The University of the State of New York

The State Education Department
State Review Officer
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No. 13-129

Application of the BOARD OF EDUCATION OF THE ARLINGTON CENTRAL SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Law Offices of Vanessa M. Gronbach, LLC, attorneys for petitioner, Vanessa M. Gronbach, Esq., of counsel

Gina DeCrescenzo, PC, attorneys for respondents, Gina M. DeCrescenzo, 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 the decision of an impartial hearing officer (IHO) which determined that the educational program and related services recommended by its Committee on Special Education (CSE) for respondents' (the parents') son for a portion of the 2010-11 school year and the entire 2011-12 school year were not appropriate. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

At the time of the impartial hearing, the student was 15 years old, in the ninth grade at a residential school, and eligible for special education programs and related services as a student with an emotional disturbance (34 CFR § 300.8[c][4]; 8 NYCRR 200.1[zz][4]; Dist. Ex. 20, Tr. pp. 2120-24, 2218).

On June 10, 2010, the CSE met to review the student's program for 2010-11, his eighth grade year (Dist. Ex. 74). The CSE recommended that the student's program include special

classes for core curriculum and study skills classes (id. at p. 5 On September 16, 2010, the student left the school grounds without permission and was suspended (Dist. Ex. 71). On September 20, 2010, the student was hospitalized and did not return to the district middle school (Dist. Ex. 70; Tr. p. 767). On October 14, 2010, the CSE reviewed approval of a district referral to the Boards of Cooperative Educational Services (BOCES) Adolescent Day Treatment (ADT) program (Dist. Ex. 64 at p. 6). On October 25, 2010, the student began attending the BOCES ADT program (id. at p. 1). On November 23, 2010, the CSE recommended that the student continue the ADT program in an 8:1:1 special class for the remainder of the 2010-11 school year (id. at pp. 1, 5). The student was hospitalized in January 2011 through the beginning of February 2011 (Dist. Ex. 63).

On March 3, 2011, the CSE convened to discuss recommendations for the student for the 2011-12 school year, when the student would be in ninth grade (Dist. Ex. 61). The CSE recommended the BOCES BETA ADT 8:1:1 special class (id. at p. 1). On March 16 through 23, 2011, the student was hospitalized (Dist. Ex. 60). On April 12, 2011, the student was involved in a behavior incident that resulted in his restraint by crisis workers (Dist. Ex. 56, pp. 9-11). On May 3, 2011, the student was suspended for one day (id. at pp. 1-3). Following the suspension, the student returned to school for just one day, May 27, 2011, prior to the end of the school year (Dist. Ex. 55).

On October 21, 2011, the CSE convened to review the student's program and noted his inconsistent attendance and behavior challenges (Dist. Ex. 50). The CSE decided to have a Functional Behavior Assessment (FBA) conducted so that a behavior plan could be put in place for the student (id. at p. 2; Dist. Ex. 49). On January 4, 2012, BOCES filed a Person in Need of Supervision (PINS) Complaint Form concerning the student (Dist. Ex. 45). On February 6, 2012, the CSE convened for a manifestation determination and concluded that the student's behaviors were not a manifestation of his disability (Dist. Ex. 40). The team approved an independent FBA and neuropsychological evaluations (id.; Dist. Ex. 30). In the month following the April 2012 CSE meeting, the student had at least 10 absences and there were many days where the student only attended part of the school day (Dist. Ex. 51). After that, the student did not attend school except for part of one day from May 15, 2012 through the end of the school year (Dist. Exs. 51, 23).

A. Due Process Complaint Notice

By amended due process complaint notice dated July 2, 2012, the parents requested an impartial hearing, asserting that the student was denied a FAPE for the 2010-11 and 2011-12 school years (Dist. Ex. 6 at pp. 1-7). Regarding the 2010-11 and 2011-12 school years, the parents asserted that, despite multiple CSE meetings each year, the district failed to properly evaluate the student and failed to offer an appropriate program, placement and related services to meet his specific needs (id. at 3).

