



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 16-036

**Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Harrison Central School District**

### **Appearances:**

Gina DeCrescenzo, PC, attorneys for petitioners, Gina M. DeCrescenzo, Esq., of counsel

Ingerman Smith, LLP, attorneys for respondent, Thomas Scapoli, Esq., of counsel

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition costs at the Winston Preparatory School (Winston Prep) for the 2012-13 school year. The appeal must be dismissed.

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

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

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

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

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

The parties' familiarity with the facts of this case is presumed; however, considering the length of the impartial hearing and the issues on appeal, a limited background of the student's educational history is warranted.

For the 2008-09 school year, the student attended a district general education kindergarten class (Parent Ex. A at p. 2). In January 2009, the parents referred the student to the CSE, which in June 2009 initially found the student ineligible for special education services (Tr. pp. 109, 112). For the 2009-10 school year, the student began first grade in a district general education class and in October 2009, the CSE reconvened and determined the student was eligible for special education

and related services as a student with an other health impairment (Tr. pp. 113-14, 117).<sup>1</sup> In February or March 2010, the student was moved to a "self-contained" placement, where he also had opportunities to attend a "co-teaching" class for approximately 45 minutes per day (Tr. pp. 117-19). At the start of the 2010-11 school year (second grade), the student attended a general education classroom with the support of integrated co-teaching (ICT) services (Tr. pp. 119-20). In January 2011, the CSE convened due to concerns about the student's behavior and subsequently recommended placement in an 8:1+2 special class described in the hearing record as an "emotional support class," which the student attended for the remainder of the 2010-11 school year and the entirety of the 2011-12 school year (third grade) (Tr. pp. 120-121; Dist. Exs. 8 at pp. 1-2, 6; 12 at pp. 10-11; 13 at pp. 1, 11).

On June 18, 2012, a CSE convened to conduct the student's annual review and to develop an IEP for the 2012-13 school year (Dist. Ex. 27 at pp. 1, 5). The June 2012 CSE recommended an 8:1+2 special class emotional support placement with related services of three 30-minute sessions per 6-day cycle of counseling in a group, four 30-minute sessions per 6-day cycle of speech-language therapy in a group, and one 30-minute session per 6-day cycle of occupational therapy (OT) in a group for the 2012-13 school year (*id.* at pp. 1, 4, 16).

By letter to the district dated August 14, 2012, the parents notified the district of their intent to enroll the student at Winston Prep for the 2012-13 school year and to seek reimbursement for the costs of the student's tuition and transportation at Winston Prep (Parent Ex. N).

On September 3, 2012, the parents executed an enrollment contract with Winston Prep for the student's attendance during the 2012-13 school year (Parent Ex. J at pp. 1-2).

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

In a due process complaint notice, dated June 17, 2014, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year, that Winston Prep was an appropriate unilateral placement and that equitable considerations supported their request for tuition reimbursement (*see* Dist. Ex. 1 at pp. 1-9).

Initially, the parents alleged that the June 2012 CSE failed to offer the student an appropriate program and placement to address the student's needs for the 2012-13 school year (Dist. Ex. 1 at p. 5). Next, the parents alleged that the CSE failed to recommend behavior modification services or cognitive behavioral therapy for the student, in spite of recommendations from a private evaluator (*id.*). The parents further alleged that the annual goals in the June 2012 IEP failed to address the student's unique needs (*id.* at p. 7). Additionally, the parents argued that the CSE failed to "prevent or address" bullying of the student (*id.* at p. 6). The parents further argued that the CSE failed to offer the student adequate counseling, speech-language and reading services (*id.* at pp. 6-7). In addition, the parents contended that the CSE failed to recommend social skill training for the student (*id.* at p. 6). Next, the parents contended that the CSE failed to

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<sup>1</sup> The student's continuing eligibility for special education and related services as a student with an other health-impairment is not in dispute (*see* 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

conduct a functional behavioral assessment (FBA) and develop a behavioral intervention plan (BIP) for the student, despite the student's maladaptive behaviors (*id.* at p. 5).

Turning to the unilateral placement, the parents asserted that Winston Prep was an appropriate placement for the student because it provided instruction specially designed to meet the student's unique needs and provided a setting where the student's maladaptive behaviors were ameliorated and the student made progress (Dist. Ex. 1 at pp. 7-8). The parents also alleged that equitable considerations favored their request for relief because they cooperated with the CSE and provided timely and sufficient notice of their intent to unilaterally place the student at Winston Prep (*id.* at p. 8).

As relief, the parents requested payment of the costs of the student's tuition at Winston Prep for the 2012-13 school year; payment related to the student's transportation costs to and from Winston Prep; reimbursement for attorneys' fees; and any further relief, including compensatory education, deemed appropriate by the IHO (*id.* at p. 9).

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

After a prehearing conference on July 29, 2014, the parties proceeded to an impartial hearing on September 23, 2014, which concluded on December 22, 2015 after 19 days of proceedings (Tr. pp. 1-4385; *see* IHO Ex. 6).<sup>2</sup> In a decision dated May 4, 2016, the IHO found that the district offered the student a FAPE for the 2012-13 school year (IHO Decision at pp. 167-239, 241).

As an initial matter, the IHO determined that any claims that accrued on or before June 16, 2012 were time-barred by the IDEA's statute of limitations (IHO Decision at pp. 177-78). Accordingly, the IHO declined to make findings with respect to any claims alleging a denial of a FAPE for the 2010-11 and 2011-12 school years, including the use of physical restraints and the sufficiency of the FBA and BIP developed in 2010 (IHO Decision at pp. 177-78, 203).<sup>3 4</sup>

With respect to the 2012-13 school year, the IHO found that (1) the annual goals contained in the IEP were appropriate to address the student's needs; (2) the student would have received appropriate behavior modification services through continued attendance in the 8:1+2 special class emotional support placement along with participation in school-based counseling and speech-language therapy; (3) the student would have received appropriate 1:1 instruction when needed in the 8:1+2 special class emotional support placement and in mainstream settings with a classroom aide; and (4) cognitive behavioral therapy, home-based therapy, family training, and family

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<sup>2</sup> On January 12, 2015, the IHO issued an interim ruling on an evidentiary matter (IHO Ex. 15).

<sup>3</sup> The IHO noted that the parents raised claims regarding the use of physical restraints during the 2010-11 and 2011-12 school years in their closing brief (IHO Decision at p. 178; IHO Exhibit 32 at pp. 24-32).

<sup>4</sup> Although the IHO found that the parents' claims related to bullying were time-barred, the IHO addressed those claims substantively and found that the district acted appropriately in responding to the parents' and student's complaints (IHO Decision at pp. 212-13).

counseling were not required for the student to receive a FAPE (IHO Decision at pp. 193, 210, 217).<sup>5</sup>

Turning to the June 2012 IEP, the IHO found that the IEP accurately reflected the results of evaluations considered by the CSE, and the CSE's recommendations were appropriate and reasonably calculated to offer the student a FAPE in the least restrictive environment (LRE) (IHO Decision at pp. 188, 199-200). Next, the IHO found that the student's behaviors were effectively managed in the 8:1+2 special class emotional support placement during the 2011-12 school year and that the IEP contained detailed information regarding the student's social development and management needs as well as appropriate social/emotional/behavioral goals that the student would have worked on during the 2012-13 school year (*id.* at pp. 177-78, 203, 206). The IHO found that the student benefited from the social skills training and counseling that the student received during the 2011-12 school year and reasoned that the student would have continued to benefit from those services during the 2012-13 school year (*id.* at pp. 221, 225). The IHO also found that because the student made progress in the areas of speech-language and reading during the 2011-12 school year, the CSE's recommendation for continuation of speech-language therapy and the 8:1+2 special class emotional support placement during the 2012-13 school year would have continued to provide the student with educational benefits (*id.* 234-38).

Having concluded that the district offered the student a FAPE for the 2012-13 school year, the IHO found that it was not necessary to determine whether the student's unilateral placement at Winston Prep was appropriate or whether equitable considerations weighed in favor of the parents' request for relief (IHO Decision at p. 238).

