The University of the State of New York

The State Education Department
State Review Officer
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No. 16-066

Application of the BOARD OF EDUCATION OF THE WHITEHALL 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:
Girvin & Ferlazzo, PC, attorneys for petitioner, Tara L. Moffett, Esq., of counsel

Brandi Burns, Esq., attorney for respondents

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 found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at an out-of-State public school for the 2015-16 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

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

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such

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

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

III. Facts and Procedural History

The student attended a district elementary school for kindergarten and first grade (Joint Ex. 15 at p. 2). During first grade (the 2005-06 school year), the student received "Title I" services in reading and math,[1] individualized support from a reading specialist, and occupational therapy (OT) to improve visual motor skills (id.). Also during first grade, the student received a diagnosis of an attention deficit hyperactivity disorder (ADHD) and was determined eligible for accommodations pursuant to Section 504 of the Rehabilitation Act of 1973 (section 504) (see 29 U.S.C. § 794[a]) (id.). The student then transferred to a parochial school, where he remained through fifth grade (id. at pp. 2-3). In spring 2011, the student was found eligible for section 504 accommodations by the district in which the parochial school was located (id. at p. 3). The student reenrolled in the district for sixth grade in fall 2011 (id. at pp. 2-3, 6). In spring 2012, the student was referred for

[1] Presumably this refers to services provided pursuant to Title I of the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act (see 20 U.S.C. § 6301 et seq.).

updated testing and, according to the parent, was found eligible for special education services at that time (Tr. pp. 265-66; Joint Ex. 15 at pp. 1, 3, 7).[2]

On March 10, 2014, a CSE convened to develop the student's IEP for the 2014-15 (ninth grade) school year (Joint Ex. 16 at p. 3). Finding the student eligible for special education and related services as a student with an other health-impairment (OHI), the CSE recommended 15:1 special classes in mathematics, English, social studies, and science (id. at pp. 3, 9). The CSE further recommended several program modifications, testing accommodations, and four annual goals in the areas of reading, writing, and mathematics (id. at pp. 8-12).

On January 13, 2015, the student was involved in an incident with another student (the other student) (Tr. pp. 73, 220-21, 279-80). Both students attended the same 15:1 classroom and on the day in question, the other student wrote messages in a notebook stating that he was going to "kill [the student]" (Tr. pp. 114-15, 220-21, 281-83, 311-12).[3] The student was not in school on the day the messages were written (Tr. pp. 282-83). Upon learning of the threats, the district called the State police, who informed the student and his parents later that day (Tr. pp. 283-84).

According to the parents, on the day of the incident the district superintendent assured them that the other student would not attend school the following day (Tr. p. 285). The student's mother testified that the day after the incident, both the student and the other student were at school; as a result, the parents removed their son from school and he did not attend for several days (Tr. pp. 287-88, 338). Following the student's return to school, the parents indicated that the student had trouble sleeping, was not eating, and was "combative," and that beginning on January 22, 2015, they obtained four private counseling sessions for the student, at which time he received a diagnosis of post-traumatic stress disorder (PTSD) (Tr. pp. 288-89, 307-09, 340).

On March 6, 2015, a CSE convened to develop the student's IEP for the 2015-16 school year (Joint Ex. 5 at p. 3). The CSE meeting was attended by the district director of special education who served as the CSE chairperson during the meeting, a special education teacher, the school psychologist, a regular education teacher, and the student's mother (Tr. pp. 18, 46; Joint Ex. 5 at p. 3). The CSE developed four annual goals in the areas of reading, writing, study skills and mathematics, and again recommended program modifications, testing accommodations, and 15:1 special classes in mathematics, English, social studies, and science (compare Joint Ex. 5 at pp. 3, 9-11, with Joint Ex. 16 at pp. 8-12). The director of special education also testified that the student's mother requested an OT screening during the meeting (Tr. pp. 70, 72).

On May 28, 2015, the student sustained an ankle injury and received home-based tutoring for the remainder of the 2015-16 school year (Tr. pp. 55-56; Joint Ex. 11). In July 2015, the district conducted a reevaluation of the student consisting solely of a review of records (Joint Ex. 14).

In August 2015, the student's parents met with both the superintendent and the district director of special education to discuss the parents' concerns regarding how the student and the other student would be kept apart for the 2015-16 school year (Tr. pp. 75-77, 292-95). Following

[2] The student's eligibility for special education programs and services as a student with a disability at all relevant times is not in dispute in this appeal.

