



The University of the State of New York

The State Education Department

State Review Officer

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No. 17-030

Application of a STUDENT WITH A DISABILITY, by her 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 daughter's tuition costs at the John Cardinal O'Connor School (JCOS) for the 2012-13 and 2013-14 school years. Respondent (the district) cross-appeals from the IHO's determination that the parent's unilateral placement at JCOS was appropriate to address the student's needs. The appeal must be dismissed. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The student has a history of weaknesses in attending, reading and writing, speech-language development, social/emotional development and executive function skills (see generally Dist. Exs. 22, 24, Parent Exs. OO, TT, XX, YY). Furthermore, the student has received diagnoses of fetal alcohol syndrome, reactive attachment disorder, attention deficit hyperactivity disorder (ADHD), hypothyroidism, and depression (Parent Ex. DD at p. 1; LL at p. 1; OO at p. 34; QQ at pp. 1, 7; YY at p. 3).

The hearing record reflects that, upon her registration in the district, the student began attending a general education class in a district elementary school for the 2008-09 school year (first grade) (Dist. Ex. 3; Parent Ex. ZZ). In January 2009, the parents referred the student to the CSE

for an evaluation and, in June 2009, a CSE convened to consider the student's eligibility for special education and concluded that, after the completion of further testing, the CSE would reconvene to make a determination about eligibility (Parent Exs. RR; UU; AAA). An August 2009 neuropsychological evaluation of the student described and/or assessed the student's developmental history, adaptive behavior/skills and social/emotional functioning, academic and cognitive abilities, and language, and emphasized the student's significant and complex etiology and her struggles relating to losing her first language and adopting English as her only language (Parent Ex. 00). For the 2009-10 school year, the student began second grade in a district general education class and, in October 2009, the CSE reconvened and determined that the student was eligible for special education and related services as a student with an other health-impairment (Tr. pp. 2305-11).^{1, 2} The student's report card for the 2010-11 school year reflected that, while the student's reading was below grade level, her reading was improved and, including her decoding skills her, were improving (Dist. Ex. 6 at p. 7). For the 2010-11 school year (third grade), the student attended a general education class in a different district elementary school and received resource room and related services of small group counseling and speech-language therapy (Dist. Exs. 8 at p. 1; 10 at p. 1; 19; 20).³ During a March 2011 CSE meeting, the parents expressed to the committee that the student's speech-language development was "their primary concern" and that they believed that English as a second language (ESL) instruction was inappropriate and "may even be harmful" for the student; however, the CSE indicated that it could not "opt the student out" of ESL instruction, since it was considered to be "core instruction" (Dist. Ex. 9 at p. 6). A CSE convened in May 2011 and developed an IEP for the student for the 2011-12 school year (fourth grade) (Dist. Ex. 21). According to an addendum to the May 2011 CSE meeting minutes, the parents informed district that the student would be attended JCOS for the 2011-12 school year (Dist. Ex. 21 at p. 2).⁴

The parents obtained a May 2012 private neuropsychological evaluation of the student, which they provided to the district (Dist. Ex. 22 at pp. 10-43; see Dist. Ex. 23 at p. 2). The hearing record also shows that the parents obtained a variety of private services for the student related to the student's social/emotional, behavioral, language, and academic skill development, some of which continued through the 2012-13 and 2013-14 school years, as well as a number of private evaluations to assess the student's cognitive, academic, linguistic, and social/emotional functioning and assess the student's needs related to speech-language, auditory processing, and occupational therapy (see, e.g., Tr. pp. 1657-58, 1687, 2275-78, 2311-12, 2317, 2337-40, 2481, 2622-43; Dist. Exs. 22 at pp. 10, 12-13; 23 at p. 2; 27 at p. 3; Parent Exs. S; DD; KK-LL; OO at pp. 8-10; QQ; SS; YY; DDD; see also Parent Ex. HHH).

¹ The October 2009 IEP was not included in the hearing record.

² The student's eligibility for special education and related services as a student with an other health-impairment for the school years at issue in this proceeding is not in dispute (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

³ According to the student's IEP, the change in school buildings was at the request of the parents and with the approval of the superintendent (Dist. Ex. 10 at p. 1).

⁴ The Commissioner of Education has not approved JCOS as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7)).

On June 13, 2012, a CSE convened to conduct the student's annual review and to develop an IEP for the 2012-13 school year (Dist. Ex. 23 at pp. 1-2). During the June 2012 CSE, the parents and/or their attorney raised concerns about the CSE's recommendations, including concerns relating to the level of supervision the student needed during lunchtime, the provision of parent counseling and training, the student's need for a special day school program, as well as the student's need for assistive technology in the form of an FM system (Dist. Ex. 23 at pp. 2-3; Parent Ex. Z at p. 1). However, the CSE determined that the student did not require an FM system to access the curriculum, that there was no basis for parent counseling and training at that time, and that the student did not require a special day school program (Dist. Ex. 23 at pp. 3, 9-11; Parent Ex. Z at p. 1). The June 2012 CSE recommended five 45-minute sessions per 6-day cycle of resource room services in a group of five with related services of three 30-minute sessions per 6-day cycle of speech-language therapy in a small group and one 30-minute session per 6-day cycle of counseling in a small group (id. at pp. 1, 10-11).

By letter to the district, dated June 28, 2012, the parents expressed disagreement with the June 2012 CSE's "program and placement recommendations" and notified the district of their intent to enroll the student at JCOS for the 2012-13 school year and to seek reimbursement from the district for the costs of the student's tuition (Parent Ex. CC).⁵

On July 18, 2012, the parents executed an enrollment contract with JCOS for the student's attendance during the 2012-13 school year (Parent Ex. W). Additionally, on July 18, 2012, a CSE from the district of location convened and developed an individualized education services program (IESP) for the student for the 2012-13 school year, with an expected implementation date of September 5, 2012 (Dist. Ex. 36 at p. 1).⁶ The CSE recommended that the student receive three 30-minute sessions per week of speech-language therapy in a small group and one 30-minute session per week of counseling in a small group (id. at pp. 1, 9).

On May 15, 2013, a CSE convened to conduct the student's annual review and to develop an IEP for the 2013-14 school year (Dist. Ex. 27 at pp. 1, 2).⁷ During the CSE meeting, the parents expressed that reports from the district's reevaluation of the student "did not present an adequate

⁵ In subsequent a letter to the district, dated August 25, 2012, the parents reiterated their disagreement "with the placement recommendations" in the June 2012 IEP and indicated that a letter with "specific remarks to add to the IEP" would be forthcoming (Parent Ex. Y). The hearing record does not include a subsequent letter from the parents with specific remarks about the June 2012 IEP.

⁶ There are two duplicate exhibits of the student's July 2012 and October 2013 IESPs in the hearing record (compare Dist. Exs. 36-37, with Parent Exs. G; BB). Because the district exhibits are more legible, this decision cites to the corresponding district exhibits.

⁷ In the district's post-hearing brief to the IHO and in the district's memorandum of law on appeal, the district cited to a CSE transcript from the May 2013 CSE meeting (IHO Ex. 8 at p. 32; Dist. Mem. of Law. at pp. 18-19, 22, 26). However, the CSE transcript from the May 2013 CSE meeting was not entered into evidence at the impartial hearing and was not included in the hearing record submitted to the Office of State Review. On the final day of the impartial hearing, held on August 6, 2015, the IHO indicated that a conference call would take place on August 24, 2015 to determine whether portions of the CSE transcripts from the June 2012 and May 2013 CSE meetings would be entered into evidence (Tr. pp. 2701-702). No record of the conference call appears in the hearing record. Additionally, the IHO's decision does not list the transcript as having been entered into evidence and does not cite the transcript in her decision (see IHO Decision). Accordingly, the district's references to this transcript have not been considered.

representation" (id. at p. 2). The parents also inquired about the student's need for an FM system and the need for parent counseling and training but the CSE decided against including such recommendations in the student's IEP (id. at pp. 4, 10, 14). The May 2013 CSE recommended daily 40-minute sessions of resource room services in a group of five and a daily 8:1 special class in reading with related services consisting of two 40-minute sessions per 6-day cycle of speech-language therapy in a small group and one 30-minute session per 6-day cycle of counseling in a small group (id. at pp. 1, 13). The IEP indicated that the student needed "strategies, including positive behavioral interventions, supports and other strategies to address behaviors that impede[d] [her] learning or that of others" but did not need a behavioral intervention plan (BIP) (id. at p. 11). According to the CSE meeting minutes, the parents disagreed "with the recommended placement" (id. at p. 4).

By letter to the district, dated May 20, 2013, the parents expressed disagreement with the May 2013 CSE's "program and placement recommendations" and notified the district of their intent to enroll the student at JCOS for the 2013-14 school year and to seek reimbursement for the costs of the student's tuition from the district (Parent Ex. O).

The parents executed an undated enrollment contract with JCOS for the student's attendance during the 2013-14 school year (Parent Ex. H). On October 10, 2013, a CSE from the district of location convened and developed an IESP for the student for the 2013-14 school year, with an expected implementation date of September 3, 2013 (Dist. Ex. 37 at p. 1). The CSE recommended that the student receive two 30-minute sessions of speech-language therapy in a small group and one 30-minute session of counseling in a small group (id. at pp. 1, 9).

A. Due Process Complaint Notice

In a due process complaint notice dated June 12, 2014, the parents alleged that the district failed to offer the student a FAPE for the 2012-13 and 2013-14 school years (Dist. Ex. 1). More specifically, the parents alleged that the district failed to conduct a functional behavioral assessment (FBA) or create a BIP for the student despite the parents' requests and the district's knowledge of the student's maladaptive behaviors (id. at pp. 4-5). Next, for the 2012-13 and 2013-14 school years, the parents alleged that the CSEs failed to recommend an appropriate program and placement to adequately address the student's needs (id. at p. 4). In particular, the parents argued that the CSEs repeated the same program that was unsuccessful in previous years and failed to recognize the student's need for a smaller class and building size and more individualized and structured support (id.). Additionally, for both disputed school years, the parents alleged that the district failed to use an appropriate "scientifically-based methodology" to address the student's needs (id. at p. 5). Next, the parents alleged that the CSEs failed to recommend adequate or appropriate related services for the student, including speech-language therapy, counseling, and social skills training (id. at pp. 6-7). In addition, the parents argued that the CSEs failed to recommend adequate alternative behavior modification services or parent counseling and training for the 2012-13 and 2013-14 school years (id. at p. 5). Additionally, the parents argued that the CSEs failed to recommend an appropriate assistive technology device for the student; namely, an FM system (id. at p. 7). Lastly, the parents argued that the CSEs ignored the parents' safety concerns by recommending a program that incorporated unstructured free time (id.).

Turning to the unilateral placement, the parents asserted that JCOS was appropriate because it provided instruction specially designed to meet the student's unique needs and provided a program and setting where the student's maladaptive behaviors improved 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 CSEs and provided the district with timely and sufficient notice of their intent to unilaterally place the student at JCOS (*id.* at p. 8). The parents also alleged that equitable considerations weighed in favor of the requested relief as the parents cooperated with the district, provided the district with private evaluations, and timely expressed their disagreements with the CSEs' recommendations (*id.*).

As relief, the parents sought "annulment" of the student's "current IEP" and development of an "appropriate IEP" (Dist. Ex. 1 at p. 9). The parents also requested that the district be required to reimburse them for the costs of the student's tuition at JCOS for the 2012-13 and 2013-14 school years, as well as for the costs of attorney's fees and expenses (*id.*). The parents also requested "any further relief, including compensatory education," deemed appropriate by the IHO (*id.*).

B. Impartial Hearing Officer Decision

On September 15, 2014, the parties proceeded to an impartial hearing, which concluded on August 6, 2015, after 13 days of proceedings (*see* Tr. pp. 1-2743). In a decision dated March 22, 2017, the IHO found that the district offered the student a FAPE for the 2012-13 and 2013-14 school years (IHO Decision at pp. 50-58).^{8,9} First, the IHO found that the hearing record did not support a finding that the student's behavior impeded her learning or prevented her from accessing

⁸ In an interim decision dated March 13, 2015, the IHO found that there was probative value sufficient to allow the parents to introduce private evaluations conducted subsequent to the June 2012 CSE and May 2013 CSE meetings into evidence and elicit testimony from expert witnesses regarding the evaluations and the appropriateness of the student's IEPs for the 2012-13 and 2013-14 school years (IHO Ex. 3 at p. 3). The IHO noted that the district's arguments regarding the timing of the evaluations relative to the CSE meetings at issue went to the weight she would afford the evidence, not the admissibility (*id.*).

⁹ The length of time it took the IHO to issue a decision in this case is a concern. When a parent files a due process complaint notice, 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]). 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 due process complaint notice was filed on June 12, 2014, it took almost three years for a decision to be issued (IHO Decision at p. 58). Additionally, while there were 13 hearing dates over the span of almost one year, the IHO failed to explain why she determined the record close date to be March 6, 2017, which was over a year and a half after the hearing concluded, and over a year after the parties submitted their post-hearing briefs (IHO Decision at p. 1; IHO Exs. 7; 8). While the IHO noted that "[e]xtensions of the compliance date were granted due to witness availability, receipt of the final transcript, writing and submission of the closing briefs by both parties and time to review the transcripts, evidence and closing documents and render a decision" (IHO Decision at p. 7), the IHO failed to include any documentation relating to her granting of the parties' extension requests in the hearing record as required by State regulations (8 NYCRR 200.5[j][5][i], [iv], [vi][c]). Furthermore, the timeframe within which a decision must be rendered is a regulatory requirement regardless of the length of the hearing record (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.

the curriculum and therefore the district was not required to conduct an FBA or develop a BIP (id. at p. 51-53). The IHO further found that, although the student was impulsive and at times exhibited bossy behavior, the hearing record contained evidence that the student responded to accommodations and supports provided to ameliorate these behaviors (id. at p. 52). Next, the IHO held that the district did not need to provide the student with an FM system because the student made progress without one in the district's public schools and the June 2012 and May 2013 IEPs contained accommodations to assist the student, including seat preference (id. at p. 53). Additionally, the IHO found that, although the student had access to an FM system at JCOS, there was no credible evidence that it was intended specifically for her or that she could not access the curriculum without it (id.). Next, the IHO found that, notwithstanding reports of "different and perhaps troublesome behavior at home," the student's behavior in school and her academic and social/emotional progress did not warrant the parents' request for parent counseling and training (id.). The IHO also held that providing the student with ESL instruction was not a denial of a FAPE because ESL is not a special education service (id. at p. 54). In addition, the IHO found that the June 2012 IEP and the May 2013 IEP were appropriate and that there was no indication in the hearing record the student "would not have been equally successful if she had remained in [the] [d]istrict" for the school years at issue (id. at p. 54).