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

The parents appeal, asserting that the IHO erred in finding that the district provided the student with a FAPE during the 2012-13 school year. Initially, the parents argue that the IHO erred in "disregarding the district's programming" for the 2010-11 and 2011-12 school years. The parents also argue that the IHO erred by failing to find that a November 2010 FBA was invalid and a November 2010 BIP was unsound.<sup>6</sup> The parents argue that the IHO erred in finding it appropriate that the June 2012 CSE determined that an FBA and BIP were not required for the student, despite the student's recorded maladaptive behaviors. Additionally, the parents assert that the IHO erred in finding that the student's behaviors were "effectively managed" during the 2011-12 school year such that similar programming for the 2012-13 year would continue to meet the student's behavioral needs. Next, the parents assert that the IHO inappropriately refused to

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<sup>5</sup> The parties have not appealed these findings. Therefore, these issues are final and binding on the parties and will not be reviewed on appeal (8 NYCRR 200.5[k], 279.4[a]; see also 34 CFR 300.514[b]).

<sup>6</sup> In this case, the IHO correctly determined that the parents' claims regarding physical restraints and any claims related to the 2010-11 and 2011-12 school year that accrued on or prior to June 16, 2012, were time barred as the parents filed their due process complaint notice more than two years after they knew or should have known of the actions forming the basis of their complaint. Thus, the parents' contention that a November 2010 FBA was invalid and a November 2010 BIP was unsound will not be addressed. However, I will consider any facts that occurred during the 2010-11 and 2011-12 school years which are relevant in determining the parents' timely claims related to the 2012-13 school year (Ind. Sch. Dist. No. 413, Marshall v. H.M.J., 123 F. Supp. 3d 1100, 1113-1114 [D. Minn. 2015]).

consider the parents' claims with respect to restraints used during the 2010-11 and 2011-12 school years. The parents also contend that the IHO erred in holding that the June 2012 CSE provided the student with appropriate counseling and social skills training. Next, the parents contend that the IHO erred in failing to determine that the district did not provide the student with appropriate speech-language and reading services. The parents further argue that the IHO erred in finding that the student made progress during the 2011-12 school year, and failed to consider areas where the student demonstrated a lack of progress during the 2010-11 and 2011-12 school years.

With respect to the unilateral placement, the parents allege that the IHO erred by failing to determine that Winston Prep was an appropriate placement for the student. The parents maintain that Winston Prep was reasonably calculated to enable the student to receive educational benefits. Next, the parents argue that the IHO erred in failing to determine that equitable considerations favor the parents. The parents contend that equitable considerations favor their request for relief because they cooperated with the CSE and provided timely and sufficient notice of their intent to unilaterally place the student at Winston Prep. For relief, the parents requested payment of the costs of the student's tuition and transportation at Winston Prep for the 2012-13 school year, reimbursement for attorneys' fees, and any further relief deemed appropriate.

In an answer, the district responds to the parent's allegations and generally argues to uphold the IHO's decision in its entirety.

## **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. June 2012 IEP**

#### **1. Progress in 8:1+2 Special Class Placement**

The parents argue that the IHO erred in finding that the June 2012 IEP was reasonably calculated for the student to receive educational benefits and that the IHO failed to consider the student's programming and experience during the 2010-11 and 2011-12 school years in which the student demonstrated a lack of progress. However, contrary to the parents' argument, the evidence in the hearing record supports the IHO's finding that the student made progress while placed in the 8:1+2 special class emotional support placement during a portion of the 2010-11 and the 2011-12 school years in the areas of academic achievement including reading, math, and writing, as well as in speech-language skills, social/emotional/behavioral functioning, and motor skills.

A student's progress under a prior IEP is a relevant area of inquiry for purposes of determining whether a subsequent or future IEP has been appropriately developed, particularly if the parents express concern with respect to the student's rate of progress (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66, 2013 WL 3155869 [2d Cir. Jun. 24, 2013]; Adrienne D. v. Lakeland Cent. Sch. Dist., 686 F. Supp. 2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, \*14-\*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ., at p. 18 [December 2010]). Furthermore, "if a student had failed to make any progress under an IEP in one year," at least one court has been "hard pressed" to understand how the subsequent year's IEP could be appropriate if it was simply a copy



of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch. v. Scott P., 62 F.3d 520, 534 [3d Cir. 1995] [noting, however, that the two IEPs at issue in the case were not identical as the parents contended]).

According to the notes contained in the student information section attached to the December 15, 2011 IEP, the special education teacher indicated that the student transitioned quickly from his previous placement, acclimated to the structure and expectations of the class, and was eager to follow class rules (Dist. Ex. 13 at p. 2). The notes reflected the special education teacher's report that on a day-to-day basis in the small, structured classroom environment the student required only mild-to-moderate verbal prompting with clear expectations to manage his behavior, and physical intervention was only necessary on two occasions (id.). The special education teacher reported that the student had been successful mainstreaming for science lab and special events with the support of an aide, noting that the student required little assistance from the aide at those times (id.). The school psychologist reported that she had observed the student well over 20 times and that the student was engaged and on task during these informal observations (id.; see Dist. Ex. 21 at p. 2). The principal also indicated that he had observed the student approximately 20 times over the few weeks preceding the CSE meeting, and that the student was engaged and on task in all but one visit (Dist. Ex. 13 at p. 2).

The IEP progress report from December 15, 2011 through June 22, 2012 shows that the student demonstrated progress related to his annual goals in reading, math, writing, language, social/emotional behavioral functioning, and motor skills (see Dist. Ex. 32 at pp. 1-7). In the area of reading, the student achieved annual goals related to reading comprehension, paraphrasing, and identifying both the main idea in a reading passage, and digraphs in orally presented words (id. at pp. 1-2). With respect to the annual goal related to decoding, the student was progressing satisfactorily, but had not achieved the goal (id. at p. 1). In writing, the student achieved his two annual goals related to writing three paragraphs and spelling 30+ basic sight words (id. at p. 2). With respect to math, the student achieved all three annual goals related to completing two digit addition and subtraction problems with regrouping as well as identifying the correct operation in word problems (id. at pp. 2-3). With respect to speech-language skills, the student achieved three of his four annual goals related to understanding and using temporal concepts, comprehending and using irregular plurals and past tense verb forms, recognizing and providing rhyming words, and producing target sounds (id. at p. 4). The report indicated the student achieved all seven annual goals related to social/emotional/behavioral functioning, which required him to facilitate compromises with peers and identify strategies to foster positive relations with peers and adults (id. at pp. 4-6). The annual goals achieved in the area of social/emotional/behavioral functioning also related to the student interacting in a socially acceptable manner with peers and adults including using non- aggressive verbalizations and body language, self-monitoring of his behavior through reflective journals, checklists, and charts, as well as seeking out appropriate people to ask for assistance when under stress (id. at pp. 5-6). In the area of motor skills, the student achieved his two annual goals related to completing fine motor and functional tasks, and following verbal directions to complete a three-step motor task (id. at pp. 6-7).<sup>7</sup> In all, the student achieved 19 of 21 annual goals for the 2011-12 school year (id. at pp. 1-7).

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<sup>7</sup> According to the June 2012 IEP, the occupational therapist indicated that the student made good progress including coordinating both sides of his body together and following multi-step sequences with less prompting

At the time of the June 2012 CSE meeting, the student's report card indicated that he was meeting age expectations in most academic areas (Parent Ex. P at p. 1, 4; see Dist. Ex. 27 at p. 3). The notes contained in the student information section attached to the June 2012 IEP indicated that review of raw data from the administration of the New York State mathematics and English language arts (ELA) assessments showed that the student had the potential to achieve a "Level 3," indicating he was meeting grade level expectations (Dist. Ex. 27 at p. 3).<sup>8</sup> The June 2012 English Language Learner Progress Report indicated that the student demonstrated "[a]bove [I]anguage [I]level" in listening, speaking and reading skills, and "[a]t [I]anguage [I]level" in writing (Dist. Ex. 15 at p. 1). In addition, the English as a second language (ESL) teacher testified that the student scored proficient in all language domains including listening, speaking, reading, and writing on the 2012 New York State English as a Second Language Achievement Test (NYSESLAT) (Tr. pp. 1250-51, 1265).