[3] Both the mother and the district director of special education testified that they believed the incident had to do with a third student (Tr. pp. 115, 282-83).

the meeting, the parents called the director of special education to inform him that the student was going to attend school in another school district (Tr. pp. 77-78, 295).

The student began attending a public school in an out-of-State school district for the 2015-16 school year (tenth grade) (Tr. pp. 265-66, 268). In September and October 2015, the out-of-State school district conducted a psychoeducational evaluation of the student (Joint Ex. 23). The out-of-State school district convened a CSE in November 2015 and determined that the student was eligible for special education services as a student with an OHI, and the student began receiving services on December 4, 2015 (Joint Ex. 19 at pp. 1-2, 10).

A. Due Process Complaint Notice

In a due process complaint dated February 19, 2016, the parents requested an impartial hearing (Joint Ex. 1). The parents contended that the district "failed to reevaluate" the student "within three . . . years" (id. at p. 3). As a result, the parents alleged that they placed the student in the out-of-State school district (id.). The parents also contended that the district did not provide them with a procedural safeguards notice (id.). Further, the parents maintained that the student "received death threats from another student" in spring 2015; the parents argued that the student "had to undergo therapy as a result of these death threats," and while they had requested "protocols to keep [the student] safe," the district superintendent "was not willing to discuss a plan to ensure [the student's] safety" (id.).

As for relief, the parents requested reimbursement for tuition paid to the out-of-State school district for the 2015-16 school year, as well as for "future years of tuition" (Joint Ex. 1 at p. 3). Additionally, the parents requested reimbursement for the costs of the student's counseling (id.).

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing on June 16, 2016, which concluded on June 20, 2016, after two days of proceedings (see Tr. pp. 1-417). In a decision dated August 25, 2016, an IHO found that the district failed to offer the student a FAPE for the 2015-16 school year (IHO Decision). Initially, with regard to the parents' claims regarding evaluations, the IHO found that the reevaluation of the student conducted by the district school psychologist was not timely and was not conducted by a "multidisciplinary team including a teacher or other specialist" (id. at p. 21). Furthermore, the IHO determined that the reevaluation "did not include information provided by the [s]tudent's [p]arents, classroom-based observations, or observation by teachers and related service providers," and that the district did not inform the parents that it had determined additional data was not necessary (id.). However, the IHO found that the cumulative impact of these violations did not impede the student's right to a FAPE, significantly impede the parent's opportunity to participate in the decision-making process, or cause a deprivation of educational benefit (id. at p. 22). In making this determination, the IHO noted the school psychologist's testimony that she did not have enough time to conduct a full psychoeducational evaluation due to a recent transition of administration and staff (id. at pp. 22-24).

Next, the IHO found that after the "bullying incident," the district failed to reconvene the CSE, "did not conduct an FBA or BIP for the [s]tudent," and did not create or implement a "safety

plan regarding the [o]ther [s]tudent's return to school" (IHO Decision at p. 27).[4] The IHO determined that the district failed to "follow the law for bullying and have a safety plan in place" (id.). The IHO found that the hearing record was "devoid of documentation or testimony concerning the [d]istrict's efforts to comply with [the Dignity for All Students Act] DASA" and that "late August [or] early September" was "too late for the [d]istrict to pursue a safety plan" (id. at p. 28). The IHO found that, "[a]s a result of the effects of bullying, the [s]tudent's needs have changed such that the [March] 2015 IEP was no longer designed to provide meaningful educational benefit" (id.).

Next, the IHO found that the parents had shown that the unilateral placement at the out-of-State public school was appropriate (IHO Decision at pp. 29-30). Regarding equitable considerations, the IHO determined that although the parents "failed to properly notify the [d]istrict of their removal of the [s]tudent and demand for reimbursement," they "were not cognizant of the notice requirements of IDEA" (id. at pp. 31-32). The IHO awarded reimbursement for the costs of the student's tuition for the 2015-16 school year at the out-of-State public school, reduced by 30 percent, and for the costs of the student's counseling (id. at pp. 32-33). The IHO denied the parent's request for prospective funding of the cost of tuition for future school years as "not supported in the record" (id. at p. 32).