With respect to the unilateral placement, the IHO found that, although the hearing record included inconsistent evidence as to the amount of progress the student made during the 2012-13 and 2013-14 school years, JCOS provided the student with an educational program that met her special education needs, and was therefore appropriate (IHO Decision at 55-56). Next, the IHO found that equitable considerations weighed in favor of the parents because the parents acted in good faith, cooperated with the district, and consented to evaluations (id. at p. 57). Although the IHO found it "troubling" that the parents revoked their consent to allow the district to speak with the student's private providers, the IHO noted that it did not reflect sufficient bad faith to warrant a denial of the parents' request for relief (id. at pp. 57-58).

IV. Appeal for State-Level Review

The parents appeal, asserting that the IHO erred in finding that the district offered the student a FAPE for the 2012-13 and 2013-14 school years.¹⁰ Initially, the parents argue that the IHO applied an incorrect legal standard in determining whether the district offered the student a

¹⁰ To the extent the parents do not raise arguments on appeal regarding claims alleged in the due process complaint notice, which were not reached by the IHO, these issues are deemed abandoned and will not be further addressed (8 NYCRR 279.8[c][2], [4]). These include the parents' allegations that, for the 2012-13 and 2013-14 school years: (1) the CSEs failed to recommend adequate alternative behavior modification services for the student; (2) the CSEs failed to recommend appropriate counseling and social skills training services for the student; and (3) the CSEs failed to recognize the student's need for a smaller building size (see Dist. 1 at pp. 4-6). In addition, the parents do not appeal the IHO's finding that the hearing record did not support the parents' request for parent counseling and training. Therefore, this determination has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

FAPE for the school years at issue.¹¹ Turning to the CSEs and IEPs at issue, the parents argue that the IHO disregarded the student's history of maladaptive behaviors and erred in finding that an FBA and BIP were not required for the student during the 2012-13 and 2013-14 school years. With respect to the appropriateness of the program recommendation for both school years, the parents argue that the IHO disregarded the student's lack of progress in the district's public school during the 2010-11 school year. The parents assert, as a separate issue, that the district disregarded the impact that the student's social, behavioral, and attentional issues had on the student's learning.¹² Next, the parents assert that the IHO erred in finding that the June 2012 and May 2013 CSEs recommended reading programs for the student that would have adequately addressed the student's decoding deficits. The parents further assert that the district failed to provide appropriate speech-language therapy services for the student for both school years. More specifically, the parents argue that the district relied on ESL instruction as a substitute for evidence-based speech-language therapy services for the student. The parents also argue that the June 2012 and May 2013 CSEs failed to offer the student a placement in the least restrictive environment (LRE).¹³ Additionally, the parents assert that the IHO erred in finding that the student did not need assistive technology in the form of an FM tuner for the school years at issue. For relief, the parents request that the district be required to reimburse them for the costs of the student's tuition and transportation at JCOS for the 2012-13 and 2013-14 school years, as well as the costs of attorneys' fees, along with any further relief deemed appropriate.

In an answer and cross-appeal, the district responds to the parents' request for review by asserting admissions and denials and requests that the IHO's decision that the district offered the student a FAPE for the 2012-13 and 2013-14 school years be upheld. The district further asserts that the parents improperly rely on reports and opinions which were not in front of the June 2012

¹¹ The parents argue that the IHO applied the standard as set forth by the Second Circuit in Cerra v. Pawling Central School District and not the standard as set forth by the Supreme Court in Andrew F. v. Douglas County School District. In Cerra, the Second Circuit held that a school district satisfies its obligation to offer a FAPE under the IDEA if it develops "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]). In Andrew F., the Supreme Court held that a school district satisfies its obligation to offer a FAPE if it offers the student "an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"(137 S. Ct. at 999). Although the standard set forth in Andrew F. is the controlling law, since the IHO issued her decision on March 22, 2017—the same day the Supreme Court issued its decision in Andrew F.—it is unclear whether or not the IHO was aware of the existence of the Andrew F. decision. In any event, as more fully described below, the hearing record contains sufficient evidence to support the IHO's ultimate conclusion that the district offered the student a FAPE for the 2012-13 and 2013-14 school years applying the standard set forth by the Supreme Court in Andrew F.

¹² This argument appears to relate to opinions of private providers or evaluators that a general education classroom was not appropriate for the student (see Parent Mem. of Law at p. 28).

¹³ Since the parents allege for the first time on appeal that the CSEs failed to offer the student a placement in the LRE, this allegation is outside the scope of review and will not be considered (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d]; 8 NYCRR 200.5[j][1][ii]; Y.S. v. New York City Dep't of Educ., 2013 WL 5722793, at *5 [S.D.N.Y. Sept. 24, 2013] [holding that "because [the student's] parents did not include a[n] [LRE] claim in their due process complaint," and it was not addressed during the administrative proceedings, their claim was waived; see, e.g., T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170 [2d Cir. 2014]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012]).

and May 2013 CSE's. In the cross-appeal, the district asserts that the IHO erred in finding that JCOS was an appropriate unilateral placement for the student.¹⁴

In an answer to the cross-appeal, the parents respond to the district's allegations and argue to uphold the IHO's finding that JCOS is an appropriate unilateral placement for the student.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court recently indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988, 999 [2017]). 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).

¹⁴ Neither party appeals the IHO's determination that equitable considerations weighed in favor of the parents' request for relief. Therefore, this determination has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

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; see Endrew F., 137 S. Ct. at 998-1001 [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"]; 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 adequacy of a given IEP turns on the unique circumstances of the child for whom it was created (Endrew F., 137 S. Ct. at 1001). The IEP must be "reasonably calculated to enable the child to make progress appropriate in light of his circumstances" (Endrew F., 137 S. Ct. at 1002; see 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 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]).¹⁵

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.

¹⁵ The Supreme Court recently stated that if it is unreasonable to expect a child to attend a regular education setting, the "educational program in a student's IEP must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

Four v. Carter, 510 U.S. 7, 12-16 [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 as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. June 2012 IEP

1. General Education Placement with Resource Room Services

The parents argue on appeal that the IHO disregarded the student's lack of progress during the 2010-11 school year and erred by finding that the June 2012 CSE's recommendation that the student attend a general education classroom and receive resource room services was appropriate for the student.

a. Progress During the 2010-11 School Year

Turning first to the student's progress during the 2010-11 school year, a student's progress under a prior IEP is to varying degrees a relevant area of inquiry for purposes of determining whether a subsequent IEP is appropriate, particularly if the parents express concern with respect to the student's rate of progress under the prior IEP (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66 [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, at *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 [Dec. 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 a subsequent 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]).

Initially, the district is correct that the student's progress during the 2010-11 school year was sufficiently distant in time from the June 2012 CSE meeting (as, at the time of the June 2012 CSE meeting, the student was just completing her first year at JCOS) that it carries less weight in the analysis of the June 2012 IEP. Moreover, a comparison of the May 2010 and June 2012 IEPs reveals they do not set forth identical programs. The May 2010 IEP provided that the student attend a general education classroom, and receive five 45-minute sessions of resource room per six-day cycle, as well as two 30-minute sessions of counseling per six-day cycle and two 35-minute sessions of speech-language therapy per six-day cycle (Dist. Ex. 10 at p. 1). Although similar, in that the student was primarily placed in a general education classroom with resource room services

five times in a six-day cycle, the June 2012 IEP differed from the May 2010 IEP in that the June 2012 CSE recommended one additional session of speech-language therapy per six-day cycle and one less session of counseling per six-day cycle (compare Dist. Ex. 23 at pp. 10-11, with Dist. Ex. 10 at p. 1).

In addition, the hearing record shows that the student made progress throughout the 2010-11 school year. According to the student's third grade report card, the student maintained or improved her skill levels throughout the 2010-11 school year (Dist. Ex. 19 at p. 1). Specifically, the student demonstrated improvement in the following areas: writing skills, such as her ability to organize and develop ideas effectively and use appropriate spelling; mathematics, with respect to effort; behaviors that promote learning, with respect to homework completion; in class participation in languages other than English; and knowledge and concepts in physical education (id.). Furthermore, the student's skill level was marked as "meeting grade level expectations" or "exceeding grade level expectations" on 54 out of 63 skills for which she received a grade; however, she demonstrated "approaching grade level expectations" in overall reading comprehension, reading vocabulary, reading fluency, and critical and responsive listening (id.). In writing, the student was approaching grade level expectations with respect to effectively communicating her ideas orally, using effective language or style in writing, and using appropriate grammar (id.). In behaviors that promote learning, the student was approaching grade level expectations in her ability to demonstrate self-discipline and work cooperatively with others (id.). The student's then-current classroom teacher testified that the areas where the student received a two (approaching grade level expectations) for all three semesters showed that she was making progress; she elaborated that, if the student had stayed stagnant at her original levels, the grade would have gone from a two to a one (below grade level expectations), but that, since she was earning twos, she was moving up in her reading assessments (Tr. pp. 750-52; see Tr. pp. 78-79).

The trimester three comments in the third grade report card described the student as a hard worker, who was eager to please and could "always be counted on to help" (Dist. Ex. 19 at p. 4). The report card further indicated that the student was always prepared with her materials and homework and that she loved to read (id.). Academically, the third-grade report card indicated that the student's decoding and fluency had improved and she was beginning to work on decoding multisyllabic words and to use context clues along with her background knowledge to determine the meaning of unknown words (id.). Finally, the report card indicated that the student was on grade level in math, she was persistent in her problem solving, and her fluency in multiplication problems had improved (id.). The report card indicated that the student enjoyed Spanish class, participated in all class activities, and was a "wonderful language learner that t[ook] risks often" (id.). Finally, in vocal music, the teacher described the student as a "wonderful music student who participates in everything" (id.).

According to the 2010-11 annual goals progress report, the student made progress on all annual goals and achieved 3 out of 16 annual goals (Dist. Ex. 20 at pp. 1-5). Additionally, the progress report indicated that the student was progressing satisfactorily on 10 out of 16 annual goals with two goals noting that the student was progressing satisfactorily for the first two trimesters and detailing in the final trimester comments that the student had made progress on these goals but continued to need to work on specific skills within the broader annual goal (id.).

During the May 2011 CSE meeting, the student's then-current special education teacher and classroom teacher discussed the student's levels of performance (Dist. Ex. 21 at p. 2). The special education teacher reported that the student demonstrated good number sense and had overall average range math skills but that she showed some difficulty with word problems (id.). Additionally, the student's then-current classroom teacher reported that the student was attentive and active in class and opined that her difficulty with word problems was no different than other third graders (id.). The special education teacher reported that during reading subtests on standardized testing, the student stopped to monitor herself and to use strategies, her reading comprehension was "quite good" and she was able to rhyme, but had difficulty deleting sounds (id.). The classroom teacher added that, by the end of the 2010-11 school year, the student was reading at a level N which was approximately on grade level (id.). Further, in discussing the student, the teachers described that the student had written expression skills solidly within the average range and that she generated good ideas and was able to write them down on paper with better organization than in the past (id.). Additionally, according to the classroom teacher, the student exhibited some weakness with sentence structure and grammar but her writing was less repetitive, she was using order words, and spelling and grammar skills were emerging (id.).

With respect to the student's progress in the social/emotional and behavioral realm, according to the May 2011 CSE meeting minutes, the parents reported during the CSE meeting that the student was doing better and had shown improvement socially, although she continued to have difficulty making friends (Dist. Ex. 21 at p. 2). They further described the student as "bossy and indicated that [she] c[ould] be sneaky and provocative"; however, the district psychologist noted there had been a decrease in that kind of behavior in school (id.). The student's classroom teacher reported at the May 2011 CSE meeting that the student was respectful and was picking up the nuances of social interactions and that the "bullying" had calmed down and the "tattling stopped] with a quick reminder" (id.).

The student's classroom teacher for the third grade testified that she noticed other students tell the student to "stay out of [their] business" and further described that the student was impulsive, became involved with other students' conversations or arguments between other students, and needed to be redirected (Tr. pp. 739, 779). The teacher stated that she did not classify this as bullying and that the student did not argue with peers more than an average third-grader and "never caused fear in any other student, or any violence, or any kind of behavior that made kids intimidated by her" (Tr. pp. 739-40, 779-80). The teacher also testified that, although there were times the student struggled "not to be bossy," she slowly made improvement and became less so by the end of the year, and that she was pleased with the student's performance in her class (Tr. pp. 756-58). Furthermore, the teacher testified that she saw a lot of progress in the student (Tr. p. 758). Finally, the classroom teacher testified that the student's inattentiveness could be taken care of by redirecting her to a task and refocusing her to the "work at hand"; furthermore, when she was asked what strategies she used in addition to redirecting, refocusing and visual cues, the teacher responded "none were necessary" (Tr. pp. 784-85). The teacher testified that the student sometimes needed redirection but that it was not a constant need and it "by no means impacted her learning" (Tr. p. 737). She further testified that the student was distractible, but she did not need an FBA or BIP (Tr. pp. 738-39).

