8, 2011]; L.K. v. Dep't of Educ., 2011 WL 127063, at *11 [E.D.N.Y. Jan. 13, 2011]; see also 8 NYCRR 200.6[b]). The parent raises no allegation that the teachers were not able to implement the student's IEP.

and task completion (Dist. Ex. 14 at pp. 8-19). For example, to meet the student's needs in fluency and pragmatic language, the September 2014 IEP included a speech-language goal targeting speech intelligibility by utilizing appropriate rate of speech, volume and articulatory precision (id. at pp. 3, 8). To meet the student's deficits in writing, the September 2014 IEP included a goal involving writing complex sentences when provided explicit sequential instruction in expanding sentences and a goal in which the student would use multisensory writing strategies to write arguments to support claims with clear reasoning and relevant evidence (id. at pp. 3, 17).

The ELA teacher testified that the September 2014 CSE felt that it was appropriate for the student to be in a 12:1+1 special class because it would provide the student with the support he needed (Tr. p. 52). The director of admissions from the nonpublic school at which the parent requested the student be placed stated that she agreed that a 12:1+1 placement would be appropriate for the student (Tr. p. 134). Moreover, the 12:1+1 special class program recommended by the September 2014 CSE employs the same class ratio and is not significantly different from the parent's desired private school placement (compare Dist. Ex. 14 at pp. 19-20, with Tr. pp. 113-16). The parent testified that at the time of the September 2014 CSE meeting she was in agreement with the proposed IEP (Tr. p. 98).

The evidence in the hearing record reveals that the September 2014 IEP and its recommendation for a 12:1+1 special class placement was reasonably calculated to meet the identified needs of the student and provide him with a FAPE.[11]

3. Specialized Reading Instruction

Regarding the parent's specific contention that the September 2014 IEP was not appropriate because it failed services to address the student's need for specialized reading instruction, the hearing record does not support this claim.

The September 2014 IEP indicated that the student presented with a reading disorder and that he struggled to decode some words; had difficulty reading words in context and using contextual cues to derive meaning from text; struggled to make inferences, predictions, and connections to text; had difficulty responding to explicit comprehension questions; and needed to work on building vocabulary and overall knowledge base (Dist. Ex. 14 at pp. 2-3). The IEP also indicated that the student was often unable to distinguish important from unimportant information in word problems and required explicit teaching of strategies to apply to word problems (id. at p. 3).

To support the student in building his reading skills, the September 2014 IEP included recommendations for multi-sensory reading instruction to address the student's deficits in phonics, decoding, and fluency; preteaching of vocabulary; extra time for in-class and take-home reading assignments; previewing upcoming reading assignments; and the use of graphic organizers to assist the student in tracking information when reading (Dist. Ex. 14 at p. 6). As noted above, the

[11] To the extent the parent asserts the student did not make adequate progress during the 2014-15 school year after the September 2014 CSE meeting, an IEP must be evaluated prospectively as of the time it is created and the parent may not rely on evidence that the student did not make progress to establish that the IEP was not appropriate (R.E., 694 F.3d at 186-88).

IEP also included a number of recommendations that generally supported the student's learning (id. at pp. 6-7).

To address the student's deficits in reading, the September 2014 IEP included a number of annual goals (Dist. Ex. 14 at pp. 11-13). To address the student's delayed reading comprehension skills, the IEP included a goal in which given strategies such as previewing organizers, comprehension checks, and motivational topic texts, the student would be able to correctly answer comprehension questions (id. at pp. 2, 11). To further build the student's comprehension skills as well as his overall knowledge base, the IEP included a goal in which the student would improve his comprehension of narrative text by using relevant background knowledge and information from the text to make appropriate inferences, connections, and predictions (id. at pp. 2, 12). To address the student's decoding needs, the IEP included a goal in which given explicit instruction and strategies such as visual, auditory, tactile, kinesthetic association the student would fluently decode a variety of syllable-types (id. at pp. 2, 11). The September 2014 IEP also included a goal in which the student would use multisensory reading strategies and textual evidence to support analysis of the text and draw inferences from the text, to address the student's need in reading words in context, using contextual clues to derive meaning from text, and drawing inferences (id. at pp. 2, 13).

