



The University of the State of New York

The State Education Department

State Review Officer

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No. 14-169

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

Appearances:

Ingerman Smith, LLP, attorneys for petitioner, Joseph E. Madsen, Esq., of counsel

Disability Rights Network New York, attorneys for respondents, Shain M. Neumeier, 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 determined that the educational program recommended by its Committee on Special Education (CSE) for respondents' (the parents') son for the 2012-13 school year was not appropriate. The parents cross-appeal from the IHO's decision insofar as the IHO denied relief requiring the district to allow a dog on school property to assist the student. The appeal must be sustained. 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

With respect to the student's educational history, the hearing record shows that, after transferring to the district, the student attended a 15:1 special class in a district public school (see

Tr. pp. 101-05; Dist. Exs. 2 at pp. 7, 9; 10 at p. 1; 13).¹ The student had received diagnoses of disruptive disorder—not otherwise specified, oppositional defiant disorder, Asperger's syndrome, and attention deficit hyperactivity disorder (ADHD)—combined type (see Dist. Exs. 3 at p. 1; 12 at p. 1). During the 2011-12 school year, the district conducted a functional behavioral assessment (FBA) and developed a behavioral intervention plan (BIP) for the student, which it revised in March 2012 (see Dist. Ex. 18 at pp. 1, 6; see also Tr. pp. 105-06; Dist. Ex. 2 at p. 1).²

On May 31, 2012, the CSE convened to conduct the student's annual review and to formulate an IEP for the 2012-13 school year (see Dist. Ex. 3 at p. 1). According to the hearing record, the parents requested that the student's newly obtained assistance dog be allowed to attend the May 2012 CSE, so that the CSE could observe the kinds of things the dog could do that helped the family at home and in the community, and so the CSE could consider adding the dog to the student's IEP as an accommodation (Tr. p. 1721).³ The May 2012 CSE recommended a 15:1 special class placement in a community school (Dist. Ex. 3 at pp. 1, 8, 10; see Tr. pp. 100-01). In addition, the May 2012 CSE recommended related services consisting of one weekly 30-minute counseling session in a small group (5:1) and one bi-monthly 30-minute individual counseling session (Dist. Ex. 3 at pp. 1, 8). The May 2012 CSE also recommended a full time 1:1 aide and a BIP to address the student's impulsivity and distractibility (*id.* at pp. 6, 8). The May 2012 IEP included approximately 16 annual goals and testing accommodations (*id.* at pp. 6-7, 9).

The hearing record shows that the student attended the recommended placement in the district public school (Tr. pp. 1652-53). On October 2, 2012, the CSE reconvened at the parents' request to address their concerns with the student's 1:1 aide and BIP (Dist. Ex. 4 at p. 1). The CSE recommended an additional social/emotional/behavioral annual goal; specifically, that the student would communicate and interact in a socially acceptable manner with peers (*id.* at p. 7). The CSE also approved a psychiatric evaluation at the district's expense and recommended that the FBA and BIP be revised (*id.* at p. 1). On October 5, 2012, the district conducted a new FBA and developed a new BIP for the student (see Dist. Ex. 20 at pp. 1-10; see also Tr. pp. 255-56).

On December 17, 2012, the CSE again reconvened to, among other things, review the parents' concerns regarding the student's current FBA and BIP (Dist. Ex. 5 at p. 1). The parents also requested an "independent behavior consultant" be added to the IEP (*id.*). The district

¹ While the district cumulatively numbered all of its exhibits in sequential order (see Dist. Exs. 1-36), the citations in this decision conform to the total number of pages in each separate exhibit.

² Testimony by the district school psychologist indicates that, when the student entered the district for the 2011-12 school year, he came with "a lot of information" from his previous school district (Tr. p. 105-06). Rather than "just start throwing things" at the student (from his previous district), the school psychologist explained that the district wanted to get to know the student in order to understand his needs (Tr. p. 106). Therefore, at the time of a November 3, 2011 CSE meeting, the CSE recommended the district generate its own FBA and BIP for the student (Tr. p. 106; Dist. Ex. 2 at p. 1).

³ The extent to which the dog should be deemed a service dog is disputed on appeal. Without commenting on the appropriateness of the "service dog" designation, this decision will refer to the dog as an "assistance dog" consistent with the description utilized by the organization responsible for training the dog (see, e.g., Parent Exs. D at pp. 1-2; O at p. 1).

recommended that the student continue with his current program and services and added monthly one-hour sessions of individual parent counseling and training to the IEP (id. at pp. 1, 7). The CSE also requested authorization to speak with the student's food therapist and continued to recommend the psychiatric evaluation at the district's expense (id. at p. 1).

A. Due Process Complaint Notice

By due process complaint notice dated October 1, 2013, the parents alleged that the district denied the student a FAPE for the 2012-13 school year (see Parent Ex. S at p. 20; see also Parent Ex. Q at p. 1). The parents set forth detailed factual allegations underlying the following claims: the CSEs that convened to develop and modify the student's IEPs for the 2012-13 school year inappropriately found the student eligible for special education as a student with an other health-impairment rather than as a student with autism (Parent Ex. S at p. 20). The parents also claimed that the district deprived the student of a FAPE by failing to provide parent counseling and training, failing to allow the parents to participate in the development of a BIP and continuing to use the BIP despite the parents' objections (id. at pp. 20-21). Next, the parents asserted that the district refused to allow the student to utilize his assistance dog and refused to allow the dog on school property in alleged violation of his rights under the IDEA, the Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act of 1973 (Section 504), and the New York State Human Rights Law (id.).⁴ In addition, the parents alleged that the district did not provide the student with a qualified aide, inappropriately used a "time-out" room in violation of State regulation, and required the student to "polish the aide's shoes" in violation of State regulation (id. at pp. 20-21).

As relief, the parents requested that the IHO order the district to change the student's eligibility classification to autism, include the assistance dog on the IEP and allow the dog to accompany the student to various school activities and other non-educational events on school property, provide an aide trained to work with students who have received diagnoses with autism, and immediately desist from using a "time-out" room (IHO Decision at pp. 21-22).