The May 2011 CSE meeting minutes included information provided by the school psychologist, who provided the student's counseling services during the 2010-11 school year, that

the student enjoyed being part of a group, was an active participant, and could easily take a leadership role (Dist. Ex. 21 at p. 2; see Tr. pp. 94, 1120-21). She further explained that the student needed to be reminded of her "group member status" and was working on accepting feedback and improving her social skills (Dist. Ex. 21 at p. 2). Finally, the psychologist described the student as "empathetic to others" (id.). She further explained that the student had made some friends in the classroom but that she was working on appropriately expressing her opinions and suggestions, her volume level when sharing her ideas, her sensitivity to criticism, and accepting feedback and different points of view (id.). The school psychologist also testified that the student was always very engaged in the counseling sessions, "very participative," and did not have difficulty maintaining attention (Tr. p. 1141). She further testified that the student did not exhibit negative behaviors other than a "tendency to speak up" and to be impulsive, needing verbal redirection (Tr. p. 1142). The psychologist indicated that the student's then-current teachers did not express concerns regarding being unable to manage the student's behaviors and that there was no indication that the student needed an FBA (Tr. p. 1143). She further testified that she did not observe behaviors that impacted the student's learning and she was able to access the curriculum (Tr. pp. 1148-49). Finally, the psychologist testified that, by the end of the 2010-11 school year, the student had shown improvement in that she was less inclined to say unkind things to other students and she was "able to sustain her gains without regressing to less desirable behaviors" (Tr. pp. 1151-52).

With respect to the student's speech-language needs, according to the CSE meeting minutes, the parents reported that the student had made "great progress" with the speech-language therapist in addressing her phonemic issues and added that the only issue was the student's continued struggle to express herself quickly (Dist. Ex. 21 at p. 2). The parents expressed concern the student would not answer questions in a large class setting (id.). Conversely, the student's then-current classroom teacher reported that the student participated and raised her hand in class, noted "that it [was] rare that the student c[ouldn't] find a word," and reported that the student "d[id] understand concepts" (id.). The teacher also testified that the student took part in whole group discussions and she would volunteer "no more no less than another average third grader" (Tr. p. 739).

At the time of the May 2011 CSE meeting, the student's then-current speech-language therapist reported that the student worked with "great attention and motivation," indicating that she had progressed towards mastering most of the annual goals, but continued to require support to describe multi-step tasks and experiences because she omitted certain steps and relevant details (Dist. Ex. 21 at pp. 2, 6). With regard to the student's articulation skills, the speech-language therapist reported that the student's speech was characterized by residual errors but that she was capable of imitating target sounds with accuracy and was slowly transferring these skills (id. at p. 2). Additional testing results indicated that the student performed within the average range on most subtests of the Comprehensive Test of Phonological Processing (CTOPP) and the Test of Auditory Processing Skills – Third Edition (TAPS-3), with the exception of the non-word repetition subtest on the CTOPP (id. at p. 6). She exhibited considerable difficulty repeating non-words, and it was noted that the student had significant difficulty with new multi-syllabic words related to phonological memory; however, the speech-language therapist indicated that the student liked to learn and use new strategies (id. at p. 2).

The speech-language therapist testified that, in fall 2010, the student presented as an enthusiastic learner and indicated that the student's attention was "quite good," she did well in a group, and she loved to participate (Tr. pp. 435-36). Additionally, the therapist reported that the student continually progressed and her attention was better than the average child in her third grade groups (Tr. pp. 437-38). She further described the student as having a particular strength as a learner, specifying that, if the student didn't understand something, you only had to show her a strategy once, and she utilized strategies beautifully and did not forget them (Tr. p. 435). The speech-language therapist testified that the student was doing well in her classroom and making progress on her speech-language therapy goals (Tr. p. 445). She testified that, based on her clinical observation, data, and assessments, the student made progress in all areas, including in the classroom (Tr. p. 507). Finally, she indicated that she had "observed a lot of progress throughout the school year (Tr. pp. 449-50).

Furthermore, in an email to the building principal, dated June 2011, the parents indicated that the student had a great year (2010-11) and opined that she was "on track" and had become "very studious" and responsible with a "great trajectory" (Dist. Ex. 28 at p. 12). Additionally, they described the district staff as "warm, loving and healing" and opined that they "really saved the children's lives" (*id.*). The parents also indicated that the student had improved in her speech and they were very happy with how the staff had treated her (*id.* at p. 11). Finally, in a March 2011 email, the parents wrote that they loved the district's school but that they were researching other special education schools and were trying to give the student the "tailor made therapeutic intervention that the state simply shouldn't have to provide" (*id.* at p. 14).

Based on the above, the hearing record supports a finding that the student exhibited progress during the 2010-11 school year, such that a recommendation for a similar placement was not unreasonable in light of the gains the student had made. Accordingly, despite the parent's argument that the IHO disregarded evidence of the student's struggles, there is no basis in the hearing record to disturb the IHO's determination on this point.

b. Other Information and CSE Recommendations

In addition to the evidence of the student's progress during the 2010-11 school year in the district program, the June 2012 CSE was also required to consider the student's functioning as of the June 2012 CSE meeting, taking into account how the student functioned during the 2011-12 school year at JCOS and the evaluative information available to the CSE. While the adequacy of the evaluative information available to the June 2012 CSE and the student's present levels of performance as described in the resultant IEP are not in dispute, a discussion thereof provides context. The June 2012 CSE considered multiple sources of information, including a report of the student's scores on the April 2011 English language arts (ELA) State assessment and the May 2011 mathematics State assessment, a February 2012 JCOS progress report, an April 2012 JCOS report card, a May 2012 private neuropsychological evaluation, a May 2012 classroom observation, and a June 2012 letter from the student's private psychiatrist (Tr. pp. 92-96; Dist. Exs. 18; 22; 23 at pp. 1-6; Parent Ex. DD).

The student's JCOS report card indicated that by the end of the second quarter of the 2011-12 school year, the student was highly motivated, engaged, had shown improvement in self-control, was interacting positively with her classmates and had achieved first honors (District. Ex.

22 at p. 2.) According to the report card, the student had achieved grades of 90 in reading and social studies and 92 in math and science; but also indicated that she needed to improve her reading comprehension and vocabulary, writing composition, spelling, grammar, speaking and listening, and self-control (id.) The June 2012 IEP reflected the student's level 3 score on both the New York State ELA (April 2011) and mathematics (May 2011) assessments (compare Dist. Ex. 18, with Dist. Ex. 23 at p. 6). According to the parent report, which explained the student's scores, a Level 3 is the proficiency standard and indicates the student is on track to earn a college ready score on the ELA and math Regents examinations (Dist. Ex. 18 at p. 1).

In addition to the student's report card and state assessment information, the CSE had before it the privately obtained May 2012 neuropsychological evaluation (Dist. Ex. 22 at pp. 10-42). The psychologist who conducted the neuropsychological evaluation used a variety of measures to assess the student's intellectual functioning, visual motor integration/visual spatial processing, academic achievement/language aptitude, language and communication skills, memory and learning, attention and executive functioning, and behavior and social/emotional functioning (id.). With respect to intellectual functioning, the psychologist reported that the student's overall cognitive abilities fell within the average range (id. at pp. 15, 17, 38). She noted, however, that there was significant variability among index scores and reported that the student's performance suggested that she was strongest with nonverbal reasoning abilities (id. at pp. 15, 38). The psychologist further reported that the student was better able to reason with verbal information and perform tasks in an efficient manner than she was able to access information from her short-term memory or identify and manipulate individual sounds (id. at pp. 15-17, 38).

Although the student exhibited some variability in her performance on standardized measures of academic achievement, the psychologist reported that most of the student's scores fell within the low average to average ranges (Dist. Ex. 22 at pp. 18, 38-39).¹⁶ More specifically, the psychologist indicated that the student's reading abilities were variable and her ability to identify words in isolation as well as her ability to apply basic phonetic strategies to decode unfamiliar words were below age expectations (id. at pp. 18, 32). The psychologist opined that the student's performance suggested that sight word vocabulary was an area of relative weakness (id. at p. 18). With respect to phonological awareness, the psychologist reported that the student demonstrated variable skills with relative strengths noted in her elision and rapid naming abilities and a relative weakness in blending words (id. at pp. 18-19, 40). The psychologist reported that the student exhibited the greatest difficulty with phonological memory (id. at p. 19). The student's ability to comprehend what she read fell within the low average to average range and the psychologist attributed any difficulty in this area to the student's decoding and vocabulary issues (id. at pp. 19-20, 32). The psychologist described the student's reading speed and accuracy as "good" (id. at p. 32). With respect to written expression, the psychologist reported that the student's spelling and writing fluency were in the low average range but noted that the student tended to use simple sentence structure and make some grammatical errors (id. at pp. 20-21). The student's knowledge of basic math facts and her ability to perform mathematical computations were assessed to be age

¹⁶ Although the June 2012 IEP included the results from a March 2011 administration of the Kaufman Test of Educational Achievement – Second Edition (KTEA - II), the psychologist who evaluated the student's academic skills in May 2012 also participated in the June 2012 CSE meeting via telephone and the committee discussed the results of her academic assessment (Tr. pp. 92-95; Dist. Ex. 22 at pp. 1, 10-42; 23 at pp. 1, 4-5).

appropriate (id. at p. 20). Furthermore, with respect to visuomotor functions and visual motor integration, the student performed in the high average to very superior range (id. at pp. 17-18, 42).

According to the psychologist's assessment, the student demonstrated age appropriate receptive language skills and expressive language skills at the upper end of the low average range (Dist. Ex. 22 at p. 22). The psychologist reported that the student had some difficulty following complex directions when they were presented orally (id. at pp. 22, 24, 32). The psychologist noted that the student demonstrated some difficulty with metalinguistic language competence in that on tests that measured her abilities with more abstract and figurative language the student had difficulty understanding the demands of the task and her responses were short and awkwardly worded (id. at pp. 24). The psychologist opined that, overall, the student did well with basic concrete language but struggled to process and comprehend material when more complex language was used; as a result, she had difficulty providing meaningful information in response (id. at p. 32).

With respect to memory and learning, the psychologist indicated that the student demonstrated overall age-appropriate abilities (Dist. Ex. 22 at p. 31). The psychologist reported that the student seemed to learn best when information was presented over several trials or when meaningful context was provided (id. at p. 32). According to the psychologist, abstract visual information was more difficult for the student to remember than concrete visual information, but once visual information was successfully encoded and consolidated, the student could easily retrieve it (id. at pp. 24-25, 32). With respect to attention, the psychologist stated that the student did not present with any difficulties sustaining attention on a test that measured attention, but noted among other things that the student was on medication for ADHD at the time (id. at pp. 28, 32-33).

As discussed in more detail below, the psychologist also reported the results from behavior rating scales completed by the student, her mother and her teacher (Dist. Ex. 22 at pp. 27-30).

In order to address the student's medical and therapeutic needs, the psychologist, who conducted the May 2012 neuropsychological evaluation, recommended that the student should continue consultation with her pediatric psychiatrist and receive cognitive behavioral therapy (Dist. Ex. 22 at p. 34). She further suggested that consultation with a speech-language therapist "may be warranted," the family "could benefit" from some guidance and parent training, and academic remediation "may be warranted" (id.). In academics, the psychologist recommended that: the student receive consistent supervision by adults; her interactions be monitored continuously in a small school setting with a small class size in an inclusive setting that minimizes the number of pull-outs; and she receive in-school counseling (id. at pp. 34-35). Additionally, the psychologist recommended preferential seating, extra time to process and comprehend directions and to complete language-based assignments, and additional class time (2x) for class tests and standardized assessments (id. at p. 35). The May 2012 neuropsychological evaluation report also contained suggestions that "would benefit" the student such as multiple exposures to new material, auditory information broken down into smaller segments; directions repeated, rephrased and simplified; check for understanding; periodic breaks; and encouragement to go back and check her work (id.). The May 2012 neuropsychological evaluation report included additional academic recommendations for visual supports, repeating and restating directions, checking for understanding, simplification of questions, scaffolding, and refocusing and redirection (id. at pp.

36-37). Finally, the psychologist indicated that it was essential that the student be taught reading using both a systematic and a multi-sensory approach such as Orton-Gillingham or Lindamood Bell in order to work on decoding, encoding, fluency, phonemic awareness, writing and auditory memory skills (Dist. Ex. 22 at pp. 35-36).

The May 2012 classroom observation, reviewed by the June 2012 CSE, indicated that the student participated in a large group assembly of 60 multi-aged students and was often one of several students to raise her hand and answer various questions posed by the school principal (Dist. Ex. 22 at p. 6). The student then returned to her class of nine students, eight of whom participated in multi-sensory reading activities (id. at pp. 6-7). According to the observation report, the student did not demonstrate difficulty in decoding the reading passages aloud, her vocal volume was loud and her speech pattern had a "distinct quality," and, while she answered literal questions, the student had a harder time with inferential questions (id. at p. 9). With respect to written expression, the observer noted that the student demonstrated uncertainty with capitalization rules and that differentiation for this lesson was not evident (id.). As detailed below the classroom observation also described the student's attention and behavior (id.).

The June 2012 CSE also considered a June 2012 letter from the student's private psychiatrist, summarized in further detail below, that indicated the student exhibited low self-esteem and a high degree of anxiety and impulsivity (Parent. Ex. DD at p. 1).

Turning to the June 2012 IEP, the CSE recommended that the student attend a general education classroom and receive five 45-minute sessions of resource room per six-day cycle, as well as speech-language therapy and counseling (Dist. Ex. 23 at pp. 1, 10-11). The June 2012 CSE further addressed the student's needs with recommendations for a variety of accommodations and modifications including: color-coded folders and notebooks; refocusing and redirection; visual aids and manipulatives; graphic organizers; visual cues; student to paraphrase directions; word banks; preview vocabulary and concepts; extra time to process or formulate responses; chunking information; special seating arrangements; and relating concepts to previous experiences (id. at pp. 8, 11). The director testified that the program modifications and accommodations contained in the June 2012 IEP were added based upon conversations at the CSE meeting and on the May 2012 neuropsychological evaluation (Tr. p. 99). The June 2012 IEP contained approximately 13 annual goals designed to improve the student's skills in the areas of reading, writing, mathematics, speech-language, and social/emotional and behavioral (id. at pp. 9-10). Additionally, the June 2012 IEP indicated that the student was a multi-sensory learner who needed models, visuals, manipulatives, and hands on experiences to help her learn (id. at p. 6).

