The University of the State of New York

The State Education Department
State Review Officer
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No. 17-020

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

Appearances:
Thivierge & Rothberg, PC, attorneys for petitioner, Randi M. Rothberg, Esq., of counsel

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, Brian Davenport, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her son's tuition costs at the IVDU School (IVDU) for the 2014-15 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

At the time of the 2014-15 school year at issue, the student was 18 years old (see Dist. Ex. 1 at p. 1). The information in the hearing record pertaining to the student's educational history is sparse, yet it does indicate that the student began attending IVDU in September 2011 (Dist. Ex. 7).

A CSE convened on June 11, 2014, to develop the student's IEP for the 2014-15 school year (Dist. Ex. 1 at pp. 1, 11). Attendees at the June 2014 CSE meeting included a district school psychologist (school psychologist), a regular education teacher, and, by telephone, the parent, the student's IVDU special education teacher, and an advocate (see Tr. pp. 14-15; Dist. Ex. 1 at p. 14). Finding the student eligible for special education and related services as a student with a learning

disability, the June 2014 CSE recommended a program consisting of a 15:1 special class placement in a community school, as well as related services of two 30-minute sessions per week of individual occupational therapy (OT), two 30-minute sessions per week of individual counseling, one 30-minute session per week of counseling in a group (3:1), and three 30-minute sessions per week of individual speech-language therapy (Dist. Ex. 1 at pp. 1, 7-8).[1] The IEP indicated that the student would participate in the same State and district-wide assessments that were administered to regular education students (id. at p. 10). The CSE also provided the student with testing accommodations including extended (double) time, separate location/room in a small group, and directions read and reread aloud and questions read aloud except on tests of reading comprehension (id. at p. 9). Furthermore, the June 2014 IEP described the student's transition needs and included post-secondary goals and a coordinated set of transition activities (id. at pp. 3, 9).

By prior written notice dated June 23, 2014, the district summarized the special education placement and related services recommended in the June 2014 IEP for the 2014-15 school year, and identified the evaluative information relied upon by the CSE and other options considered (Dist. Ex. 2 at pp. 2-3). In a school location letter dated June 23, 2014, the district identified the public school site to which the district assigned the student to attend for the 2014-15 school year (id. at p. 1). On September 6, 2014, the parent executed an enrollment agreement for the student's attendance at IVDU during the 2014-15 school year (Parent Ex. F).

A. Due Process Complaint Notice

The parent filed a due process complaint notice on January 28, 2015 (Parent Ex. A at p. 1). Thereafter, the parent submitted an amended due process complaint notice on February 18, 2016, subsequent to the first hearing date (Parent Ex. J at p. 1; see Tr. pp. 54-55).[2] In the amended due process complaint notice, the parent asserted that the district failed to develop an IEP that was reasonably calculated to provide the student with educational benefits for the 2014-15 school year (Parent Ex. J at p. 2).

Initially, the parent claimed that the June 2014 CSE "may have not been duly constituted" and that the signature page of the June 2014 IEP did "not include a signature for the district representative" (Parent Ex. J at p. 2). The parent next asserted that the district failed to administer necessary evaluations "that could form the basis for the development of an appropriate IEP," and that the student's improvements in math and reading should have "caused the IEP team to administer new evaluations," furthermore, the parent claimed that the June 2014 CSE failed to

[1] The student's eligibility for special education programs and related services as a student with a learning disability is not in dispute (see 34 CFR 200.8[10]; 8 NYCRR 200.1[zz][6]).

[2] The IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[c][2][E][i][I]; [f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][i][b]. Here, the parent sought to amend the due process complaint notice more than a year after the original complaint was filed, and after the district had rested its case (Tr. pp. 54-55, 64). Inexplicably, the IHO allowed the amendment to the due process complaint notice (Tr. p. 64). However, as the district did not object to the amendment of the due process complaint at the hearing, and as they do not now raise this as an issue, any argument relating thereto has been waived (Tr. p. 64).

administer new evaluations to determine the student's functioning after it "changed [the student's] recommendation from alternate assessment to standardized assessment" (id.). The parent also argued that the CSE should have administered a functional behavioral assessment (FBA) to determine if a behavioral intervention plan (BIP) was necessary to address the student's "socially inappropriate behavior" (id.). Next, the parent claimed that the CSE "failed to check the appropriate boxes on [the student's] IEP," and that the IEP did not contain all necessary information regarding the student's needs (id.). Specifically, the parent asserted that the IEP did not provide the student's reading decoding and reading comprehension levels (id. at p. 3). The parent next alleged that the management needs section of the IEP was incomplete (id. at p. 2).

The parent further claimed that the annual goals developed for the student were not appropriate or sufficiently challenging (id.). In particular, the parent contended that the IEP included a combined reading and math goal in the IEP that was not appropriate because it contradicted other information in the IEP regarding the student's functional ability in math (id. at p. 3). The parent also contended that the counseling goals did not fully address the student's issues with social/emotional functioning (id. at p. 2). The parent also argued that the IEP did not contain vocational goals despite the postsecondary goals referencing vocational training (id.). Finally, the parent maintained that the program recommendation for a 15:1 special class was not appropriate for the student because such a placement would not provide the amount of redirection and refocusing required by the student, and the IEP failed to identify how the 15:1 special class would address the student's "academic and social/emotional deficits" (id. at pp. 2-3).

For relief, the parent requested that the IHO order the district to "directly pay her son's tuition to [IVDU] and/or reimburse her for [the costs of her son's] tuition at [IVDU] for the 2014-2015 school year" (Parent Ex. J at p. 3).