The parents challenged the program and placement for the 2010-11 school year, asserting that the student's anxiety, anger and maladaptive behaviors were not appropriately (Dist. Ex. 6 at p. 3). The parents further asserted that the student was not appropriately transitioned after hospitalizations, that appropriate goals and objectives were not developed, and that an FBA and behavioral intervention plan (BIP) were not developed despite the student's interfering behaviors

(id. at pp. 3-4). The parents further alleged that an incident involving a restraint of the student in April 2011 caused the student post-traumatic stress and was never addressed (id. at p. 4). The parents assert that the student was not offered appropriate testing accommodations to meet his needs, or related services to address his continuing interfering behaviors (id. at p. 5).

Regarding the 2011-12 school year, the parents asserted that despite the student's problems experienced in the 2010-11 school year, the student's program and related services did not change, although his placement was changed (Dist. Ex. 6 at p. 5). The parents also argued that the district failed to use a transition plan from middle school to high school or following the student's hospitalization during the school year (id.). The parents further asserted that the district improperly failed to find that the student's behaviors were a manifestation of his disability in February 2012 (id.). Regarding an April 2012 CSE subcommittee meeting, the parents assert that the subcommittee failed to have a required member because it lacked a general education teacher, and also failed to include members who had special expertise regarding the student's maladaptive behaviors (id. at pp. 5-6). The parents further argue that the district failed to develop an FBA or BIP, failed to address the student's school phobia, failed to offer appropriate testing accommodations and related services to address the student's behaviors, and failed to consider a more restrictive placement or identify a specific placement (id. at pp. 6-7).

As relief, the parents propose as a resolution that the current IEP be annulled, that a new IEP with an appropriate program and placement be provided, that an independent FBA and BIP be paid for by the district, that the district implement the recommendations provided in April 2012 by the parents' expert relating to an FBA and BIP, that an independent neuropsychological evaluation be paid for by the district, and that the district provide compensatory services relating to the 2010-11 and 2011-12 school years (Dist. Ex. 6 at p. 8).

B. Impartial Hearing Officer Decision

An impartial hearing convened on September 18, 2012 and was completed on February 26, 2013, after eleven nonconsecutive hearing dates (Tr. pp. 168 – 2331). By decision dated June 10, 2013, the IHO found that the district had failed to offer the student a FAPE for a portion of the 2010-11 school year and the entirety of the 2011-12 school years, ordered the CSE to reconvene within 20 days, and ordered authorizations for neuropsychological evaluations and FBAs (IHO Decision at pp. 35-47).

First, the IHO found that the student's initial IEP in place for the 2010-11 school year offered the student a FAPE. The IHO found that the data considered by the CSE team was less than two years old and that the information considered included detailed information on the student's behaviors from his behavior class as well as oral reports from participants who knew the student well (id.). The IHO determined that the absence of an FBA was not dispositive and the CSE had a proper basis for relying on the degree of support recommended for the student (id.).

The IHO noted that during the course of the 2010-11 school year, the CSE met multiple times (IHO Decision at p. 37). Following a hospitalization of the student, the CSE placed the student at a BOCES placement in October 2010 (id.). No additional testing was done by the CSE prior to that placement, and the CSE as a whole did not consider assessment information from the hospital although the CSE Chairperson was in receipt of such information (id.). The IHO

considered that the November 2010 IEP was not substantively changed other than the change to the BOCES placement (id.). The IHO determined that the absence of a FBA or BIP at that time did not deprive the student of a FAPE, in part because the support at the BOCES placement included a treatment plan that was regularly reviewed (id. at p. 38).

Second, the IHO considered that the CSE convened in March 2011, and determined that both the program for the balance of the 2010-11 school year and as proposed for the 2011-12 school year denied the student a FAPE (IHO Decision at pp. 38-39). At the time of the March 2011 CSE meeting, the student had been discharged from a hospitalization two weeks prior and a classroom crisis had occurred the day before the meeting (id. at p. 38). Regarding the remainder of the 2010-11 school year, the IHO determined that the district was in receipt of information in its own records concerning the student's aggression and was aware of his absences (id. at p. 39). The IHO noted that following the CSE meeting in March 2011, the CSE took no action after the student exhibited more disruptive behaviors, including a crisis in class requiring restraint in April, as well as declining attendance (id. at pp. 38-40). Regarding the 2011-12 school year recommendations, the CSE recommended a different BOCES program for the 2011-12 school year that was more academically challenging, but did not review in detail the student's interfering behaviors or discuss an FBA at the meeting (id.). The IHO determined that the failure to conduct an FBA resulted in a denial of FAPE for the 2011-12 school year because the CSE did not reasonably rely upon anecdotal reports of the student's improvement or the effectiveness of the supports continuing to be recommended given the existence of contradictory evidence concerning student attendance difficulties and interfering behaviors (id. at pp. 39-40).