B. Impartial Hearing Officer Decision

After a prehearing conference on November 15, 2013, an impartial hearing convened in this matter on January 15, 2014, and concluded on June 18, 2014, after nine days of proceedings (see Nov. 15, 2013 Tr. pp. 1-38; Tr. pp. 1-2067).⁵ The IHO issued a decision, dated September 30, 2014, granting a portion of the parent's requested relief (see IHO Decision at pp. 21-47).⁶ With respect to the CSE processes, the IHO found that the district did not impede the parents opportunity to participate in the decision making process regarding the provision of a FAPE to

⁴ The parents' claim with respect to parent counseling and training was withdrawn during the impartial hearing (see Tr. pp. 11-12). Accordingly, this decision will not address this issue further.

⁵ The transcript of the prehearing conference is separately paginated and, as such, references to prehearing transcript are prefaced by the date of the proceedings (see Nov. 15, 2013 Tr. pp. 1-38).

⁶ Notwithstanding his determinations adverse to the district, it is unclear from the IHO's decision whether or not he ultimately found that the district denied the student a FAPE for the 2012-13 school year (see generally IHO Decision).

the student and that the absence of a regular education teacher at some of the CSE meetings did not render the resulting IEPs deficient (id. at p. 34).

As for the student's eligibility classification, the IHO summarized definitions of the classifications in federal regulations and the description of diagnoses in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-V), as well as various observations of and evaluative data about the student, and noted that he was "not convinced that there was a careful and thorough review by the CSE of the characteristics of [a]utism both from the [d]istrict's documents, the independent reports and evaluations" (IHO Decision at pp. 21-26). The IHO found that, despite the district's argument for the eligibility classification of other health-impairment based on the student's multiple disabilities, testimony "that children with Asperger's Syndrome often possess a multitude of other disabilities that affect their ability to learn" supported a classification of autism (id. at p. 27). Consequently, the IHO ordered the CSE to change the student's eligibility classification to a student with autism (id.).

The IHO noted that the CSEs considered evaluative data about the student during the meetings and that, other than the question of the assistance dog, the parents did not challenge the educational program recommended in the student's IEPs for the 2012-13 school year (IHO Decision at p. 34). Nonetheless, the IHO reviewed the content of the May 2012 IEP and noted that it did not include annual goals targeted to address certain of the student's deficiencies (id. at p. 38). Next, finding that the student demonstrated a lack of progress under a BIP during the 2011-12 school year, as reported in a log book, the IHO found the similar approach for the 2012-13 school year supported a finding that the "IEP was not substantive[ly] adequate to address [the student's] behavioral needs" (id. at pp. 43-44).⁷

As for the assistance dog, the IHO found that the district provided the student access to a special education program and general education activities and did not act in a discriminatory manner but deferred resolution of the parents' claims under the ADA, Section 504, and the New York Human Rights Law to a more appropriate forum (IHO Decision at p. 45-46). However, the IHO found that the CSEs failed to adequately consider the assistance dog as an accommodation on the student's IEP, given the student's lack of progress in his behaviors and evidence of "an underlying neurological involvement" to his impulsive and distracted behaviors (id. p. 46). Consequently, the IHO ordered the CSE to assess the appropriateness of including an assistance dog on the student's IEP and observe the student with the dog in various non-school settings, such as his home and a store, church, and doctor's office, and in the community (id.).

With respect to issues of implementation of the student's IEPs and BIPs during the 2012-13 school year, first, the IHO acknowledged the acrimonious relationship between the parents and the district, which the IHO found exacerbated by the district's delay in implementing parent counseling and training mandated on the December 2012 IEP (id. at pp. 33-34). Turning to the parents' claims pertaining to student's assigned 1:1 aides and the implementation and amendment of the BIP, the IHO noted conflicting testimony with respect to a "calming bracelet" the 1:1 aide allegedly provided to the student but found that, in either case it did not rise to a denial of a FAPE (id. at p. 39). The IHO found that it was the function of the district, not the parents, to

⁷ There are three IEPs for the 2012-13 school year; however the IHO did not specify which IEP he found to be substantively inadequate with respect to the student's behavioral needs.

determine the qualifications of a teacher's aide (id. at p. 45). According to the IHO, the issues of the student's out of school suspension and the use of a "time out" room were also without merit and did not deprive the student of a FAPE (id.). Finally, the IHO found that there was a disparity between the student's cognitive function and his academic achievement and that the evidence did not support that the student made more than "mere trivial advancement" academically from the 2012-13 school year to the 2013-14 school year (see id. at pp. 41-42).

The IHO also made findings apparently relating to the student's IEP for 2013-14 school year (see IHO Decision at pp. 43, 44). For example, the IHO found that the May 21, 2013 CSE improperly discussed a non-district placement for the student because the parents were not provided with prior written notice (id. at p. 44). Next, the IHO ordered that, going forward, the district must ensure that a regular education teacher be included in any discussion of the student's placement in a general education environment, in light of the student's participation in a school concert and rehearsals with nondisabled peers (id.). Further, referencing recommendations included in the May 2013 IEP, the IHO ordered that the CSE reexamine the counseling services recommended for the student in light of their ineffectiveness in "addressing the student's inappropriate behaviors in the environment outside the counseling office" (id. at p. 43). Noting that, although a December 2010 evaluation report included a recommendation that the parents implement a "vigorous physical education" for the student, citing the benefits of "non[pharmacological] means of dealing with attentional-control programs" and the benefits of exercise, the IHO also found that the CSE should have considered physical activity as part of the student's special education program and ordered it to do so going forward (id. at p. 45).