IV. Appeal for State-Level Review

The district appeals, arguing that the IHO incorrectly determined that it failed to offer the student a FAPE for the 2015-16 school year. The district argues that the IHO's determination that the student's needs changed following the January 2015 incident was without evidentiary basis. The district also contends that the IHO erred in disregarding the fact that the parents did not relate to the district their concerns about the student's safety, social/emotional needs, or problems with peers, which compromised the CSE's ability to address them. The district also asserts that the IHO did not identify how the district's failure to convene a CSE before March 2015 impeded the student's educational opportunities. Furthermore, the district asserts that the IHO's determination regarding the district's implementation of its obligations pursuant to the Dignity for All Students Act was outside his jurisdiction and contrary to the evidence in the hearing record, and that the IHO's finding that the district's offer of a safety plan was "too late" was arbitrary and capricious.

Next, the district contends that the IHO erred concluding that the out-of-State school was appropriate for the student, arguing that the IHO disregarded evidence that the student received no special education services or supports from the out-of-State school district until December 2015. The district also asserts that the IHO erred in finding that equitable considerations supported the parent's request for reimbursement. Finally, the district argues that the IHO erred in ordering reimbursement for counseling services as the record was devoid of evidence other than the parents' testimony that the student received the services.

In an answer, the parents respond to the district's allegations, asserting that the IHO correctly found that the district failed to offer the student a FAPE for the 2015-16 school year, that the unilateral placement in the out-of-State school district was appropriate, and that equitable

[4] The acronyms FBA and BIP are presumed to refer to a functional behavioral assessment and a behavioral intervention plan, respectively.

considerations supported their request for reimbursement.[5] In a reply, the district requests that the parents' answer be dismissed because it fails to comply with pleading requirements and is not responsive to the petition.[6]

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; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; 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]adequate 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. of Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720 [2d Cir. Aug. 16, 2010]).

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

[5] Both parties refer to the IHO's decision as being dated August 29, 2016; the (unsigned) copy of the decision included in the hearing record submitted to the Office of State Review is dated August 25, 2016 (IHO Decision at p. 33).

[6] As the parents' answer contains no procedural defenses and the parents did not submit any additional documentary evidence, the reply exceeds the scope permitted by State regulations (8 NYCRR 279.6). Although the district is correct that the parents' answer does not comply with the regulations governing practice before the Office of State Review, I decline the district's request that I exercise my discretion to reject the answer.

203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

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

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. Scope of Review

In their due process complaint notice, the parents claimed that the district failed to

conduct the student's triennial evaluations, but although the IHO found that this failure did not result in a denial of a FAPE, the parents do not raise this claim in their Answer as a separate basis for a finding of a denial of a FAPE (Joint Ex. 1 at p. 3; IHO Decision at p. 22). Nevertheless, the district has an obligation to conduct evaluations of the student at least once every three years unless the district and the parents agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]). In this case, the only evaluation conducted by the CSE prior to the 2015-16 school year was a psychoeducational evaluation post-dating the March 2015 CSE meeting, consisting solely of a record review (Joint Ex. 14 at pp. 1-2). Furthermore, a considerable portion of the evaluation report described the school psychologist's reasons for failing to conduct a timely evaluation, specifically citing a "significant transition" and a failure by the district to timely send requests for consent (id. at p. 1). I remind the district that school personnel transitions are not an excuse for a failure to meet its obligations under the IDEA. I also remind the district that reevaluations should be as thorough as necessary to ensure that a student is appropriately assessed in all areas of suspected disability and must be sufficiently comprehensive to identify all of the student's special education needs (see 8 NYCRR 200.4[b][4]-[6]).

Similarly, although the parents argued in their due process complaint notice that the district failed to provide them with the procedural safeguards notice, the IHO did not address in his decision whether this claim rose to the level of a denial of a FAPE, and the parents do not raise it on appeal. Nonetheless, under the IDEA and federal and State regulations, a district must provide parents with a copy of a procedural safeguards notice annually, as well as: upon initial referral or parental request for evaluation; the first filing of a state complaint or due process complaint notice in a school year; upon a decision to impose a suspension or removal constituting a disciplinary change in placement; and upon parental request (20 U.S.C. § 1415[d][1][A]; 34 CFR 300.504[a]; 8 NYCRR 200.5[f][3]). At the impartial hearing, the director of special education testified that it was the district's practice to send a procedural safeguards notice to parents only upon a student's initial referral, and that the district would not provide additional copies of the procedural safeguards notice unless requested by the parents (Tr. pp. 142-43). Furthermore, the March 2015 prior written notice informing the parents of the recommendations made by the March 2015 CSE stated that the parents had "[p]reviously . . . received a [p]rocedural [s]afeguards [n]otice that explains your rights regarding the special education process" and to "[p]lease refer to . . . [the] Director of Special Education Services . . . if an additional copy is needed" (Joint Ex. 5 at p. 1). While the parents do not raise this issue on appeal, and it cannot be considered with regard to an alleged denial of a FAPE, I remind the district that federal and State statutes and regulations require it to provide a copy of the procedural safeguards notice to parents annually, and informing the parents that they have a right to obtain a copy if they so choose does not satisfy the district's obligation to provide notice (see Procedural Safeguards Notice, 71 Fed. Reg. 46693 [Aug. 14, 2006] [stating that a school district cannot meet its obligation to provide procedural safeguards notice to parents by directing parents to a website, and that "a public agency must still offer parents a printed copy of the procedural safeguards notice. If, however, a parent declines the offered