The IHO also considered the CSE meeting held on October 21, 2011 at the request of the parents to reconsider the student's program (IHO Decision at p. 40). The BOCES placement representatives reported that the program was not working and that an FBA was required and the CSE ordered an FBA and BIP (id. at pp. 40-41). The IHO found no evidence that the CSE inquired as to the results of the FBA and BIP, and further found that they were nullities based on the little data collected and the evidence in the record that they were inadequate (id. at p. 41). The IHO found that the district's negative manifestation finding on February 6, 2012, largely was made in support of a pending for the purpose of continuing a PINS proceeding initiated by the district (id.). The IHO further noted that the CSE also convened a meeting on April 13, 2012, at the parents' request, but no changes were made to the student's then existing program (id. at 42).

The IHO considered the parents' request for compensatory services and other relief and found that: 1) the IHO lacked jurisdiction to order provision of residential services for the student; 2) there was no authority or basis for an order of district-wide training on IDEA, including methods of teaching, counseling and restraints and seclusion; 3) the CSE was properly ordered to reconvene as requested by the parents; and 4) regarding the parents' request for corrective services, the IHO found that an award of compensatory services was not appropriate under the circumstances, but that appropriate evaluative material had been lacking and was required; therefore, the IHO ordered the parents' ability to have continued access to independent evaluations (IHO Decision at pp. 44-47). Specifically, the IHO ordered relief as follows: 1) the CSE was to reconvene within 20 days to review the student's current program; 2) continuing authorizations for a neuropsychological evaluation and an FBA until completed; 3) if the student is transferred from his current facility, the district will provide the parents with an independent FBA and BIP at the new facility by a provider selected by the parents; and 4) if the student remains at his present facility, the district

will provide the parents with an independent FBA and BIP by a provider selected by the parents (id. at p. 47).

IV. Appeal for State-Level Review

The district appeals, asserting that the IHO erred in finding that it did not offer the student a FAPE for a portion of the 2010-11 school year and the entire 2011-12 school year. The district argues that the IHO erred in finding that the continued lack of an FBA and BIP for the student and, ultimately an inadequate FBA and BIP, denied the student a FAPE for the 2010-11 and 2011-12 school years. The district asserts that contrary to the findings of the IHO, the student did progress during the school years in and had appropriate supports. The district argues that a BIP could not address the student's test avoidance and anxiety.

For the 2010-11 school year, the district asserts that the IHO erred because the student's IEP identified the student's needs and provided strategies and goals to address those needs. The district notes that the student stopped attending school on May 4, 2011 and did not return and that his attendance had been an issue for the entire 2010-11 school year.

Regarding the 2011-12 school year, the district asserts that the IHO erred by concluding that the BOCES representatives determined that the program was not working and that an FBA was required. Further, the district argues that the FBA and BIP were not inadequate and that the IHO erred when she found that they were nullities, especially in light of her reliance on a private expert's opinion in coming to that determination. The district asserts that the IHO failed to defer to the opinions of district staff and the student's educational providers on February 6, 2012, where it was concluded that there was no manifestation of the student's disability, and also that the IHO erred in finding that the manifestation determination occurred so that a PINS proceeding initiated by the district could remain in place.

The district attaches an IEP from June 7, 2013, which was not available at the time of the impartial hearing to its petition for appeal, as proposed District Exhibit 119. The district submits the IEP in support of its opposition to the relief granted by the IHO, which required the CSE to reconvene within 20 days of her June 10, 2013 decision. The district also disputes the need for further neurological evaluations or FBAs as ordered by the IHO, noting that these issues were discussed at the June 7, 2013 CSE meeting and the parent agreed with the FBA/BIP by Berkshire staff and that a neuropsychological evaluation was not needed at that time.