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing, which began on June 4, 2015 and concluded on May 25, 2016, after two hearing days (see Tr. pp. 1-131). In a decision dated January 25, 2017, the IHO concluded that the district had offered the student a FAPE for the 2014-15 school year (IHO Decision at pp. 8-10).[3] The IHO first determined that the parent's claims that the CSE was

[3] The length of time it took the IHO to complete the impartial hearing and issue a decision in this case is of particular concern. When a parent files a due process complaint notice, the impartial hearing or prehearing conference must commence within 14 days of the conclusion of the resolution period (8 NYCRR 200.5[j][3][iii][b][1]-[4]). The IHO is required to render a decision not later than 45 days after the expiration of the resolution period (34 CFR 300.510[b], [c]; 300.515[a]; 8 NYCRR 200.5[j][5]), unless an extension has been granted at the request of either party (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5][i]). However, extensions may only be granted consistent with regulatory constraints, the IHO must ensure that the hearing record includes documentation setting forth the reason for each extension, and each extension "shall be for no more than 30 days" (8 NYCRR 200.5[j][5][i]). Absent a compelling reason or a specific showing of substantial hardship, "a request for an extension shall not be granted because of school vacations, a lack of availability resulting from the parties' and/or representatives' scheduling conflicts, avoidable witness scheduling conflicts or other similar reasons" (8 NYCRR 200.5[j][5][iii]). Moreover, an IHO "shall not rely on the agreement of the parties as a basis for granting an extension" (id.). If an IHO has granted an extension to the regulatory timelines, State regulation requires that the IHO must issue a decision within 14 days of the date the IHO closes the hearing record (8 NYCRR 200.5[j][5]). Pursuant to State regulation, an IHO shall determine when the record is closed and notify the parties of the date the record is closed (8 NYCRR 200.5[j][5][v]). In this case, from the time the first due process

not properly constituted, that the district failed to administer necessary evaluations, that the student's behaviors warranted an FBA, that the annual goals contained in the IEP were not appropriate or sufficiently challenging, and that the IEP did not contain vocational goals, were not supported by the hearing record (id. at p. 8). The IHO explained that the IVDU special education teacher who participated in the June 2014 CSE meeting was "highly involved in the construction of the goals," and that the parent did not express any disagreement with the IEP, except with regard to class size (id. at pp. 8-9). Furthermore, the IHO found the hearing record established that the parent's objections to the IEP were "solely [related] to the class size of the recommended program," and that the parent only sought a "smaller classroom" in order to address the student's issues transitioning from class to class, which the IHO determined was not identified as a need in the IEP or in other evidence in the hearing record (id. at p. 9). The IHO also found that there was no testimony by the parent's witnesses regarding the CSE meeting other than the parent's own disagreement with the recommended class size, and that the parent did not offer any other testimony or evidence to rebut the testimony of the district's witness as to the appropriateness of the recommended program (id.). Therefore, the IHO found that the student's program for the 2014-15 school year was appropriate (id.).

After finding that the district's recommended program for the 2014-15 school year was appropriate, the IHO also addressed the appropriateness of the unilateral placement at IVDU (IHO Decision at p. 10). The IHO determined that IVDU was not appropriate, as it was "not the least restrictive environment" for the student (id.).[4] The IHO further addressed equitable considerations, finding that they would not bar an award of tuition reimbursement because the district offered no evidence that would preclude such an award and the hearing record reflected cooperation by the parent (id. at pp. 11-12).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO incorrectly found that the district offered the student a FAPE for the 2014-15 school year, that IVDU was not an appropriate unilateral placement, and erred in not awarding reimbursement for the costs of the student's placement at IVDU. Initially, the parent argues that the IHO, without discussion, dismissed several claims

complaint notice was filed on January 28, 2014, it took almost two years for a decision to be issued, and while the impartial hearing covered only two days, there was almost a year between the first and second hearing dates (see IHO Decision at p. 12; Tr. pp. 3, 61; Parent Ex. A.). The IHO explained that the hearing was scheduled to continue on September 9, 2015 based on the availability of witnesses from IVDU, and that the hearing was thereafter "adjourned at the request of the parties" (Tr. pp. 55-56, 61). The hearing was apparently adjourned several times after September 9, 2015, as the second hearing date did not occur until May 15, 2016, but the reasons for the adjournments are unclear, other than to accommodate the submission of the amended due process complaint notice, as the IHO failed to include any documentation relating to the extension requests in the hearing record as required by State regulations (8 NYCRR 200.5[j][5][i], [iv], [vi][c]). In addition, the IHO did not explain why the record close date occurred more than seven months after the hearing concluded. Furthermore, although the IHO determined the record to be closed on January 4, 2017, she issued her decision 21 days after the record close date, in violation of State regulation (8 NYCRR 200.5[j][5]). The IHO is reminded that she is required to abide by the regulatory requirements governing the timelines within which impartial hearings must be conducted and IHOs must issue decisions.

[4] Additionally, the IHO noted that the parent's other children attend private schools, even though she noted that such considerations "may seem speculative . . . and [are] not necessarily [germane] to this determination" (IHO Decision at pp. 10-11).

raised by the parent, including whether the district conducted sufficient evaluations, including an FBA, whether the goals developed by the CSE were appropriate or sufficiently challenging, and whether the IEP contained vocational goals. The parent also claims that the IHO improperly dismissed the parent's challenge that the recommendation for a 15:1 special class placement was not appropriate for the student. The parent contends that the IHO's determinations on these issues did not apply the correct legal standards and that they were not supported by the hearing record.

Next, the parent contends that the district failed to evaluate the student sufficiently because no new evaluations were conducted after it was determined that the student had made dramatic improvements in reading and math and was "'moved from alternate assessment to diploma bound' status." The parent also contends that the district failed to complete an FBA for the student despite a 2012 evaluation revealing "scores within the [c]linically [s]ignficant range" in a number of areas. The parent further claims that the district failed to include appropriate annual goals in the June 2014 IEP and failed to develop any vocational goals for the student. Specifically, the parent notes that the June 2014 IEP contained a "long reading and math [g]oal" that should have been listed as two distinct goals and that one of the goals was a "'very basic'" kindergarten-level goal that did not reflect the student's functional ability. The parent also claims that the IEP included a math goal that the student would have mastered before the start of the 2014-15 school year.

Next, the parent claims that the IHO improperly shifted the burden to the parent to show that the student's placement in a 15:1 special class was not appropriate for the 2014-15 school year. The parent contends that it was the district's burden to prove that its recommendations for the student were appropriate, but that in any event, the hearing record included evidence that a 15:1 special class was too large for the student. Furthermore, the parent asserts that the IHO incorrectly "found . . . no evidence in the record [related to the student's] difficulty transitioning between classrooms." In addition, the parent suggests that the district's recommendation was not appropriate to meet the student's needs because the school psychologist could not recall whether the 15:1 special class recommended by the CSE was "a Regents diploma bound program," and that she was unclear what information "a high school would need concerning an entering student," the number of credits the student had "acquired as of the time of the IEP meeting," or the age until which the student could attend high school.