Although on appeal the parents assert the student's progress in reading was de minimis, the hearing record supports a contrary conclusion. The 2011-12 reading development scores and recordings report shows the student made progress in reading during third grade (Dist. Ex. 28 at p. 1). The report indicated with respect to a high frequency word list for reading, the student read 183 out of 220 words during term one, and by term three had improved to read all 220 words correctly (id.). Regarding a high frequency word list for spelling, the student spelled 116 out of 220 words correctly in term one and improved to spelling 184 out of 220 words in term three (id.). With respect to the Dynamic Indicators of Basic Early Literacy Skills (DIBELS) assessment, conducted by the special education teacher, the student achieved a 39 word count per minute (WCPM) during term 1, and a 74 WCPM during term three, which according to the special education teacher's testimony indicated growth in the area of reading fluency (Tr. pp. 760-61, 2075; Dist. Ex. 28 at p. 1). Also, the special education teacher testified that the student made "huge growth" in reading as shown by the increase in his score according to a Fountas and Pinnell assessment from a reading level "K" in term one to a reading level "N" in term three (Tr. pp. 758-59; Dist. Ex. 28 at p. 1).

A review of the 2011-12 academic behavior log indicated that the student made progress in the area of social/emotional/behavioral functioning (see Dist. Ex. 31 at pp. 1-5). The special education teacher maintained an academic behavior log of the student's behaviors from September 2011 through June 2012 (Tr. p. 1092; Dist. Ex. 31 at pp. 1-5). A review of the behavior log shows that overall, the student's behaviors decreased over the course of the 2011-12 school year (see Dist. Ex. 31 at pp. 1-5). For example, from September 2011 through January 2012, the student engaged in verbal aggression 37 times, physical aggression 5 times, and staff conducted 3 physical interventions (Dist. Ex. 31 at pp. 1-3). Whereas, from February through June 2012, the student engaged in verbal aggression 12 times, physical aggression 4 times, and staff conducted 1 physical intervention (Tr. pp. 889-90; Dist. Ex. 31 at p. 3-5). In summary, the behavioral data shows the student's behavior decreased in the areas of verbal and physical aggression (Dist. Ex. 31 at pp. 1-5). Additionally, the June 2012 IEP reflected that the principal reported that the student was

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and cuing to complete each step (Dist. Ex. 27 at p. 12).

<sup>8</sup> According to the testimony of the district principal, the student performed at a Level 3 ["proficient"] on both the third grade New York State mathematics and ELA assessments (Tr. pp. 1508-09).

observed daily beginning in November 2011 and that each time the student was on task and behaving appropriately (Dist. Ex. 27 at p. 2).

The parents assert that the IHO disregarded discrepancies between the behavior log maintained by the special education teacher and the progress notes and observations of the related service providers; however, a comparison of the documents does not support such an assertion. The behavior log completed by the special education teacher documented observations of the student while in the classroom, and the speech-language pathologist and school psychologist took notes about the student's behavior and progress toward IEP annual goals during both push-in and pull-out sessions and classroom observations (Tr. pp. 1125, 1127; Dist. Exs. 17; 18 at pp. 1-2; 19; 21; 31). The behavior log completed by the special education teacher documented instances of when the student engaged in verbal and physical aggression, when he needed physical intervention, when he completed all his work, and the level of prompting required on a given day (see Dist. Ex. 31 at pp. 1-5). The progress notes taken during speech-language therapy and counseling sessions noted behaviors similar to those the special education teacher documented in the behavior log, such as the student's ability to follow directions and participate in the session, as well as his activity level, distractibility, and lack of verbal/physical control (Dist. Exs. 17; 18 at pp. 1-2; 19; 21). A review of the classroom behavior log and the related service progress notes shows that the behaviors staff documented in the various settings were not inconsistent with each other (compare Dist. Ex. 31, with Dist. Exs. 17-19; 21). To the extent the parents assert that the special education teacher's behavior log does not reflect behaviors included in the speech-language pathologist's notes, the special education teacher testified that she was not present during all of the student's related service sessions, and even when in the same room "tried to really focus [her] attention on keeping to [herself]," so as to not "step on the other teacher's toes" (Tr. pp. 1627-28).

A review of the notes contained in the student information section attached to the June 2012 IEP also identifies progress the student made in the area of social/emotional/behavioral functioning while attending the 8:1+2 special class emotional support placement (Dist. Ex. 27 at pp. 3, 9-10, 12). According to the notes, the special education teacher stated social skills had been an area of "huge growth in depth and quality" for the student (id. at p. 3). The special education teacher noted that the student exhibited an increase in self-awareness, was working on asking for help, developed basic friendships, but continued to require adult support regarding social skills and when he became upset (id.). The school psychologist commented that the student participated in a social skills group at lunch where he bonded with peers and exhibited leadership qualities (id.). The present levels of performance included in the June 2012 IEP indicated that instances of inappropriate social interactions such as verbal and physical aggression had decreased and were now a rarity (id. at p. 9). The June 2012 IEP indicated the student interacted appropriately with classmates and staff given mild verbal prompts the majority of the time (id. at pp. 9-10). The IEP also indicated that the student followed classroom routines and exhibited behavioral growth during the school year in a highly structured special class (id. at p. 12). The IEP noted that as of June 2012, the student's aggressive behaviors decreased and his ability to control his anger and physical aggression had greatly improved although it was a continued area of need (id. at pp. 3, 10). The IEP further indicated that the student's movement away from physical aggression to more appropriate self-regulating strategies was a very significant accomplishment (id. at p. 10).

Contrary to the parents' assertion, a review of the hearing record shows that the student made progress in the area of speech-language skills while attending the 8:1+2 special class

emotional support placement (Dist. Ex. 27 at p. 9). According to the notes contained in the student information section attached to the June 2012 IEP, the speech-language therapist reported the student made progress in rhyming words, and with articulation and syntax skills, but had continuing needs in the areas of describing tasks, providing directions, and with social language skills (*id.*). The speech-language therapist reported the student made progress in speech-language therapy including improvement in the areas of participating in two-way conversations, including answering and asking questions, and making related comments, rhyming words, articulation skills, using irregular plural and irregular past tense during sentence completion tasks, and understanding the temporal concepts before and after (*id.*). As stated previously, during the 2011-12 school year the student achieved three of four annual goals related to language skills, and the June 2012 IEP reflected reports that the student was "cooperative and compliant" during pull-out sessions and that he participated well with the other student in his group (Dist. Exs. 27 at p. 9; 32 at pp. 3-4).

While the parents' desire for the student to reach grade level across all academic areas is understandable, the student's progress must be measured in light of his abilities and the circumstances surrounding his educational experiences (see *Rowley*, 458 U.S. at 202; *Mrs. B.*, 103 F.3d at 1121). Prior to the age of six, the student was not exposed to English and did not appear to have attended any formal education program (Tr. pp. 106-07; Parent Ex. QQQ at pp. 5-8). As previously discussed, the student has received diagnoses including fetal alcohol effects, ADHD, reactive attachment disorder, mood dysregulation, and developmental coordination disorder (Dist. Ex. 24 at p. 45). The hearing record reflects that despite the student's continued needs in academics, language, and social/emotional/behavioral functioning, the student made academic progress and progress in language skills while at the district; particularly evidenced by the student's Level 3 (proficient) achievement on both the third grade NYS ELA and mathematics assessments, and his proficient scores in all language domains of the NYSESLAT (Tr. pp. 1250-51, 1265, 1508-09; see Dist. Ex. 15 at p. 1). The principal testified that the student's performance on the NYS ELA and mathematics tests show the "kind of work he was capable of and the kind of achievement he made" (Tr. p. 1508). The clinical psychologist also testified that in light of the student's diagnoses, background, and related educational needs "it made his progress seem all the more significant" (Tr. p. 2290).

In view of the above, a review of the hearing record shows that the student made progress while attending the 8:1+2 special class emotional support placement during a portion of the 2010-11 and the 2011-12 school years in the areas of academic achievement including reading, math, and writing; social/emotional/behavioral functioning; and speech-language and motor skills. Thus, the hearing record supports the IHO's determination that the June 2012 CSE's continuing recommendation of an 8:1+2 emotional support program with related services was reasonably calculated for the student to receive educational benefits during the 2012-13 school year.

