



The University of the State of New York

The State Education Department

State Review Officer

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No. 12-218

Application of the XXXXXXXXXXXXXXXXXXXXX for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Shaw, Perelson, May & Lambert, LLP, attorneys for petitioner, Michael K. Lambert, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from a decision of an impartial hearing officer (IHO) which ordered the district to fund an independent educational evaluation (IEE) of the student at public expense. The appeal must be sustained.

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

With regard to the student's educational history in this case, the student has attended a district public school since first grade, absent a period of time when the student attended a program for "at risk" students and during the student's hospitalization on more than one occasion (see Dist. Exs. 20 at pp. 2-3; 35 at pp. 1-3). The parents referred the student to the CSE for an initial evaluation during 2009 to determine the student's eligibility for special education (see Dist. Ex. 21 at p. 1).

On November 12, 2010, a subcommittee of the CSE convened to conduct the student's annual review and to develop the student's IEP for the remainder of the 2010-11 school year (Dist. Ex. 16 at pp. 1, 5). Among other services and recommendations, the November 2010 IEP noted that the student needed a functional behavioral assessment (FBA) and a behavioral intervention plan (BIP) (id. at 1). Following the November 2010 CSE subcommittee meeting,

the district engaged and contracted for the services of a private psychologist to conduct an FBA and to develop a BIP for the student (see Tr. pp. 83-84; Dist. Ex. 15 at pp. 3-4).¹ The psychologist reported his assessment of the student's behaviors in an FBA and accompanying BIP, both dated January 23, 2011 (see Dist. Exs. 12 at p. 1; 13 at p. 1; see also Tr. pp. 90-91, 93-94).²

On June 21, 2011, a CSE subcommittee convened to conduct the student's annual review and to develop the student's IEP for the 2011-12 school year (10th grade) (Dist. Ex. 7 at p. 1). Finding the student eligible for special education as a student with an other health-impairment, the June 2011 CSE subcommittee recommended a general education placement with: indirect consultant teacher services for one hour per week in English; direct consultant teacher services for five 40-minute periods per week in science; and direct consultant teacher services for five 40-minute periods per week in mathematics (id. at pp. 1, 9; see also Dist. Ex. 28 at p. 1).³ The June 2011 CSE subcommittee also recommended that the student receive supplementary resource room instruction (5:1) for five 40-minute periods per week (Dist. Ex. 7 at pp. 1, 9; see also Dist. Ex. 28 at p. 1). The June 2011 IEP also noted that a BIP remained in place for the student (Dist. Ex. 7 at p. 6).⁴

Following the parents' request, the CSE subcommittee reconvened on December 20, 2011 to review the student's IEP (Tr. p. 35; Dist. Ex. 9 at p. 1; Parent Ex. A).⁵ By prior written notice dated December 23, 2011, the district informed the parents that it would "arrange for [a] behavioral consultant to observe [the] student in order to assess [the] BIP effectiveness and modify as necessary" (Dist. Ex. 31 at p. 1). The prior written notice also stated that "the [b]ehavioral consultant w[ould] review BIP effectiveness and update FBA/BIP as necessary" (id.). Thereafter, the psychologist who developed the student's January 2011 FBA and BIP

¹ The hearing record reflects that previously, in 2010, a district school psychologist conducted two FBAs and developed two BIPs to address the student's interfering behaviors (Tr. pp. 29-30; see generally Dist. Exs. 23; 24; 25; 26). The district director of pupil personnel services testified that the previous BIPs did not effectively address the student's interfering behaviors, which prompted the November 2011 CSE subcommittee's decision to pursue the new FBA and BIP for the student (Tr. 29).

² While conducting the FBA of the student, the psychologist considered, in addition to the student's previous FBAs and BIPs, numerous sources of documentary or evaluative information, which included: the student's November 2010 IEP; miscellaneous discipline reports from the district; an October 26, 2010 child psychiatrist report; a January 14, 2010 neuropsychological evaluation; a December 15, 2009 psychological evaluation; a December 14, 2009 educational evaluation; and a December 11, 2009 speech-language evaluation (Tr. p. 86; Dist. Ex. 12 at p. 2; see generally Dist. Exs. 16-26). In addition, the psychologist considered information and data collected from: interviews with the student and his parents; interviews with numerous district personnel and staff who were familiar or worked with the student; and an observation of the student in multiple settings over two separate days (Tr. pp. 86-87; Dist. Ex. 12 at p. 2).