The parents answer, denying the district's claims on appeal, and asserting that the IHO properly determined that the IEPs at issue failed to provide the student with a FAPE. The parents argue that certain claims and relief were not directly appealed by the district, such as the lack of any indication that an FBA was discussed at the March 3, 2011 CSE meeting, the district's failure to provide appropriate evaluative material, and the parents' right to continued access to independent evaluations, and that these issues are not subject to review. The parents request dismissal of the petition, along with reversal of the IHO's Decision to the extent the parents were denied compensatory relief.

The district replies, disputing that it failed to appeal the portions of the IHO Decision relating to denial of FAPE. The district asserts that its appeal encompassed all of the IHO's

Decision except for the finding that a portion of the 2010-11 school year offered the student a FAPE and the IHO's denial of compensatory services. The district argues that the parents have not cross-appealed and that the denial of compensatory services should be upheld.

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 v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [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, 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, 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, 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. Procedural Matters

1. Parents' Request for Compensatory Services

I note that the parents request affirmative relief, namely the reversal of the IHO's denial of compensatory services, in a "Wherefore" clause inserted at the conclusion of the answer. The

parents have not cross-appealed as noted by the district, and the district has not appealed the IHO's denial of compensatory services to the student. "A respondent who wishes to seek review of an impartial hearing officer's decision may cross-appeal from all or a portion of the decision by setting forth the cross-appeal in respondent's answer. . . . " (8 NYCRR § 279.4[b]). As the determination of the IHO denying compensatory services has not been appealed by either party, it will not be addressed in this decision (see 8 NYCRR § 279.4).

2. Additional Documentary Evidence

The district submits a June 7, 2013 IEP as additional evidence with its petition, noting that it was not available at the time of the impartial hearing. The district submits the IEP in support of its request to modify certain relief granted by the IHO relating to additional evaluations and assessments. The parents have not responded or opposed the district's submission of the IEP.

Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer'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. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). Despite the lack of opposition from the parents, and while this document could not have been offered at the time of the impartial hearing, I nonetheless do not find that this additional evidence is necessary to render a decision and, therefore, the June 7, 2013 IEP will not be considered.

B. 2010-11 School Year

The district appeals the IHO's finding that the student was denied a FAPE for a portion of the 2010-11 school year.

First, I note that the district's appeal was not limited in scope as asserted by the parents, but encompassed the entirety of the IHO's findings supporting her ultimate determination that a FAPE was denied to the student. Regarding the IHO's conclusion that the student was denied a FAPE for a portion of the 2010-11 school year, I concur with the IHO's determinations as set forth herein. I note that the IHO's decision was thorough, well-reasoned and cited to the relevant portions of the lengthy hearing record and extensive testimony.

The IHO based her decision that the district denied the student a FAPE for part of the 2011-11 school year primarily on the district's failure to conduct an FBA or develop a BIP during that school year. Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. When developing an IEP, if a student's behavior impedes his or her learning or the learning of others, the CSE must "consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior when developing, reviewing, and revising an IEP (20 U.S.C. § 1414[d][3][B][i]; see 34 CFR 300.324[a][2][i]; 8 NYCRR 200.4[d][3][i], 200.22[b][2]). 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]). A behavioral intervention plan shall also be considered for a student with a disability in cases where the student's behavior places the student or others at risk of harm or injury (8 NYCRR 200.22[b][1]).

A behavioral intervention plan (BIP) is defined as a plan based on the results of a functional behavioral assessment (FBA) and it describes the problem behavior, sets forth hypothesis as to why the problem behavior occurs, as well as intervention strategies to address the behavior (8 NYCRR 200.1[mmm]). The FBA shall be based upon multiple sources of data as appropriate, including information obtained by direct observation of the student and from the student's teachers, parents, and related service providers, and "shall not be based solely on the student's history of presenting problem behaviors" (8 NYCRR 200.22[a][2]). The FBA is required to set forth a baseline of the student's problem behaviors, including sufficient detail and addressing "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 BIP must identify baseline data on the student's problem behaviors across settings, people and times of day and note the frequency, duration and intensity of the targeted behaviors (8 NYCRR 200.22[b][4][i]). The BIP shall identify intervention strategies to prevent the behavior, to teach alternative behaviors and provide consequences for the inappropriate and alternative behaviors (8 NYCRR 200.22[b][4][ii]). The BIP shall also include a schedule to measure the effectiveness of the interventions (8 NYCRR 200.22[b][4][iii]).