## **2. Other IEP Claims**

A review of the hearing record supports the IHO's determination that, based upon the student's needs, the June 2012 CSE recommended adequate special education services including counseling, social skills instruction, speech-language therapy, and reading services for the student.

In this instance, although the sufficiency and consideration of the evaluative information before the June 2012 CSE is not directly in dispute, a discussion thereof provides context for the

discussion of the issue to be resolved—namely, whether the CSE's recommendations were sufficient to address the student's counseling, social skills, speech-language therapy, and reading needs.

In developing the student's IEP for the 2012-13 school year, the June 2012 CSE considered several documents that discussed the student's needs in the areas of academic achievement, social/emotional/behavioral functioning, language processing, and motor skills including a May 30, 2012 occupational therapy (OT) evaluation report, a June 1, 2012 educational achievement assessment report, a 2011-12 (third grade) report card, a June 5, 2012 neuropsychological evaluation report, and a June 12, 2012 physician letter (Dist. Exs. 24 at pp. 1-55; 27 at p. 5).

The May 2012 OT evaluation report indicated that the student had received diagnoses of an attention deficit hyperactivity disorder (ADHD), a sensory processing disorder, fetal alcohol syndrome, and sleep apnea (Dist. Ex. 24 at p. 9). The evaluating occupational therapist noted that the student was cooperative but was also fidgety and exhibited limited eye contact during the assessment process (*id.* at p. 10). The evaluator also noted that the student exhibited increased sensory defensive behaviors, decreased body awareness, and greater difficulty maintaining attention to verbal instructions when the student entered the gym area with its increased stimulation and people (*id.*). The evaluator noted that these behaviors were not due to a behavioral issue such as defiance or opposition, but rather inadequate central nervous system processing (*id.*). With respect to the Bruininks-Oseretsky Test of Motor Proficiency (BOT-2) results, the student's fine motor precision was at 6.0 - 6.2 years, fine motor integration was at 5.10 - 5.11 years, manual dexterity was at 8.0 - 8.2 years, and upper-limb coordination was at 6.3 - 6.5 years (*id.*). The report also indicated the student's fine motor control was "poor" and that he exhibited difficulty with fine motor and handwriting performance (*id.* at p. 12).

Results from the Sensory Processing Measure (SPM), reflected that the student's T-scores fell in the "Definite Dysfunction" range in the areas of vision, touch, body awareness, balance/motion, and planning and ideas, with "Some Problems" noted in the area of socialization (Dist. Ex. 24 at p. 10). Results from the Sensory Profile completed by the parent indicated the student demonstrated difficulties in the areas of sensory seeking, emotional reactivity, low endurance/tone, inattention/distractibility, poor registration, fine motor/perceptual, visual processing, touch processing, and multisensory processing (*id.* at p. 11). Additionally, according to the mother's report, the student exhibited difficulty with sensory processing related to endurance/tone, modulation related to body position and movement, modulation of sensory input affecting emotional responses, modulation of visual input affecting emotional responses and activity level, emotional/social responses, behavioral outcomes of sensory processing, and thresholds for response (*id.*). The evaluator concluded that based on the assessments and observations conducted, the student exhibited a sensory processing disorder; specifically, a sensory modulation disorder (*id.* at p. 12). The occupational therapist provided suggestions and recommendations to address the student's sensory needs, including providing various tactile, visual, and auditory stimuli, two 45-minute sessions of individual OT per week in a sensory gym, and a sensory diet for home and school (*id.* at pp. 13-14).

The June 1, 2012 educational achievement evaluation report included scores from an administration of the Kaufman Test of Educational Achievement, Second Edition (KTEA-II) to the student (Dist. Ex. 24 at p. 2). The student achieved a reading composite standard score of 91,

math composite standard score of 99, and written language composite standard score of 98, all which fell within the average range (id. at p. 3). The student achieved standard scores (percentile rank) of 86 (18) in letter word recognition, 99 (47) in reading comprehension, 99 (47) in math concepts and applications, 97 (42) in math computation, 116 (86) in written expression, and 82 (12) in spelling (id.).

The neuropsychological evaluation report dated June 5, 2012 conducted by a private psychologist in April 2012 provided detailed information regarding the student's functioning (Dist. Ex. 24 at pp. 17-55). Administration of the Wechsler Intelligence Scale for Children Fourth Edition (WISC-IV) to the student yielded standard scores (percentile rank) of 98 (45) in verbal comprehension, 104 (61) in perceptual reasoning, 86 (18) in working memory, 97 (42) in processing speed, and a full scale IQ of 96 (39) (id. at p. 50). According to the psychologist, the full scale IQ of 96 should be considered with caution and the student's domain scores needed to be examined carefully because of variability in the student's performance across domains (id. at p. 23). The report indicated that the student's verbal, nonverbal reasoning, and processing speed scores fell within the average range (id. at pp. 23-25). According to the report, the student's working memory scores fell within the low average range, which indicated an area of relative weakness for the student (id. at p. 25).

With respect to the Woodcock Johnson Tests of Achievement -Third Edition (WJ-III), the student achieved standard scores (percentile rank) of 83 (13) in broad reading, 82 (12) in letter word identification, 91 (27) in passage comprehension, 92 (30) in reading fluency, 77 (6) in broad math, 71 (3) in math calculation skills, 84 (14) in applied problems, 70 (2) in math fluency, 77 (6) in broad written language, 83 (13) in written expression, 87 (19) in writing fluency, and 77 (6) in spelling (Dist. Ex. 24 at pp. 50-51). According to the neuropsychological report, the student's performance in academic achievement was variable with scores "falling between the [b]orderline and [h]igh [a]verage range" (id. at p. 26). Overall and including the results from additional reading assessments, the student's word reading, reading accuracy, and reading fluency scores fell within the borderline to low average range (id. at p. 28). The student's broad math and written language scores fell within the borderline range (id.).

Administration of the Clinical Evaluation of Language Fundamentals-Fourth Edition (CELF-4) to the student yielded scaled scores (percentile rank) of 4 (2) in recalling sentences, 9 (37) in formulated sentences, 6 (9) in word classes 2-receptive, 4 (2) in word classes 2-expressive, 5 (5) in word classes 2-total, and 9 (37) in understanding spoken paragraphs (Dist. Ex. 24 at p. 52). The report indicated that overall, results of language testing were variable and the student "had some difficulty" with both receptive and expressive language tasks (Dist. Ex. 24 at p. 31).

The Behavior Rating Inventory of Executive Functions (BRIEF) assessed the student's executive functions, with the parents and teacher serving as informants (Dist. Ex. 24 at p. 54). Based upon parent and teacher reports, the behavioral regulation index T-scores were 71 and 70 respectively and the metacognitive index T-scores were 76 and 55 respectively (Dist. Ex. 24 at p. 54). The global executive composite T-score of 76 (parent) and the T-score of 61 (teacher) fell in the significant and at-risk range respectively (id.). According to the psychologist, based on the parents' responses, the student's elevated scores suggested global difficulties with self-regulation, inhibiting impulses, modulation of emotions, flexibility to problem-solve, sustaining working memory, initiating, planning, organizing, and self-monitoring (id. at pp. 36-37). The psychologist

noted that according to the teacher's responses, overall the student's scores were within age expectancies, but he had elevated scores in the areas of inhibition of behaviors and emotional control (id. at p. 27).

With respect to the Behavior Assessment System for Children-Second Edition (BASC-2): teacher form, the student's scores of 58 in hyperactivity, 65 in aggression, 59 in conduct problems, and an externalizing composite score of 61 fell within the average to at-risk range (Dist. Ex. 24 at pp. 54-55). With respect to the BASC-2 parent form, the student's scores of 80 in hyperactivity, 75 in aggression, 73 in conduct problems, and an externalizing composite score of 79 all fell within the clinically significant range (id.). Both of the internalizing composites, based upon the completed teacher and parent forms, fell within the average range, and the school problems composite score, based upon teacher ratings, fell within the average range (id. at p. 55). The adaptive skills composite score, based upon the teacher ratings, fell within the average range, but fell within the clinically significant range based on parent ratings (Dist. Ex. 24 at p. 55). According to the psychologist, in the area of social/emotional/behavioral functioning, overall results of the BASC-2 completed by the parents revealed significant concerns in the area of hyperactivity, aggression, conduct problems, depression, attention problems, and atypicality (id. at p. 40). The psychologist noted that the BASC-2 completed by the special education teacher did not reveal elevated scores in any area (id.).