printed copy of the notice . . ., it would be reasonable for the public agency to document that it offered a printed copy of the notice that the parent declined"]).

B. Bullying

On appeal, the district argues that the IHO erred in finding that the student was denied a FAPE because of the January 2015 incident. The district maintains that the IHO erred by finding that the student's needs had changed substantially following the incident, despite a lack of evidence in the record to support such determination. The district also argues that the IHO disregarded the impact of the parents' failure to "relate their concerns" about the student's safety, social/emotional needs, or other peer issues to the CSE. As an initial matter, although the term "bullying" was used by the IHO in his decision to describe the January 2015 incident, neither party used the term during the impartial hearing (see IHO Decision at pp. 1, 20, 24-25, 27-28).[7] The district does not deny in its appeal that the incident constituted an instance of bullying. As this understanding goes unchallenged by the district, for the purposes of this decision, the incident is considered to be an instance of bullying.[8]

A parent may file a due process complaint notice with respect to any matter relating to the identification, evaluation, or educational placement of a student with a disability, or the provision of a FAPE to such student (20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.507[a][1]; 8 NYCRR 200.5[i][1]). Similarly, in an appeal from an IHO's decision to an SRO, State regulation authorizes an SRO to conduct an impartial review of an IHO's decision related to the "identification, evaluation, program or placement of a student with a disability" (8 NYCRR 279.1[b]; see 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"]; A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 n.17 [E.D.N.Y. 2012] [noting that "[u]nder New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"]). In this case, the parents' claims relating to the January 2015 incident are not related to the identification, evaluation, or educational placement of the student, or the provision of a FAPE to the student. Rather, the parents claimed that the student "received death threats from another student in the spring of 2015" and that the "superintendent was not willing to discuss a plan to ensure [the student's safety]" despite their "requests for protocols to keep [him] safe" for the 2015-16 school year (Joint Ex. 1 at p. 3). As discussed below, the hearing record indicates that the parents effectively sought assurances from the district that their son and the other student would have no further contact—matters incapable of resolution through the IDEA's impartial hearing procedures.

According to the student's parents and the director of special education, the other student was removed from school after the incident and did not return until late May 2015, at which point

[7] The IHO indicated that bullying was "acknowledged" to have occurred (IHO Decision at p. 20).

[8] My understanding of bullying in this case is informed by an interpretation issued by the United States Department of Education, which has stated that "[b]ullying [is] characterized by aggression used within a relationship where the aggressor(s) has more real or perceived power than the target, and the aggression is repeated, or has the potential to be repeated, over time. Bullying can involve overt physical behavior or verbal, emotional, or social behaviors (e.g., excluding someone from social activities, making threats, withdrawing attention, destroying someone's reputation) and can range from blatant aggression to far more subtle and covert behaviors" (Dear Colleague Letter, 61 IDELR 263 [OSERS/OSEP 2013]).

the student was receiving home instruction due to an ankle injury (Tr. pp. 75, 312, 364; see Joint Ex. 11).