The parent also argues that the student's placement at IVDU was appropriate for the 2014-15 school year, that the IHO erred in finding that IVDU was not the student's least restrictive environment, and that the IHO ignored the evidence in the hearing record demonstrating how IVDU met the student's needs. For relief, the parent requests that the district be ordered to reimburse the parent for the costs of or directly fund the student's tuition at IVDU.

In an answer, the district responds to the parent's allegations, and argues to uphold the IHO's decision with respect to whether it offered the student a FAPE. The district does not contest the parent's appeal to the extent she asserts that the IHO erred in finding IVDU was not appropriate on the basis that it was not in the least restrictive environment.

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]). 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).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F. v. Douglas County Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 998-1001 [Mar. 22, 2017] [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"] Rowley, 458 U.S. at 192). The student's recommended program must also be

provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs"' of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

A. Sufficiency of Evaluative Information

The parent contends that the district failed to sufficiently evaluate the student. Specifically, the parent claims that the district was required to conduct new evaluations as a result of the student's improvement in his reading and math skills, as reflected by the June 2014 CSE's recommendation that the student be "'moved from alternate assessment to diploma bound status."

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and must conduct one at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education

and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

The hearing record shows that the June 2014 CSE used the following information to develop the student's IEP for the 2014-15 school year: an April 2012 psychoeducational evaluation report, an April 2012 social history update, an April 2012 Level 1 Vocational Interview, and a June 2014 teacher report, as well as input from the parent and the special education teacher of the student from IVDU (see Tr. pp. 16-17; Dist. Exs. 2 at p. 2; 3-7).[5]

An April 2012 psychoeducational evaluation report considered by the June 2014 CSE provided information regarding the student's cognitive functioning (Dist. Ex. 3). As part of the psychoeducational evaluation, an administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) to the student yielded composite scores (percentile rank) of 65 (1) in verbal comprehension, 86 (18) in perceptual reasoning, 94 (34) in working memory, 68 (2) in processing speed, and a full scale IQ of 72 (3) (id. at p. 5). The results revealed the student's nonverbal reasoning abilities were better developed than his verbal reasoning abilities (id. at p. 2). The present levels of performance in the June 2014 IEP reflected these results by including composite scores from the WISC-IV and noting that the student's cognitive skills were in the borderline range (Dist. Ex. 1 at p. 1).

The April 2012 psychoeducational evaluation report also contained information regarding the student's academic skills, adaptive behavior, and social/emotional and behavioral functioning (Dist. Ex. 3). The student's academic achievement, as evaluated by the Woodcock-Johnson Test of Achievement-Third Edition (WJ-III ACH), indicated that the student performed at a mid-third grade level in reading, a mid-fourth grade level in basic math skills, and an initial fourth grade level in written expression, based upon grade equivalent scores (id. at pp. 3-4, 6-7). Results of the Vineland Adaptive Behavior Scales-Second Edition (Vineland-II) parent report indicated the student's overall adaptive behavior score fell within the low range, consistent with his cognitive abilities (id. at p. 4). Specifically, the student's scores were in the low range in the areas of communication, daily living skills, and socialization, and his maladaptive behavior index fell within the clinically significant range (id.). Results of an administration of the Behavior Assessment System for Children-Second Edition (BASC-2) to the student's teacher reflected in the April 2012 psychoeducational evaluation report yielded scores in the clinically significant range in the areas of externalizing problems and internalizing problems, indicating that the student presented with "significant" behavioral challenges (Dist. Ex. 3 at p. 4; see also Dist. Ex. 4 at pp. 3-4). Specifically, the April 2012 psychoeducational evaluation report indicated that the student presented with clinically significant levels of hyperactivity, aggression, conduct problems, anxiety, and depression, as well as difficulties with functional communication (Dist. Ex. 3 at p. 4). In addition, the student scored within the at-risk range in the areas of school problems and adaptive skills (id.). The report also reflected information from the student's pediatrician that the student had received a diagnosis of an attention deficit hyperactivity disorder (ADHD) and "has limited

[5] While it is somewhat unclear whether the June 2014 teacher report from IVDU noted in the July 2014 prior written notice was a written report or verbal input provided by the IVDU special education teacher during the June 2014 CSE meeting, testimony from the school psychologist that "[t]he school actually provided [teacher reports] for us," suggests that this was a written report (Tr. pp. 16, 34; see Dist. Ex. 2 at p. 2). Regardless, this report was not included in the hearing record.

intelligence, very short attention span and poor impulse control" (id. at p. 1). According to the evaluation report, the student's emotional factors, together with the diagnosis of ADHD, a severe learning disability, and related academic needs, "collectively contribute to his low level of functioning" (id. at p. 4).

The June 2014 CSE also reviewed an April 2012 social history update of the student which provided information regarding the student's educational background, familial history, and social skills (Dist. Ex. 7). The report noted the student did not have any eating, sleeping, or physical restrictions (id.). According to the report, the student ate, brushed his teeth, and bathed independently, but exhibited fine motor difficulties (id.). The report also indicated the student was socially awkward, lacked boundaries, and had difficultly interpreting social cues (id.). The June 2014 CSE also reviewed an April 2012 Level I Vocational Interview that provided information regarding the student's likes and dislikes regarding classes, his participation in sports, his hobbies, his career interests, his strengths of helping his teachers, and his areas of difficulty including listening, obeying adults, and working independently (Dist. Ex. 6).

In addition to the above listed evaluative material, the June 2014 CSE also utilized updated information provided by the student's special education teacher at IVDU when drafting the present levels of performance (Tr. pp. 15-16, 34). Specifically, the school psychologist testified and the IEP reflects that the special education teacher provided information to the CSE regarding the student's then-current academic abilities and social/emotional and behavioral functioning (Tr. p. 16; Dist. Ex. 1 at pp. 1-2). According to the special education teacher, as reflected in the June 2014 IEP, the student's reading and writing abilities were at the seventh grade level and his math skills were at the eighth grade level (Dist. Ex. 1 at p. 1). The IEP also indicated the student's listening comprehension and recall for details were good, noting that he wrote a cohesive essay and had discussed characters, plot, and a setting of a story, and worked better with graphic organizers to assist him with organization (id.). In math, the student solved word problems, converted word problems into equations, and solved equations (id.). The June 2014 IEP indicated the student's weaknesses were related to his difficulties with maintaining attention and distractibility, which interfered with his academic performance (id.). The IEP also indicated that the student exhibited inconsistent motivation and may become agitated and "shut down," but when he applied himself, he produced good work (id.). The IEP noted that the student would no longer participate in the alternate assessment program but would instead participate in Statewide assessments (id. at pp. 1, 10). The June 2014 IEP also reflected that the student may be socially inappropriate at times but "not in a harmful way" and that he did not realize that his actions may be inappropriate (id. at pp. 1-2). The IEP also reflected the student had learned to better control his behavior when agitated, was learning to walk away rather than to react, and his aggressive behavior "had diminished a great deal" (id. at p. 2).