According to the director, the program recommendations made by the June 2012 CSE were appropriate because the student had made consistent progress in the resource room program when she last attended the district's program (Tr. p. 117). She explained that the student's word attack skills and vocabulary would be addressed in the recommended resource room (Tr. pp. 321-322). She further explained that reading instruction was provided through a workshop model, which delivered individualized, differentiated instruction (Tr. pp. 90-91, 117). The student's special education teacher, who attended the June 2012 CSE meeting, testified that the program was appropriate because the student would receive extra support in a general education classroom with students of all abilities (Tr. p. 913). She further opined that the student would receive the extra support she needed to address her skill deficits in the resource room, speech-language therapy to

increase her language skills, and counseling services "to help her navigate the school day" (Tr. p. 913).

As noted above, the private neuropsychological evaluation report included a recommendation for a small class size in an inclusive setting that minimizes the number of pull-outs (Dist. Ex. 22 at pp. 34-35). On appeal, the parent also takes issue with the number of times the student would be pulled out of the classroom for resource room services, as compared to, in the parent's example, a general education classroom placement with integrated coteaching (ICT) services.¹⁷ State regulation defines resource room services as the provision of specialized supplementary instruction in an individual or small group setting for a part of the school day to students who have been grouped together based on the similarity of their individual needs, in a group of no more than five students per teacher (8 NYCRR 200.1[rr]; 200.6[f][3], [4]). State guidance issued in November 2013 elaborates that such supplementary instruction "is not provided in place of the student's regular academic instruction" ("Continuum of Special Education Services for School-Age Students with Disabilities," at p. 9, Office of Special Educ. [Nov. 2013], [available at http://www.p12.nysed.gov/specialed/publications/policy/continuum-schoolage-revNov13.pdf](http://www.p12.nysed.gov/specialed/publications/policy/continuum-schoolage-revNov13.pdf)). By way of comparison, ICT services are defined as "specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" in a classroom staffed "minimally" by a "special education teacher and a general education teacher" (8 NYCRR 200.6[g]). ICT services provide for the delivery of primary instruction to all of the students attending such a setting ("Continuum of Special Education Services for School-Age Students with Disabilities," at pp. 14-15).

Nothing in the information available to the CSE indicates that the student should not have received primary instruction in the general education classroom. In fact, the resource room services appear to strike the balance in terms of incorporating a small setting, such as that recommended in the private neuropsychological evaluation report, while recognizing the student's ability to achieve progress in the general education classroom.¹⁸

The parent also alleges that the district disregarded the relationship between the student's social/emotional and behavioral needs and her learning difficulties. As elaborated upon below with respect to the discussion of the student's interfering behaviors, the parent presented witnesses during the impartial hearing who offered their views regarding the student's behavioral needs and her need for a smaller classroom setting, including testimony via affidavit from a private board certified behavior analyst—doctoral level (BCBA-D) and the student's private psychiatrist (see Parent Exs. EEE; FFF). According to the BCBA-D, behaviors noted on the student's June 2012 IEP such as inattention, impulsivity, the need for refocusing and reminders to keep out of matters

¹⁷ On appeal, the parent framed this as an LRE argument. As noted above, any allegation that the district failed to offer the student a placement in the LRE is raised for the first time on appeal and is, therefore, outside the scope of review. However, to the extent the parents' argument references the appropriateness of the resource room services relative to the student's academic and social/emotional needs (as opposed to the level of access to nondisabled peers), it is relevant to the above discussion.

¹⁸ The August 2009 neuropsychological evaluation also recommended the student attend an integrated class or a general education classroom with a "package of services" equal to an integrated classroom, specifying that the student should receive no less than two academic hours per day in a resource room setting (Parent Ex. OO at pp. 36-37).

that did not concern her, and socially inappropriate interactions with peers would be unmanageable in a large, general education environment (Parent Ex FFF at p. 11-12). The student's private psychiatrist also opined that, if the student was placed back into a large general education classroom, it would be "emotionally destabilizing for her" (Parent Ex. EEE at pp. 21-22). Putting aside the question of the weight to be afforded these opinions—discussed below—the information available to the CSE reflected that the student had already made improvements in the social/emotional realms, as described above. Moreover, the resource room services would align with concerns about the student's attention in that, to the extent the student's distractibility might cause her to miss portions of instruction in the general education setting, the resource room services could supplement such instruction.

Based on all of the foregoing, including evidence of the student's progress during the 2010-11 school year, the hearing record supports the IHO's determination that the June 2012 CSE developed a program that was reasonably calculated to enable the student to make progress appropriate in light of her circumstances, as described in the information available to the CSE.

2. Special Factors

a. Interfering Behaviors

The parents assert that the IHO erred in finding that the district's failure to conduct an FBA and develop a BIP did not constitute a denial of a FAPE. Specifically, the parents assert that the IHO disregarded the student's history of maladaptive behaviors. Moreover, the parents assert that they raised the student's behavioral problems with the district on a number of occasions. The district asserts that the IHO correctly determined that no credible evidence supported the student's need for an FBA and BIP, noting that the student did not exhibit significant behaviors and responded to redirection.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also *E.H. v. Bd. of Educ.*, 361 Fed. App'x 156, 160 [2d Cir. Oct. 16, 2009]; *A.C.*, 553 F.3d at 172). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider developing a BIP for a student that is based upon an FBA (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's 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 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, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F.3d at 190; see L.O. v. New York City Dep't of Educ., 822 F.3d 95, 113 [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 particular care must be taken to determine whether the IEP addresses the student's problem behaviors (id.).

With regard to a BIP, the special factor procedures set forth in State regulations 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]).¹⁹

¹⁹ 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]).

As with the failure to conduct an FBA, the district's failure to develop a BIP in conformity with State regulations does not, in and of itself, automatically render the IEP deficient, as the IEP must be closely examined to determine whether it otherwise addressed the student's interfering behaviors (see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 80 [2d Cir. 2014]; F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 6-7 [2d Cir. Jan. 8, 2014]; M.W. v. New York City Dep't of Educ., 725 F.3d 131, 139-41 [2d Cir. 2013]; R.E., 694 F.3d at 190).

As an initial matter, much of the evidence cited by the parents on appeal as justifying the student's need for an FBA and BIP relates to the student's behavior during the 2009-10 and 2010-11 school years and the student's behavior at home. For example, the parents reference concerns regarding the student's significant behaviors, which began shortly after she was adopted in 2008 (i.e. self-injurious behaviors, eloping, impulsivity, stealing and bullying) (Tr. pp. 2275-76, 2289, 2298). As detailed above, the hearing record reveals that the student made progress in the social/emotional and behavioral realms during the 2010-11 school year. Moreover, the responsibility of the June 2012 CSE was to assess the student's needs at the time of the June 2012 CSE meeting; accordingly, the question of whether or not the student exhibited interfering behaviors at school such that an FBA and BIP were warranted is determined based on how the student was functioning in school leading up to the June 2012 CSE meeting, while taking into account the student's progress over time.

The June 2012 CSE determined that the student did not require strategies, including positive behavioral interventions, to address behaviors that impeded the student's learning or that of others and did not recommend the development of a BIP for the student (see Dist. Ex 23 at p. 8).²⁰ As noted above, in developing the June 2012 IEP, the CSE considered multiple sources of evaluative information that contained information regarding the student's behavior, including a February 2012 JCOS progress report, an April 2012 JCOS report card, a May 2012 classroom observation, a May 2012 private neuropsychological evaluation, and a June 2012 letter from the student's private psychiatrist (id. at p. 4; see Dist. Ex. 22 at pp. 1-43; Parent Ex. DD).

The February 2012 JCOS progress report indicated that the student's positive attitude, curiosity, and inquisitiveness allowed her to thrive academically (Dist. Ex. 22 at p. 3). The student's April 2012 JCOS report card added that the student attained a "B" in Conduct (score range of 84-86) but needed to continue to improve her self-control (id. at p. 2). Additionally, the May 2012 classroom observation, conducted at JCOS by a district elementary school CSE chairperson, indicated that the student was attentive and well behaved, stood and sat appropriately with her class during an assembly, walked safely in the hallways and complied with classroom and lesson directions, kept her materials neat and organized within her desk, knew the routines and expectations of the classroom, completed most activities independently, and interacted with peers and adults in an age appropriate manner (id. at p. 9; see Tr. p. 94).

The May 2012 private neuropsychological evaluation reviewed by the CSE included an assessment of the student's attention and executive functioning and behavior and social/emotional functioning (Dist. Ex. 22 at pp. 26-30). With respect to attention and executive functioning, the

²⁰ Although it was not in front of the June 2012 CSE, the September 2012 JCOS IEP also indicated the student did not need strategies or supports to address behaviors that interfered with her learning or that of others and did not recommend the development of an IEP (Dist. Ex. 33 at p. 3).

psychologist who conducted the evaluation reported that the parent's responses on a behavior rating scale indicated that the student often talked at the wrong time, blurted things out, and interrupted others (*id.* at p. 27). In addition, the parent indicated that the student acted wilder and sillier than peers, got in trouble if not supervised by an adult, tended to act out of control, and had trouble "putting the brakes" on her actions (*id.*). Responses provided by the student's teacher indicated that the student sometimes acted out of control and needed to be told to stop, was impulsive and interrupted others, and did not think of consequences before acting (*id.*). In addition, the teacher's responses indicated that the student was unaware of her own behavior and how it impacted others, talked/played loudly and did not realize it bothered others, overreacted to small problems and had outbursts for little reason, and reacted more strongly to situations than other children (*id.*). The teacher also noted that the student had a short attention span and was easily distracted (*id.* at p. 28). With respect to behavior and social/emotional functioning, the parent's responses on a second behavior scale indicated the student often broke the rules and disobeyed, lied to get out of trouble, complained about being teased and not having friends, was sad and lonely, and "somatized" things (*id.*). Based on the parent's responses the student's behavior was rated as "significant" in the areas of conduct problems, depression, somatization, and functional communication and "at-risk" in the areas of hyperactivity and anxiety (*id.* at pp. 28-29). Responses provided by the student's teacher did not result in elevated scores in any area (*id.* at p. 29). The psychologist reported that the student's responses on a self-report rating scale suggested that she felt apprehensive and anxious, and also that she presented with low self-esteem and some pessimism, indicative of dysthymia (*id.* at p. 30). The psychologist suggested that "[t]o protect herself [the student] may display a mix of being sad and irritable, demanding and manipulative" (*id.* at pp. 30, 33).

Next, the June 2012 CSE considered a letter from the student's private psychiatrist that indicated the student exhibited low self-esteem and a high degree of anxiety and impulsivity (Parent. Ex. DD at p. 1). The psychiatrist opined that, in a large student population without constant supervision, the student would resort to "either retreating to a passive child or acting aggressively as an adult by 'bossing' other students around" (*id.*). He noted that, in either case, such behavior had contributed to the student's need for "significant interventions" to allow her to learn and engage in appropriate social interventions (*id.*). The psychiatrist suggested that the student's social skills "require[d] constant monitoring for appropriateness and chronic repetition and reminders" (*id.*).

In addition to the to the above, the June 2012 CSE meeting minutes included a description of the student's behavior provided by the student's then-current JCOS classroom teacher (Dist. Ex. 23 at p. 3). The teacher reported that the student required refocusing and redirection to tasks (*id.*). With respect to socialization, the teacher indicated that the student had made friends in and out of class, interacted with students in all grades, and had grown in her ability to handle social situations (*id.*). The teacher further indicated that the student used the social skills strategies that she had been taught and that her behavior depended on who she sat with (*id.* at p. 3).

According to the meeting minutes, the student's private therapist, who attended the June 2012 CSE meeting, described the student as a "fragile, easily overwhelmed student" and he expressed concern that the student could "fall[] backwards and los[e] her self-esteem" (Dist. Ex. 23 at p. 2).

The foregoing reflects that the June 2012 had before it information that revealed that, while the student presented as attentive and well-behaved at times, she also exhibited needs in the areas of self-control and impulsiveness, attentiveness, and social appropriateness. The present levels of performance on the student's June 2012 IEP accurately summarized these areas of need (compare Dist. Ex. 23 at p. 8, with Dist. Exs. 22 at pp. 2, 9, 26-30; 23 at p. 2, and Parent Ex. DD at p. 1). The IEP indicated that, in the classroom, the student had made good friends and was an eager participant in class discussions (Dist. Ex. 23 at p. 8). The IEP further indicated that the student was easily distracted and needed to be refocused (id.). According to the IEP, the student at times became involved in situations that did not concern her and needed reminders to keep out of such situations (id.). In addition, the student had strong opinions and was sometimes inappropriate with her feelings about others (id.). The IEP described the student's social strengths as her motivation to please her teachers and her kindness and protective nature toward other students (id.). Areas of concern included the student's need to develop the skills necessary to interact appropriately with peers (id.). Further, as noted above, the IEP indicated that the student did not require strategies, including positive behavioral interventions, to address behaviors that impeded the student's learning or that of others and did need a BIP (id.).

In order to address the student's needs in these areas, the June 2012 CSE recommended that the student receive one 30-minute session of counseling per six-day cycle (Dist. Ex. 23 at p. 11). Furthermore, consistent with recommendations contained in the May 2012 private neuropsychological evaluation, the June 2012 CSE recommended accommodations and modifications to address the student's social/emotional and behavioral needs, including: in-school counseling, refocusing and redirection, extra time to process or formulate responses, and special seating to minimize ambient noise and distractions (compare Dist. 22 at pp. 35-37 with Dist. Ex. 23 at pp. 8, 11). The June 2012 IEP also contained an annual goal designed to address the student's ability to communicate and interact in a socially acceptable manner with peers (Dist. Ex. 23 at p. 10).