IV. Appeal for State-Level Review

The district appeals, alleging that the IHO erred in his findings of fact and conclusions of law. First, with respect to the conduct of the impartial hearing, the district contends that the IHO erred in his evidentiary rulings and used two different standards for the parties. Consequently, the district requests that the SRO review video of the student with the dog at home, which the IHO ruled irrelevant. Next, the district contends that the IHO made several findings, which were outside of the scope of the parents' due process complaint notice; including findings relating to the parents' opportunity to participate at the CSE meeting and findings with respect to annual goals, counseling, CSE composition, and the failure to provide the parents with prior written notice regarding the possibility of an out of district placement.

Turning to the merits, the district contends that the CSEs properly deemed the student eligible for special education as a student with an other health-impairment and that the IHO erred in ordering that the eligibility classification be changed to autism. With respect to the assistance dog, the district contends that the dog was not a "service animal" within the meaning of the ADA. Further, the district alleges that the IHO erred in finding that the CSE failed to adequately consider the student's use of the assistance dog in school. The district argues that an assistance dog was not required for the student to obtain an educational benefit and that the recommended 1:1 aide was more appropriate for the student. The district further asserts that the IHO erred and exceeded his authority in ordering that the CSE observe the student with the dog in non-educational settings. The district also alleges that the IHO should have ruled in favor of the

district with respect to the ADA and Section 504 issues given his findings that the district did not act in a discriminatory manner towards the student.

In an answer and cross-appeal, the parents respond to the district's petition by denying and admitting the allegations raised and asserting that the IHO correctly determined that the district failed to offer the student a FAPE for the 2012-13 school year.⁸ In their cross-appeal, the parents allege that the IHO erred by failing to grant certain relief. The parents request an order requiring the district to permit access of the assistance dog in the student's public school or, in the alternative, requiring that the district observe the dog at school and "remand to the IHO for further determination of a FAPE after the observation." In an answer to the parent's cross-appeal, the district argues that the "service dog" was not a service animal and was not appropriate or necessary for the student to receive educational benefit.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural

⁸ The parents requested several extensions of time to serve their answer in this matter, culminating in a final request, which was conditionally granted with a directive to include in the answer a statement of good cause for the delay. The parents served the answer and cross-appeal one day beyond the allowed timeframe and set forth a statement of good cause in a separate correspondence (see Parent Aff. of Serv.). In the exercise of my discretion, and under the circumstances of this case, I will consider parents' answer and cross-appeal. However, counsel for the parents is strongly encouraged to comply with State regulations and explicit directives from the SRO in any future filings with the Office of State Review or risk the likelihood that a pleading will not be considered or an appeal will be dismissed.

violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

(see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Preliminary Matters

1. Conduct of the Impartial Hearing / Additional Evidence

The district asserts that the IHO exhibited bias in his evidentiary rulings. It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see Application of a Student with a Disability, Appeal No. 12-066; Application of a Student with a Disability, Appeal No. 11-144; Application of the Bd. of Educ., Appeal No. 10-097; Application of a Student with a Disability, Appeal No. 10-018; Application of a Student with a Disability, Appeal 10-004; Application of a Student with a Disability, Appeal No. 09-084; Application of the Bd. of Educ., Appeal No. 09-057; Application of a Student with a Disability, Appeal No. 09-052; Application of a Student with a Disability, Appeal No. 08-090). An IHO must also render a decision based on the hearing record (see Application of a Student with a Disability, Appeal No. 09-058; Application of a Student with a Disability, Appeal No. 08-036). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, and shall not, by words or conduct, manifest bias or prejudice, according each party the right to be heard (Application of a Student with a Disability, Appeal No. 12-064; Application of a Student with a Disability, Appeal No. 07-090; Application of a Student with a Disability, Appeal No. 07-075; Application of a Student with a Disability, Appeal No. 04-046; Application of a Student Suspected of Having a Disability, Appeal No. 01-021). While impartial hearing rights include the right of both a parent and a district to "present evidence and confront, cross-examine, and compel the attendance of witnesses" (34 C.F.R. 300.512[a][2]; see 8 NYCRR 200.5[j][3][xii]), the IHO "shall exclude any evidence that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]).

The district specifically argues that the IHO made inconsistent rulings by refusing the admission into evidence a video recording proffered by the district depicting the student at home with the assistance dog but later allowing the admission of testimonial evidence proffered by the parents describing student and the dog at home and other non-school settings. The IHO excluded

the video at that time reasoning that the recording of the dog and student in the home was not relevant (Tr. pp 283-291). Initially, the district attempted to introduce the disputed DVD video recording during direct examination of a district behavioral specialist who, but the witness had not been present in the home, did not participate in the creation of the recording, and had not seen the dog in school and was not able to provide a foundation for moving the video into evidence (see Tr. pp. 280-81). Further, to the extent the district asserts that the parent laid a foundation, such testimony referred to numerous videos and it is not clear from the hearing record whether or not the disputed recording was amongst those to which she referred (see Tr. pp. 2054-55). Moreover, the video was never observed by the CSEs that convened to develop or amend the student's IEPs for the 2012-13 school year (see Tr. pp. 284-85). Therefore, without reaching the question of the relevance of the depiction of the student and the dog in the home environment versus the school environment, I concur with the assessment that the video held limited relevance to the question of whether the CSEs properly declined to recommend an assistance dog as part of the student's educational program for the 2012-13 school year (see Tr. pp. 284-85, 286, 288-89, 291). The IHO's subsequent rulings allowing testimony about the dog in the home environment, against the district's objections, were also within his discretion and appropriate under the circumstances (see Tr. pp. 951-54, 1034-39, 1135-37, 1242, 1381). In overruling the district's objections, the IHO acknowledged that the witnesses offered testimony about their first hand observations of the student and acknowledged that he would "take . . . into account" that the observations took place in the home environment (e.g., Tr. pp. 1038-39), thus recognizing at least some potential prejudice to the district if testimonial evidence of the dog's performance in the home were used improperly to bolster the parent's position that the assistance dog should have been permitted on the student's IEP. Accordingly, the IHO acted within his discretion in this respect (see generally 8 NYCRR 200.5[j][3][xii]). Even assuming the IHO's balancing of these two evidentiary rulings was less than perfect, it did not, in and of themselves, amount to reversible error in this instance because upon careful consideration of the hearing record, I find that there is insufficient evidence that the IHO displayed bias against the district.