The neuropsychological report indicated the student had received diagnoses of fetal alcohol effects, ADHD, reactive attachment disorder, mood dysregulation, a developmental coordination disorder, executive dysfunction, and a reading disorder (Dist. Ex. 24 at p. 45). The report indicated the student was presenting with symptoms of an anxiety disorder related to academics and socialization, and thus an anxiety disorder as defined in the Diagnostic and Statistical Manual of Mental Disorders, 4th Edition, should continue to be ruled out (id.).

The evaluating psychologist made numerous recommendations including interventions and supports in medical, therapeutic, and academic areas (Dist. Ex. 24 at pp. 45-49). The psychologist recommended cognitive behavior therapy, an adoption support group, a structured reading program using a multisensory approach, remediation to assist with executive functions and organizational skills, in-school counseling to develop social skills and reduce anxiety, and classroom accommodations including visual and verbal cues and refocusing techniques, among others (id.).

In addition to the neuropsychological evaluation report, the June 2012 CSE reviewed a June 12, 2012 letter from the student's psychiatrist (Parent Ex. ZZZ at pp. 1-3; Dist. Ex. 24 at pp. 15-16).<sup>9</sup> The psychiatrist indicated that as the product of the student's diagnoses and pre-adoption history, the student exhibited a high degree of anxiety, depression, impulsivity, and lack of executive functions (Dist. Ex. 24 at p. 15). The psychiatrist noted that "in a mainstream school with a large student population without the benefit of constant supervision," the student felt ostracized and resorted to emotional outbursts and aggressive behavior (id.). According to the psychiatrist, these behaviors had contributed to the student's "inability to learn and process his school work at an appropriate pace" (id.). The psychiatrist indicated the student required a "small, safe educational setting that helps him feel included," along with prompting and intensive

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<sup>9</sup> The psychiatrist indicated the student had been under his care for the past three years (Dist. Ex. 24 at p. 5).

interventions including monitoring of social skills and "chronic" reminders and repetition (id.). The psychiatrist recommended for the 2012-13 school year that the student be placed in a private school with a small teacher to student ratio to assist the student academically and socially (id. at pp. 15-16).

The June 2012 CSE also reviewed the student's third grade (2011-12) report card that described the student's functioning and progress for the fall and winter marking periods (Dist. Exs. 24 at p. 5; 27 at p. 5). With respect to trimester one, the special education teacher reported that student had a strong work ethic and a desire to be successful (id. at p. 6). The special education teacher noted that within the small, structured class setting the student's behavior was "generally appropriate given regular mild to moderate verbal prompting" and he had very rare instances of physically acting out (id.). The special education teacher further reported the student knew appropriate strategies for interacting with adults and peers and was working on applying those skills in a consistent manner (id.). According to the report the student looked to connect with others, had friends in class and other classrooms, and was working on self-discipline, following class rules, following directions, staying in the assigned area, and raising his hand (id.). The special education teacher indicated that the student's ability to manage and organize third grade materials was at grade level (id.). With respect to academics, the student was working on meeting grade level standards in reading, and was using some comprehension strategies, responding appropriately to what was read and discussed, and showing understanding of narratives above his reading level (id.). The student read 216/220 Dolch sight words, which was an improvement from September 2011, and wrote relevant and thorough written responses to reading, as well as continued to work on decoding novel words and reading fluency (id.). The report indicated that the student's writing was at grade level (id.). According to the report, the student generated ideas appropriate to the task; his ideas were expressed in two of three genres; he understood purpose and audience; used appropriate grammar, punctuation, and capital letters; completed simple sentences; and was working on meeting grade level standards in spelling (id.). The student's math skills were at grade level (id.). The student solved addition problems with three digit numbers to 400 using two strategies accurately, solved two and three digit subtraction problems to 300 using two strategies accurately, compared and ordered numbers to 1000, and worked on determining what operation to use when completing story problems (id.). According to the report, the student met grade level standards in science and social studies (id.).

With respect to trimester two, in the area of behaviors that promote learning, the special education teacher rated student as approaching grade level expectations regarding demonstrating appropriate behaviors, obeying the school and class rules, demonstrating self-discipline, working cooperatively, listening respectfully, and following directions (Dist. Ex. 24 at p. 5). The report indicated the teacher rated the student as exceeding grade level expectations in the areas of taking pride in work and demonstrating desire to learn, and meeting grade level expectations in responding to feedback, demonstrating organizational skills, working independently, and completing class work and homework (id.). In writing, the teacher rated the student as meeting grade level expectations in several areas including communicating ideas in different genres, generating ideas, capitalization, and presentation; exceeding grade level expectations in effort; and approaching grade level standards in spelling (id.). In math, the teacher rated the student as meeting grade level expectations in all areas including knowing content, understanding concepts, applying skills, and demonstrating effort (id.). With respect to reading, the student approached grade level expectations in the areas of overall comprehension, vocabulary, and fluency; met grade



level expectations in applying comprehension strategies, listening skills, and communicating effectively; and exceeded expectations in effort (id.).

According to the second trimester report card, the student improved his ability to raise his hand and work independently, produced high quality work and took pride in his work (Dist. Ex. 24 at p. 7). According to the special education teacher report, the student's behavior continued to be generally appropriate given the small, structured class setting with regular mild to moderate verbal prompting (id.). As in the first semester, the special education teacher reported that the student only had very rare instances of physically acting out (id.). The student continued to work on consistent application of appropriate strategies for interacting with adults and peers, continued to look to connect with others, and maintained his friendships including appropriately greeting friends in the hallway (id.). According to the report, the student managed and organized his class materials (id.). The report indicated that the student worked mostly on following class rules and regulating his emotional state and impulses, so they would not interfere with academic demands or social relationships (id.). With respect to academics, the student was at a Fountas and Pinnell independent level "M" which was an improvement from September and he continued to work on meeting grade level standards in reading (id.). The student improved in his ability to answer comprehension questions and generally responded appropriately to what was read and discussed; he mastered 220 Dolch sight words, and continued to write quality reading responses (id.). In writing, the student continued to generate ideas and understand purpose/audience, use end punctuation and capital letters to start sentences, and use appropriate grammar regarding singular/plural form, pronouns, adjectives, and simple sentences (id.). The report indicated that the student continued to have an affinity for math, but needed more encouragement to complete problems and take risks with new topics to build confidence (id.). The report indicated the student continued to meet grade level standards in science and social studies (id.).

As mentioned above, the CSE convened on June 18, 2012 to conduct the student's annual review and relied upon the aforementioned evaluative information in order to recommend special education programs and services for the student (Dist. Ex. 27 at pp. 1, 5-6). To address the student's academic, social/emotional/behavioral, language, and motor needs, the June 2012 CSE recommended that the student remain in his current 8:1+2 special class emotional support placement with related services of three 30-minute sessions per 6-day cycle of counseling in a group, four 30-minute sessions per 6-day cycle of speech-language therapy in a group, and one 30-minute session per 6-day cycle of OT in a group for the 2012-13 school year (id. at pp. 1, 4, 16).<sup>10</sup> The June 2012 IEP also provided the student with numerous management resources to address his identified needs (id. at p. 12).

Thus, the June 2012 CSE had knowledge of the student's overall improvement in academic, language, social/emotional, and behavioral skills during the 2011-12 school year (see Dist. Exs. 24 at pp. 1-55; 31). Accordingly, taking into account the student's progress, the June 2012 CSE's recommendations with respect to the student's counseling, social skills, speech-language therapy, and reading services were appropriate to address the student's needs.

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<sup>10</sup> One of the counseling and speech-language sessions were push-in services the student received in the classroom setting (Dist. Ex. 27 at p. 16).