The parent presented witnesses during the impartial hearing who offered their view regarding the student's behavioral needs and her need for an FBA and/or BIP (see Parent Exs. EEE; FFF). For example, while she did not attend the June 2012 CSE meeting, BCBA-D testified via affidavit that the student "needed not only an FBA, but a BIP in place" for the 2012-13 school year (Parent Ex FFF at p. 17).²¹ The BCBA-D opined that the student's "social impropriety" (verbal aggression, impulsivity, inability to take turns, getting involved with issues that did not concern her and bullying) not only interfered with the student's learning, but also with the learning of her classmates (id. at p. 5, 12; see Tr. p. 1786). The BCBA-D further opined that the accommodations listed on the student's IEP would not be effective in eliminating the student's unfocused and inattentive behavior and that, in order to modify the student's behavior, the district needed to know its function (Parent Ex FFF at p. 13). As a result, the BCBA-D indicated that the student required an FBA and BIP for the 2012-13 school year so that her specific behaviors (persistent inattention and socially inappropriate behaviors) could be targeted and modified by providing her with consistent, alternative positive behavioral strategies, supports, and skills to replace her problem behaviors (id. at p. 17).

²¹ The BCBA-D began working with the student in January 2014 (Parent Ex. FFF at pp. 5-6).

The student's private psychiatrist, who authored the letter considered by the June 2012 CSE and summarized above (Parent Ex. DD), also testified via affidavit that the program and services offered in the June 2012 IEP were inadequate to meet the student's educational and mental health needs (Parent Ex. EEE at pp 21-22). While the psychiatrist testified that the student made progress in her behaviors during the 2011-12 school year (i.e., he noted that, by the end of the 2011-12 school year, the student was emotionally stable and was not experiencing any high levels of anxiety, impulsivity, aggression, or depression), he indicated that the student's progress was due to attending JCOS and the support she was receiving in that environment (*id.* at pp. 18-19).²² He opined that, in a large classroom, the student would need individual cognitively and behaviorally based counseling tailored to her specific areas of deficit "in which she would be taught various strategies, tools and methods to cope with her behaviors, mood instability and anxiety so that they would not interfere with her learning" (*id.* at p. 23). Based on the psychiatrist's testimony, his evaluation of the student's behaviors, as they appeared in school, and the recommended program were solely based on parent reports, and he did not have any contact with the district school staff or the JCOS staff (Tr. pp. 1670, 1674, 1678, 1680, 1684, 1689, 1695).²³ However, the psychiatrist reported that when formulating psychiatric decisions and making diagnoses he also considered information gleaned from personal interview and examination (Parent Ex. EEE at p. 8).

Notwithstanding the aforementioned opinions of the BCBA-D and the student's psychiatrist, neither of them participated in the June 2012 CSE meeting; accordingly, the CSE cannot be faulted for failing to consider their views (*see* Parent Ex. 23 at p. 1; *see also* C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [finding that "a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE . . ."). In addition, the June 2012 considered contemporaneous evaluations and school reports that included descriptions of the student's behaviors and addressed the student's behavioral needs in the June 2012 IEP and, as such, may be afforded some amount of deference (*see* Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 592 F.3d 267, 270 [1st Cir. 2010] [noting that "the underlying judgment" of those having primary responsibility for formulating a student's IEP "is given considerable weight"]; J.E. & C.E. v. Chappaqua Cent. Sch. Dist., 2016 WL 3636677, at *16 [S.D.N.Y. June 28, 2016], *aff'd* 2017 WL 2569701 [2d Cir. June 14, 2017], citing E.S. v. Katonah-Lewisboro Sch. Dist., 742 F. Supp. 2d 417, 436 [S.D.N.Y. 2010] ["The mere fact that a separately hired expert has recommended different programming does nothing to change [the] deference to the district and its trained educators"], *aff'd*, 487 Fed. App'x 619 [2d Cir. July 6, 2012]; Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at *6 [N.D.N.Y. June 19, 2009] [explaining that deference is frequently given to the school district over the opinion of outside experts]).

As summarized above, the IEP provided that the student receive counseling, as well as accommodations targeted to address the student's social/emotional and behavioral needs, and set forth a goal targeted to improve the student's socially acceptable communication with peers (Dist.

²² The interim principal of JCOS also testified via affidavit that the student made progress with impulse control and behaviors during the 2011-12 school year at JCOS, noting that JCOS provided the student with a rewards-based positive behavioral plan (Parent Ex. GGG at pp. 9-10).

²³ Furthermore, the psychiatrist testified that the parents did not want him to discuss the student with the district and suggested that this was because the parents did not feel the school was providing an appropriate education to the student, and they were "looking at other options" (Tr. pp. 1649-50, 1718-19).

Ex. 23 at pp. 8, 10, 11). The district director of special education and support services (the director) testified that the CSE provided counseling services and addressed social skills development and that the student's needs did not "rise to a level beyond that" (Tr. pp. 301-02). The director further opined that the provision of refocusing, redirection, preferential seating, and chunking information supported the student's behavior, which could "at times" be described as impulsive (Tr. pp. 302-03). The director's explanation is consistent with the evaluative information summarized above and the parent's experts did not offer a position that undermines this ultimate conclusion.

Based on all of the foregoing, even considering the CSE's determination that the student did not require an FBA or a BIP as a serious procedural violation, in this instance, it would not rise to the level of a denial of a FAPE or otherwise contribute to such a finding because the June 2012 CSE had sufficient information regarding the student's behaviors and the June 2012 IEP adequately identified and recommended supports for the student's behavioral needs (R.E., 694 F.3d at 190).

b. Assistive Technology

The parents assert that, contrary to the IHO's finding, the June 2012 failed to offer the student appropriate assistive technology services—namely an FM system—to address the student's audiological processing needs for the 2012-13 school year.

Under the IDEA, one of the special factors that a CSE must consider is whether the student "requires assistive technology devices and services, including whether the use of school-purchased assistive technology devices is required to be used in the student's home or in other settings in order for the student to receive a [FAPE]" (8 NYCRR 200.4[d][3][v]; see 20 U.S.C. § 1414[d][3][B][v]; 34 CFR 300.324[a][2][v]; see also Educ. Law § 4401[2][a]). Accordingly, the failure to recommend specific assistive technology devices and services rises to the level of a denial of a FAPE only if such devices and services are required for the student to access his educational program (see, e.g., Application of the Bd. of Educ., Appeal No. 13-214; Application of a Student with a Disability, Appeal No. 11-121).

According to the June 2012 CSE meeting minutes, the parents raised concerns about the student requiring an FM system during the June 2012 CSE meeting (Dist. Ex. 23 at p. 3). The minutes also reflect that the student's private therapist who attended the June 2012 CSE meeting, described the student's "auditory processing and ability to filter out distraction" as "below age level expectations" (id. at pp. 1, 2). Additionally, an August 2009 neuropsychological evaluation, which was referenced on the June 2012 IEP, included the results of standardized testing of the student in the area of auditory processing and indicated that the student's standard scores fell in the low average to borderline range (Parent Ex. OO at p. 21; see Dist. Ex. 23 at pp. 4-5). Although the district speech-language therapist testified that the June 2012 CSE considered an auditory processing evaluation, the June 2012 IEP does not list an auditory processing evaluation under the list of evaluations (Tr. pp. 461-62; Dist. Ex. 23 at pp. 4-6; Parent Ex. Z at p. 1).²⁴ While it is unclear whether or not the June 2012 CSE reviewed it, the hearing record includes an August 2010 audiological evaluation that predated the June 2012 CSE meeting, which reported that, while the student did not show signs of an auditory processing disorder, she could be easily distracted when

²⁴ As discussed below, the May 2013 CSE considered the results of an auditory processing evaluation conducted in March 2013 (Dist. Ex. 27 at p. 5).

competing acoustic signals were present (Parent Ex. KK at p. 3). The audiologist recommended a comprehensive assessment, provision of preferential seating, provision of written summaries of critical academic information, enrollment in an auditory training program, and use of an FM system (id.).

Ultimately, the CSE determined that the student did not require an FM system to access the curriculum; however, the CSE did recommend special seating arrangements to help minimize ambient noise and distractions (Dist. Ex. 23 at pp. 3, 11). State guidance, recently issued in April 2017, provides that in determining whether a student needs assistive technology devices and services to receive a FAPE, a CSE should consider certain questions, including, but not limited to, "[w]hat the student can do now with and without assistive technology devices and services?" ; "[w]hat does the student need to be able to do?"; "[d]oes the student need assistive technology devices and services to ensure equitable access to the general curriculum?"; "[w]hat assistive technology services would help the student participate in the general curriculum and/or classes?"; and, "[d]oes the student need assistive technology devices and services to access auditory information?" (see "Assistive Technology for Students with Disabilities," at pp. 3-4, Office of Special Educ. Mem. [Apr. 2017], available at <http://www.p12.nysed.gov/specialed/documents/assistive-technology-for-students-with-disabilities.pdf>). Consistent with State guidance, the district director testified that, in determining whether the student required an FM system for the 2012-13 school year, the June 2012 CSE considered whether the student was able to participate in class instruction and make progress (Tr. pp. 111-12). CSE members noted that the student had made progress in the district's program without an FM system and further noted that at JCOS the student was observed participating in a large group setting (Tr. pp. 111-12; Parent Ex. Z at p. 1; see Tr. pp. 435-38, 449-50, 463-64, 507, 737-40, 750, 756-58, 779-80, 1141-43, 1148-49, 1151-52; Dist. Exs. 18; 19; 20; 21).

An FM system was described by the student's speech-language therapist from the 2010-11 school year, who attended the June 2012 CSE meeting, as a system that amplifies the instructor's voice and helps fade out ambient noise (Tr. pp. 464-65). Although, the district speech-language therapist testified that she was "not really qualified" to answer whether she believed the student required an FM system because she was not an audiologist, she further testified that she did not feel the student required an FM system based on her observations of the student (Tr. pp. 461-64, 483). Additionally, the speech-language therapist indicated that the student did not exhibit difficulty filtering out ambient noise and that she was able to pay attention to the teacher (Tr. pp. 464-65). The district speech-language therapist also testified that the June 2012 IEP was appropriate based on her observation that the student continually made progress as she moved through the grades and that the recommended support was sufficient to help her be an independent learner (Tr. p. 474-75).

Based on the foregoing, the evidence in the hearing record sufficiently supports the IHO's determination that the student did not need an FM system to access the educational curriculum. The hearing record shows that the student made progress in the district school without an FM system and also that she was observed successfully participating in class at JCOS without an FM system. Although the student may have benefited from use of an FM system, the hearing record does not support a finding that the student required an FM system in order to receive a FAPE.

3. Reading Instruction

The parents argue that the district failed to offer an Orton-Gillingham based program that would have addressed the student's needs relating to decoding for the 2012-13 school year.

State regulation defines "specially designed reading instruction" as "specially designed individualized or group instruction or special services or programs . . . in the area of reading . . . which is provided to a student with a disability who has significant reading difficulties that cannot be met through general reading programs" (8 NYCRR 200.6[b][6]). State guidance discussing specialized reading instruction notes that the term "specialized reading instruction" need not appear on an IEP and that such instruction may be provided through various means, including via a resource room program ("Guidelines on Implementation of Specially Designed Reading Instruction to Students with Disabilities and Clarification About 'Lack of Instruction' in Determining Eligibility for Special Education," VESID Mem. [May 1999], available at <http://www.p12.nysed.gov/specialed/publications/policy/readguideline.html>). In addition, the guidance specifies that "[i]nstructional methodology may be discussed at the [CSE] but is not specified on an IEP" ("Guidelines on Implementation of Specially Designed Reading Instruction," VESID Mem.).

Further, in general, a CSE is not required to specify methodology on an IEP, and the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher's discretion, absent evidence that a specific methodology is necessary (Rowley, 458 U.S. at 204; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 575-76 [2d Cir. Oct. 29, 2014]; A.S. v. New York City Dep't of Educ., 2011 WL 12882793, at *16 [E.D.N.Y. May 26, 2011] [noting the "broad methodological latitude" conferred by the IDEA], aff'd 573 Fed. App'x 63, 66 [2d Cir. July 29, 2014]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 86 [2d Cir. July 24, 2013]; R.E., 694 F.3d at 192-94; M.H., 685 F.3d at 257 [indicating the district's "broad discretion to adopt programs that, in its educational judgment, are most pedagogically effective"]; see M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *12 [S.D.N.Y. Mar. 31, 2014] [finding in favor of a district where the hearing record did not "demonstrate[] that [the student] would not be responsive to a different methodology"]; but see A.M. v. New York City Dep't of Educ., 845 F.3d 523, 541-45 [2d Cir. 2017]).

The August 2009 neuropsychological evaluation of the student, which was referenced on the June 2012 IEP, indicated that the student met the criteria for a reading disorder and recommended that the student receive specific remedial and teaching methodologies, noting a need for intense and focused remediation in the area of phonemic awareness to aid in the formation of decoding skills (Parent Ex. OO at pp. 31-32, 36; see Dist. Ex. 23 at pp. 4-5). The report indicated that "the best remedial methodology for [the student] in reading and writing [was] the Wilson Reading System"(Parent Ex. OO at p. 37). Additionally, the May 2012 private neuropsychological evaluation included recommendations that the student be taught reading comprehension using a systematic approach and that the student's reading instruction use a multi-sensory approach, such as Orton Gillingham or Lindamood Bell (Dist. Ex. 22 at pp. 35-36).

Notwithstanding these recommendations, the district director testified that the district used Wilson, which was an Orton-Gillingham based program, "for students whose decoding [was] significantly delayed," but the providers at the CSE meeting did not feel Wilson was appropriate

for the student because the student was decoding "pretty much at grade level" (Tr. pp. 67-68). The district director described an Orton-Gillingham based program as one that employed sequential phonics instruction (Tr. p. 67). She indicated that the district followed a systematic reading program called Fountas and Pinnell, which was not an Orton-Gillingham based program (Tr. pp. 67-68). Additionally the May 2012 neuropsychological evaluation indicated that the student scored in the borderline range in letter-word identification; however, the psychologist suggested that, while the student was able to decode text, as text became more complex, she made mistakes which impacted her comprehension (Dist. Ex. 22 at pp. 33, 39). Finally, the director testified that the student's decoding was commensurate with grade level expectations, therefore systematic instruction in phonics was not considered, although the district continued to work with her (Tr. p. 297).