Relatedly, the district included the video with its petition and requests that I review the same. Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 13-238; Application of a Student with a Disability, Appeal No. 12-185; Application of the Dep't of Educ., Appeal No. 12-103; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). In this case, the additional evidence was offered at the time of the impartial hearing; however, for substantially the reasons set forth above, I find that the video submitted by the district is not necessary in order to render a decision and therefore is not properly considered on this appeal. It is entirely possible that the dog's presence might have benefited the student, but that is not the issue. The issue presented was whether the absence of the assistance dog on the student's IEP and resultant preclusion of the dog from the student's classroom amounted to a denial of a FAPE under the IDEA because the student would be unable to receive educational benefits from the other services offered in the IEP under the Rowley standard, and I tend to agree with the IHO's earlier ruling that the video of the student and the dog in other settings is of little relevance to this issue.

2. Scope of the Impartial Hearing and Review

Before reaching the merits in this case, a determination must be made regarding which claims are properly before me on appeal. The district argues that the IHO made rulings that exceeded the scope of the parents' due process complaint notice. Namely, the district asserts that the IHO erred in reaching issues related to CSE composition, parental participation into the development of the IEP, the CSEs' consideration of evaluation information, the sufficiency of the annual goals included in the student's IEP, the student's academic achievement, and, with respect to the May 2013 CSE, the CSE's exploration of an out of district placement without prior written notice to the parents and the effectiveness of counseling services for the student (see IHO Decision at pp. 31-34, 42-45).

The party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student With a Disability, Appeal No. 13-151; Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). However, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]; see, e.g., B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 59 [2d Cir. June 18, 2014]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]).

In the present case, the parties engaged in a prehearing conference, during which the parents' counsel represented that the claims at issue for resolution by the IHO involved the student's eligibility classification and the recommendation for an assistance dog (Nov. 15, 2013 Tr. pp. 4-7).⁹ The IHO acknowledged that, while there were two main issues in the case, "there may be other issues brought up" that were included in the due process complaint notice and that he would "accept" those issues (Nov. 15, 2013 Tr. p. 16). However, I find that the parents' due process complaint notice cannot be reasonably read to include the issues identified in the district's petition as being raised and decided sua sponte by the IHO (compare Parent Ex. P at pp. 1-21, with IHO Decision at pp. 21-47). Moreover, a further review of the hearing record shows that the district did not agree to an expansion of the issues in this case and that the parents did not attempt to amend the due process complaint notice (see Tr. pp. 1-2067).¹⁰ Accordingly, the IHO exceeded his jurisdiction by addressing the issues identified by the district and those particular findings must be reversed.

⁹ This is consistent with State regulations which provide that one of the purposes conducting a prehearing conference is for "simplifying or clarifying the issues" (8 NYCRR 200.5[j][3][xi][a]).

¹⁰ Additionally, the district did not open the door to these claims by soliciting testimony from a witness "in support of an affirmative, substantive argument" as to these issues (B.M., 569 Fed. App'x at 59; see M.H., 685 F.3d at 250-51; N.K., 961 F. Supp. 2d at 585; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *9 [S.D.N.Y. Aug. 5, 2013]).

Finally, neither party has appealed the IHO's determinations with respect to the following issues (1) the alleged provision of a "calming bracelet to the student, (2) the qualifications of the district's paraprofessionals, (3) the alleged use a "time out" room, and (4) parent participation. Therefore, those aspects of the IHO's decision have become final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see also Application of a Student with a Disability, Appeal No. 11-027; Application of a Student with a Disability, Appeal No. 11-015; Application of the Dep't of Educ., Appeal No. 10-115; Application of a Student with a Disability, Appeal No. 10-102).

B. May, October, and December 2012 IEPs

1. Eligibility Classification

Next, the district asserts that the IHO erred in finding that autism was a more appropriate eligibility classification for the student than other health-impairment and directing the CSE to change the student's IEP to reflect the same (see IHO Decision at p. 27). The IDEA provides that a student's special education programming, services and placement must be based upon a student's unique special education needs and not upon the student's disability classification (20 U.S.C. § 1412[a][3] ["Nothing in this chapter requires that children be classified by their disability so long as each child . . . is regarded as a child with a disability under this subchapter"]; 34 CFR 300.111; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *9 [S.D.N.Y., Dec. 16, 2011] [finding that once a student's eligibility is established "it is not the classification per se that drives IDEA decision making; rather, it is whether the placement and services provide the child with a FAPE" [emphasis in the original]; see also Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011] [finding that "the particular disability diagnosis affixed to a child in an IEP will, in many cases, be substantively immaterial because the IEP will be tailored to the child's specific needs"]). In other words, a district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]), and an evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]). Accordingly, even if a classification of autism was appropriate for the student, as the parent suggests, this alone, absent some evidence that the student's current classification, rather than his needs, inappropriately drove the resulting recommended program, does not contribute to a finding that the district failed to offer the student a FAPE (see M.R., 2011 WL 6307563, at *9). Here, the record reflects that the program offered to the student—while subject to disagreements among CSE team members—was driven by the student's needs, and not his classification (see generally Dist. Exs. 3; 4; 5). The parents do not raise issue with the description of the student's present levels of performance in his IEPs or with any CSE recommendations for the 2012-13 school year specific to annual goals, class placement, or related services (see generally Parent Ex. S).

Moreover, while the parents assert that that the student would have been more appropriately deemed eligible for special education as a student with autism, they do not argue

that the student did not meet the eligibility requirements for the category of other health-impairment (compare 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1], with 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]). Testimony by the school psychologist, the behavior specialist, and the student's special education teacher, reflect that other health-impairment was an appropriate classification for the student for the 2012-13 school year (Tr. pp. 114-15, 123-25, 262-64, 349-50, 353; see Dist. Exs. 3 at p. 1; 4 at p. 1; 5 at p. 1).