The hearing record does not support the parents' allegations that the June 2012 CSE's continuation of counseling and social skills instruction at the same duration and frequency as provided by the district during the 2011-12 school year was inappropriate based on reports of the student's wetting, anxiety, being bullied, social isolation, feeling ostracized, loss of self-esteem, and suicidal ideation during the 2011-12 school year. With respect to incidents of wetting, the special education teacher testified that it was "not an ongoing problem" for the student and that she responded to the parents' concerns by prompting the student to use the bathroom and paying attention to activities he was unwilling to disengage from to use the bathroom (Tr. pp. 927-28). The speech-language pathologist testified that the special education teacher placed the student on a toileting schedule to assist the student in not waiting until the last minute to use the bathroom (Tr. pp. 621-22). With respect to anxiety, the director of special education and the principal testified that the student did not exhibit anxiety in the school setting (Tr. pp. 160, 1506). The speech-language pathologist testified that the student did not exhibit anxiety or suicide ideation within the school setting (Tr. p. 535). With respect to bullying, testimony of the director of special education, special education teacher, school psychologist, and principal all show the student sometimes experienced conflicts with classmates, but upon investigation bullying allegations were not substantiated, including no evidence of a pattern of bullying (Tr. pp. 188-89, 869-70, 1416, 1585, 1660-62). With respect to the parents' assertions regarding socialization, the school psychologist testified the student had charisma, an interesting personality, and was liked by peers (Tr. pp. 1336-37). The school psychologist further testified that he did not believe the student was isolated or that his peers did not like him (Tr. p. 1336-37). The principal testified the student was social and his classmates were social with the student (Tr. p. 1506). As stated previously, a review of the student's IEP annual goal progress report and report card shows he benefitted from the social skills instruction and counseling services he received during the 2011-12 school year (*see* Dist. Ex. 32; Parent Ex. P). Accordingly a continuation of counseling and social skills instruction at the same frequency and duration for the 2012-13 school year was reasonably calculated to enable the student to receive educational benefits.

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

The parents argue that the IHO erred in finding that the June 2012 CSE properly determined that the student did not require an FBA and a BIP.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; *see* 8 NYCRR 200.4[d][3][i]; *see also* *E.H. v. Bd. of Educ.*, 2009 WL 3326627, 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. v. New York City Dep't of Educ.*, 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; *Tarlowe*, 2008 WL 2736027, at \*8; *W.S.*, 454 F. Supp. 2d at 149-50). 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 includes, 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 regulation, an FBA shall be based on multiple sources of data including, but not limited to, "information obtained from direct observation of the student, information from the student, the student's teacher(s) and/or related service provider(s), a review of available data and information from the student' record and other sources including any relevant information provided by the student's parent" (8 NYCRR 200.22[a][2]). An FBA must also be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]).

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.).

In preparation for the June 2012 CSE meeting, the district did not conduct an FBA nor did the CSE develop a BIP for the student (see Parent Ex. L; Dist. Ex. 27 at p. 4).<sup>11</sup> The CSE indicated in the June 2012 IEP that the student required "strategies, including positive behavioral interventions, supports and other strategies to address behaviors that impede[d] the student's learning or that of others" (Dist. Ex. 27 at p. 13). During the June 2012 CSE meeting the parents asked the district about conducting an FBA and developing a BIP for the student (Parent Ex. L at p. 1; Dist. Ex. 27 at p. 4). As set forth in the June 2012 IEP and prior written notice, the CSE determined that the current structure and supports in the recommended 8:1+2 special class emotional support placement addressed the student's needs, and noted that an FBA and a BIP would be considered "should the student demonstrate the need beyond what is provided within the emotional support class" (id.). In this instance, considering the student continued to exhibit behaviors that interfered with learning during the 2011-12 school year, even though the CSE believed those behaviors were being addressed by the supports in place in the 8:1+2 special class emotional support placement, the district should have conducted an FBA (compare 8 NYCRR 200.4[b][1][v], with 200.22[b][1] [while a CSE is required to conduct an FBA in an initial evaluation for students who engage in behaviors that impede learning, a CSE must consider the development of a BIP for students who engage in behaviors that impede learning "despite consistently implemented general school-wide or classroom-wide interventions"]]). However, even considering the CSE's decision not to conduct an FBA as a procedural violation, in this

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<sup>11</sup> Although the hearing record contains an FBA and BIP developed in November 2010, these documents were not implemented during the student's 2011-12 or 2012-13 school years nor were they considered during the preparation of the student's June 2012 IEP (Parent Ex. CCCC; Dist. Ex. 27 at p. 5). Therefore, a discussion of the November 2010 FBA and BIP has little, if any, relevance to an analysis of the June 2012 IEP.

instance, the lack of an FBA does not rise to the level of a denial of a FAPE because, as discussed below, the June 2012 CSE had sufficient evaluative information regarding the student's behaviors and the June 2012 IEP adequately identified and described the student's behavioral needs (R.E., 694 F.3d at 190 [the “purpose of an FBA is to ensure that the IEP's drafters have sufficient information about the student's behaviors to craft a plan that will appropriately address those behaviors”]).

A behavior log maintained by the student's special education teacher during the 2011-12 school year reflected data on the frequency of the student exhibiting verbal aggression, physical aggression, as well as the need for staff to physically intervene with the student, the frequency with which the student completed all his work, and the level of prompting required (Tr. pp. 701, 709, 1124, 1126; Dist. Ex. 31). According to the June 2012 IEP, instances of the student exhibiting verbal or physical aggression had decreased, and were "rare" at the time of the June 2012 CSE meeting (Dist. Ex. 27 at pp. 3, 9; see Dist. Ex. 31). Information in the IEP and the behavioral data collected by the special education teacher reflected that during the 2011-12 school year, the student exhibited "rare" instances of physical aggression in class since September 2011, and staff had not used physical interventions with the student since February 2012 (Dist. Ex. 31; see Dist. Ex. 27 at pp. 2, 10). The IEP indicated that "the movement away from physical aggression to more appropriate self-regulating strategies is a very significant accomplishment for the student" (Dist. Ex. 27 at p. 10). According to the IEP, the student easily accepted both natural and staff issued consequences and was responsive to authority the majority of the time, and in the classroom the quality and depth of his social skills increased during the 2011-12 school year (id. at pp. 9, 11). The IEP indicated that in the past during behavioral outbursts the student had misused materials, but had not demonstrated difficulties in this area since the fall, and was respectful of school and personal items (id. at p. 11).

Information about the student's interfering behaviors as of June 2012 included a review of the April 2012 private neuropsychological evaluation report, which identified the student's difficulty with self-regulation, impulsivity, modulating emotions, planning and organizing (Dist. Exs. 24 at p. 44; 27 at p. 2). Additionally, the May 2012 OT evaluation report—which was reviewed by the CSE—indicated that the student exhibited a sensory modulation disorder and that the student's self-regulation deficit resulted in difficulties with impulsivity, attention, focus, and following directions (Dist. Exs. 24 at pp. 9-10, 12-13; 27 at p. 3). A June 12, 2012 letter from the student's psychiatrist, also reviewed by the CSE, indicated that the student engaged in emotional outbursts and aggressive behavior (Dist. Exs. 24 at p. 15; 27 at p. 2).<sup>12</sup> In testimony, the special education teacher identified the student's behaviors during the course of the 2011-12 school year as verbal and physical aggression, low frustration tolerance, and impulsivity; she also indicated that the student exhibited difficulties with self-regulation, following rules, and maintaining spatial boundaries (Tr. pp. 822-24; see Dist. Ex. 31).<sup>13</sup>

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<sup>12</sup> The June 2012 IEP noted that the psychiatrist who authored the letter had neither observed the student in nor spoken with staff at the student's current school setting (Dist. Ex. 27 at p. 2).

<sup>13</sup> The district suspended the student due to his physical aggression for two days in October 2011 (Parent Ex. NN at pp. 1-2).