The student's third grade classroom teacher described the reading instruction she provided to the student in summer 2010 and during the 2010-11 school year. She explained that she used a workshop model in which she: presented a mini lesson to the whole class, based on a particular teaching point; modeled the skill using a read-aloud or small text; and engaged in guided reading with the whole class and then divided into small groups for more guided reading or independent work (Tr. pp. 705, 716; see Tr. pp. 90-91). District staff further explained that students' reading abilities were assessed using high frequency word lists and running records and that the results of the assessments helped to inform instruction (Tr. pp. 87-91, 701-02; see Tr. p. 706). The classroom teacher testified that, during guided reading, the student worked on improving her reading fluency, decoding, chunking, use of context clues, reading cadence, observation of punctuation, and response to basic comprehension questions (Tr. pp. 709-10; see Tr. pp. 708-09). According to the classroom teacher, the student improved her knowledge of sight words, as well as her independent reading level during the summer Bridges program, but that she was not meeting the established benchmark (Tr. pp. 710-11). The classroom teacher reported that the student continued to make progress through the 2010-11 school year, specifying that she went from a Fountas and Pinell instructional level L to an instructional level N (Tr. pp. 731-32). Furthermore, the hearing record indicates that, at the end of the 2010-11 school year, the student achieved a level 3 on the 2011 ELA State assessment, which, according to the classroom teacher, was on grade level and met the State standard expectation (Tr. pp 745-46; Dist. Ex. 18 at pp. 1-2).

The district special education teacher, who was familiar with and had instructed students using Orton-Gillingham based programs,²⁵ testified that the parents had requested Orton-Gillingham based instruction at the student's March 2011 CSE meeting (Tr. p. 889; Dist. Ex. 9 at p. 6; see Tr. pp. 837, 839-40). She recalled that her opinion at the time was that the student's reading skills were such that she did not require Orton-Gillingham instruction in order to improve her reading abilities (Tr. p. 885). She explained that, because student was reading less than a year below grade level, knew all of the letter/sound correspondences, was able to read consonant-vowel-consonant words, and was learning many vowel-consonant E words through word study she did not require Orton-Gillingham instruction to improve her reading abilities (Tr. pp. 885-86).

At the time of the June 2012 CSE meeting, the student's JCOS teacher reported that the student's Preventing Academic Failure level was Book E (end of second grade) and that she would

²⁵ Although the district special education teacher testified that she was trained in Preventing Academic Failure and Wilson, she confirmed that she was not certified in them (Tr. pp. 938-40).

begin the next school year at Book F (third grade) (Dist. Ex. 23 at p. 3). The teacher, who worked with the student during the 2010-11 school year, testified that she was surprised that the student was on Book E in Preventing Academic Failure because Book E had not yet introduced vowel-consonant E words, and the student had met an IEP goal related to this skill at the end of third grade (Tr. pp. 901-02, 992-93). The teacher further testified that there was "no point in time" that she thought it was necessary to instruct the student using an Orton-Gillingham based program such as Wilson or Preventing Academic Failure (Tr. p. 942, 945).

According to the June 2012 IEP, the student had difficulty reading words with unusual spelling patterns and multi-syllabic words, as well as difficulty answering implicit (inferential) questions and identifying pertinent details (Dist. Ex. 23 at p. 7). In addition, the IEP indicated that the student needed to improve her decoding skills and her ability to predict vocabulary meaning through the use of contextual cues (id.). The May 2012 neuropsychological evaluation indicated that: the student's academic skills were in the low average to average range with variable skills in identifying words in isolation; her ability to apply phonetic strategies in order to decode unfamiliar words was in the low average range; her phonological memory was an area of weakness; and that difficulties in comprehension were related to decoding and vocabulary issues (Dist. Ex. 22 at p. 32 see Dist. Ex. 22 at pp. 18-20).²⁶

The June 2012 IEP recommended that the student attend a general education classroom and receive resource room and related services (Dist. Ex. 23 at p. 10). The June 2012 IEP contained annual goals designed to improve the student's ability to identify and use word attack skills regarding diphthongs, to identify the number of syllables in a word, divide words into syllables and to decode the words; to read prefixes and suffixes to decode words; and to identify contextual clues and predict definitions of unfamiliar vocabulary words (id. at p. 9). Furthermore, the following speech-language therapy goals would assist the student in developing her reading skills; specifically, to improve her ability to sequence unfamiliar sound patterns when speaking and learning new words and to sequence relevant events accurately with relevant details when retelling narratives (id. at p. 10). Additionally, to further support the student with her reading the IEP recommended the student received word banks, preview vocabulary and concepts, allowed extra time to process and formulate responses, chunk information, related concepts to previous experiences and use visual aids (id. at p. 11).

Although the student exhibited weaknesses in decoding and phonics skills (and the district was required to address those deficits), the district was also required to do so within "a comprehensive and integrated literacy curriculum" aimed at ensuring that the student would acquire skills necessary to progress in the general education curriculum ("Guidelines on Implementation of Specially Designed Reading Instruction to Students with Disabilities and Clarification About 'Lack of Instruction' in Determining Eligibility for Special Education," VESID Mem.). As set forth above, the program described in the June 2012 IEP was designed to help the student become a more proficient reader and addressed the student's deficits, and the hearing record

²⁶ While the evaluator reported that the student's ability to apply phonetic skills was in the low average range, she alternately characterizes the skill as "below age expectations" and falling in the "[b]orderline" range (compare Dist. Ex. 22 at p. 32, with Dist. Ex. 22 at pp. 18, 39).

does not support a finding that the student required a particular methodology in order to make progress appropriate in light of the circumstances.

4. Speech-Language Therapy

Turning to the parent's argument that the district failed to specify a specific methodology regarding speech and language instruction, as discussed above with respect to the parent's allegations about reading instruction, the district was not required to identify a particular methodology in the IEP absent evidence that a specific methodology was necessary (*Rowley*, 458 U.S. at 204).²⁷ Nevertheless, the student's speech-language therapist from 2010-11, who also attended the June 2012 CSE meeting, testified that she was familiar with and utilized some principals of articulation methodologies, specifying that these methodologies were used to "try to help students really correct a sound" (Tr. pp. 429-30). She further testified that she did not recall if she used specific methodologies with the student; however, she described that one of the student's strengths was that she was very good at imitating a sound, and opined that, if a student is good at imitating a sound, it is much easier to teach a sound (Tr. p. 432). However, the parent does not directly assert that the student needed to receive speech-language therapy using these particular articulation methodologies and no information available to the CSE indicated that the student would benefit from a particular methodology in speech-language therapy. Rather, the parents' argument appears to be, not that the student needed a particular methodology, but that a CSE is in all instances required to specify on a student's IEP a methodology for delivering services to a student with a disability. Nothing in the IDEA requires such a broad interpretation of the CSE's obligations with respect to identifying methodologies. On the contrary, as noted above, methodology is usually a matter left to the discretion of the teachers and providers who ultimately implement the student's program.

Next, with respect to the parents' argument that the district relied on ESL instruction as a substitute for evidenced-based speech-language therapy services, as an initial matter, ESL instruction is not a special education service ("Bilingual and English as a Second Language (ESL) Services for Limited English Proficient (LEP)/ English Language Learners (ELLs) who are Students with Disabilities," Office of Special Educ. Mem. [March 2011], available at <http://www.p12.nysed.gov/specialed/publications/bilingualservices-311.pdf>; see 8 NYCRR 154-1.2[a]). Furthermore, the hearing record shows that the student tested proficient in ESL at the end of the 2010-11 school year and ESL instruction was discontinued (Dist. Ex. 17 at pp. 2, 7-8). Additionally, to the extent that the parents may be arguing that ESL supplemented the speech-language therapy services the student received during the 2010-11 school year and, therefore a continuation of the same level of speech-language therapy services without ESL services would be insufficient, such an argument is misplaced as the analysis is based on whether the recommendation was appropriate in light of the student's needs at the time of the June 2012 CSE.

Turning to the speech-language services recommended in the June 2012 IEP, a review of the evaluative information before the June 2012 CSE regarding the student speech and language

²⁷ With respect to the parents' argument that the student required speech and language instruction using Wilson or another Orton-Gillingham based program, the hearing record shows that Orton-Gillingham is a specific methodology that provides specific sequential phonics instruction, and Wilson is an Orton-Gillingham based program for students whose decoding is significantly delayed (Tr. pp. 67-68).

skills, as discussed in detail above, indicated: that the student performed in the average range in her receptive language skills and the low average range in her expressive language skills; and that the student exhibited difficulties in processing lengthy pieces of information efficiently; and that, when more complex language was used, the student struggled to offer complete and meaningful responses (Dist. Ex. 22 at pp. 22-23). As noted above, during the 2011-12 school year, the student received services pursuant to an IESP developed by the district of location, including three 30-minute sessions per week of speech-language therapy in a small group (Dist. Ex. 36 at pp. 1, 9). According to the June 2012 IEP, the student's speech-language therapist from the district of location reported that, during the 2011-12 school year, the student made progress in all areas and she was able to express conclusions, discuss main ideas, convey explanations, and provide details to answer questions accurately (Dist. Ex. 23 at p. 7).²⁸ According to the CSE meeting minutes, a speech-language "progress report" indicated that the student continued to make progress in her ability to describe and compare/contrast people and objects, but required verbal cues to include some salient attributes (*id.* at p. 2). In addition, the minutes reflected that the student also continued to rely on clinician support to stay on target, to generate sentences that were syntactically correct, and to avoid extraneous information (*id.*).

The June 2012 CSE recommended the student receive speech- language therapy (5:1) three times per six-day cycle for 30 minutes per session (Dist. Ex. 23 at p. 11). Additionally, the IEP contained approximately four annual goals designed to improve the student's ability: to sequence unfamiliar sound patterns when speaking and learning new words; to produce target sounds in isolation, syllables, and all positions of words and blends; to sequence events accurately and include relevant details when retelling narratives; and to formulate grammatically correct sentences and maintain appropriate verb tense in oral communication (*id.* at p. 10). Furthermore, the June 2012 IEP recommended strategies, modifications and accommodations, such as the use of word banks, previewing vocabulary and concepts, allowing extra time to process and formulate responses, chunking information, and relating concepts to previous experience, which would assist the student in her areas of weakness while her language skills continue to develop (*id.* at p. 11).

Considering the progress the student made during the 2011-12 school year, while receiving the same level of speech-language therapy as recommended in the June 2012 IEP, and further considering the management strategies and annual goals contained within the June 2012 IEP aimed towards addressing the student's speech-language deficits, the recommended speech-language therapy for the 2012-13 school year was reasonably calculated to allow for the student to make progress.

B. May 2013 IEP

1. General Education Placement with Resource Room Services

The parents argue on appeal that the IHO erred in finding that the May 2013 CSE's recommendation of a general education classroom with resource room services was appropriate

²⁸ Although the June 2012 IEP references a progress report from the student's speech-language therapist for the 2011-12 school year, such a report was not included in the hearing record and the speech-language therapist from the district of location did not attend the June 2012 CSE meeting (*see* Dist. Ex. 23 at pp. 1-2, 7).

for the student. A review of the evidence in the hearing record does not support the parents' contentions.

Again here, while the adequacy of the evaluative information available to the May 2013 CSE and the student's present levels of performance as described in the resultant IEP are not in dispute, a discussion thereof provides context for the issue to be resolved; namely, whether the general education placement with a special class for reading and resource room services was appropriate and reasonably calculated to provide the student with educational benefit. The hearing record indicates that the May 2013 CSE had before it evaluative information from the student's reevaluations by which to identify the student's present levels of performance and design an IEP appropriate to meet her needs (Dist. Ex. 24). Specifically, the May 2013 CSE considered a December 2012 social history update, a December 2012 psychological evaluation, a December 2012 educational reevaluation, a December 2012 classroom observation, a December 2012 speech-language reevaluation, a February 2013 JCOS progress report, a March 2013 JCOS report card, a March 2013 speech-language progress report from the district of location, a May 2013 counseling summary from the district of location, and a May 2013 private auditory processing evaluation (Tr. p. 118; Dist. Exs. 24; 27 at pp. 2-7; Parent Exs. P; Q; S).

In addition to providing information regarding the student's behavior, as detailed below, the reports and evaluation results considered by the May 2013 CSE provided the committee with information regarding the student's intellectual and academic functioning, as well as her speech-language needs and abilities.

With respect to intellectual functioning, the May 2013 IEP reflected the results of both the parents' May 2012 private neuropsychological evaluation and the district's December 2012 psychoeducational evaluation (compare Dist. Ex. 27 at pp. 7-8, with Dist. Exs. 22; 24 at pp. 5-13). Consistent with the December 2012 psychoeducational evaluation, the May 2013 IEP indicated that the student's overall cognitive abilities were difficult to summarize with a single score, as her performance on measures of nonverbal reasoning abilities resulted in significantly higher scores than her performance on tasks requiring verbal reasoning (compare Dist. Ex. 24 at pp. 7-8, 10, with Dist. Ex. 27 at p. 7-8). Also consistent with the December 2012 psychoeducational evaluation, the May 2013 IEP reported that the student's working memory skills were assessed to be in the average range, and her processing speed abilities were assessed to be in the high average range (compare Dist. Ex. 24 at pp. 8-9, with Dist. Ex. 27 at p. 8).²⁹

With respect to the student's academic abilities and consistent with the results of the district's December 2012 educational evaluation, the May 2013 IEP indicated that administration of the KTEA-II yielded scores in the average range on measures of the student's reading comprehension, knowledge of math concepts and applications, math computation, written expression, and spelling (compare Dist. Ex. 24 at pp. 17, 19, with Dist. Ex. 27 at p. 8). Additionally, the IEP reported that the student's ability to read words in isolation fell in the below average range (id.). The IEP indicated that the student could not remember syllabication rules, which hindered her decoding, and had difficulty reading unfamiliar multisyllabic words (Dist. Ex. 27 at p. 8). Finally, the May 2013 meeting minutes indicated that the pattern of scores reported

²⁹ At the CSE meeting the parent opined that the reevaluation reports did not present an adequate representation of the student (Dist. Ex. 27 at p. 2).

from the December 2012 educational evaluation were noted to be similar to those reported in the May 2012 private psychoeducational evaluation (Dist. Ex. 27 at p. 2; see Dist. Ex. 22 at pp. 10-43; 24 at pp. 15-20).