The student's IEPs for the 2012-13 school year set forth diagnoses the student had received, including disruptive disorder NOS, oppositional defiant disorder, Asperger's syndrome, and ADHD-combined type (Dist. Exs. 3 at p. 5; 4 at p. 5; 5 at p. 4). The IEPs further noted that the student's medical diagnoses affected his learning whereby the student demonstrated symptoms of inattention, cognitive impulsivity, and distractibility (id.). According to the school psychologist, the parents requested that the CSE change the student's eligibility classification to autism during the 2012-13 school year (Tr. p. 124). The hearing record shows that the CSEs considered information from the parents, including information about behaviors the student exhibited at home that the parents felt were consistent with a diagnosis on the autism spectrum, but determined that an eligibility classification of autism did not describe how the student functioned in the school setting as well as other health-impairment, in light of the other diagnoses, as well as the predominance of his distractibility and behavioral needs (Tr. pp. 123-24, 263-65; see also Tr. pp. 143-44; Ex. 15 at pp. 1-4).¹¹

Accordingly, specific to determining the student's classification for the 2012-13 school year, the hearing record demonstrates the district considered all of the diagnoses the student had received, including an autism spectrum disorder, and developed a special education program for the student that was aligned with the student's needs. Thus, there was no violation by the district and the IHO's decision with respect to the student's classification must be reversed.

2. Special Factors-Interfering Behaviors

The district asserts that the IHO erred in finding that the BIPs developed for the student's 2012-13 school year were inappropriate relative to the student's progress with a similar approach during the 2011-12 school year (see IHO Decision at p. 44). The parents argue that the BIPs were inappropriate, failed to adopt an observable and measurable data tracking system for the student's behaviors, and failed to result in an improvement in the student's academic performance. To extent the parties dispute both the substance of the student's BIP, as well as the

¹¹ The school psychologist also testified, relative to the 2011-12 school year that, while the student "absolutely" exhibited some behaviors that could be viewed as consistent with a diagnosis of autism (which diagnosis the psychologist did not dispute), the student's difficulty connecting with peers and establishing eye contact were not the behaviors interfering with his ability to function within the classroom (Tr. pp. 119-20). The school psychologist indicated that, based on her experience and her observations, the student's exhibited behaviors in school more consistent with the diagnoses of ADHD, oppositional defiant disorder, and disruptive disorder (Tr. p. 119).

adequacy implementation of the BIP and the student's progress thereunder, both permutations of the parents' claim are addressed herein.¹²

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, 160-61, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. E. Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at *8; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]). To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]; Piazza v. Florida Union Free Sch. Dist., 2011 WL 1458100, at *1 [S.D.N.Y. Apr. 7, 2011]; Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *30 [N.D.N.Y. Sept. 29, 2009] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 380 [S.D.N.Y. 2008]).

In New York State, policy guidance explains that "the IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address [among other things, a student's interfering behaviors,] in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at pp. 22, Office of Special Educ. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP," and if necessary, "the student's need for a [BIP] must be documented in the IEP" (id.). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student (8 NYCRR 200.4[d][3][i], 200.22[a]-[b]).

¹² The parents' claim relating to the student's interfering behaviors originated in the due process complaint notice did not challenge the adequacy of the FBA or BIP (see Parent Ex. S at p. 21 [alleging the district failed to offer a FAPE "[b]y not allowing parents any input in the development of the [BIP], and continuing the use of it despite [the parent's] protests . . ."). Careful review of the parents' argument in their memorandum of law in support of their answer and cross-appeal indicates that their concern with the BIP during the 2012-13 school year related more to the manner in which it was implemented rather than the substance of the BIP itself (Parents' Mem. of Law at pp. 3-8). For example, the parents set forth various instances where they allege that data was reported inaccurately or inconsistently (id.). While the IHO explicitly did not foreclose the parents' claim, during the prehearing conference, the parents' counsel made representations that the district was addressing the parents' concerns with the BIP (Nov. 15, 2013 Tr. at p. 7; see also Tr. pp. 8-9, 16). The parents' counsel indicated that the BIP had been implemented, the parent "just took odds with the way it was being implemented" (Nov. 15, 2013 Tr. at pp. 14-15).

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]).

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]). Neither the IDEA nor its implementing regulations require that the elements of a student's BIP be set forth in the student's IEP ("Student Needs Related to Special Factors," Office of Special Educ. [Apr. 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" (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 . . . and shall be considered in any determination to revise a student's [BIP] or IEP" (8 NYCRR 200.22[b][5]).

It is undisputed that the student exhibited interfering behaviors that impeded his learning or that of others (e.g., Tr. pp. 113-14, 117-20, 432-433, 1130, 1240, 1550-51; Dist. Exs. 3 at pp. 1, 4-6; 4 at pp. 3-5; 5 at pp. 3-5; 10 at p. 3; 11 at p. 1; 12 at pp. 1-3; 13; 14; 15 at pp. 1-4; 18 at pp. 1, 4, 6-7; 19 at p. 1; 20 at pp. 1-2, 4; 21 at p. 1). Focusing on the IHO's analysis of the parents' FBA/BIP claim, the IHO concluded that, based on his review of "subjective data" in the student's log book from the 2011-12 school year, the student did not benefit from the BIP and

"ABC" system put in place to address his inappropriate behaviors (IHO Decision at p. 44).¹³ The IHO indicated this was so because the student's inappropriate behaviors did not respond to this particular system in a long standing manner, rendering the IEP substantively inadequate to address the student's behavioral needs (id.). However, the student's behavioral progress or lack thereof during the 2011-12 school year was not an appropriate basis for analysis, in this instance, where the May 2012 CSE added a 1:1 aide to the student's IEP, thereby materially changing the educational program (compare Dist. Ex. 2 at p. 7, with Dist. Ex. 3 at p. 8; see Tr. pp. 120-21, 255-57, 350-51; cf. Carlisle Area Sch. v. Scott P., 62 F.3d 520, 530 [3d Cir. 1995] [examining a student's progress under a prior IEP but noting that the two IEPs at issue in the case were not identical as the parents contended]). In addition, the hearing record demonstrates that the student made some progress with his behavioral needs during the 2011-12 school year, albeit at times inconsistent (Dist. Ex. 19 at p. 1; see Tr. pp. 251-54).