The hearing record shows that during the March 2015 CSE meeting, which occurred while the other student was removed from school, the student's parents did not express concerns related to the recommendations made by the March 2015 CSE (Tr. pp. 321-22). The director of special education testified that the student's mother did not express any concern during the CSE meeting about the evaluation process or the recommended program other than to "keep pushing in the direction [the district was] going in," and did not raise any concerns regarding the final recommendation (Tr. pp. 68-71).[9] The director also testified that the student's mother raised no concerns regarding the safety or health of the student during the CSE meeting, nor did she raise concerns regarding social or peer issues (Tr. pp. 70-71). Additionally, the student's mother explained that she did not raise concerns regarding the student's safety at the time of the March 2015 CSE meeting because the other student was out of school and so, "there was no reason to discuss [it]" (Tr. pp. 301-02, 317). The student's mother also testified that she did not raise the student's diagnosis of PTSD at the March 2015 CSE meeting, even though she was aware of the diagnosis at that time (see Tr. pp. 308-09, 316-17). Furthermore, the school psychologist testified that the student's mother did not identify any issues related to the student's social/emotional needs or safety at the CSE meeting (Tr. p. 189).

Following the incident, the student's parents obtained an order of protection against the other student (Tr. pp. 317, 344). The student's father testified that the August 2015 meeting with the district was scheduled because the order of protection would expire before the start of the school year (Tr. p. 344). In determining to remove the student from the district, the student's parents relied on the director's statements that the two students would "be [in classrooms] across [the hall] from each other" and that, as far as the student's mother understood, the students would "see each other in the hallway, gym room, lunch room, any art classes, [and in the] cafeteria" (Tr. pp. 294-95, 346-47, 354). However, there is no evidence in the hearing record that the parents raised any concerns with the district regarding how these interactions would interfere with the student's program or affect his ability to receive a FAPE, and the director of special education testified that when the parents informed him the student would no longer attend the district public school, they raised no issues or concerns regarding the March 2015 IEP or the student's program or services (see Tr. p. 78). The superintendent testified that the parents' "biggest concern" during the August 2015 meeting was keeping the other student out of school and that the parents wanted to ensure that the other student was not in the same building as their son (Tr. pp. 371-72, 376; see Tr. pp. 344, 346).

Thus, the parents' claims are unrelated to the identification, evaluation or educational placement of the student, or to the provision of a FAPE to the student. Furthermore, while it is understandable that the parents wanted to be certain that there would be no threats to the student's safety once he entered the school building, schools are not guarantors of a child's safety (Mirand v. City of New York, 84 N.Y.2d 44, 49-50 [1994] [while "[s]chools are under a duty to adequately supervise the students in their charge . . . [s]chools are not insurers of safety, however, for they cannot reasonably be expected to continuously supervise and control all movements and activities of students"]; see Stephenson v. City of New York, 19 N.Y.3d 1031, 1033-034 [2012]). Without

[9] The March 2015 IEP did not reference the incident but noted that the student "[had] good relationships with adults and peers" and had no social development needs "at [that] time" (Joint Ex. 5 at pp. 3, 6-7).

expressing any opinion as to whether the parents may have claims to raise in another forum, my jurisdiction is limited to matters arising under the IDEA.

The IHO also found that, as a result of the January 2015 incident, the student's needs changed "such that the [March] 2015 IEP was no longer designed to provide meaningful educational benefit" (IHO Decision at p. 28).[10] However, the parents did not argue in their due process complaint notice that the incident resulted in a change to the student's needs or services he required that was not properly reflected in the March 2015 IEP, or that the incident rendered the student incapable of receiving educational benefit from his current program for the remainder of the 2014-15 school year. Despite this, out of an abundance of caution, I will discuss the IHO's finding that as a result of the incident the student's needs had changed "such that the May 2015 IEP was no longer designed to provide meaningful educational benefit," therefore denying the student a FAPE. Under certain circumstances, if a student with a disability is the target of bullying, such bullying may form the basis for a finding that a district denied the student a FAPE (Dear Colleague Letter, 61 IDELR 263 [OSERS/OSEP Aug. 20, 2013] [noting that districts have an obligation to ensure that students who are targeted by bullying behavior continue to receive FAPE pursuant to their IEPs]). In determining whether the parents' allegations related to bullying and harassment rise to the level of a denial of FAPE, the test applied by one district court has been "whether school personnel w[ere] deliberately indifferent to, or failed to take reasonable steps to prevent bullying that substantially restricted a child with learning disabilities in her educational opportunities" (T.K. v. New York City Dep't of Educ., 779 F. Supp. 2d 289, 316 [E.D.N.Y. 2011]).