Consistent with the December 2012 speech-language reevaluation, the May 2013 IEP reflected the results of the student's performance on the Comprehensive Assessment of Spoken Language (CASL) (Dist. Ex. 27 at p. 9). The IEP stated that, based on CASL testing, the student presented with a wide range of abilities (id.). The IEP highlighted the student's below average score on the lexical/semantic processing index and noted that the student's performance on subtests within this category reflected her ongoing difficulty with word knowledge, recognition, recall, and oral expression (compare Dist. Ex. 24 at pp. 25-26, 29, with Dist. Ex. 27 at p. 9). The May 2013 IEP further reported that the student's performance on isolated skills from an administration of the Comprehensive Test of Phonological Processing (CTOPP) indicated on-going weaknesses in phonological memory (compare Dist. Ex. 24 at p. 26-27, 29, with Dist. Ex. 27 at p. 9).

Additionally, according to the May 2013 CSE meeting minutes, the CSE chairperson reviewed a speech-language progress summary provided by the district of location which indicated that the student enjoyed attending therapy sessions and was an important contributor to the group (Dist. Ex. 27 at p. 3; see Parent Ex. Q at p. 1). Consistent with the March 2013 progress summary, the May 2013 IEP reported that the student demonstrated excellent progress in her ability to explain, sequence and relate information, and very good progress in her use of language involving increasingly mature vocabulary and grammar (compare Parent Ex. Q at p. 1, with Dist. Ex. 27 at p. 9). The May 2013 IEP reported that the student continued to demonstrate deficits in word retrieval and word knowledge (id.). Finally, the IEP reported that the student presented with concreteness in her thinking and had difficulty comprehending nuances of language which could cause conflict within the group dynamic (id.).

According to the CSE meeting minutes, the chairperson also reviewed a counseling summary from the district of location; based on that summary, the IEP reported that the student was making progress in all areas noted on her IESP both in and out of the classroom and specified that she was working on identifying and managing impulsive behaviors, working and playing cooperatively without inappropriately displaying frustration, and developing socially appropriate affective behaviors (Dist. Ex. 27 at pp. 3, 10; see Parent Ex. P).

A March 2013 private auditory processing evaluation, provided by the parents to the May 2013 CSE, indicated the student presented with a "specific auditory processing disorder in the area of discrimination, auditory integration and temporal processing" (compare Dist. Ex. 27 at p. 9, with Parent Ex. S at p. 6; see Dist. Ex. 27 at p. 3). Additionally, the May 2013 IEP reported the evaluator's conclusion that the student had a phonological processing disorder and a "right ear advantage suggesting an immature auditory system" (compare Dist. Ex. 27 at p. 9, with Parent Ex. S at pp. 6-7). Finally, as reported from the private evaluation, the May 2013 IEP noted that the student's overall score on one formal measure of auditory processing did not identify her as having an auditory processing disorder but that the student had difficulty on isolated subtests and may have difficulty listening to rapid speech rates and foreign accents (compare Dist. Ex. 27 at p. 9, with Parent Ex. S at p. 7).

The student's then-current teacher from JCOS reported to the May 2013 CSE that the student was reading at the end of fourth grade level, could decode words in isolation at the fifth-grade level, and continued to have difficulty with reading multi-syllabic words, fluency, and inferential comprehension (Dist. Ex. 27 at p. 8). In writing, the teacher reported that the student had difficulty organizing her thoughts in a sequential and coherent manner but that she was able to generate ideas and used her notes to write (*id.* at p. 9). The teacher further reported that the student was working at a single paragraph level and that she did well on weekly spelling tests but had difficulty transferring the skills to written work (*id.*). In math, the student's teacher indicated that she was in the higher math group and was performing at the middle of fifth grade level (*id.* at p. 8). Finally, the student's teacher reported that in study skills, the student had a good work ethic, but had difficulty getting into "work mode" (*id.* at p. 9). The student's second quarter report card indicated that the student received grades of 84 in reading, 95 in language arts, 90 in mathematics, 96 in social studies and 99 in science (Dist. Ex. 24 at p. 30). The report card indicated that the student needed improvement in composition/writing, grammar and speaking/listening, but not vocabulary/phonics or spelling (Dist. Ex. 24 at p. 30).

To address the student's identified needs, the May 2013 CSE recommended the student attend a general education classroom with the addition of an 8:1 special class in reading once per day for 40 minutes and resource room once per day for 40 minutes (Dist. Ex. 27 at p. 13). Additionally, the May 2013 IEP recommended the student receive the following related services: one 40-minute session of counseling in a small group per six day cycle and two 40-minute sessions of speech-language therapy in a small group per six day cycle (*id.*). To further support the student, the May 2013 CSE recommended that she receive the following supplementary aids and services, program modifications, and accommodations throughout the school day: student to paraphrase directions; use of word banks; previewing vocabulary and concepts; provision of graphic organizer; allowing extra time to process and formulate responses; chunking of information; special seating arrangements; relating concepts to previous experience; using visual aids; and providing copies of class notes (*id.* at pp. 13-14). The director, who chaired the May 2013 CSE meeting, testified that the combination of recommended programs, related services, and accommodations would have enabled the student to make meaningful educational progress (Tr. p. 138). She explained that the student's reading goals would be addressed through the recommended reading program and the resource room program would address the other skills that were listed on the May 2013 IEP (Tr. pp. 335-36). Furthermore, the director noted that the teachers would address these skills in concert, but primarily the reading teacher would be responsible for the instruction tied to the reading goals (Tr. pp. 335-36).

None of the new information before the May 2013 CSE warrants a different conclusion regarding the parents' positions about the appropriateness of the resource room services (as opposed to ICT services) or the weight of the opinions of the parents' experts regarding the student's ability to function in a general education classroom given her social/emotional and behavioral needs. Rather, a review of the evidence in the hearing record, as a whole reveals that, based on the information available to the May 2013 CSE, the program outlined in the IEP, including the general education classroom placement with resource room services and an 8:1 special class for reading, was reasonably calculated to address the student's needs. Thus, the IHO's determination that the May 2013 CSE recommended an appropriate program recommendation for the student's 2013-14 school year must be upheld.

2. Special Factors

a. Interfering Behaviors

The parents assert that the IHO erred in finding that the district's failure to conduct an FBA and develop a BIP for the 2013-14 school year did not constitute a denial of a FAPE.

As with the 2012-13 school year, much of the evidence cited by the parents as justifying the need for an FBA and BIP relates to the student's behavior during the 2009-10 and 2010-11 school years and the student's behavior at home, which as detailed above does not support the parents' claim given the evidence of the student's social/emotional and behavioral progress in the school environment during the 2010-11 school year and the lack of evidence that the student exhibited the significant behaviors described by the parent at school or during the period of time leading up to the May 2013 CSE meeting.

However, in contrast to the June 2012 CSE, the May 2013 CSE determined that the student required strategies, including positive behavioral interventions, to address behaviors that impeded the student's learning or that of others but, like the June 2012 CSE, did not recommend the development a BIP for the student (compare Dist. Ex. 23 at p. 8, with Dist. Ex 27 at p. 11). In addition, whereas the June 2012 IEP described the student as having "significant delays in attentional skills, speech skills, language skills, and social skills which inhibit progress in the general education curriculum," the May 2013 IEP had a slightly different description indicating that "the student had significant delays in emotional regulation, speech/language skills, and attention skills which inhibit progress in the general education curriculum" (compare Dist. Ex. 23 at p. 8, with Dist. Ex. 27 at p. 11). In developing the May 2013 IEP, the CSE considered multiple sources of evaluative information which described the student's behavior, including a December 2012 classroom observation report, the student's JCOS second quarter report card, a December 2012 speech-language evaluation, a December 2012 psychoeducational evaluation, a May 2013 letter from the student's private psychiatrist, and a May 2013 counseling summary (Dist. Exs. 24 at pp. 1, 5-14, 21-23, 25-30; 27 at pp. 2-7; Parent Exs. L at p. 1; P; DDD).

The hearing record shows that the CSE reviewed the classroom observation report, which was conducted at JCOS (compare Dist. Ex. 24 at pp. 21-23, with Dist. Ex. 27 at p. 3). Consistent with the December 2012 classroom observation report, the May 2013 meeting minutes indicated that, during the classroom observation, the student was respectful to peers and the teacher, was attentive, focused, participated throughout the observation, completed her work independently in a timely manner, asked appropriate questions, followed directions, and read in a round robin fashion (compare Dist. Ex. 24 at pp. 21-23, with Dist. Ex. 27 at p. 3). The observer noted, as did the CSE meeting minutes, that, according to the JCOS teacher, the student had a difficult day about once a month and that she got along well with others but did not always read social cues (compare Dist. Ex. 24 at p. 23, with Dist. Ex. 27 at p. 3). The meeting minutes also reflected a verbal report provided by the student's JCOS teacher, in which she indicated that the student required "a lot of support and guidance with peers," could be impulsive which affected her relationships with others, wanted to help but could be overbearing, and that she had one very good friend and many other friends (Dist. Ex. 27 at p. 3). Consistent with the March 2013 counseling summary from the district of location, the May 2013 CSE meeting minutes also included information that the student had made progress in all areas noted on her IESP during counseling and in the classroom, and described

the student as "kind, caring and intelligent" (compare Parent Ex. P, with Dist. Ex. 27 at p. 3). The meeting minutes further indicated that the student was choosing to stay out of classroom drama and appeared "happy and comfortable at school" (Dist. Ex. 27 at p. 3).

The student's JCOS second quarter report card indicated that she attained a grade of "B" in conduct, and the teacher's comments indicated that the student had improved in her ability to focus on herself, as opposed to peers (Dist. Ex. 24 at p. 30).

The CSE also reviewed the results of a December 2012 psychoeducational evaluation, completed by the district as part of a reevaluation of the student (Dist. Exs. 24 at pp. 5-20; 27 at p. 2). The district psychologist's assessment of the student included behavioral observations, as well as the administration of behavioral rating scales to the student and her mother and teacher (Dist. Ex. 24 at pp. 6, 9-10). According to the psychologist, the student greeted her with enthusiasm, engaged in "small talk," followed testing directions, greeted peers, and was pleasant and conversational (*id.* at p. 6). The psychologist noted that the student demonstrated the use of strategies and the ability to change strategies when they did not provide her with the best result (*id.*). She indicated that the student's attention and concentration was "optimal during this one-on-one testing situation" (*id.*). To better understand the student's social/emotional functioning the psychologist requested that the student, the student's mother, and the student's classroom teacher complete the Behavior Assessment System for Children, Second Edition (BASC-2) (*id.* at p. 9). Responses provided by the student's mother yielded scores in the "at-risk" range for indexes related to internalizing problems and behavioral symptoms (*id.* at p. 10). According to the parent's observations the student engaged in disruptive behaviors, was pessimistic and/or sad, displayed a high number of health-related concerns in the absence of serious health problems, engaged in strange behaviors, had difficulty making friends and was sometimes unwilling to join group activities (*id.*). Further, the mother's responses indicated that the student demonstrated poor expressive and receptive communication skills, and had difficulty seeking out and finding information on her own (*id.*). The student's teacher's responses on the BASC-2 (TRS-P) endorsed the items in the areas of executive functioning and negative emotionality, which fell in the "at-risk" range (*id.*). The teacher's responses indicated that the student sometimes had difficulty controlling and maintaining her behavior and mood and had a tendency to react negatively when faced with changes in everyday activities and routines (*id.*). The psychologist stated that student's responses on the BASC-2 self-report (SRP) resulted in no elevated scores (*id.*).

The student's then-current teacher from JCOS, who participated in the May 2013 CSE meeting (Dist. Ex. 27 at p. 1), testified that, during the 2012-13 school year, the student had difficulty with spoken language and nonverbal cues, which affected her academically and socially (Tr. p. 2350). She further testified that the student experienced difficulties working with others, including understanding what they were trying to say to her, answering them, and communicating with them (Tr. p. 2351). The teacher described that, when there was difficulty, the group had to stop, explain, or figure out what the problem was and "how to fix it" so the student understood (Tr. pp. 2350-51). She explained that she addressed social weaknesses through the use of strategies, which included, in part, redirecting, refocusing academically, breaking things down or breaking down social situations, and role playing (Tr. pp. 2351-52, 2360-61, 2371-72). The teacher testified that the student responded well to the classroom behavior plan, and that she understood consequences and rewards; however, although the student understood the theory, because she was impulsive the practice was more difficult for her (Tr. pp. 2357-58). The teacher reported that the

student was "always on top of people, very close to them" and didn't understand that it made people uncomfortable (Tr. pp. 2360-61). Additionally, the teacher opined that the student had an impulsive, aggressive nature—almost to the point of being dangerous to herself and others—but that, throughout the 2012-13 school year, the student learned strategies that allowed her to slow down and acknowledge her impulsive and aggressive tendencies and to give herself time to respond (Tr. pp. 2369-70). The teacher reported that the student bullied peers and was bullied by peers but also noted that she wasn't alone and was in a population where "those things needed to be addressed" (Tr. p. 2372). The teacher indicated that the student made progress in her social skills and interactions with peers and that the complexity, severity, and number of incidents had decreased by then end of the 2012-13 school year (Tr. pp. 2372). Finally, the teacher testified that the behaviors she described occurred during recess and opined that it was due to the student not understanding the rules of the game (Tr. pp. 2412-14). The teacher noted that, as the group got bigger, it became more difficult for the student to manage social situations (Tr. p. 2412).

The teacher stated that the student benefited from the small-group setting provided by JCOS, along with constant positive reinforcement and other strategies, and that, therefore, she did not check the box on the JCOS IEP that would indicate that the student required strategies to address behaviors that impeded her learning or that of others (Tr. pp. 2410-11; see Dist. Ex. 34 at p. 2).