While the parent asserts that the district failed to sufficiently evaluate the student, the parent does not specifically identify what evaluative information the June 2014 CSE lacked and does not challenge the accuracy or the thoroughness of the present levels of performance, and so it does not appear that the parent is alleging any harm as a result. Rather, as discussed above, the CSE had a comprehensive range of information available during the June 2014 CSE meeting that adequately identified all areas of need for the student; in addition, the evaluative information considered by the June 2014 CSE was completed within three years of the CSE meeting and the hearing record does not reflect that any of the participants requested updated evaluations (Dist. Exs. 1, 3-7; see

34 CFR 300.303[a], [b][2]; 8 NYCRR 200.4[b][4]). Further, the school psychologist testified that there was no need to do a new psychoeducational evaluation at the time of the June 2014 CSE meeting, and did not recall any discussion regarding reevaluating the student during the June 2014 CSE meeting (see Tr. pp. 19, 34-35).

Accordingly, the hearing record does not support a finding that the June 2014 CSE did not have sufficient evaluative information available to develop the student's June 2014 IEP.

B. Functional Behavioral Assessment

The parent next contends that the district should have completed an FBA for the student. Specifically, the parent asserts that the district failed to conduct a sufficient assessment of the student's behaviors related to the results of the April 2012 BASC-2, the April 2012 psychoeducational evaluation, and the student's "history of aggression and other interfering and inappropriate behaviors."

A district is required to conduct an FBA in an initial evaluation for students who engage in behaviors that impede their learning or that of other students (8 NYCRR 200.4[b][1][v]). 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]).

The Second Circuit has indicated 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" (R.E., 694 F.3d at 190; see L.O. v. New York City Dep't of Educ., 822 F.3d 95, 112-13 [2d Cir. 2016]). 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 substantive review is impaired because it is impossible to know what information an FBA would have provided, and particular care must be taken to determine whether the CSE had sufficient information to appropriately address the student's problem behaviors (R.E., 694 F.3d at 190).

The April 2012 BASC-2 results indicated that the student presented with significant behavioral challenges in the areas of hyperactivity, aggression, and conduct problems (Dist. Exs.

3 at p. 4; 4 at pp. 3-4).[6] In addition, the April 2012 psychoeducational report noted that the student's behaviors contributed to his difficulty within a school setting (Dist. Ex. 3 at p. 7). Notably, the psychoeducational report identified that the student showed tendencies to "resolve conflicts aggressively," exhibited acting out behaviors, and "harbor[ed] his feelings until they erupt[ed] in aggressive outbursts"; furthermore, these "behaviors contribute[d] substantially to his high rating for school problems" (id. at p. 5). Additionally, the June 2014 IEP identified that the student may become easily agitated and slam a door shut or kick a door (Dist. Ex. 1 at p. 2). The IEP further described that the student's moods could be inconsistent and change quickly (e.g., becoming overly excited one minute and if disappointed, shutting down immediately) (id.). According to the IEP, the student required frequent redirection and refocusing and his distractibility interfered with his performance (id. at p. 1).

However, at the time of the June 2014 CSE meeting, the BASC-2 results and the psychoeducational report were approximately two years old, and despite the behavioral difficulties reflected in the June 2014 present levels of performance, the information available to the June 2014 CSE reflected that overall, the student's maladaptive behaviors had greatly decreased in the intervening period (see Dist. Exs. 1 at p. 2; 3 at p. 4; 4 at pp. 3-4). Specifically, the school psychologist testified that both the parent and IVDU special education teacher reported that the student's behavior "had really improved a great deal," and the school psychologist indicated that the student did not have "aggressive episodes" during the 2013-14 school year (Tr. pp. 30-31, 35, 45). The June 2014 IEP also reflected that the student's aggressive behavior had decreased significantly, and the IVDU special education teacher reported that the student had learned to control himself better when he became agitated and was learning to "walk away rather than react" (Dist. Ex. 1 at p. 2). Although the IEP indicated that at times the student exhibited socially inappropriate behavior, it was "not in a harmful way," and the teacher reported that the student was friendly and respectful to staff (id. at p. 1). At times when the student exhibited quickly changing moods, the IEP noted that "breaks" were "usually effective in getting him to come back and participate in the class" (id. at p. 2). Additionally, the June 2014 IEP indicated that when the student was focused, he performed well and participated in class discussions and lessons (id. at p. 1). In the request for review, the parent also counters her own claims by admitting that the student's behaviors had improved since the April 2012 BASC-2 and the April 2012 psychoeducational evaluation were completed because IVDU "had supports in place to help him" (see Request for Rev. ¶ 3).

Although the student continued to exhibit some maladaptive behaviors, the June 2014 CSE addressed the student's behavioral needs in the June 2014 IEP (Dist. Ex. 1 at pp. 1-2, 4-5, 7). The June 2014 CSE recommended two 30-minute sessions per week of individual counseling and one 30-minute session per week of counseling in a group to increase the student's coping and social skills, assist with emotional regulation, and decrease his behaviors, and the school psychologist testified that the CSE recommended counseling to address the student's behavioral needs (Tr. pp. 36, 45-46; Dist. Ex. 1 at pp. 2, 7). The June 2014 IEP also noted that the student required frequent redirection and refocusing to address his needs related to attention and behavior (Dist. Ex. 1 at p. 1). The June 2014 IEP further indicated that the student required positive reinforcement throughout the day and support when he became agitated (id. at p. 2). The June 2014 IEP also

[6] Results from the Vineland-II parent rating report also indicated the student's maladaptive behavior index fell within the clinically significant range (Dist. Exs. 3 at p. 4; 5 at p. 2).

contained several annual goals that targeted skills related to improving the student's emotional regulation skills, ability to follow directions, communication skills, frustration tolerance, and use of coping strategies (id. at pp. 4-5). For example, one of the annual goals indicated the student would "continue to improve his ability to cope with conflict by planning and using 3 strategies to respond to anger non-aggressively, and by implementing 3 coping strategies to maintain self control when upset" (id. at p. 4). Another annual goal indicated the student would "increase his self esteem by making a positive self affirmation during counseling sessions" (id.). A third goal indicated that the student would "improve frustration when challenged in an activity and demonstrate utilization of strategies taught in OT sessions" (id.).