The student's father testified that the student exhibited emotional and psychological changes after the incident; specifically, that he was not eating or sleeping, was combative, and was reluctant to go to school (Tr. pp. 338, 342). The father further testified that the student was "chastised" by several of his teachers, who "made false allegations" against his son (Tr. pp. 338-39). Both parents testified that peers, including the other student's brother, taunted or threatened the student (Tr. pp. 283, 339-40). However, the hearing record does not reflect that the incident or any of these alleged difficulties with his peers impeded the student's ability to make progress. Rather, the evidence in the hearing record indicates that the district did not have reason to believe that, as a result of the incident, the student's educational opportunities were substantially restricted such that the March 2014 IEP was no longer reasonably calculated to provide him with educational benefit, or that the March 2015 IEP would not provide him with educational benefit. The hearing record indicates the student generally progressed during the remainder of the 2014-15 school year subsequent to the incident. The director of special education testified that he was unaware of any issues with the student's educational performance following the January 2015 incident (Tr. p. 73). Furthermore, the student's grades showed that academically "he was making progress," and also that he "attained most of the goals on his IEP" for the 2014-15 school year (Tr. p. 51; Joint Exs. 7-9). The student's transcript for the 2014-15 school year showed that the student's grades increased after the incident in both the third and fourth quarters, with the exception of a failing grade in physical education for the third quarter (Tr. p. 52; Joint Exs. 7; 8). Moreover, the student's 2014-15 progress report for IEP goals and objectives noted that the student was "progressing gradually"

[10] While the IHO further stated in his decision that "immediately" after the January 2015 incident, the district did not reconvene the CSE, or conduct an FBA and BIP, he did not make a finding of a denial of a FAPE related to these issues (IHO Decision at p. 27), and as these claims were not raised in the parents' due process complaint notice or in the Answer they will not be addressed here (see Joint Ex. 1 at pp. 1-3).

on his reading goal and "satisfactorily" on his math goals and exhibited somewhat inconsistent progress in writing (Tr. pp. 51-52; Joint Ex. 9 at pp. 1-4).

As noted above, the March 2015 CSE meeting was attended by, among others, the student's special education teacher, his regular education English teacher, and a school psychologist (compare Joint Ex. 5 at p. 3, with Joint Ex. 8). Socially, teacher reports included in the March 2015 IEP indicated that the student had good relationships with peers and adults (Tr. pp. 391-92; Joint Ex. 5 at p. 7). The March 2015 IEP reflected that the student did not have any social development needs at that time, including parent concerns (Tr. pp. 71, 189; Joint Ex. 5 at p. 7). Although the parent testified during the impartial hearing that the student exhibited behavioral changes after the January 2015 incident, the director of special education and the superintendent testified that the student did not exhibit significant behavioral issues in school before or after the incident, and the March 2015 IEP did not reflect reports of any significant behavioral issues at school (Tr. pp. 145, 338, 392, 395; Joint Ex. 5 at p. 7; see Joint Ex. 13).

The superintendent further testified that no issues or concerns regarding the student were brought to his attention by district staff or administrators after the incident (Tr. pp. 386-87, 392, 396-97). The director of special education opined that the student's attendance was not impacted following the incident, and the student's attendance records reflect this understanding (Tr. pp. 56, 73-74; see Joint Exs. 10; 26 at pp. 1-4).[11] This case involves a single incident that occurred when the student was not in school (Tr. pp. 283-84; see Tr. pp. 314-15). After the incident occurred, the student continued to perform well academically and as discussed below, the hearing record indicates that the district discussed the incident with the parents and attempted to address their concerns (see Tr. pp. 51-52, 74-77, 314-15, 363; Joint Exs. 7; 8; 9).

Although the hearing record in this case does not specify to what extent, if at all, the district assessed the effect of the incident on the student after the incident occurred, it does not support a finding that the district was deliberately indifferent or failed to take reasonable steps in response to the incident.[12] With respect to additional steps that a district might take to address bullying about which it is on notice, the United States Department of Education has identified the following nonexclusive actions: "separating the accused harasser and the target; providing counseling for the target and/or harasser, or taking disciplinary action against the harasser" (Dear Colleague Letter, 55 IDELR 174 [OCR Oct. 26, 2010]). In this case, the district took disciplinary action against the other student and removed him from school for several months during the 2014-15 school year as a result of the incident (Tr. pp. 73-75, 115, 290, 364).

Additionally, the student's father testified that he attended "several meetings" with the district's previous superintendent to discuss the incident (Tr. p. 363). Furthermore, when the

[11] The director of special education also testified that the student's attendance was discussed at the March 2015 CSE meeting, but no concerns were raised (Tr. p. 54).