The letter from the student's private psychiatrist, which was similar to the letter considered by the June 2012 CSE, indicated the student exhibited low self-esteem and a high degree of anxiety and impulsivity (compare Parent Ex DD, with Parent. Ex. DDD). The psychiatrist opined that, in a large student population without constant supervision, the student often resorted to "either retreating to a passive child or acting aggressively as an adult by 'bossing' other students around" (Parent Ex. DDD at p. 1). He noted that, in either case, such behavior had contributed to the student's need for "significant interventions" to allow her to learn and process her schoolwork at an appropriate pace and to engage in appropriate social interventions (id.). The psychiatrist suggested that the student's social skills "require[d] constant monitoring for appropriateness and chronic repetition and reminders" (id.).

Given the testimony of the student's teacher for the 2012-13 school year, it was appropriate for the May 2013 to find that the student required strategies, including positive behavioral interventions, to address behaviors that impeded the student's learning or that of others (Dist. Ex 27 at p. 11). To the extent that the May 2013 CSE should have also recommended the development of a BIP for the student, as with the June 2012 IEP, the failure does not result in a denial of a FAPE in this instance given the description of the student's needs (primarily related to social interactions with peers) and the social/emotional and behavioral supports built into the student's May 2013 IEP. In particular, the May 2013 IEP contained recommendations to address the student's behavioral needs including but not limited to: counseling; speech-language therapy; refocusing and redirection; the use of models, visuals and hands on experiences; special seating arrangements; allowing extra time to process and formulate responses; and relating concepts to previous experience (Dist. Ex. 27 at pp. 10, 13-14). Further, the May 2013 IEP carried over an annual goal from the June 2012 IEP designed to address the student's ability to communicate and interact in a socially acceptable manner with peers (compare Dist. Ex. 23 at p. 10, with Dist. Ex. 27 at p. 12), and added an annual goal for the student to self-identify her impulsive behaviors and explain how they impact the behaviors of others (Dist. Ex. 27 at p. 12).

As with the 2012-13 school year, the parents point to the testimony of their experts to support their position that the May 2013 CSE should have recommended a BIP for the student (see Parent Ex FFF at p. 17). The BCBA-D raised the same concerns regarding the proposed May 2013 IEP as she did regarding the June 2012 IEP and generally asserted that the student's behaviors were managed in the small 9:1 classroom at JCOS where the student received individual attention, but could not be managed within a general education environment (*id.* at pp. 11-12, 13, 17). As was the case regarding the June 2012 CSE, neither the private psychiatrist nor the BCBA-D attended the May 2013 CSE meeting and, while their opinions have been considered, the ultimate recommendations of the district staff are given more weight under the particular facts of this case.

Based upon the foregoing, including the legal standard set forth above with respect to the June 2012 IEP, the evidence in the hearing record supports a finding that, even considering the CSE's determination that the student did not require an FBA or a BIP as a serious procedural violation, it would not rise to the level of a denial of a FAPE or otherwise contribute to such a finding because the May 2013 CSE had sufficient information regarding the student's behaviors and the June 2012 IEP adequately identified and recommended supports for the student's behavioral needs (*R.E.*, 694 F.3d at 190).

b. Assistive Technology Services—FM System

The parents argue that the district's failure to provide the student with an FM system for the 2013-14 school year denied the student a FAPE.

According to the hearing record, the May 2013 CSE discussed the parents' request for an FM system and determined, based on the student's performance in the classroom setting, results of the classroom observation, and the March 2013 auditory processing evaluation, that the student did not need an FM system to make progress (Tr. pp. 134-35; Dist. Exs. 24 at pp. 21-26; 27 at p. 3; Parent Ex. S).

The March 2013 auditory processing evaluation indicated that the student presented with a specific auditory processing disorder in the areas of discrimination, auditory integration, and temporal processing; however, on one formal test of auditory processing (SCAN-3C Test of Auditory Processing Disorders in Children - 2009), the student was not identified with an auditory processing disorder (Parent Ex. S at pp. 4, 6-7). Additionally, the evaluator opined that the student's auditory comprehension was in the average range, speech discrimination was considered good, and hearing was within normal limits (*id.* at pp. 6-7). However, the evaluator also noted that the student's auditory memory was compromised, mishearing was observed, and circumlocutionary speech and word retrieval problems were present (*id.* at p. 7). The March 2013 auditory processing evaluation contained recommendations for accommodations and modifications to improve the student's integration, temporal processing, and phonological processing skills including, in part: preferential seating, extended time for testing and classwork, a separate testing area, preteaching, study notes, visual aids, a copy of class notes, checks for understanding, information to be presented slowly, repetition, and time to process information and respond (*id.*). In addition, the evaluator suggested the use of an FM system to aid in clarity, focus, and attention (*id.*). Similarly, the JCOS teacher suggested that the student would benefit from an FM system because the one used in her classroom improved the student's ability to attend and focus (Tr. pp. 2368-69). While the classroom FM system was intended for use with another

student, the JCOS teacher opined that all students benefitted from the system and that it allowed all of the students to attend to and focus on what was being said (Tr. pp., 2369, 2417-19).

Notwithstanding the above, the director of special education testified that the May 2013 CSE would have considered additional supports, services, and aids, such as an FM system, had the student not been making progress in a classroom or educational environment (Tr. pp. 179-80, 212). Additionally, the district speech-language therapist, who attended both the June 2012 and the May 2013 CSE meetings, opined that, in her experience working with the student during the 2010-11 school year, the student did not require an FM system to do well in school (Tr. pp. 482-83). In addition, a review of the hearing record reveals that the May 2013 CSE recommended similar supplemental aids, program modifications, and accommodations as were recommended in the March 2013 auditory processing evaluation, discussed in greater detail above (compare Dist. Ex. 27 at pp. 13-14, with Parent Ex. S at p. 7).

Based upon the foregoing, the hearing record indicates that, while the student might have benefited from the use of an FM system, she did not require one to access the curriculum or to receive educational benefit for the 2013-14 school year.

3. Reading Instruction

The parents argue that the district failed to offer an Orton-Gillingham based program that would have addressed the student's decoding issues for the 2013-14 school year.

The December 2012 educational evaluation results, discussed in more detail above, indicated that student's skills in the areas of reading comprehension, written expression, and spelling fell within the average range of ability (Dist. Ex. 24 at pp. 15-19). However, the student's ability to read words in isolation as measured on a letter and word recognition subtest fell within the below average range (id.). The student's then-current teacher reported that the student was reading at the end of fourth grade level, could decode words in isolation at the fifth-grade level and continued to have difficulty with reading multi-syllabic words, fluency, and inferential comprehension (Dist. Ex. 27 at p. 3).

To address the student's reading needs, the May 2013 CSE recommended the student attend a special class for reading, which represented an increased level of support in this area relative to the June 2012 IEP (compare Dist. Ex. 23 at p. 10, with Dist. Ex. 27 at p. 13). The district director of special education testified that the May 2013 CSE decided to recommend the student for a special class in reading based on the assessments it reviewed and the fact that the student was going into middle school where the focus shifted from teaching reading to English (Tr. p. 137). She further testified that, based on the student's difficulty with the nuances of language, multisyllabic words, and inferential comprehension, the CSE felt the special class was necessary in order to continue her instruction in reading (id.). The director testified that, with the special class in reading and resource room, the IEP would "ensure that she continued to make progress with [the district]" (Tr. pp. 138-39).

The student's teacher from JCOS testified that, during the 2012-13 school year, she used Preventing Academic Failure to address the student's deficits in encoding and decoding (Tr. pp. 2353-54). She reported that the instruction was provided daily in a small group for approximately 45 minutes to one hour and that the Preventing Academic Failure program broke down sounds and

spelling patterns for the student (Tr. pp. 2354, 2397). She explained that Preventing Academic Failure was a "primary" program for kindergarten through third grade (Tr. pp. 2355-56, 2394-95). She noted that the student's comprehension skills were at a higher level and, therefore, to address the student's inferential reasoning and critical thinking skills the teacher had to supplement Preventing Academic Failure with additional materials and strategies (Tr. pp. 2356, 2395-97). A review of formalized testing shows that the student's standard scores with respect to measures of reading, spelling and writing were generally similar in March 2011, when the student was attending the district school and in December 2012, when the student was attending JCOS (compare Dist. Ex. 23 at p. 5, with Dist. Ex. 26 at p. 6).

With regard to the student requiring an Orton-Gillingham based program, the hearing record does not support the parents' argument that the student required this particular methodology to the exclusion of others in order to improve her decoding skills. Compared to the June 2012 CSE, the May 2013 CSE did not have before it any new recommendations suggesting that the student required an Orton-Gillingham based program and the district's own staff and providers based their position regarding the methodology on their own evaluations and observations of the student and did not simply disregard the opinions of the private evaluators (but see A.M. v. New York City Dep't of Educ., 845 F.3d at 541-45 [2d Cir. 2017][holding that "when the reports and evaluative materials present at the CSE meeting yield a clear consensus" regarding methodology, absent evidence to the contrary, a program that does not recommend the use of that methodology will not be reasonably calculated to enable the student to receive educational benefits]). Moreover, the hearing record indicates that the student's overall reading skills fell within the average range, with variability in some areas, which would all be addressed in the May 2013 IEP recommendations for a special class in reading and resource room daily.

Based on the above, there is no evidence that the student required the Orton-Gillingham approach exclusively in order to address the student's decoding issues for the 2013-14 school year. A review of the hearing record does not support the parents' argument that the student required a program based on the Orton-Gillingham methodology in order to improve her decoding skills for the 2013-14 school year. In light of the reasons and legal standards set forth above, the hearing record indicates that the recommendations contained in the May 2013 IEP were appropriate to meet the student's identified needs.

4. Speech-Language Therapy

Turning to the parents' contention that the May 2013 CSE recommended insufficient speech-language therapy services for the student for 2013-14 school year, the parents' argument relating to the methodology fails for the same reasons detailed above.

With respect to the information reviewed by the May 2013 CSE, a December 2012 speech-language reevaluation indicated that the student presented with a wide range of abilities, specifying that her performance on specific subtests of the CASL showed her continued difficulties with word knowledge, recognition, recall, and oral expression (Dist. Ex. 24 at p. 24-27). Additionally, the evaluator opined that the student's performance on the CTOPP indicated continued weaknesses in phonological memory (id. at p. 27). The May 2013 CSE reviewed a progress report from the student's then-current speech-language pathologist from the district of location, which indicated that the student demonstrated excellent progress in her ability to explain, sequence, and relate

information, and very good progress in her use of language involving increasingly mature vocabulary and grammar (Dist. Ex. 27 at p. 3; see Parent Ex. Q at p. 1). The May 2013 IEP reported that the student continued to demonstrate deficits in word retrieval and word knowledge (id.). The IEP noted that the student had been diagnosed with an auditory processing disorder and that it was reported that she misheard linguistic information (Dist. Ex. 27 at p. 9). Finally, the December 2012 speech and language re-evaluation report noted that the student retained a residual /r/ distortion on words that contained /r/ controlled vowels and a w/r substitution (Dist. Ex. 24 at p. 27).

The May 2013 IEP recommended that the student receive speech-language therapy twice per six-day cycle for 40 minutes in a small group (Dist. Ex. 27 at p. 13). Relative to the June 2012 IEP, the May 2013 CSE's recommendation represented a reduction in the amount of speech-language therapy from three times per six day cycle for 30 minutes per session (total 90 minutes per cycle) to twice per six day cycle for 40 minute per session (total 80 minutes per cycle) (compare Dist. Ex. 23 at p. 11 with Dist. Ex. 27 at p. 13). According to the speech-language therapist who completed the December 2012 reevaluation of the student and attended her May 2013 CSE meeting, the change was to accommodate the addition of the special reading class and to reduce the number of times the student would be pulled out of her general education classroom (Tr. p. 533). The district speech-language therapist testified that the December 2012 reevaluation showed that the student had some "nice strengths and capabilities," but she still had some weaknesses in word knowledge and some higher-level thinking skills (Tr. p. 480). She further testified that the May 2013 CSE added some annual goals targeting word retrieval, a different vocabulary goal, a higher-level language skills goal (i.e. idioms and figurative language), and continued a goal for phonological processing (Tr. pp. 485-86). Finally, she testified that she felt the May 2013 CSE recommendations contained in the IEP would have enabled the student to make meaningful educational progress, and opined that it continued to provide her with the level of support she needed (Tr. pp. 488-89).

Notwithstanding the above, a private speech-language pathologist, who began working with the student in summer 2013, testified that, based on a comprehensive review of the student's records, the May 2013 IEP speech-language therapy recommendation was not appropriate because the student required individual therapy on an intensive basis (Tr. pp. 1335, 1346, 1397). She defined intensive as five times per week and opined that it could be combined with individual resource room support to address both her speech and language disorder and to help her acquire academic competencies (Tr. p. 1397). However, the standardized assessment results from the December 2012 speech-language reevaluation showed that the student's core and index composite scores fell generally within the average range with the exception of the lexical/semantic category, which showed continued difficulty with word knowledge, recognition, recall, and oral expression (Dist. Ex. 24 at p. 27). Additionally, the reevaluation indicated that the student continued to have difficulty in phonological memory (id.). A review of these results, along with the student's progress report discussed during the May 2013 CSE meeting, shows that, while the student continued to exhibit some deficits in her speech and language skills, these deficits were not so severe as to require that level of intensive therapy. Furthermore, the May 2013 CSE developed annual goals designed to improve these identified weaknesses; specifically, the goals targeted: the student's phonological processing skills and ability to sequence unfamiliar sound patterns and multi-syllabic words; her ability to utilize word retrieval strategies; and her ability to accurately

identify knowledge of use of words (e.g. synonyms, antonyms, idioms figurative language) (Dist. Ex. 27 at p. 12).

Based on the above, the May 2013 IEP recommendations were appropriate to meet the student's identified speech and language needs.

VII. Conclusion

Having determined that the evidence in the hearing record establishes that the district offered the student a FAPE for the 2012-13 and 2013-14 school years, the necessary inquiry is at an end, and there is no need to reach whether the student's unilateral placement at JCOS was an appropriate placement or whether equitable considerations would have supported an award of tuition reimbursement (Burlington, 471 U.S. at 370; see M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]). In light of these determinations, I need not address the parties' remaining contentions, including the district's cross-appeal.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: Albany, New York
July 12, 2017

SARAH L. HARRINGTON
STATE REVIEW OFFICER