Although State regulations call for the procedure of using an FBA when developing a BIP, the Second Circuit has explained that, when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F.3d at 190). The Court also noted that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE," but that in such instances particular care must be taken to determine whether the IEP addresses the student's problem behaviors (id.).

In addition, a student's IEP is required to be revised as appropriate for any reason, including based on information about the child provided to or by the parents, or the child's anticipated needs (20 U.S.C. § 1414[d][4][A]).

The record reflects that the student escalating behaviors were known to the CSE during the 2010-11 school year and increasingly affected the student's academics as the school year progressed (Tr. pp. 1030-31, 1049, 1052-53, 1058-59). The district was on notice of the student's increasing problems with attendance, which ultimately resulted in the student attending only one partial day of school after the beginning of May 2011 (Tr. pp. 942, 955-57, 981-83).

The CSE determinations and recommendations in June 2010 and November 2010, relating to the student's 2010-11 program and services, were not found by the IHO to deny the student a FAPE (IHO Decision at pp. 36-38). The IHO noted that the parent did not object to the CSE's determinations made at the June 2010 and November 2010 meetings (IHO Decision at pp. 14-15, 17-18; Tr. pp. 755, 852). The IHO also considered that although an FBA was not performed at that time, the CSE was in receipt of detailed and individualized information regarding the student

from his teacher who recorded individual behaviors (Tr. pp. 858, 864, 868). The IHO also relied on the fact that the data considered by the CSE was less than two years old and the CSE considered oral reports from participants who knew the student well (IHO Decision at pp. 36-37).

Regarding the district's claims on appeal that the student progressed during the 2010-11 school year, I find that the IHO properly considered these claims and determined that the district failed to offer the student a FAPE commencing in March 2011 (IHO Decision, at pp. 38-40, 45-46). As noted by the IHO, the district's continued reliance on anecdotal claims of improvement and use of the same supports, even in the face of the student's continuing problem behaviors is evidence that the student's needs were not being effectively met by the district (IHO Decision, at p. 39). The IHO noted that the failure of the district to attempt to develop and implement a BIP prevented it from determining whether the program and placement for the student remained appropriate in March 2011, and for the reminder of the school year, and whether additional tactics and supports could address the student's anxiety and resulting problems with behavior and attendance (IHO Decision, at pp. 39, 39 n. 27, 45-46). As noted by the IHO, there was evidence that the student's test avoidance and anxiety could have been addressed with an appropriate BIP (IHO Decision, at p. 39, Tr. p. 1991). I concur with the IHO that by the time of the March 3, 2011 CSE meeting, the CSE had sufficient evidence of the student's anxiety relating to academic performance and his interfering behaviors to warrant discussion of an FBA and BIP (IHO Decision, at p. 38).

Specifically, on March 3, 2011, the CSE convened, shortly after the student's recent hospital discharge, to make recommendations for the student's 2011-12 school year (Dist. Ex. 61). The CSE recommended the BOCES BETA ADT 8:1:1 special class, with counseling once a week individually and once a week in a small group, and with the same program modifications and test accommodations (id. at p. 1). The student was to receive a copy of class notes and also test accommodations of extended time (1.5), directions read, and special location for final and state exams (id. at pp. 10-11). The hearing record reflects that the student's absences and behaviors were not a main focus of the meeting (Tr. p. 953), despite his continuing absences during weeks prior to the meeting and the fact that the day before the meeting crisis workers needed to be called for an incident involving the student (Dist. Exs. 55, 56). The program recommended for the student for his ninth grade year was more challenging academically than his prior program (Tr. pp. 1498-99). Although the CSE considered an updated education evaluation, there was no updated psychological evaluation and the CSE did not recommend an FBA (Dist. Ex. 61). I concur with the IHO's determination that the failure to perform an FBA at that time resulted in a denial of FAPE for the student, as of March 2001, and for the remainder of the 2010-2011 school year.