Although at the time of the June 2014 CSE meeting it did not appear that the evaluative information reflected that the student exhibited behaviors that impeded his learning or that of others to the degree an FBA was required, assuming without deciding that the failure to conduct an FBA based on his prior behavioral difficulties constituted a procedural violation, in this instance, this failure does not rise to the level of a denial of a FAPE because the June 2014 IEP otherwise identified and addressed the student's problem behaviors with appropriate supports and strategies (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., 762 F.3d 145, 169 [2d Cir. April 2, 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. v. New York City Dep't of Educ., 553 Fed. App'x 2, 6-7 [2d Cir. January 8, 2014]; M.W. v. New York City Dep't of Educ., 725 F.3d 131, 140-41 [2d Cir. July 29, 2013]; R.E., 694 F.3d at 190; A.C., 553 F.3d at 172-73).

C. Annual Goals and Transition Services

The parent also claims that the district failed to include appropriate annual goals in the June 2014 IEP. Specifically, the parent identifies that the June 2014 IEP contains a "long reading and math [g]oal" that should have been listed as two distinct goals and that part of the goal was a "'very basic'" kindergarten-level goal that did not belong in the IEP. The parent also alleges that the student would have "mastered the material to be covered" by a goal in the June 2014 IEP addressing multiplication and division with decimals.

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

The hearing record indicates that the June 2014 CSE developed 14 annual goals based on the student's identified needs as reflected in the present levels of performance in the June 2014 IEP (see Dist. Ex. 1 at pp. 1-2, 4-7). The present levels of performance identify that the student's reading, writing, and math skills were well below grade level and that he exhibited difficulties with

attention, social skills, emotional regulation, and behavior (id. at pp. 1-2). In accordance with his academic needs, the June 2014 IEP contained annual goals that targeted the student's needs related to reading comprehension, math word problems, algebraic equations, math computation skills, written expression, and grammar (id. at pp. 5-6). To address the student's social/emotional and behavioral needs, as discussed above, the June 2014 CSE developed annual goals related to improving the student's communication and conflict resolution skills, use of coping strategies, self-esteem, emotional regulation, ability to follow directions and complete classroom tasks, and frustration tolerance (id. at pp. 4-5, 7).

A review of the annual goals also reveals that each of the annual goals included evaluative criteria (i.e., 3 out of 5 trials, 3 out of 4 trials, 9 out of 10 trials, or 80 percent accuracy), an evaluation schedule (i.e., measuring progress 1 time per quarter), and a method for evaluating progress (i.e., teacher or provider observations and class activities) (Dist. Ex. 1 at pp. 4-7). In addition, the school psychologist testified that the June 2014 CSE developed annual goals to address the student's needs in the areas of reading, math, writing, and attention with the input of the IVDU special education teacher (Tr. pp. 21-27). Notably, the school psychologist testified that the June 2014 IEP contained annual goals that were provided to the June 2014 CSE by IVDU and reviewed with the parent (Tr. p. 40). The school psychologist also testified generally that the annual goals in the June 2014 IEP were appropriate and consistent with the student's abilities (Tr. p. 27).

Regarding the "long" reading and math goal in the IEP, the psychologist testified that the goal as included on the IEP was a typographical error and that it "should have been one goal," rather than addressing two different subjects (Tr. pp. 22-23; Dist. Ex. 1 at p. 5). The math portion of the goal related to kindergarten math skills was well below the student's current skill level; however, the school psychologist explained that the portion of the goal related to kindergarten level math skills was a typographical error and should not have been included in the IEP (Tr. pp. 22-24; Dist. Ex. 1 at p. 5). Despite that typographical error, the June 2014 IEP contained three other annual goals that addressed the student's math needs (Dist. Ex. 1 at p. 6). The principal of IVDU (principal) testified that the annual goal related to the computation of multiplication and division problems with decimals was inappropriate because the student had mastered that goal in the previous school year (see Tr. p. 108; Dist. Ex. 1 at p. 6). However, the principal did not attend the June 2014 CSE meeting, and it did not appear that this information was shared with the CSE by the IVDU special education teacher during the development of the annual goals (Dist. Ex. 1 at p. 6; see Tr. pp. 21-27, 40).[7] Furthermore, the parent's arguments related to deficiencies with the annual goals are vague and do not identify what, if any, specific needs went unaddressed by the annual goals. Thus, while there is no dispute that the June 2014 IEP contained a typographical error, the hearing record supports a finding that the June 2014 CSE developed an IEP for the student that addressed his identified areas of need and provided information sufficient to guide a teacher in instructing the student and measuring his progress (C.M. v. New York City Dep't of Educ., 2017 WL 607579, at *20 [S.D.N.Y. Feb. 14, 2017]; L.B. v. New York City Dep't of Educ.,

[7] Even assuming that the student had already achieved some of the goals included in the IEP for the 2014-15 school year, such level of achievement "does not render the goals in the IEP per se inappropriate" (R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *13 [S.D.N.Y. Sept. 27, 2013] [emphasis in the original], aff'd, 2014 WL 5463084 [2d Cir. Oct. 29, 2014]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 284 [S.D.N.Y. 2013]; see C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013]).

2016 WL 5404654, at *10-*11 [S.D.N.Y. Sept. 27, 2016]; J.L. v. New York City Dep't of Educ., 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013]; J.A. v. New York City Dep't of Educ., 2012 WL 1075843, at *7 [S.D.N.Y. March 28, 2012];see T.F. v. New York City Dep't of Educ., 2015 WL 5610769, at *6 [S.D.N.Y. Sept. 23, 2015];D.A.B. v. New York City Dep't of Educ., 973 F. Supp. 2d 344, at 359-60 [S.D.N.Y. 2013]; D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at *8 [S.D.N.Y. Oct. 12, 2011]).