The June 2012 IEP identified the student's behaviors as conflicts with peers (issuing "commands" and taking the role of the teacher), impulsivity (blurting out thoughts or judgements), disrespectful behavior ("huffing" or eye rolling when issued a directive from staff), difficulty during transitions to different settings such as lunch/hallway (running, jumping, intentionally falling down, becoming limp, and using a loud voice), inappropriate social interactions (e.g., verbal or physical aggression), decreased ability to appropriately express frustration, boredom, and silliness, as well as difficulty maintaining self-regulation (becoming "hyper," agitated, or losing focus) (Dist. Ex. 27 at pp. 2-3, 9-11).

Regarding situations in which the student's interfering behaviors occurred, the June 2012 IEP indicated that conflict usually stemmed from the student's perception of rules and other peoples' failure to conform to the rules or receive appropriate consequences for breaking a rule (Dist. Ex. 27 at pp. 3, 11). The IEP further indicated that when the student misinterpreted a social event, conflicts would often occur (*id.* at p. 11). According to the IEP, interacting with peers demonstrating low level social skills decreased the student's ability to interact appropriately (*id.* at p. 10). As stated above, transitions to different physical environments could be dysregulating for the student (*id.* at p. 11). The IEP indicated that the student had decreased abilities to self-regulate in unstructured settings such as the lunchroom or playground, in the presence of certain sensory input such as people engaging in physical activity in his proximity and typical classroom noise, and when he personally engaged in physical activity (*id.* at pp. 10-11).

In sum, the CSE had a significant amount of information about the student's behavioral needs which it included in the June 2012 IEP. Furthermore, as discussed in detail below, a review of the June 2012 IEP demonstrates that it adequately addressed the student's social/emotional and behavioral needs, such that the lack of an FBA and BIP did not rise to the level of a denial of a FAPE (*F.L. v. New York City Dep't of Educ.*, 553 Fed. App'x 2, 6-7 [2d Cir. Jan. 8, 2014]; *M.W. New York City Dep't of Educ.*, 725 F.3d 131, 140-41 [2d Cir. 2013]; *R.E.*, 694 F.3d at 190).

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

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

(8 NYCRR 200.22[b][1]). If the CSE determines that a BIP is necessary for a student the BIP shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . . ; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness

of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR 200.22[b][4]).<sup>14</sup>

As mentioned above, the June 2012 CSE did not develop a BIP for the student (see Parent Ex. L; Dist. Ex. 27 at p. 4). Additionally, at the June 2012 CSE meeting, the CSE indicated that the student did not need a BIP and, further, that the current structure and supports in the recommended 8:1+2 special class emotional support placement addressed the student's needs (id.). In this instance, although the district met its regulatory obligation to consider whether the student's behaviors warranted a BIP, the district should have developed a BIP based on the student's interfering behaviors as documented in the hearing record during the preceding school year (see e.g., Dist. Ex. 31). However, assuming without deciding that the failure to develop a BIP constituted a procedural violation (even though it was considered), the lack of a BIP did not impede the student's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process, or cause a deprivation of educational benefits because, as discussed below, the June 2012 IEP, as a whole, identified the student's behavioral needs and included strategies for managing them (20 U.S.C. § 1415[f][3][E][ii]; see 34 CFR 300.513; 8 NYCRR 200.5[j][4]).

With respect to strategies used to improve the student's behavior, the June 2012 IEP reflected that related to classmate interactions the most common prompts provided to the student were to refrain from issuing "commands" to peers, to apologize when he violated a social expectation, and to use an appropriate voice level (Dist. Ex. 27 at pp. 9-10). The IEP indicated that staff avoided situations where the student would interact with peers who demonstrated low level social skills, which "has been an effective strategy in fostering social development" (id. at p. 10). To support the student's social language skills in unstructured settings, the classroom teacher provided "explicit, repeated instruction" including visual aids, and a classroom aide to accompany the student to those settings (id. at p. 9). The IEP noted that the most common prompts related to staff interactions were to refrain from disrespectful behavior such as huffing and eye rolling when issued a command or redirection from staff, to gain attention when help was needed on an assignment, and to promptly comply with a direction (id. at p. 10).

To assist the student during transitions to different environments, the June 2012 IEP reflected that staff provided verbal prompts including the expectations for transitioning; reminders about reward time, the value of punctuality, and consequences for inappropriate transitions; to attend to the timer; as well as directives to re-perform the physical transition using "walking feet"

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<sup>14</sup> The Official Analysis of Comments to the federal regulations explains that the decision regarding whether a student requires interventions such as a BIP rests with the CSE and is made on an individual basis (Consideration of Special Factors, 71 Fed. Reg. 46683 [August 14, 2006]). However, neither the IDEA nor its implementing regulations require that the elements of a student's BIP be set forth in the student's IEP. State guidance indicates that New York State regulations merely "require that a student's need for a BIP be documented in the student's IEP" ("Student Needs Related to Special Factors," Office of Special Educ. [April 2011], available at <http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf>). However, once a student's BIP is developed and implemented, "such plan shall be reviewed at least annually by the CSE or CPSE" (8 NYCRR 200.22[b][2]). Furthermore, "[t]he implementation of a student's [BIP] shall include regular progress monitoring of the frequency, duration and intensity of the behavioral interventions at scheduled intervals, as specified in the [BIP] and on the student's IEP. The results of the progress monitoring shall be documented and reported to the student's parents and to the CSE or CPSE and shall be considered in any determination to revise a student's [BIP] or IEP" (8 NYCRR 200.22[b][5]).

or a quieter voice (Dist. Ex. 27 at p. 11). The IEP also indicated that the teacher sometimes provided mild prompting to the student to assist him in accepting schedule changes that resulted in his reward time being changed (id. at p. 11).

According to the June 2012 IEP, to address the student's physical aggression, the teacher implemented de-escalation techniques including talking, withdrawing the student from the situation, having the student suck on a lozenge, and redirecting his attention to a suggested book or preferred task (Dist. Ex. 27 at p. 10). Additionally, the IEP indicated that calling home as a de-escalation strategy was "helpful" (id. at p. 3).

The June 2012 IEP indicated that staff provided the student with moderate support when he became dysregulated due to feelings of frustration, boredom, and silliness, and planned to reduce situations in which those feelings may be a "detriment" (Dist. Ex. 27 at p. 10). Specific supports related to those emotions described in the IEP included providing explicit instruction in strategies to express academic frustration and seek help, occupying the student with engaging activities during "down" time, and intervening early to prevent silly behavior from becoming excessive (id.). Other supports to improve the student's self-regulation included providing the student with a variety of sensory-based breaks built into his day, including several proprioceptive or deep pressure-based activities to assist the student in maintaining a calm and organized level of arousal (id. at p. 12). The IEP indicated the student had access to a therapy ball within the classroom to obtain vestibular and proprioceptive input and whenever he needed to stay on task during tabletop activities (id. at p. 12). The IEP also indicated the student had a weighted vest, which he wore every other hour throughout the school day, and that the district provided the student with a weighted ball and various deep-pressure calming activities to assist him in regulating his arousal level so that he may better attend in class (id.).

The June 2012 IEP also identified the student's continued areas of need (Dist. Ex. 27 at p. 11). According to the IEP, the student needed to increase appropriate social conversation skills in less-structured settings and with less-skilled peers (id.). He also needed to increase his ability to comply with staff directives and refocus without eye rolling, huffing, or making other rude gestures (id.). According to the IEP, the student also needed to increase his ability to appropriately complete physical transitions to various school environments (id.). The IEP indicated the student needed to continue to use de-escalation strategies to avoid physical and verbal aggression about, or directed at, peers or staff (id.). The IEP further provided that the student needed to increase his ability to self-regulate in the presence of heightened auditory, visual, and physical sensory input (normal classroom noise, multiple student movement, personal movement) (id.). Additionally, the IEP indicated that the student needed to continue to improve emotional self-regulation when experiencing anger, frustration, boredom, and silliness, and that the student needed to increase the use of self-calming strategies and incorporate those strategies throughout his day so he could learn to self-regulate (id. at pp. 11-12).