[12] The superintendent testified that he believed that the district had a "file" on the incident, but he was not certain of its existence (Tr. pp. 379-80). Furthermore, the school psychologist testified that she was not asked or advised to speak to the student by administration, by any teachers, or by the parents, and that since she had already been working with the other student it could have been a "conflict of interest" for her to speak with the student as well (Tr. pp. 221-22). The school psychologist further testified that the incident "was not brought up" by anyone at the March 2015 CSE meeting, and there is no indication in the March 2015 IEP—or elsewhere in the hearing record—that the incident was discussed by the CSE (Tr. p. 223; Joint Ex. 5 at pp. 3, 5-7).

parents became concerned that both students would attend the same school in the 2015-16 school year, the then-current superintendent and the director of special education met with them to discuss how the students would be kept apart during the upcoming school year (Tr. pp. 75-76, 292-94).[13, 14] The director of special education testified that during the meeting, he reviewed both students' schedules with the parents and explained to them that the students would not share any classes but would share a lunch period (Tr. pp. 76-77, 111-13). He also explained that the other student would have been in the school building for half the school day (Tr. p. 112). The director of special education further suggested additional safety supports, including having one of the students leave their classes a few minutes early to ensure that there were "no interactions in the hallways" (Tr. pp. 76-77). Despite the district's attempts to address the parents' concerns regarding the student's safety for the 2015-16 school year, and while the director of special education felt that the meeting went "pretty good," the parents informed him after the meeting that the student would no longer attend the school district, and the student was subsequently enrolled in the out-of-State school district in August 2015 (Tr. pp. 75-78, 111-13, 292-95, 344-47, 368-72, 375-78; Joint Ex. 19 at p. 2). While the IHO found that the district did not timely develop a safety plan for the student, as discussed above the district had no basis to believe that the incident would restrict the student's ability to receive a FAPE without the addition of a "safety plan" (see T.K. v. New York City Dep't of Educ., 32 F. Supp. 3d 405, 421-22 [E.D.N.Y. July 23, 2014]).

For the reasons described above, the IHO's finding that the student was denied a FAPE due to the student's needs changing "as a result of the effects of the bullying," such that the March 2015 IEP was no longer designed to provide "meaningful educational benefit" for the 2015-16 school year must be reversed.

Turning now to the district's argument that the IHO's determination that the hearing record was "devoid of documentation or testimony" regarding compliance with the Dignity for All Students Act was outside his jurisdiction and contrary to evidence in the record, the Dignity for All Students Act states that

> every school district shall create policies, procedures and guidelines that shall . . . require the principal, superintendent, or [their designee] to lead or supervise the thorough investigation of all reports of harassment, bullying and discrimination, and to ensure that such investigation is completed promptly after receipt of any written reports" and require the school to "eliminate any hostile environment . . . [or] prevent recurrence of the" bullying or discriminatory behavior, and to "ensure

[13] The parents originally met with the interim superintendent to discuss the student and their own safety concerns (Tr. pp. 344-345, 368-70, 372). However, the superintendent and parents testified that the parents' concerns were more appropriately the province of the director of special education and so they met with him as well (Tr. pp. 294, 346, 375, 382-83).

[14] According to the United States Department of Education, a school should, as part of its appropriate response to an incident of bullying, convene a CSE to determine whether, as a result of the effects of the bullying, the student's needs have changed such that the student's IEP is no longer designed to provide meaningful educational benefit (Dear Colleague Letter, 61 IDELR 263). Although the IHO found that the district failed to reconvene the CSE after the January 2015 incident, the hearing record reflects that the CSE convened in March 2015 to develop an IEP for the 2015-16 school year, the student's mother testified that after the March 2015 CSE meeting the parents did not request further CSE meetings before they removed the student from the district, and there is no indication in the record that the district was unwilling at the March 2015 CSE meeting to discuss the incident (Tr. p. 322; see Joint Ex. 5 at p. 3).

> the safety of the student . . . against whom such . . . bullying or discrimination was directed

(Educ. Law § 13[1]).