The parent further contends that the district failed to include "[g]oals and [o]bjectives for vocational training," even though the district identified in the "measurable postsecondary goals" section of the June 2014 IEP that the student would "receive vocational training" (Dist. Ex. 1 at p. 3). Under the IDEA, to the extent appropriate for each individual student, an IEP must focus on providing instruction and experiences that enable the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34]; see Educ. Law § 4401[9]; 34 CFR 300.43; 8 NYCRR 200.1[fff]). Accordingly, an IEP for a student who is at least 16 years of age (15 under State regulations), or younger if determined appropriate by the CSE, must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills (20 U.S.C. § 1414[d][1][A][i][VIII]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]). An IEP must also include the transition services needed to assist the student in reaching those goals (id.). Transition services must be "based on the individual child's needs, taking into account the child's strengths, preferences, and interests" and must include "instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation" (20 U.S.C. § 1401[34][B]-[C]; 8 NYCRR 200.1[fff]). It has been found that "a deficient transition plan is a procedural flaw" that will only rise to a denial of a FAPE if it impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6, *9 [S.D.N.Y. Mar. 21, 2013], citing Klein Indep. Sch. Dist. v. Hovem, 690 F.3d 390, 398 [5th Cir. 2012] and Bd. of Educ. v. Ross, 486 F.3d 267, 276 [7th Cir. 2007]; see A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *11 [S.D.N.Y. March 19, 2013).

While the parent does not specifically raise claims related to the adequacy of the student's post-secondary goals or transition services, a review of the June 2014 IEP reveals that the CSE included postsecondary goals and transition services as part of the student's program. The post-secondary goals identified that the student would receive vocational training, obtain services "from various employment resources," and develop "independent living skills while living at home" (Dist. Ex. 1 at p. 3). In developing these goals, the hearing record indicates that the June 2014 CSE considered the April 2012 Level 1 Vocational Interview, which provided the CSE with information about the student's academic preferences, areas of strengths and weaknesses (Dist. Exs. 2 at p. 2; 6). The school psychologist also testified that the vocational assessment of the student assisted the district to understand the student's interests and plan for his future (Tr. pp. 37-38, 40).[8] The June 2014 IEP also included a coordinated set of transition activities indicating that

[8] The school psychologist testified upon graduation the plan was for the student to be employed (Tr. pp. 46-47).

the student would maintain his attention and increase his independent study skills to complete assignments, "explore opportunities for volunteering within the community to gain experience," and gain competitive employment; the transition activities also noted that the student would continue with OT, counseling, and speech-language therapy (Dist. Ex. 1 at p. 9).[9]

Rather than specifically raising claims with regard to the adequacy of the postsecondary goals and coordinated set of transition activities, the parent argues that the June 2014 IEP did not include a goal to address vocational training despite indicating that the student would receive vocational training. However, the parent cites to no authority for the proposition that a district is required to develop annual goals to address recommended vocational training; furthermore, federal and State regulations do not impose such a requirement (8 NYCRR 200.4[d][2][ix]; see 34 CFR 300.43; 34 CFR 300.320[b]). Accordingly, the district included all the elements required by the IDEA in the coordinated set of transition activities and postsecondary goals (see D.B., 2011 WL 4916435, at *9).

Assuming that the failure to include an annual goal for vocational training was a procedural error, even where a student's transition plan is deficient, such a deficiency may not rise to the level of a denial of a FAPE when the IEP is viewed as a whole (L.B., 2016 WL 5404654, at *15 [identifying that when the IEP is viewed as a whole, a "vague and generic" post-secondary transition plan did not deprive the student a FAPE, especially where deficiencies in post-secondary goals were mitigated by the inclusion "elsewhere in the IEP of goals . . . aimed at improving particular skills that would ultimately help [the student] achieve the . . . outcomes described in the transition plan"]; see J.M. v. New York City Dep't of Educ., 171 F. Supp. 3d 236, 246-48 [S.D.N.Y. March 21, 2016]). In this case, the parent does not allege a denial of a FAPE based upon a deficient transition plan, nor has she identified any harm resulting from the failure to develop annual goals specifically aimed at vocational training that would support a determination that the district (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]).. Furthermore, the June 2014 IEP included annual goals to address the following skills that pertain to vocational and/or post-secondary academic pursuits: solving math word problems with real life applications, improving verbal expression, following directions, improving emotional regulation and conflict resolution skills, and using coping strategies (Dist. Ex. 1 at pp. 4-6).[10] Furthermore, these goals aligned with the student's transition needs, as identified in the coordinated set of transition activities, to maintain attention, follow directions, and complete assignments (id. at pp. 4, 7, 9). The goals also align with those areas IVDU's principal identified as addressed by the student's vocational program at IVDU; specifically, "anger management, utilizing calming down, [and] coping strategies" (Tr. p. 78).

As the evidence in the hearing record demonstrates that the annual goals in the June 2014 IEP aligned with and targeted the student's needs identified in the present levels of performance,

[9] In addition, the school psychologist testified that IVDU staff was involved with the development of the coordinated set of transition activities (Tr. p. 46).

[10] The school psychologist testified that she did not remember whether the June 2014 CSE discussed vocational programming for the student, but that unless the student attended a vocational program, specific vocational goals would not be developed (Tr. pp. 37-38, 40-41).

appropriately addressed the student's needs, and were sufficiently specific and measurable to guide instruction and to evaluate the student's progress over the course of the school year, I find that the goals were appropriate for the 2014-15 school year (see D.A.B., 973 F. Supp. at 359-61; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 334-35 [S.D.N.Y. 2013]).

D. 15:1 Special Class

The parent claims that the IHO improperly found without explanation or analysis that the 15:1 special class was appropriate for the student. However, a review of the hearing record supports the IHO's finding that the June 2014 CSE's recommendation of a 15:1 special class was appropriate given the information available to the CSE at the time of the student's annual review.

