The University of the State of New York

The State Education Department
State Review Officer
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No. 18-048

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
The Legal Aid Society, attorneys for petitioner, by Joel J. Pietrzak, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Thomas W. MacLeod, Esq.

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 parent) appeals from a decision of an impartial hearing officer (IHO) which determined that the educational program and services respondent's (the district's) Committee on Special Education (CSE) had recommended for her son for the 2017-18 school year were 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 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 relevant CSE meeting, the student had received diagnoses of disruptive behavior, a mood disorder, disruptive mood dysregulation disorder, and reactive aggression which were treated with medication and privately-obtained individual therapy (Dist. Ex. 2 at p. 1; 5; 7). With respect to the student's educational history, while attending "early elementary" school, the student reportedly exhibited inappropriate language use, "hitting when he was corrected," and "defiance towards directives" (Dist. Ex. 6 at p. 2).[1] The student began attending a general education class and received special education teacher support services (SETSS) in a charter

[1] At an unspecified time, the student had received paraprofessional support (Dist. Ex. 11 at p. 2).

school for the 2015-16 school year (fourth grade) (Dist. Ex. 10 at p. 1). According to an April 2017 functional behavioral assessment (FBA) report, the student adapted well to the new school, made significant academic progress, and did not exhibit violent or defiant behaviors during that school year or require a behavioral intervention plan (BIP) to support his functioning in the classroom (Dist. Ex. 6 at pp. 2-3). The student remained in the charter school during the 2016-17 school year (fifth grade) (Dist. Exs. 8 at p. 1; 9 at p. 1).

The student was hospitalized twice during the 2016-17 school year due to reactive aggression and oppositional behaviors, with the most recent hospitalization occurring in June 2017 after he was physically aggressive at school (Dist. Exs. 1 at p. 3; 5; 7).[2] In a letter dated June 19, 2017, addressed "To Whom it May Concern" the student's psychiatrist recommended "a more therapeutic school setting" for the student (Dist. Ex. 5). Although during the 2016-17 school year the student's academic performance was primarily at grade level, the evidence in the hearing record indicates that his social/emotional challenges became an obstacle to his academic success and regression had begun to be noted (Dist. Exs. 6 at p. 2; 9 at pp. 2-3).

On July 26, 2017 a CSE convened to develop an IEP for the 2017-18 school year (sixth grade) (Dist. Ex. 1 at p. 12). Having found the student eligible for special education services as a student with emotional disturbance, the CSE recommended a 12-month school year program in an 8:1+1 special class in a specialized school with one 40-minute session per week of individual counseling and one 40-minute session per week of group counseling (id. at pp. 1, 8-9).[3] Additionally, the July 2017 CSE recommended the services of a full-time 1:1 crisis management paraprofessional for the student (id. at p. 8). The CSE indicated in the IEP that the student required "strategies, including positive behavioral interventions, supports and other strategies to address behaviors that impede[d] the student's learning or that of others" (id. at p. 5). The July 2017 CSE also indicated in the IEP that the student required a BIP and that he "present[ed] with significant behavior issues which interfere[d] with his acquisition of the curriculum" (id.). With respect to the effect of the student's needs on involvement and progress in the general education curriculum, the July 2017 CSE indicated that the student "require[d] a setting with a strong behavioral support system and an intensive pupil staff ratio in order to access the curriculum" (id.). Finally, the CSE developed annual goals and recommended supports for the student's management needs (including a list of "FBA and BIP interventions" and targets for counseling, as well as an incentive system with points, preferential/proximity seating, a social skills program, crisis management, and behavioral interventions), testing accommodations (including extended time, breaks, revised test directions, and administration of tests in a separate location), and door-to-door special transportation (id. at pp. 4-7, 9, 11). According to the July 2017 IEP, the student's father voiced his concern at the CSE meeting that the student "receive rigorous academics at his functional level" so he would not "fall behind academically" and stated his preference that the student attend "a therapeutic setting" (id. at pp. 2, 4, 13).

[2] The hearing record contains references to a third psychiatric hospitalization, possibly during 2017 or within "the last year," but lacks details with respect to this third hospitalization (see Tr. pp. 129, 132-35, 145-46).

[3] The student's eligibility for special education programs and related services as a student with an emotional disturbance is not in dispute (see 34 CFR 300.8[c][4]; 8 NYCRR 200.1[zz][4]).

The district sent the parents a prior written notice dated July 28, 2017, that summarized the program recommended by the July 2017 CSE (Dist. Ex. 3 at p. 1). The July 2017 prior written notice also indicated that the CSE considered integrated co-teaching (ICT) services for the student but that the CSE rejected that option because the student demonstrated "significant behavioral and emotional needs[, which] warranted a more intensive student to staff ratio as well as more behavioral supports" (id. at p. 2). Additionally, the July 2017 prior written notice indicated the student required "a small structured setting with a smaller student to teacher ratio to address behavioral and social emotional issues" (id.).[4]

A. Due Process Complaint Notice

In a due process complaint notice dated August 2, 2018, the parent asserted that the recommendation for the student to attend a specialized school program was not sufficiently "therapeutic" and that the CSE should have placed the student in a more therapeutic program, and further asserted that she did not feel the student would be safe in a district specialized school or in the charter school (IHO Ex. I at p. 2).[5] The parent requested that the student be placed in a different school setting where both his education and behavior would improve (id.).[6]

B. Impartial Hearing Officer Decision

The impartial hearing commenced on October 2, 2017 and concluded on February 21, 2018 after three days of proceedings (Tr. pp. 1-155). In a decision dated March 12, 2018, the IHO determined that the district offered the student a FAPE for the 2017-18 school year (see IHO Decision at pp. 4-6). In particular, the IHO found that, based on the testimony about the program offered by the district—which was not rebutted by the parent—the July 2017 CSE "reviewed the data and came up with a program that reasonably c[ould] be expected to address [the student's] needs" (id. at p. 5). Further, the IHO determined that the recommended program was "far more therapeutic in nature" than the student's previous placement at the charter school and was less restrictive than the nonpublic school the parents were requesting (id.).