Moreover, the hearing record also demonstrates that the student's BIP for the 2012-13 school year effectively targeted the student's interfering behaviors and was modified as necessary. The hearing record reflects a behavior intervention specialist attended the May 2012, October 2012, and December 2012 CSE meetings (Dist. Exs. 3 at p. 1; 4 at p. 1; 5 at p. 1).¹⁴ The May 2012 IEP reflects that the CSE recommended the student receive a 1:1 aide to meet his health and safety needs in the school environment, along with his continued participation in the 15:1 special class with counseling and supports per his individualized BIP (Dist. Ex. 3 at p. 1).

The October 2012 IEP reflects the CSE met on that date per the parents' request to address concerns with the 1:1 aide and the student's BIP (Dist. Ex. 4 at p. 1). The CSE approved a psychiatric evaluation at district expense and recommended the student's FBA/BIP be redone (id.). Three days later, on October 5, 2012, in consideration of the addition of the 1:1 aide to the student's educational program and to address his challenging behaviors, the district conducted a new FBA and developed a new BIP for the student (Tr. p. 255; see generally Dist. Ex. 20).¹⁵ The October 2012 FBA/BIP indicated that the behavior intervention specialist, the school psychologist, the student's special education teacher, the school social worker, and the parent participated in developing the FBA/BIP (Dist. Ex. 20 at p. 1). The FBA identified and defined the student's challenging behaviors as follows: (1) calling out while the teacher was teaching a lesson; (2) getting out of his seat and wandering the classroom; (3) disrespectful comments to teachers and peers (i.e., telling a teacher, "I don't have to listen to you"); (4) physical aggression towards peers and adults (i.e., hitting, kicking, punching); and destruction of property (i.e.,

¹³ According to the hearing record, "ABC" refers to "antecedent" (what happened before the behavior), "behavior" (the actual behavior in concrete terms), and "consequence" (what happened after the behavior occurred) (Tr. pp. 249-50). The hearing record shows that ABC is a method of data collection (see Dist. Ex. 20 at p. 2).

¹⁴ Testimony by the behavior intervention specialist indicates she was a board certified behavior analyst (BCBA) (Tr. pp. 225-26).

¹⁵ I find that it was appropriate for the district to wait to redo the student's FBA/BIP until a few weeks into the 2012-13 school year so that the district could get an indication of how the student's behavioral needs presented, particularly in light of the presence of the 1:1 aide (cf. Cabouli v. Chappaqua Cent. Sch. Dist., 2006 WL 3102463, at *3 [2d Cir. Oct. 27, 2006] [noting that it may be appropriate to address a student's behaviors in an IEP by indicating that an FBA and BIP will be developed after a student is enrolled at the proposed district public school placement]).

throwing chairs, throwing items, breaking items) (*id.* at p. 2). The FBA included a hypothesis as to when the behaviors occurred, such as during lessons, non-preferred tasks and, independent work, as well as during lunch, recess, and special area activities, such as physical education, music, and library (*id.* at p. 1). Although the FBA only quantified two incidents of physical aggression in school, it described incidents consisting of the student punching a sign in the cafeteria and breaking it, breaking and throwing crayons, and kicking a peer during recess (*id.* at p. 2). The FBA indicated that, since the beginning of the data collection period, target behaviors from the last FBA/BIP (i.e., calling out, being disrespectful to teachers and peers, and out of seat behavior) continued to occur at rates similar to last year (*id.* at pp. 2-3). The FBA further offered a hypothesis as to the function of the student's interfering behaviors (i.e., related to poor impulse control and activity and then attention motivated) (*id.* at p. 2). Also included in the FBA were strategies used at that time (i.e., verbal redirection, classroom behavior plan whereby student could earn rewards, the BIP from the previous school year until the new FBA/BIP was completed, walk with teacher as appropriate), as well as possible reinforcers (activities and tangible items) (*id.* at p. 3).

The October 2012 BIP identified the behaviors that interfered with the student's learning as physical aggression towards peers (punching, kicking, hitting or pushing), eloping from the teacher aide when in the hallway or at recess, refusal to follow adult directives, getting out of his seat, and calling out and interrupting teachers during lessons (Dist. Ex. 20 at p. 4). The goals of the BIP included that the student refrain from using his hands in an aggressive manner towards peers 100 percent of the time for two consecutive weeks, comply with an adult directive given the first time 75 percent of the time for two consecutive weeks, stay in his seat (sit or stand) 75 percent of the time for two consecutive weeks, raise his hand and wait for teacher to call on him before commenting or asking a question during academic lessons 75 percent of the time for two weeks, and remain with his class and teachers when in the hallway, classroom or at recess 100 percent of the time for two consecutive weeks (*id.*).

The October 2012 BIP also included as an objective to decrease the student's challenging behaviors by teaching and reinforcing alternative or more appropriate replacement behaviors (Dist. Ex. 20 at p. 4). The BIP lists 12 proactive strategies to address the behaviors, including non-verbal and verbal reinforcement, development of a list of highly motivating reinforcers that the student could earn in school, visual and verbal cues (i.e., visual card with expectations and rules, including the "Stop, Think and Do" traffic light), adjustments in the physical proximity of the 1:1 aide to the student depending on the student's behavior, 1:1 coverage, provision of squeeze putty when the student was fidgety and ensuring availability of school supplies, provision of a choice to put on glasses or put them away if the student was playing with them, use of a "matter-of-fact" tone when working with the student, reengagement in activities when the student was distracted instead of addressing inattentive behavior, use of social stories, and use of a daily chart with a point system for appropriate behaviors by which the student could earn a reward if he earned at least 30 out of 40 points per day (75 percent) (*id.* at pp. 5, 8-10). The BIP included tangible rules for the student to follow, all aligned with the target behaviors and goals, and indicated that, after each task/activity, the student would review the rules with his teacher or 1:1 aide and determine if he thought he earned points for each activity (*id.* at pp 5-6). The BIP provided instructions and reactive strategies for his teachers and 1:1 aide to use with the student in order to either reward appropriate behaviors or appropriately react if the student

displayed any inappropriate target behaviors (id. at pp. 6). The BIP set forth how the student's progress would be monitored and reviewed in school (id. at p. 7).