In addition, subsequent to the March 2011 CSE meeting, the student's behaviors and absences continued to be a growing problem but the CSE did not take action (Tr. p. 1036; Dist. Ex. 56). On March 4, 2011, the student was restrained after becoming aggressive during an incident that involved another student and the school principal (Dist. Ex. 56). On March 16 through 23, 2011, the student was hospitalized (Dist. Ex. 60). On April 12, 2011, the student was involved in a behavior incident that resulted in his restraint by crisis workers (Dist. Ex. 56 at pp. 9-11). On May 3, 2011, the student was suspended for one day (id. at pp. 1-3). Following the suspension, the student returned to school for one day, May 27, 2011, and was otherwise absent through the remainder of the school year (Dist. Ex. 55; Tr. p. 1046). No action was taken by the district to revise his program or supports through the end of the 2010-11 school year. The student

failed every academic class and his social worker was called to his classroom daily (Tr. pp. 954, 1058-59, 1498; Dist. Ex. 54). The parents began picking up the student early in the school day (Tr. pp. 602, 604; Dist. Ex. 23). Notably, the parents requested home tutoring for the student at the end of May and their request did not receive a response. In light of the fact that the student's attendance and tardiness continued to be problems through the end of the school year, and without affirmative action by the district, including the development of an FBA, I concur with the IHO's determination that the CSE had sufficient information to warrant development of an FBA but took no action and therefore the student was not provided a FAPE through the end of the 2010-11 school year. I note that the IEPs in effect for the 2010-11 school year did not otherwise provide strategies or supports to address the student's specific behavioral and emotional needs.

Based upon the foregoing, I concur with the IHO determination that the hearing record supports a finding that the student was denied a FAPE for the portion of the 2010-11 school year from March 2011 through the end of the school year.

C. 2011-12 School Year

The district also appeals the IHO's finding that the student was denied a FAPE for the 2011-12 school year.

As noted above, the IHO found, and I concur, that the CSE's failure to have an FBA conducted as part of the discussion at the March 3, 2011 CSE meeting, which was held to discuss recommendations for the student for the 2011-12 school year, was a procedural failure that resulted in the denial of FAPE based upon all the circumstances. In addition, there were additional CSE meetings held during the course of the student's 2011-12 school year and these additional meetings or resultant IEPs did not take appropriate actions to remedy the denial of FAPE.

The student's special education teacher in the BOCES BETA ADT class for the 2011-12 school year testified at the impartial hearing that the student had the academic ability to do the work but was overwhelmed emotionally due to the amount of work assigned (Tr. pp. 1391-93, 1406). The teacher noted that the student was motivated in math and tested out of 30% of the math course in the first few weeks of the school year (Tr. p. 1395). By November, he noted that the student was shutting down and having difficulty (Tr. p. 1404). The teacher testified as to his belief that the student's anxiety was a large factor in his inability to attend in school (Tr. p. 1434).

On October 21, 2011, the CSE convened to review the student's program and noted his inconsistent attendance and noncompliant behavior (Dist. Ex. 50; Tr. pp. 358-59). The CSE decided to have an FBA conducted by the district psychologist so that a Behavior Plan could be put in place for the student (id. at p. 2; Dist. Ex. 49). However, a more restrictive placement or a residential placement were not proposed by the CSE, and in fact no changes were made to the student's program or placement and no supports were added (Dist. Ex. 50). His assigned mental health counselor testified that the student had a tough transition into the BETA program for ninth grade (Tr. p. 1069). She noted that the student's attendance was not good all year and was very poor at the end of the year (Tr. p. 1070). She believed his attendance problems were related to his anxiety and she testified that she tried different techniques to try to help the student (Tr. p. 1081).