³ The student's eligibility for special education and related services as a student with an other health-impairment is not in dispute (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

⁴ The hearing record reflects that on October 7, 2011, a CSE subcommittee also convened to review additional evaluations and update the student's IEP (Dist. Ex. 8 at p. 1; see also Dist. Ex. 30 at p. 1).

⁵ Parents' Exhibit A constitutes an audio recording of the December 2011 CSE subcommittee meeting.

completed a "Psychoeducational Consultation" report (report) dated February 29, 2012 (Dist. Ex. 14 at p. 1).

By email to the district dated March 13, 2012, the parents requested "an evaluation by an independent behaviorist" and stated their intention to discuss their objections to the psychologist's "most recent FBA" at the next CSE meeting (Dist. Ex. 1). On March 20, 2012, the CSE subcommittee convened to review the psychologist's February 2012 report and to address the parent's email requesting "an evaluation by an independent behaviorist" (Dist. Exs. 10 at pp. 1-2; 32 at p. 1). The March 2012 CSE subcommittee reviewed the February 2012 report and noted that, although the psychologist "did not observe any problem behavior" during his observation of the student, information provided by the student's English teacher warranted certain adjustment to the student's BIP (Dist. Exs. 10 at p. 2; 32 at p. 1). However, the March 2012 CSE subcommittee determined that "overall" the student's BIP "has been successful in addressing behavioral issue[s] related to [the student's] disability" and that the student's FBA and BIP were appropriate (*id.*).⁶ Therefore, the March 2012 CSE subcommittee denied the parents' request for an "independent evaluation (FBA) at public expense" (*id.*).

A. Due Process Complaint Notice

In light of the parents' request for an IEE at public expense, the district filed a due process complaint notice dated March 29, 2012, asserting that the district reviewed and found appropriate the psychologist's "evaluation," including "follow-up observations of [the student] in his classroom setting," and requesting an impartial hearing to "present evidence as to the appropriateness" of the FBA prepared by the psychologist (IHO Ex. I at pp. 1-2).

B. Impartial Hearing Officer Decision

The hearing record reflects that the IHO conducted a prehearing conference by telephone on April 11, 2012 to clarify the positions of the parties and to narrow the scope of the issues to be adjudicated at the impartial hearing (IHO Exs. IV at p. 1; IX at p. 1).⁷ Subsequently, the IHO issued a written summary of the prehearing conference (IHO Ex. IX at pp. 1-2). In that summary, the IHO set forth the parents' position that they were not challenging the underlying January 2011 FBA and BIP (*id.* at p. 1). Rather, according to the summary, the parents stated that their request for an IEE stemmed from their objections to the factual accuracy of, and the recommendations included within, the February 2012 report prepared by the psychologist (*id.*). The IHO summarized the district's position that the February 2012 report was "more in the

⁶ Modifications to the student's BIP included addition of the following: placement of a telephone call to an administrator any time that the student refused to take a break once a teacher determined that a break was needed and docking the student ten minutes from lunch if he refused to take the break; random visits to the student's Spanish, English, and mathematics classes by authority figures to prompt increased on-task behavior and decreased disruptive behaviors; and encouragement of the student to stay after school to work with content area teachers (Dist. Exs. 10 at p. 2; 32 at p. 1).

⁷ The IHO's assiduous and documented compliance with State regulations applicable to extensions to the timelines to render a decision and procedures for the conduct of the prehearing conference is noted in this case (8 NYCRR 200.5[j][3][xi], [5][i]-[iv]; *see* IHO Exs. I-XIII).

nature of an observation; . . . not a new FBA" (id.). According to the summary, the district also contended that, in the absence of an objection to the January 2011 FBA and BIP, no right to an IEE should exist (id.).