The September 2014 IEP also included math annual goals in which the student would solve word problems by creating a chart, table or picture model and by identifying key words and operation needed, targeting the student's deficits in reading and understanding math word problems (Dist. Ex. 14 at pp. 3, 13-14). In addition, the September 2014 IEP contained speech annual goals related to the student's reading needs which involved: restating, paraphrasing and summarizing what was read; improving understanding and use of curriculum-related vocabulary and concepts, abstract language, multiple meaning words and comparative and descriptive language in the classroom; and given visual, auditory, tactile, and kinesthetic strategies, auditory memory games, and focused listening exercises with frequent practice, correctly producing letter sounds of the consonants and short vowels (id. at pp. 2, 9-10). The September 2014 IEP further provided for speech-language services twice per week individually and once per week in a group (id. at p. 20).

A review of the September 2014 IEP reveals that the September 2014 CSE considered and provided specialized instruction to address the student's unique needs in reading (Dist. Ex. 14 at pp. 1-2, 5-6, 12-13, 21). Moreover, the hearing record shows how the student's teachers employed these strategies while instructing the student. The math teacher testified that the student needed guidance in working with word problems and in identifying the operation that was needed and the relevant information (Tr. p. 72). In supporting the student's need in solving worded math problems while conforming with the recommendations in the September 2014 IEP, the math teacher explained that she "worked on reading through a problem and chunking it up into smaller chunks of information so [the student] can process it" (compare Dist. Ex. 14 at pp. 6-7, with Tr. p. 72). The ELA teacher explained that the student worked better with one to one instruction and that she worked on his fluency skills individually (Tr. pp. 43, 45). Additionally, and although at times the student became frustrated and did not want help, the ELA teacher indicated that during testing to accommodate the student's reading deficits, she read questions and passages aloud to the student (Tr. p. 50; see Dist. Ex. 14 at p. 21).

Based on the above, the evidence in the hearing record supports a finding that the September 2014 CSE considered the student's needs and provided the student with specialized reading instruction.

D. Relief Requested—Prospective Placement

I next turn to the parent's contention that the IHO erred in denying her request that the student be placed in a nonpublic school capable of addressing his specific deficits and providing specialized reading instruction. For the reasons set forth below, I decline to order that the student be placed in a nonpublic school, as it would be an improper circumvention of the CSE process.

To the extent that the parent requested that the district fund the costs of a future placement of the student in a nonpublic school, although the September 2014 IEP was not appropriate to meet the student's needs, it would be inappropriate in this instance to circumvent the statutory process, under which the CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing a student's needs, by dictating a particular result, especially in the absence of adequate evidence regarding the annual review of the student's current needs conducted subsequent to the matters under review in this proceeding. In accordance with its obligation to review a student's IEP at least annually, the CSE should have already convened to revise the student's program and developed a new IEP for the student for the 2015-16 school year (see 20 U.S.C. § 1414[d][4][A]; Educ. Law § 4402[2]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]). The appropriate course is to limit review in this matter to remediation of past harms that have been explored through the development of an appropriate evidentiary record. If the parent remains displeased with the CSE's recommendation for the student's program for the 2015-16 school year, she may obtain appropriate relief by challenging that IEP in a separate proceeding.

Furthermore, when determining an appropriate placement on the educational continuum, a CSE is required to first determine the extent to which the student can be educated in a public school setting with nondisabled peers before considering a more restrictive nonpublic school option (see E.F., 2013 WL 4495676, at *15 [explaining that "[u]nder the law, once [the district] determined that [the public school setting] was the least restrictive environment in which [the student] could be educated, it was not obligated to consider a more restrictive environment, such as [a nonpublic school]"]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *8 [S.D.N.Y. Mar. 19, 2013] [finding that "[o]nce the CSE determined that [the public school setting] would be appropriate for the [s]tudent, it had identified the least restrictive environment that could meet the [s]tudent's needs and did not need to inquire into more restrictive options such as nonpublic programs"]). Thus, a directive to prospectively require placement the student in a nonpublic school would impede the important statutory purpose of attempting, whenever possible, to have disabled students access the public school system through placement in a public school with their nondisabled peers (see Walczak, 142 F.3d at 132 [noting that the preference for educating students in the least restrictive environment applies even when no mainstreaming with nondisabled peers is possible]). Moreover, the student's needs, as previously indicated, do not suggest that removal from the public school was necessary at the time of the September 2014 CSE meeting in order to

offer the student a FAPE. Under the circumstances in this case, prospective placement relief would not be appropriate.[12]