A December 13, 2012 progress report written by the behavior intervention specialist indicated that, since the implementation of the October 2012 BIP, the student exhibited new challenging behaviors that were not identified on the BIP (i.e., crawling on the floor under desks and tables, destroying school property, physical aggression towards peers and adults) (Dist. Ex. 21 at p. 1). The report indicated that the first 15 days the BIP was implemented the student demonstrated overall success, earning the target number of points 93 percent of the time (id.). The ten days following this resulted in a 30 percent success rate in earning the target number of points (id.). The report noted that data was being reviewed to determine the current function of the student's behavior that correlated with an increase in his challenging behavior, whereupon changes to his BIP would be made accordingly (id.).

As the district implemented the student's BIP, the parents expressed concerns about the program (see Tr. p. 268). The behavior intervention specialist testified that the CSE took all of the parents' articulated concerns into consideration but did not always agree with the parents (Tr. pp. 268-69). The December 2012 IEP reflects that the CSE met, in part, to address the parents' concerns about the FBA and BIP (Dist. Ex. 5 at p. 1). The December 2012 CSE recommended among other things, that the student's FBA/BIP be revised (id.).

A progress report/BIP, dated January 11, 2013, and updated on May 8, 2013, indicates that the December 2012 CSE discussed that, due to the increase in the intensity of the student's inappropriate behaviors, the rate of reinforcement would be increased for his appropriate display of target behaviors (Dist. Ex. 27 at p. 1). The progress report indicated that, in January 2013, school staff both inside and outside the classroom were concerned with keeping the student and his classmates safe, as his behaviors resulted in a significant disruption to the class and generated safety concerns that were difficult to manage (id. at pp. 1-2). The progress report noted that, in January 2013, when the student exhibited more intense in-school behaviors, his parents removed his access to a highly preferred electronic device at home (id. at p. 2). Initially, there was an escalation in the student's behavior, but shortly thereafter, the intense behaviors decreased (id.). By the end of January 2013, data reflected the student's performance met criteria for 75 percent success (id.). The progress report noted that, after a meeting with the parent in February 2013, the criteria for success was increased to 85 percent (34 points) (id.). The report included that antecedent data was compiled from March 17, 2013 to May 8, 2013 to assess academics or activities that may have coincided with challenging behaviors (id.). Results of data collection indicated that the student's most challenging behaviors occurred more frequently during mathematics and English language arts instruction, as well as in special area activities of art, music, library, and physical education (id.). Additional data was compiled to assess the frequency of the targeted challenging behaviors (id.). The data showed that the behavior of calling out continued to be an area of difficulty for the student (id. at p. 3). However, by May 3, 2013, the data revealed from the student's points chart reflected stability for the past four months (id.). According to the progress report, the student demonstrated improvement in his ability to engage in more appropriate alternative behaviors when frustrated with academics or when he thought things were not going the way he thought they should (id.). In addition, the report indicated that the student communicated more effectively about how he was feeling and was

more easily directed than in the past (id.). Furthermore, the student exhibited some improvement with self-regulation and impulsivity with the support of the classroom behavior plan, 1:1 aide, and individualized BIP (id. at p. 3-4). The behavior intervention specialist recommended that the student continue to use an individualized BIP with the supports of a 1:1 aide to manage his challenging behaviors within the classroom setting (id. at p. 3).

Based upon the foregoing, the evidence in the hearing record supports a finding that the June 2013 CSE addressed the student's behavioral needs and formulated and updated an FBA and a BIP that were designed to target the student's interfering behaviors and which was consistent with the requirements of State regulation and, therefore, any alleged deficiencies in the BIP would not result in a finding that the district failed to offer the student a FAPE (8 NYCRR 200.22[b][4]; see M.W. v. New York City Dep't of Educ., 725 F.3d 131, 139-41 [2d Cir. 2013]; N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at *8 [S.D.N.Y. June 16, 2014]; A.C., 553 F.3d at 172). Further, the parents cited multiple examples of the district's inaccurate and/or inconsistent reporting of data collected pursuant to the student's BIP during the 2012-13 school year (see generally Dist. Ex. 26). To the extent the hearing record reveals such inaccuracies and/or inconsistencies, it does not in this instance support the conclusion that the district violated the FAPE legal standard related to IEP implementation—that is, that the district deviated from the student's IEPs in a material or substantial way (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205, 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]; see D.D-S., 2011 WL 3919040, at *13; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 495, 502-03 [S.D.N.Y. 2011]).

Finally, the parents argue that the student's BIPs were inappropriate as evidenced by the student's lack of progress during the 2012-13 school year. Progress, although an important factor in determining whether the student is receiving educational benefit, is not dispositive of all claims brought under the IDEA (see M.S. v. Bd. of Educ., 231 F.3d 96, 103-04 [2d Cir. 2000], abrogated on other grounds, Schaffer, 546 U.S. 49 [2005]). The goal of the IDEA is to provide opportunities for students with disabilities to access special education and related services that are designed to meet their needs and enable them to access the general education curriculum to the extent possible (20 U.S.C. §§ 1400[d]; 1414[d][1][A]). The IDEA provides no guarantee of any specific amount of progress, so long as the district offers a program that is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E., 694 F.3d at 189-90; M.H., 685 F.3d at 245; Cerra, 427 F.3d at 192). Nonetheless, the behavior intervention specialist testified that, while at times inconsistent, the student made behavioral progress during the 2012-13 school year, including the development of some coping skills and alternative behaviors that he was able to use on many days (Tr. pp. 265-66, 270, 322-23, 536). Moreover, contrary to the parent's assertions specific to the student's academic progress, a review of the entire hearing record demonstrates that the student made meaningful academic progress in fourth grade during the 2012-13 school year (see Tr. pp. 355-57; Dist. Ex. 8 at pp. 1-5).