The parties proceeded to an impartial hearing on July 30, 2012 (Tr. pp. 1-158). In a decision dated October 12, 2012, the IHO determined that the parents were entitled to an IEE in the form of an evaluation by an independent behaviorist at district expense (IHO Decision at p. 7). Initially, the IHO noted—consistent with the written summary of the prehearing conference—that the "parties agree[d] that there [wa]s no dispute regarding [the student's] 2011 FBA" and that the scope of the impartial hearing was limited to the parents' challenge to the February 2012 report (id. at p. 3). As to the nature of the psychologist's February 2012 report, the IHO found that, "[a]lthough the [p]arents' attorney characterized the [p]arents' request as a request for an FBA and BIP, the plain language of the written request d[id] not refer to an FBA or BIP," but rather requested "an evaluation by an independent behaviorist" (id. at p. 4 [internal citations and quotation marks omitted]). Further, the IHO noted that "it was clear" that the psychologist's report was "not intended by the [d]istrict to be a new FBA" (id. at p. 5). However, the IHO stated that the remaining issues to be resolved included "whether or not a new FBA was necessary and appropriate" and "whether or not [the psychologist's report] was sufficiently comprehensive" and provided the CSE information necessary to develop an appropriate educational program for the student (id.)

The IHO noted that the student's behaviors exhibited at the time of the January 2011 FBA as compared to those at the time leading up to the February 2012 report "were somewhat different" but that the February 2012 report "shed[] not light as to how the [s]tudent's program might be changed" to address such newer behaviors (IHO Decision at p. 5). In addition, the IHO found that the February 2012 report was not based on sufficient evaluative data, in that (1) the student did not manifest any of the negative behaviors that he normally exhibited in school during the psychologist's classroom observation, as the student was aware that he was being observed; (2) the March 2012 CSE subcommittee modified the student's BIP based on information not included in the February 2012 report, thereby demonstrating that the report failed to identify certain problem behaviors; and (3) the March 2012 CSE subcommittee "did not modify the [s]tudent's special education program or BIP to address [the student's] inability to do homework and to prepare for his classes," which were identified in the February 2012 report as areas of concern for the student, because the report failed to "provide a sufficient basis for the CSE to address the key factors . . . adversely impacting the student's educational performance" (id. at pp. at 6-7).

As relief, the IHO awarded the parents with an IEE at public expense "in the form of an evaluation by an independent behaviorist" (see IHO Decision at pp. 7-8). The IHO further ordered that the "independent behaviorist may include an FBA as part of the evaluation if the professional retained to perform the evaluation determines that an FBA is a necessary component of the evaluation" (id. at p. 8).

IV. Appeal for State-Level Review

The district appeals, seeking to overturn the IHO's determination that the parents were entitled to an IEE at public expense. The district argues that the February 2012 report was appropriate for the limited purpose for which it was intended—to assess whether the January 2011 BIP was effectively addressing the student's interfering behaviors, as identified in the January 2011 FBA. The district argues that the IHO exceeded her jurisdiction in addressing "whether or not a new FBA was necessary and appropriate" as this issue was not properly before her. The district also notes that the IHO's decision was internally inconsistent in that the IHO found that the parents did not request an FBA or BIP; yet, the IHO directed the district to fund an evaluation by an independent behaviorist and accorded such behaviorist discretion to conduct an FBA, if appropriate. Aside from the intended purpose of the February 2012 report, the district also argues that the IHO erred in finding that the report was insufficiently comprehensive. The district argues that the report included a review of documentary evidence, interviews with the student, the student's mother, the student's assistant principal and teachers, and a full-day classroom observation.

The parents did not file an answer to the district's petition.

V. Applicable Standards: Independent Educational Evaluations

The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]).⁸ If a parent requests an IEE at public expense, the school district must, without unnecessary delay, ensure that either an IEE is provided at public expense or initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]; see C.W. v. Capistrano Unified Sch. Dist., 2012 WL 3217696, at *6 [C.D. Cal. Aug. 3, 2012] [finding that a request for an impartial hearing made 41 days after the parental request for an IEE did not constitute an unnecessary delay]; see also Letter to Anonymous, 56 IDELR 175 [OSEP 2010] [stating that the phrase "without unnecessary delay" permits school districts "a reasonably flexible, though normally brief, period of time that could accommodate good faith discussions and negotiations between the parties over the need for, and arrangements for, an IEE"]. If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR

⁸ An FBA sought by a parent is an "educational evaluation" for purposes of the regulations that give the parents the right to an IEE at public expense under certain circumstances (Harris v. D.C., 561 F. Supp. 2d 63, 67-68 [D.D.C. 2008]).