The record reflects that the FBA and BIP prepared by the district's school psychologist were inadequate in various respects and I concur with the IHO that these documents were "effectively nullities" (IHO Decision at p. 41, Dist. Ex. 49). The behaviors to be addressed by the FBA were the student leaving the school building, not following teacher directives and his regressive behavior and anxiety (Dist. Ex. 49; Tr. pp. 540-41). A district supervisor of special education testified that the targeted behaviors seemed broad and she was not sure if a behavior report card was ever implemented, as referenced on the FBA (Dist. Ex. 49; Tr. pp. 486-88). Notably, the student was not observed in the classroom when the FBA was prepared, although the school psychologist testified that she had observed the student at the October 2011 CSE meeting (Tr. pp. 1591-92). However, he FBA "shall not be based solely on the student's history of presenting problem behaviors" and it appears that is exactly what occurred in the present case (8 NYCRR 200.22[a][2]). The FBA also fails to set forth a baseline of the student's problem behaviors, including sufficient detail and addressing "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 BIP fails to set forth sufficient detail to be considered adequate and fails to set forth strategies to change the problem behaviors (Dist. Ex. 49 at p. 5). The BIP sets forth recording mechanisms for the behaviors with a behavior report card and staff indications, but fails to set forth strategies to address the behaviors (id.) The BIP fails to identify baseline data on the student's problem behaviors across settings, people and times of day, fails to note the frequency, duration and intensity of the targeted behaviors, fails to identify intervention strategies to prevent the behavior, to teach alternative behaviors and provide consequences for the inappropriate and alternative behaviors, and fails to include a schedule to measure the effectiveness of the interventions (8 NYCRR 200.22[b][4]).

The parents presented the testimony of a board certified behavior analyst at the impartial hearing who had also issued a program review report in April 2012 (Tr. pp. 1742-1847, 2017-2051, 2171-2217, Dist. Ex. 33). The parents' behavior analyst testified that while she did not have enough information to do an FBA, she prepared a program review report and made recommendations for interim measures since the student was out of school so frequently (Tr. pp. 1768-69; Dist. Ex. 33). Her recommendations included online classes as an option and the use of a scribe to relieve anxiety related to typing or writing speed (Tr. pp. 1769-72). Her intent at the time of preparing her program review report was to prepare a more extensive report and her next steps were to talk to teachers at the school and also directly observe the student in school (Tr. pp. 1769, 1773). She also concluded that the FBA prepared by the district was inadequate because many elements were missing and five behaviors were too many to target in her opinion (Tr. pp. 1774-77). She opined that staff interviews were insufficient for preparation of the FBA and that the district needed to determine the cause of the student's escape desire, set forth a variety of strategies to address potential causes, and find ways to make school more attractive to the student (Tr. pp. 1784-88). She noted that the behavior contract prepared by the district was not a plan and did not contain reinforcement, but only contained punishment (Tr. p. 1779, Dist. Ex. 85). She testified that the student's significant interfering behaviors required a behavior analytical approach to remedy his behaviors and desire to escape school (Tr. pp. 1796). Her opinion was that an appropriate IEP for the student could not be developed with the information in the documents prepared by the district (Tr. pp. 1794).

In any event, the FBA and BIP were not discussed at the CSE meetings during the school year (Tr. pp. 1597-99). The district's school psychologist noted that she concluded the FBA and BIP in early November 2011, that they were implemented by BOCES staff prior to the April 2012 CSE meeting, and were first provided to the CSE at the April 2012 meeting (id.).

On February 6, 2012, the CSE convened for a manifestation determination and concluded that the student's behaviors were not a manifestation of his disability (Dist. Ex. 40). One of the district's supervisors of special education testified that the manifestation determination was scheduled because of the student's poor behavior choices, his noncompliant behaviors including not following directions, and his attendance (Tr. pp. 512-13). BOCES staff had filed a PINS proceeding and the manifestation determination was required in order to move forward with the PINS petition (Tr. pp. 513, 519-20, 531-32). After the manifestation determination, there was no IEP change initiated (Tr. p. 539).

The student's assigned mental health counselor noted that the student's attendance got very bad during February 2012 (Tr. p. 1224).