For the 2012-13 school year, the June 2012 CSE recommended an 8:1+2 special class emotional support placement (Dist. Ex. 27 at pp. 4, 16). Consistent with the strategies provided in the June 2012 IEP, the special education teacher of the emotional support program during the 2011-12 school year testified that within the 8:1+2 emotional support program the "primary focus [was] behavior" and the student was provided a quiet classroom environment with limited visual input, a hierarchy of prompts/cues, arranged seating and use of dividers, and a posted predictable

schedule (Tr. pp. 709-11, 824-27). Students in the emotional support program received push-in counseling and speech-language therapy, which helped the student identify and process emotions (Tr. pp. 824, 839-40). According to the special education teacher, the emotional support program offered students various levels of teacher support in the form of three adults: the special education teacher, a teaching assistant, and a teaching aide (Tr. p. 712). The special education teacher testified that she provided instruction to the student regarding explicit labeling of his behaviors and provided the student with cues, pre-teaching, and re-teaching to assist with self-regulation (Tr. pp. 828-30, 840, 1055-56).

According to the special education teacher, at the beginning of the 2011-12 school year the student needed approximately five physical interventions for his personal safety, and she prioritized physical aggressiveness as a behavior that "really need[ed] to be addressed" (Tr. pp. 835-86).<sup>15</sup> To address the student's physical aggression, the special education teacher stated that she took notes to identify what his "triggers" were, i.e. situations, people, or emotional states that elicited aggression in the student (Tr. pp. 837-39). Interventions included avoiding those situations when possible and if not, providing strategies to the student to handle those situations (e.g., removing himself from the situation, taking a break, providing the student with visuals of strategies) (Tr. pp. 838-42).

Additionally, in conjunction with the supports available in the 8:1+2 special class, the June 2012 CSE recommended that the student receive two push-in speech-language therapy sessions and two sessions of speech-language therapy in a separate location, one session of OT, and two push-in counseling sessions and one session of counseling in a separate location; all provided on a six-day cycle in a small group (Dist. Ex. 27 at pp. 4, 16).

To address the student's identified behavioral needs, the June 2012 IEP provided environmental, human, and material resources (Dist. Ex. 27 at p. 12). The IEP indicated the student needed predictable routines, a posted schedule, posted classroom rules, flexible seating, provision of a quiet and calm classroom with low visual and auditory input, the option to remain indoors for recess, storage of possible projectiles when not in use, allowance for flexibility in location

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<sup>15</sup> The special education teacher testified that the student did not have a formal BIP during the 2011-12 school year; however, the teacher maintained—on a daily basis—an academic behavior log from September 2011 through June 2012 regarding the student's behaviors (Tr. pp. 843, 846-55, 1092; Parent Ex. 31). The academic behavior log indicated that from September 2011 through January 2012, the student engaged in 37 instances of verbal aggression, 5 instances of physical aggression, and on 3 occasions staff provided physical intervention (Dist. Ex. 31 at pp. 1-2). From February through June 2012, the student engaged in 12 episodes of verbal aggression, 4 instances of physical aggression, and on 1 occasion staff provided physical intervention (Tr. pp. 889-90; Dist. Ex. 31 at pp. 3-5). Although instances of verbal and physical aggression are serious behaviors, particularly those that resulted in a need for physical intervention, the hearing record indicates that the 8:1+2 special class emotional support placement was effective in significantly reducing the frequency of the student's aggressive behaviors from the student's prior placement in a general education classroom with the support of ICT services (compare Dist. Ex. 31, with Parent Ex. TT). Additionally, the decrease in the frequency of the student's aggressive behaviors, to the extent that the student did not exhibit any instances of physical aggression during the three months prior to the June 2012 CSE meeting (Dist. Ex. 31 at pp. 4-5), supports the CSE's determination that the student's behaviors could be successfully managed with the supports in place in the 8:1+2 special class emotional support placement.



including temporary relocation to another room as a de-escalation technique, a posted daily work list, and allowance for short breaks between assignments (id.).

In addition, the June 2012 IEP provided the student with sequential and "as needed" teaching of rules/social skills, direct supervision during less structured time, supervision during de-escalation, monitoring for lack of self-regulation, early intervention at signs of dysregulation, a behavior management system, immediate labeled feedback of behavior, frequent monitoring for focus, assistance in apologizing, and determination of restorative tasks following inappropriate behavior (Dist. Ex. 27 at p. 12). The IEP further provided: assistance to the student to refrain from issuing commands to peers; assistance to use appropriate social conversation; a timer for physical transitions; cues to remain on task; assistance to evaluate work list and work volume; the least invasive prompts needed to stop or start a desired behavior; supervision during the writing down of homework assignments and assembly of materials; assistance with writing and spelling tasks; assistance with recognizing positive student attributes and student work production; supervision of special dietary needs during special events, snack time, and lunch time; assistance to appropriately interpret social events; and models of calmness and quietness (id.). The June 2012 IEP recommended a home-school communication log, social skill visuals, a behavior system, computer access for reward time, activities available during short breaks and down time (puzzles, creative materials, and novel books), a digital timer, a visual schedule, a word wall, a spelling reference dictionary, and graphic organizers for writing work (id. at p. 13).<sup>16</sup>

The June 2012 IEP also identified supplementary services/program modifications including refocusing and redirection, extra time to process and formulate responses, checks for understanding, asking the student to repeat directions back to the teacher, special seating arrangements, and preview/review of materials (Dist. Ex. 27 at pp. 16-17). Recommended supports for school personnel on behalf of the student included an OT consultation across all settings including physical education for 30 minutes twice monthly (id. at p. 17). The IEP provided for testing accommodations on all examinations including extended time, locations with minimal distractions, listening section repeated more than standard number of times, pacing, refocusing, and redirection (id. at p. 18).

Additionally, the June 2012 IEP included approximately 10 annual goals to address the student's social/emotional/behavioral functioning and conversational skills (Dist. Ex. 27 at pp. 14-16). The annual goals targeted several skills including fostering positive feelings, identifying methods to address overstimulation/lack of focus, communicating feelings, increasing awareness of others' verbal and nonverbal behavior, talking and redirecting to a preferred task rather than engaging in physical behaviors to express feelings of anger towards adults and peers, following directions, and developing proactive social and conversational skills (id.). And, as set forth above in detail, the student made academic and social/emotional/behavioral progress while in the 8:1+2 special class emotional support placement from January 2011 through the 2011-12 school year.

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<sup>16</sup> The June 2012 IEP indicated that the student had significant delays in language, motor, and behavioral skills as well as attention, which inhibited his progress in the general education curriculum (Dist. Ex. 27 at p. 13). The IEP indicated that while the student needed strategies including positive behavioral interventions and supports to address behavior that impeded his learning or that of others, he did not require a BIP (Dist. Ex. 27 at p. 13).

In conclusion, the June 2012 CSE's failure to conduct an FBA and develop a BIP does not in this instance, rise to the level of a denial of a FAPE because the June 2012 IEP otherwise identified and addressed the student's problem behaviors with appropriate supports and strategies as described above (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] [holding that so long as an IEP sufficiently identifies the student's behavioral impairments, and includes strategies for managing them, failure to develop a BIP will not rise to the level of a denial of a FAPE]); F.L., 553 Fed. App'x at 6-7; M.W., 725 F.3d at 140-41; R.E., 694 F.3d at 190; A.C., 553 F.3d at 172-73). Further, to the extent that the Second Circuit has considered procedural violations cumulatively (see L.O. v. New York City Dept. of Educ., 822 F.3d 95, 123 [2d Cir. 2016]), or considered the presence of procedural violations as informative of an IEP's substantive adequacy (see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 80-81 [2d Cir. 2014]), the lack of an FBA and a BIP are the only potential procedural violations in this matter and, as discussed above, the hearing record supports finding that they did not constitute or contribute to a denial of FAPE for this student.

## **VII. Conclusion**

Having determined that the evidence in the hearing record supports the IHO's determination that the district offered the student a FAPE for the 2012-13 school year, there is no need to consider whether the student's unilateral placement at Winston Prep was appropriate or whether equitable considerations support the parents' request for relief (see Burlington, 471 U.S. at 370; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

I have considered the parties' remaining contentions and find them to be without merit.

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
July 8, 2016**

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**STEVEN KROLAK  
STATE REVIEW OFFICER**