In this case, the parents did not raise claims in their due process complaint notice regarding the district's failure to comply with the Dignity for All Students Act; rather, the IHO, in making a determination on bullying, conflated the district's obligations under the IDEA with those under the Dignity for All Students Act. Whether the superintendent did not "fully comprehend his or the [d]istrict's responsibilities under DASA" has no bearing in an impartial hearing related to whether a student was provided a FAPE under the IDEA (IHO Decision at p. 28). Furthermore, while a district has clear obligations to address instances of bullying under the Dignity for All Students Act, the IEP is a vehicle to identify and address a student's special education needs that may have arisen as a result of the student being bullied; however, the IEP is not the place to set forth a district's plan for addressing the conduct of other student(s) whose conduct meets the definitions of bullying. The IHO identified no authority in the IDEA, the Dignity for All Students Act, or any corresponding statutes or regulations stating that a district's failure to comply with the Dignity for All Students Act would be a determining factor in whether a student had received a FAPE (see Motta v. Eldred Cent. Sch. Dist., 141 A.D.3d 819, 820 [3d Dep't 2016] [holding that the Dignity for All Students Act does not create a private right of action]; Benacquista v. Spratt, 2016 WL 6803156, at *8-*9 [N.D.N.Y. Nov. 17, 2016]; C.T. v. Valley Stream Union Free Sch. Dist., 2016 WL 4368191, *13 [E.D.N.Y. Aug. 16, 2016]; Terrill v. Windham-Ashland-Jewett Cent. Sch. Dist., 176 F. Supp. 3d 101, 108-09 [N.D.N.Y. 2016] [noting that "DASA does not prevent a student from bringing a claim against his/her school district under IDEA" or other appropriate statutes]).[15] Therefore, I reverse the IHO's determination to the extent that he found the district's failure to comply with the Dignity for All Students Act contributed to a denial of a FAPE.

C. Reimbursement for Counseling

On appeal, the district argues that the IHO's reimbursement of the costs of the student's counseling sessions should be reversed. Having found that the IHO erred in finding a denial of a FAPE on the only claim remaining at issue on appeal, the IHO's award must be reversed. In any event, the hearing record does not support the parents' request for reimbursement of the costs of the privately-obtained counseling services. The student's mother testified that, as a result of the incident, the student went to four therapy sessions between January 2015 and May or June 2015 (Tr. pp. 288-89, 308-09). The student's parents testified that the student was diagnosed with PTSD during his first session with the therapist; additionally, the parents testified that they shared this diagnosis, in the form of a therapy report, with the district superintendent and the student's principal (Tr. pp. 308-09, 340).

Accepting the parents' statements as true, there is still insufficient evidence in the hearing record to justify reimbursement of the costs of the student's counseling. The therapy report that the parents assert they provided to the district was not included in evidence at the hearing, and there is no evidence in the record of the counseling sessions other than the parents' testimony; in particular, there is no evidence of the services provided to the student or any clinical assessment

[15] This does not foreclose the possibility in an appropriate case that a district's failure to comply with its obligations under the Dignity for All Students Act may be a relevant factor to consider in determining whether the bullying in such case prevented a student from receiving educational benefits under his or her IEP.

of his need for such services (see Tr. pp. 1-417; Joint Exs 1-27). Furthermore, neither parent testified regarding how, if at all, the privately-obtained counseling affected the student's ability to receive educational benefits from his school program. Given the scant information in the hearing record about the counseling services, and the complete lack of any objective evidence regarding their effect, the IHO's decision to reimburse the parents for the cost of the privately-obtained counseling services must be reversed (see Hardison v. Bd. of Educ., 773 F.3d 372, 387-88 [2d Cir. 2014] [holding that the hearing record must contain detail regarding the unilaterally obtained services and how they related to the student's academic progress]).

VII. Conclusion

In summary, the IHO erred in finding that the district denied the student a FAPE for the 2015-16 school year. The IHO also erred in awarding reimbursement for the costs of the student's counseling sessions. Having determined that the parents raise no further claims on appeal that the district failed to offer the student a FAPE for the 2015-16 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether the out-of-State school was appropriate for the student (M.C. v. Voluntown Board of Educ., 226 F.3d 60, 66 [2d Cir. 2013]; Walczak, 142 F.3d at 134).

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated August 25, 2016 is reversed, to the extent that it determined the district failed to offer the student a FAPE for the 2015-16 school year; and

IT IS FURTHER ORDERED that that the IHO's decision dated August 25, 2016, is reversed, to the extent that the district was ordered to reimburse the parents for the costs of the student's tuition at the out-of-State school for the 2015-16 school year and the student's counseling sessions.

Dated: **Albany, New York**
December 14, 2016

CAROL H. HAUGE
STATE REVIEW OFFICER