The parent's primary argument is that a 15:1 special class would be too large for the student. At the impartial hearing, the parent testified that that neither she nor the special education teacher from IVDU agreed with the June 2014 CSE's recommendation for a 15:1 special class placement because it was too large (Tr. p. 112).[11] The principal further testified to her belief that the special education teacher expressed at the June 2014 CSE meeting that a 15:1 special class was too large for the student (Tr. p. 87). In addition, the principal testified that a 15:1 special class was not appropriate for the student, and that he did well in a "small" class because he felt accepted and was provided with attention (Tr. p. 87). However, the parent fails to provide a basis for this assertion other than the progress made by the student at IVDU in classes with fewer students.[12] In any case, contrary to the parent's assertions, the June 2014 CSE's recommendation of a 15:1 special class was consistent with student's needs as identified in the June 2014 IEP.

The hearing record reflects the student demonstrated needs in the areas of reading, math, writing, social/emotional and behavioral functioning, communication, and fine motor skills (Tr. pp. 16, 30, 71; Dist. Exs. 1 at pp. 1-2; 3 at p. 7; 7 at p. 1).[13] Specifically, the IEP indicated that the student's reading and writing skills were at the seventh grade level and his math skills were at the eighth grade level, and the student completed many academic assignments independently in the

[11] The parent's testimony that she and the IVDU special education teacher expressed their concern at the June 2014 CSE meeting that the 15:1 special class was "too big" for the student (Tr. p. 112), coupled with the school psychologist's testimony that all CSE participants agreed the student needed a "small" class placement (Tr. pp. 20-21; see Dist. Ex. 1 at p. 1 [noting that the student "require[d] a small class setting"]), illustrates a common predicament: that often what is considered "small" in terms of class size is in the eye of the beholder (M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 335 [E.D.N.Y. 2012], aff'd, 725 F.3d 131 [2d Cir. 2013] [holding "[t]hat the size of the class in which [the student] was offered a placement was larger than his parents desired does not mean that the placement was not reasonably calculated to provide educational benefits"]), and is not relevant to whether a placement provides appropriate services to meet a student's needs (see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015]).

[12] In the amended due process complaint notice, the parent claimed a 15:1 special class was "too large to permit the student to receive the refocusing and redirection support" he required (Parent Ex. J at p. 2). However, as noted above, the June 2014 IEP noted that the student required "a small class setting" and "redirection and refocusing often" (Dist. Ex. 1 at p. 1).

[13] The school psychologist testified that the IVDU special education teacher described the student's progress and continued areas of need, which were reflected in the June 2014 IEP (Tr. p. 30; Dist. Ex. 1 at pp. 1-2). The school psychologist further testified the special education teacher and parent both reported that the student "made a tremendous amount of progress both academically and socially" (Tr. p. 30).

areas of reading, math, and writing skills, and listening comprehension (Dist. Ex. 1 at p. 1). With respect to social/emotional functioning, the student demonstrated difficulties with frustration tolerance, social skills, and behavior (id. at pp. 1-2). The June 2014 IEP also indicated the student exhibited difficulties with maintaining attention and distractibility (id. at p. 1). The IEP further indicated the student experienced inconsistent motivation as well as agitation, but when he applied himself he produced good work (id.).

After the June 2014 CSE considered but rejected both integrated co-teaching (ICT) services as too large a setting to meet the student's needs, and a 12:1+1 special class in a specialized school because the student's needs could be met in a community school, the CSE recommended a 15:1 special class placement for all academic subjects in a community school (Dist. Exs. 1 at pp. 12-13; 2 at pp. 2-3). State regulations provide that a 15:1 special class placement is intended to address the needs of students "whose special education needs consist primarily of the need for specialized instruction which can best be accomplished in a self-contained setting" (8 NYCRR 200.6[h][4]). In addition to the individualized instruction in academic subjects the student would receive in the 15:1 special class, the June 2014 CSE recommended several supports including: redirection and refocusing to manage his distractibility, a multisensory approach to instruction, and the provision of positive reinforcement, breaks, and support during times when he was agitated (id. at pp. 1-2).

As set forth above, the June 2014 IEP included numerous annual goals to address the student's academic and social/emotional and behavioral needs (Dist. Ex. 1 at pp. 4-7). The June 2014 CSE also provided the student with testing accommodations, and the June 2014 IEP described the student's transition needs and included post-secondary goals and a coordinated set of transition activities (Tr. p. 47; Dist. Ex. 1 at pp. 3, 9). To address needs related to his fine motor, communication, and social/emotional and behavior skills, the June 2014 CSE also recommended that the student receive related services including OT, counseling, and speech-language therapy (see Dist. Ex. 1 at pp. 7-8).[14]

Although the parent and principal asserted the CSE's recommendation for a 15:1 special class did not address the student's needs due to the number of students in the class, review of the information available to the June 2014 CSE does not indicate that the student experienced an increase in distractibility, inattention, or inappropriate behaviors solely due to this factor (see generally Dist. Exs. 3-7).[15] Rather, the June 2014 IEP, that was based in part on information from the student's then-current special education teacher, indicated that although the student required redirection and refocusing "often," when focused he "perform[ed] well" (Dist. Ex. 1 at p. 1). Further, the IEP indicated that providing the student with breaks was "usually effective in getting him to come back and participate in the class" (id. at p. 2). Additionally, a review of the hearing record shows that the student did not exhibit management needs to the extent that the recommendation for a 15:1 special class, together with the related services, accommodations, and strategies recommended in the June 2014 IEP, would not have provided the student with sufficient support to meet his needs and to enable him to receive educational benefits. Therefore, the hearing

[14] The school psychologist testified that no one at the June 2014 CSE meeting expressed disagreement with the recommended related services (Tr. p. 20).

[15] Instead, the hearing record suggests the student had not recently had the opportunity to be educated in a class of more than 8-9 students (Tr. pp. 29, 84; Dist. Ex. 3 at p. 1).

record supports the IHO's finding that a 15:1 special class, together with the related services and accommodations and strategies in the June 2014 IEP, addressed the student's academic, social/emotional, and behavioral needs.

The parent also raises several other claims related to the appropriateness of the 15:1 special class that I will now briefly address. Initially, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in the due process complaint notice unless the other party agrees (20 U.S.C. § 1415[c][2][E][i][I]; [f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][i][b]; B.P., 634 Fed. App'x 845, 849-50 [2d Cir. Dec. 30, 2015]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]).