Notwithstanding the foregoing, holding that the parent is correct that the district has repeatedly failed to fulfill its basic obligations to the student under the IDEA, but finding that the student is not entitled to any remedy, would constitute a hollow victory (see Connors v. Mills, 34 F. Supp. 2d 795, 804). Furthermore, such a holding would not effectuate the purposes of the IDEA. The hearing record before me does not provide a basis for determining whether the student requires compensatory services to remedy the district's failure to address his behavioral needs during the 2014-15 school year.[13] However, the record is replete with evidence that the student's interfering behaviors are central to his special education needs. As discussed above, the hearing record also indicates that the district did not appropriately implement and monitor the student's BIP during the 2014-15 school year and that, at times, the student's teachers and providers resorted to strategies that were not contemplated by the BIP in place. Accordingly, the district is directed to retain the services of an independent behavioral consultant, agreed upon by the parties, at public expense as a compensatory remedy (see Newington, 546 F.3d at 122-23). The independent consultant shall be tasked with observing the implementation of any BIP in effect at the student's current school placement, recommending modifications to the BIP to address the student's behavioral needs in accordance with State regulations, and recommending specific training for district staff, including, to the extent necessary, both teachers and related services providers of the student, so that they may appropriately implement the student's BIP. Within 10 days of receiving the consultant's report, the district shall convene a CSE meeting to discuss whether it is necessary to modify the student's BIP to adequately address his behavioral needs. The district will be required to implement the recommended staff training, as needed, for the duration of the 2015-16 school year. The district shall also retain the consultant to monitor the student's progress under the BIP during the 2015-16 school year in accordance with the schedule set forth in the student's BIP and IEP. In addition, the district shall be required to include the consultant in any CSE meeting held to discuss modifications to the student's BIP or IEP for the 2015-16 school year.

VII. Conclusion

The hearing record supports the IHO's decision that the district failed to address the student's interfering behaviors during the 2014-15 school year, leading to a denial of a FAPE to the student. Although the parent is not entitled to prospective public placement of the student at a nonpublic school, the district is directed to retain the services of a behavioral consultant at public expense to remedy the district's specific failures regarding the implementation of the student's BIP. I strongly encourage the district to make all possible efforts to appropriately address the student's needs during the limited time he remains eligible for a public education.

[12] Because of this determination, it is unnecessary to determine whether the specific nonpublic school referenced by the parent during the impartial hearing was appropriate to meet the student's needs.

[13] The hearing record indicates that the student received 1:1 private tutoring in reading and math as a result of the settlement of the prior proceeding (Tr. pp. 101-02, 104-05). The parent testified that the student made progress as a result (Tr. pp. 104-06); however, the hearing record contains no reports from the company that provided the tutoring.

I have considered the parties' remaining contentions and find them to be without merit or that I need not address them in light of the determinations made herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the district shall, within 15 days of the date of this decision, engage the services of an independent behavioral consultant to observe the implementation of the student's BIP and make recommendations as described in the body of this decision; and

IT IS FURTHER ORDERED that the CSE shall convene within 10 days of receiving the consultant's recommendations, ensure the provision of recommended training to district staff, and determine whether it is necessary to modify the student's BIP; and

IT IS FURTHER ORDERED that the district shall engage the services of the consultant for the duration of the 2015-16 school year to monitor the student's progress under his BIP in accordance with the body of this decision.

Dated: **Albany, New York**
October 9, 2015

CAROL H. HAUGE
STATE REVIEW OFFICER