On April 13, 2012, the CSE convened to discuss the student's program and reevaluation (Dist. Ex. 31). The team approved independent FBA and neuropsychological evaluations (id.; Dist. Ex. 30). At the April 2012 CSE meeting, the FBA and BIP were not discussed and substantive changes were not made to the student's program (Dist. Ex. 31). The student's assigned mental health counselor testified that at the time of this meeting, the student's attendance was down and his behavior was not good (Tr. p. 1107). The student was not offered a more restrictive program or a residential placement (id.). One of the district's supervisors of special education testified at the impartial hearing that the parent was in agreement with residential schooling at the time of this meeting and that the district was looking into it as an option but was concerned if the student could walk out of the facility (Tr. pp. 394-97).

The parents presented the testimony of a neuropsychologist at the impartial hearing, who had commenced a neuropsychological evaluation of the student in April 2012 (Tr. pp. 1874-1937, 1960-2016). On the third testing day, the student would not come into his office (Tr. p. 1972). He noted that the behaviors exhibited by the student could be addressed with behavioral interventions (Tr. p. 1991). He indicated that he needed to complete a full assessment before he could determine the appropriate program for the student, but he noted that the student needed a highly structured environment with behavioral strategies, and that a residential program with a plan to address the student's cognitive and emotional needs could potentially provide a very structured program for the student (Tr. pp. 1996, 1999-2002, 2010). He also noted the student's recognition of his own need for a highly structured setting (Tr. p. 1908).

The school filed a PINS complaint form in January 2012 (Dist. Ex. 45), and the PINS petition was filed in June 2012 after the student's extended absences (Tr. pp. 1357, 1364). At the time of the impartial hearing, the PINS proceeding was pending in Family Court (Tr. p. 1355). As noted by the IHO, the district had been clear that the student's behaviors were related to his disability just prior to the manifestation determination, but nonetheless ultimately determined that his behaviors were not a manifestation of his disability (Tr. pp. 1264-65).

As noted by the IHO, the district had sufficient information regarding the student's needs to discuss more restrictive programs and placements at the inception of the 2011-12 school year if not sooner, considering the length of time the student had been struggling in his program and placement (IHO Decision, at p. 41). The CSE instead discussed preparation of an FBA and BIP as the sole action to be taken following the October 2011 CSE meeting, which I concur with the IHO was not appropriate under the circumstances (IHO Decision, at p. 40). The FBA and BIP prepared by the district were inadequate as detailed above, and the district did not take other actions or make changes to the student's program or placement during the course of the 2011-12 school year. I concur with the IHO's determination that an appropriate FBA and BIP was required for this student during the 2011-12 school year, and without an appropriate FBA or BIP, and in the absence of an IEP that otherwise provided strategies or supports to address the student's anxieties and behaviors, the student was not provided with a FAPE for the 2011-12 school year (IHO Decision, at pp. 40-42).

Accordingly, I concur with the IHO's determination that the student was denied a FAPE for the 2011-12 school year. I also find that the IHO appropriately awarded relief to address the denial of FAPE and I find no reason to modify that relief.

I note that the relief awarded by the IHO included an order for the CSE to reconvene within 20 days of the decision and access to future independent FBAs and BIPs and neuropsychological evaluations at district expense, but did not include the compensatory tutoring hours as requested by the parents (IHO Decision, at pp. 43-47). Notably, the parents presented the testimony of the student's clinician at his residential program, who testified that additional hours of tutoring, as requested by the parents, could be counterproductive and also may not be warranted (Tr. pp. 2233-34). Tthe parents did not present testimony or other evidence to support their request for compensatory tutoring hours and the evidence presented indicated its potential harm to the student in his residential school setting (id.). While the denial of compensatory services was not formally cross-appealed, I also note that, in any event, there is no basis in the hearing record for setting aside the IHO's determination of appropriate relief, including her denial of an award of compensatory education.

VII. Conclusion

Upon review of the hearing record, and as described above, the IHO properly concluded that the district failed to offer the student a FAPE for a portion of the 2010-11 school year and the entirety of the 2011-12 school year and appropriately awarded relief.

I have considered the parties' remaining contentions and find that I need not reach them in light of my conclusions herein.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
February 27, 2015

CAROL H. HAUGE
STATE REVIEW OFFICER