With respect to the parent's claim on appeal that the 15:1 special class recommendation was not appropriate because of the student's difficulty with transitioning, the parent's amended due process complaint notice included no allegations related to the student's difficulty transitioning between classrooms (see generally Parent Ex. J). Nevertheless, the IHO made an alternative determination related to transitioning, finding that the parent's sole objection to the 15:1 special class was the size of the recommended program, and that "the only reason [the parent] provided for wanting a smaller classroom was due to a problem [the student] could have transitioning to other classes throughout the day" (IHO Decision at p. 9).[16] The parent testified at the hearing that the student "can't handle . . . moving around from class to . . . class" (Tr. p. 115).[17] The principal also testified that the student has "a hard time transitioning" (see Tr. pp. 99-100). However, other than these two instances, there is no evidence in the hearing record, including either the June 2014 IEP or the evaluative material available to the June 2014 CSE, that indicate the CSE was or should have been aware that transitioning between classes was an issue for the student (see Dist. Exs. 1; 3; 7). Based on the foregoing, while the IHO's finding concerning the student's alleged class transitioning difficulties was not necessary to rendering a determination in this case, as the parent did not raise issues of class transitioning in the due process complaint and since the parent points to no evidence to support her contention that the student had difficulty transitioning, I nonetheless find no reason to disturb the IHO's finding.

The parent also claims that the district's recommendation was "not tailored to meet [the student's] needs" because the school psychologist was unclear whether the 15:1 special class was "a Regents diploma bound program," and was not sure about certain information pertaining to incoming high school students, including how many credits the student had acquired as of the June

[16] The principal testified that students at IVDU do not travel from class to class, but rather that teachers of different subjects travel to each classroom (see Tr. pp. 99-100).

[17] The transcript contains several instances of "indiscernible" gaps during the parent's testimony (see Tr. p. 115). For purposes of my review, I have interpreted this testimony in the light most favorable to the parent, as stating that the parent shared the student's transition difficulties with the June 2014 CSE (see id.). The district is reminded of its obligation to ensure that a "verbatim record" of the impartial hearing is kept for use by the parents, the IHO, and subsequent administrative and judicial review (20 U.S.C. § 1415[h][3]; 34 CFR 300.512[a][4]; 8 NYCRR 200.5[j][3][v]; see 8 NYCRR 279.9[a] [the district is required to submit "a true and complete copy of the hearing record before the [IHO]" to the Office of State Review]).

2014 CSE meeting and to what age the student could attend high school. Like the classroom transitioning issue discussed above, the parent's due process complaint notice does not include any allegation that the 15:1 special class was inappropriate because of any issues relating to whether the recommendation was for a Regents program or a lack of knowledge by the CSE pertaining to the 15:1 special class or the requirements for students entering high school (see generally Parent Ex. J). Rather, the parent argued in the due process complaint that the 15:1 special class was too large to address the student's needs related to refocusing and redirection and the IEP did not explain how the class would address the student's academic and social/emotional deficits (Parent Ex. J at pp. 2-3). Furthermore, the parent does not now identify any basis in the IDEA that would support a finding that her claims in this regard constitute a procedural violation or rise to the level of a denial of FAPE. The June 2014 IEP provided that the student would participate in the "same State and district-wide assessments . . . that are administered to general education students," but did not reflect any determination relating to whether the student should participate in Regents examinations (Dist. Ex. 1 at p. 10). Claims relating to the number of credits accumulated by a student, whether a student may participate in Regents examinations, or the progress of a student from grade to grade is generally not a matter for resolution by the CSE, and impartial hearings are limited to issues concerning the identification, evaluation, and educational placement of the student with a disability, or the provision of a FAPE to a student (20 U.S.C. § 1415[b][6]; 34 CFR 300.507[a][1]; 8 NYCRR 200.5[i]; see Letter to Silber, 213 IDELR 110 [OSEP 1987]). Further, graduation credits and requirements generally fall under the purview of a district's discretionary authority (see, e.g., Educ. Law § 1709[3] [authorizing a board of education "to prescribe the course of study by which pupils of the schools shall be graded and classified, and to regulate the admission of pupils and their transfer from one class or department to another, as their scholarship shall warrant"]; see also Kajoshaj v. New York City Dep't of Educ., 543 Fed. App'x 11, 17 [2d Cir. Oct. 15, 2013], citing Matter of Isquith v. Levitt, 285 App. Div. 833 [2d Dep't 1955]). Thus, to the extent that the parent claims that the school psychologist did not have certain information pertaining to the requirements for a student entering high school or whether a 15:1 special class was a Regents diploma program, the parent's claims are dismissed.

Finally, with respect to the parent's claim that the IHO shifted the burden of proof to the parent, under State law, the burden of proof has been placed 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 Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 76 [2d Cir. 2014]; R.E., 694 at 184-85). The parent points to that part of the IHO's decision which states that "[t]here was no testimony by any of the Parent's witnesses with regard to the CSE meeting" and that "the parent did not offer any persuasive testimony or evidence to rebut . . . the [district's] witnesses regarding the appropriateness of the recommended program" to support her view that the IHO had shifted the burden of proof to the parent (see IHO Decision at p. 9; Request for Rev. ¶ 6). However, as the district contends in its answer, a review of the IHO's decision shows that the IHO's statement that the parent had not offered any testimony or evidence to rebut testimony and evidence provided by the district was not an indication that the IHO placed the burden of proof in this matter on the parent but, rather, the term "rebut" indicated that after the IHO determined that the district presented evidence sufficient to meet its burden of establishing that it offered the student a FAPE, the parent did not, at that point, sufficiently attack or undermine the evidence presented by the district (see IHO Decision at p. 9; Answer ¶ 25). Moreover, even if the IHO misallocated the

burden of proof to the parent, the error would not require reversal insofar as the hearing record does not support a finding that this was one of those "very few cases" in which the evidence was in equipoise (Schaffer, 546 U.S. at 58; M.H., 685 F.3d at 225 n.3). Rather, an independent review of the entire hearing record supports the IHO's determination that the recommendation for a 15:1 special class was appropriate and that the district offered the student a FAPE (see 34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]).

VII. Conclusion

In summary, a review of the evidence in the hearing record supports a finding that the district offered the student a FAPE for the 2014-15 school year. Therefore, the necessary inquiry is at an end and there is no need to reach the issues of whether IVDU was an appropriate unilateral placement or whether equitable considerations support the parent's claim (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

I have considered the parties' remaining contentions and find that I need not address them in light of the determinations made herein.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
April 27, 2017

CAROL H. HAUGE
STATE REVIEW OFFICER