200.5[g][1][v]). However, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]).

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. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

As noted above, in order to obtain an IEE at public expense, the district must have conducted an evaluation with which the parents disagree (34 CFR 300.502[b][1], [2]). Here, the parents noted their desire to discuss with the CSE the psychologist's "most recent FBA" and, in the same correspondence, requested an "evaluation by an independent behaviorist" (Dist. Ex. 1). The parents' email, when read as a whole, therefore, appears to request that an FBA be conducted by an independent evaluator (see id.). As such, in order to stand as a viable request for an IEE on the basis of a disagreement with a district evaluation, the parents must have objected to an FBA conducted by the district. As the parties agreed during the prehearing conference that there was no dispute regarding the appropriateness of the January 2011 FBA and BIP (IHO Ex. IX at p. 1; see IHO Decision at p. 3), there can be no finding that the January 2011 FBA is the basis for the parent's disagreement. Therefore, the nature of the psychologist's February 2012 report and the purpose for which it was developed must initially be addressed. If the February 2012 report was an FBA conducted by the district, which fact the parties dispute, then the parents may potentially be eligible for an independent FBA at public expense, but if the February 2012 report is not an FBA, then the parents would not yet be eligible to seek an independent FBA at public expense.

With regard to whether an FBA was conducted by the district, the evidence includes an audio recording of the December 2011 CSE meeting, which indicates that, toward the end of the approximately one hour-long meeting, the CSE agreed to have the psychologist "come in to do an observation and update" (Parent Ex. A; see also Tr. pp. 35, 38, 49). Immediately preceding this statement, the word "FBA" was quietly uttered in the background of the recording by one individual (Parent Ex. A). It not possible to determine the identity of the speaker from the recording and there is no additional context to the utterance (id.). Based on this audio recording, the hearing record does not support a finding that the parents explicitly requested that the district conduct an FBA of the student.

Had the parents clearly requested an FBA during the December 2011 CSE meeting and the district refused, the district would have been obligated to provide the parents with prior written notice describing, among other things, the action refused and the reasons for such a refusal (34 CFR 300.503[a]-[b]; 8 NYCRR 200.5[a][1], [3]). In this case, the district provided prior written notice, dated December 23, 2011, which articulated the scope of the agreed upon "observation and update," with no indication that such a report was sought as an alternative to a parental request for an FBA (Dist. Ex. 31 at p. 1). Specifically, the district summarized that it

would "arrange for [a] behavioral consultant to observe [the] student in order to assess [the] BIP effectiveness and modify as necessary" (Dist. Ex. 31 at p. 1). The prior written notice also stated that "the [b]ehavioral consultant w[ould] review BIP effectiveness and update FBA/BIP as necessary" (id.). The prior written notice is consistent with the description in the audio record of an "observation and update" (compare Dist. Ex. 31 at p. 1, with Parent Ex. A at 1:04:05).

Thereafter, the district contacted the psychologist, who developed the student's January 2011 FBA and BIP, who agreed to return to the district to assess the implementation of the student's BIP (Tr. pp. 38-39, 94-95). In the February 2012 report, the psychologist indicated that district requested the report for the purpose of "provid[ing] the [CSE] with additional input in follow-up" to the January 2011 FBA and BIP (Dist. Ex. 14 at p. 1). Furthermore, during the impartial hearing, both the director of pupil personnel services and the psychologist testified that the report was not intended to be an updated FBA or BIP (see Tr. pp. 45-46, 94-98; see also Tr. pp. 47-48, 72, 75-76). The psychologist also testified regarding the intent underlying the creation January 2011 FBA and BIP, in contrast to that underlying the February 2012 report (see Tr. pp. 96-97).