In consideration of the above, I find that, contrary to the IHO's finding and the parents' assertions, the student's BIP for the 2012-13 school year was appropriate, used an observable and

measurable data tracking system for the student's behaviors, and resulted in the student's progress.

3. Assistance Dog

On appeal the district argues that the IHO erred in ordering the district to assess the student with the assistance dog in various non-educational setting and in ordering that the CSE consider including the dog as an accommodation on the IEP (see IHO Decision at p. 46). The district contends, among other things, that the 1:1 aide was the more appropriate accommodation to address the student's interfering behaviors in school than the dog. In their answer, the parents assert that the IHO erred in failing to order the district to permit the student's assistance dog into the district public school.

As an initial matter, the parents' cross-appeal about the district's disallowance of the assistance dog on school property rests on legal claims arising under the ADA and Section 504 but not under the IDEA. However, the State Education Law makes no provision for State-level administrative review by an SRO of IHO decisions with regard to section 504 or ADA disability discrimination claims (Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Therefore, an SRO has no jurisdiction to review any portion of the parents' claims regarding section 504 or the ADA claims or the IHO's findings, or lack thereof, and their cross-appeal in this regard is dismissed (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 n.17 [E.D.N.Y. 2012] ["Under New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"]; see also D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 507 [S.D.N.Y. 2013]).¹⁶

With respect to the district's obligations under the IDEA, it has been acknowledged that the IEP of a student a with disability may be required to include a service dog if necessary for the student to receive a FAPE (see Cave v. East Meadow Union Free Sch. Dist., 514 F.3d 240, 248 [2d Cir. 2008] [noting that "[a] request for a service dog to be permitted to escort a disabled student at school as an 'independent life tool' is . . . not entirely beyond the bounds of the IDEA's educational scheme]; EF v. Napoleon Cmty. Schs., 2014 WL 106624, at *5 [ED Mich Jan. 10, 2014] [notice of appeal filed Feb. 6, 2014]).

Here, although the assistance dog was trained with 50 commands, some of which were used to calm the student or interrupt tantrums, the use of a assistance dog for the student would be only one possible strategy to address the student's interfering behaviors (see Tr. pp. 1062, 1065). Testimony by the behavior intervention specialist indicated that the CSE considered the parents' request to allow the student to attend school with his assistance dog during part of the 2012-13 school year (Tr. pp. 273-74). However, she noted that the information provided about the dog and its ability to follow 50 commands was insufficient to explain how the dog would

¹⁶ For the same reasons, to the extent the district argues on appeal that the IHO should have found no violation of Section 504 or the ADA in light of his determination that the district did not discriminate against the student and that the student was not denied access to special and general education (see IHO Decision at p. 45), this portion of the district's appeal will not be further addressed.

address some of the student's "more concerning" and "more extreme" behaviors (i.e. crawling under the table or standing on something inappropriate) (Tr. pp. 275-76; see Tr. p. 1084; Parent Ex. D). The behavior intervention specialist noted that it did not appear that the student would need the dog in school in order to receive benefit or make progress (Tr. p. 276). Moreover, according to the behavior intervention specialist, the student was too young to handle the dog (Tr. p. 275). At that point in time, the parent was responsible for handling the dog (id.). The student would need an additional adult trained to handle the dog in order to prompt the dog to react to behaviors that might occur (id.). The behavior intervention specialist noted it was not clear how the student's inappropriate behaviors would be prevented through use of the dog (Tr. p. 276).

As set forth above, the district used appropriate strategies to address the student's challenging behaviors with the support of the 1:1 aide who would be able to anticipate the when behaviors would likely occur, verbally redirect the student, and implement the strategies set forth in the BIP (see Tr. pp. 120-121, 256-257; Dist. Exs. 20; 21; 27). In light of the district's FBA and BIP for the student during the 2012-13 school year, I find that the CSE had available to it sufficient information about the student's needs, including the manner in which the dog was able or unable to address those needs in the school context and, therefore, the IHO's order requiring the district to assess the student with the service animal outside of school is reversed.

Further, even if the dog's presence was potentially beneficial to the student, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Thus, while I can understand that the parents believe the assistance dog was a desirable service for the student, it does not follow that the district must facilitate that service. The IDEA 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, 873 F.2d at 567 [citations omitted]). In this particular instance, while the parents may have preferred that the student's IEP include a recommendation for the assistance dog, given the provision of the 1:1 aide and other supports in the IEP, the district did not deny the student a FAPE on this basis (see Rowley, 458 U.S. at 208 [finding that, notwithstanding the parent's preference, a district was not required to recommend a sign language interpreter for a hearing impaired student given supports in the IEP]; see also M.M. v. Sch. Bd., 437 F.3d 1085, 1102 [11th Cir. 2006] [finding that the parents of a hearing impaired student could not compel the district to use a particular method of communication with the student]).

VII. Conclusion

In summary, the hearing record shows that the district offered the student a FAPE for the 2012-13 school year, having developed an IEP and educational placement that was reasonably calculated to confer educational benefit in the least restrictive environment. I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated September 30, 2014, is modified by reversing that portion which found that the district failed to offer the student a FAPE for the 2012-13 school year; and

IT IS FURTHER ORDERED that the IHO's decision dated May 6, 2013, is modified by reversing that portion which ordered relief to the parents, including that portion which ordered the district to conduct observations of the student with the assistance dog, ensure attendance of a regular education teacher at the student's future CSE meetings, or make modifications to the student's IEP.

Dated: **Albany, New York**
 March 19, 2015

JUSTYN P. BATES
STATE REVIEW OFFICER