In addition to the evidence in the hearing record regarding the parties' intent that the report be an observation and update, rather than an FBA, the content of the psychologist's February 2012 report is also not consistent with the definition of an FBA in State regulations. An FBA is defined in State regulations as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and "include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it" (8 NYCRR 200.1[r]). State regulations require that an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]).

The psychologist: conducted a day-long observation of the student "inclusive of all his academic classes, lunch, and physical education"; reviewed the student's recent school records; and interviewed the student and his mother, teachers, and school staff (Dist. Ex. 14 at p. 1). The psychologist summarized his findings based on his observations and interviews, concluding, in part, that the district's efforts to support the student "may be inadvertently enabling [the student] and thereby mak[ing] him less able to work independently at home" (id. at p. 5). As to the student's interfering behaviors previously identified in the January 2011 FBA, the psychologist concluded that the student "is enjoying himself at school[,] and he is no longer presenting as a student with prominent behavior problems"; rather, the psychologist opined that the "main problem" for the student arose from his lack of "effort at home to perform academically commensurate with his ability" (id.; see also Tr. pp. 106-07). While the February 2012 report

identified program behaviors and articulated some hypothesis regarding the student's behaviors (see Dist. Ex. 14 at p 5; see also 8 NYCRR 200.22[a][2]), content required for an FBA, which did not appear in the February 2012 report, included information from multiple sources of data, and an identification of a baseline setting from the frequency, duration, intensity and/or latency across activities, settings, people, and times of day (8 NYCRR 200.22[a][2]-[3]). The February 2012 report offered more of a narrative of the psychologist's observations and interviews, rather than an assessment or collection of data, and included no quantitative information about the student's behavior. Were the February 2012 report intended to be an FBA, for these reasons it would indeed be lacking; however, since that is not the case, the omissions further support the nature of the report in the first instance; namely, an observation or update.

If anything, the intent underlying the February 2012 report and the content thereof more closely resembles a classroom observation (8 NYCRR 200.4[b][1][iv]) or an attempt to monitor and document the student's progress under the January 2011 BIP, consistent with the State regulatory scheme applicable to BIPs, which establishes procedures for "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," with the results documented and reported to the student's parents and the CSE (8 NYCRR 200.22[b][5]).⁹ Viewing the February 2012 report in this light, as something other than an FBA, the evidence in the hearing record supports a conclusion that the report was appropriate, setting forth the results of the observation, as well as a description the student's behaviors during the observation, relative to the prior school year (see Dist. Ex. 14 at pp. 1-5; see also Tr. pp. 101-02, 106-07). In contrast, the IHO's examination of the appropriateness of the February 2012 report by weighing its content against the March 2012 CSE subcommittee's discussions and unrelated modifications to the student's BIP was not an appropriate standard by which to measure the report (see IHO Decision at pp. 6-7). Such an approach implies that one single report should include all available information about a student. If that were the case, the mandate that a CSE utilize variety of assessment tools and strategies to gather relevant information about the student, including information provided by the parent, would be rendered unnecessary (see 20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see also Letter to Clarke, 48 IDELR 77 [OSEP 2007]). Moreover, it would discourage CSEs from reviewing of multiple sources of information about a student based on a view that one report should include all that would be necessary. Such an interpretation would be inconsistent with the IDEA.

Based on the foregoing, because the evidence does not support the finding that the parents requested an FBA at the December 2011 CSE meeting, the February 2012 report procured by the district was not intended to be and was not an FBA, and the district did not otherwise conduct an FBA with which the parents disagree, the parents are unable to obtain an FBA by an independent evaluator at public expense (see Application of a Student with a Disability, Appeal No. 13-216). Moreover, the February 2012 report was appropriate in light of its intended purpose.

⁹ The results of the progress monitoring "shall be considered in any determination to revise a student's [BIP] or IEP" (8 NYCRR 200.22[b][5]).

VII. Conclusion

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

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the portion of the October 12, 2012 decision of the IHO which directed the district to provide to the student, at public expense, an evaluation by an independent behaviorist is reversed.

Dated: Albany, New York
June 24, 2014


JUSTYN P. BATES
STATE REVIEW OFFICER