Additionally, the IHO concluded that the recommended 8:1+1 special class program at the district "seemed to be working" for the student and was able to meet the student's needs (IHO Decision at p. 6). Therefore, the IHO expressed reluctance to order that the student be moved to a more restrictive setting in a nonpublic school (id.). Accordingly, the IHO denied the parents' request for the student to be placed in a "therapeutic" nonpublic school (id.).

[4] Subsequent to the parent's filing of the due process complaint notice, the district also sent the student's parents a school location letter, dated August 4, 2017, which notified the parents of the particular school location to which the district assigned the student to attend for the 2017-18 school year (Dist. Ex. 4).

[5] The parent also alleged that the last time the student attended a district specialized school, "he was transferred without [their] knowledge or concern" and that the parent "received [a] threaten[ing] message and phone calls from an other student" (IHO Ex. I at p. 2).

[6] According to the hearing record, the student began attending the placement recommended in the July 2017 IEP for the 2017-18 school year (Tr. p. 62).

IV. Appeal for State-Level Review

The parent appeals and asserts that the IHO erred in finding that the district offered the student a FAPE for the 2017-18 school year. In particular, the parent asserts that the IHO erred in finding that the July 2017 IEP and the assigned public school site were appropriate for the student. Initially, the parent asserts that the IHO erred in shifting the burden of proof to the parents with respect to whether the district offered the student a FAPE. In addition, the parent argues that the IHO erred in relying on least restrictive environment (LRE) principles to make his determination. The parent challenges the IHO's decision on the basis that it "was poorly reasoned, incorrect as a matter of law, and unsupported by the hearing record." The parent requests that the CSE be required to convene to recommend a nonpublic, therapeutic day treatment program for the student.

In the memorandum of law accompanying the request for review, the parent elaborates upon her assertions. In particular, with respect to the IHO's determination finding that the district offered the student a FAPE, the parent alleges that the development of and the content of the IEP were not appropriate to address the student's significant psychiatric issues. The parent contends that the members of the CSE generally agreed that the student needed a therapeutic setting, consistent with the recommendation of the student's psychiatrist, as well as a forensic social worker. With respect to the IHO's finding that the student's therapist agreed with the student's placement in the specialized school program, the parent asserts that the IHO misunderstood the testimony and that the student's therapist was actually referring to someone else's opinion. Next, the parent contends that the IHO's ruling amounted to giving the specialized school program a "try," which the parent asserts is not appropriate in circumstances such as the present, where the student had been frequently hospitalized and demonstrated suicidal ideation. The parent notes that the IHO should not have relied upon the existence of a BIP in finding that the recommended program was appropriate because the BIP was never entered into evidence during the impartial hearing and the BIP included in the hearing record was dated before the FBA. Finally, the parent asserts that the July 2017 CSE recommended an insufficient amount of counseling for the student.

As for the IHO's rationale relating to LRE, the parent asserts that the IHO erred because neither a specialized school nor a nonpublic school has nondisabled peers with whom the student could be grouped. The parent also asserts that, at the time of the impartial hearing, in November 2017, the student's attendance at the district program was not "working," as evidenced by the student's suicidal ideation. With respect to the IHO's application of the burden of proof, the parent alleges the IHO placed the burden on the parent when he indicated that the parent did not rebut the testimony about the district's program and when he stated that the hearing record did not include evidence that the district program had not been meeting the student's needs.

The parent also asserts that the IHO erred in finding that the IEP could be effectively implemented at the assigned public school site and alleges that testimony at the impartial hearing revealed that the student's counseling services and BIP were not properly implemented at the school.

For a remedy, the parent requests that the IHO's determination that the district offered the student a FAPE for the 2017-18 school year be reversed, and that the district be required to convene a CSE to recommend placement in a nonpublic therapeutic day treatment program for the student.

In an answer, the district responds to the parent's allegations and generally argues to uphold the IHO's decision in its entirety. The district initially alleges that the parent's request for review should be dismissed for failure to comply with the regulations governing practice before the Office of State Review. Specifically, the district asserts that the parent's request for review does not contain a clear and concise statement of the issues presented and reasons for challenging the IHO's decision and fails to include proper citations to the hearing record exhibits and transcripts.

Lastly the district requests that the IHO's decision be upheld in its entirety, or in the alternative, that the SRO may order the CSE to supplement the counseling services offered to the student without unnecessarily disrupting his otherwise appropriate program and placement.

In a reply, the parent asserts that the request for review is not facially deficient and should not be dismissed on procedural grounds. Additionally, the parent responds to the district's substantive arguments and rejects the district's proposed alternative remedy of modifying the student's 2017-18 school year IEP to increase the amount of counseling the IEP offers.

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. of Hendrick Hudson Cent. Sch. Dist. 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]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. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the 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).

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 adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The 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 Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), 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]).[7]

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

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

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. Preliminary Matters

1. Compliance with Practice Regulations

The district asserts that the request for review should be dismissed for failing to comply with the regulatory requirements governing practice before the Office of State Review (see 8 NYCRR 279.8[a], [c][2]-[3]). More specifically, the district asserts that the parent's request for review does not contain a clear and concise statement of the issues presented and reasons for challenging the IHO's decision and further fails to include proper citations to the hearing record exhibits and transcripts.

State regulation provides that a request for review "shall clearly specify the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate what relief should be granted by the [SRO] to the petitioner" (8 NYCRR 279.4[a]). Additionally, the request for review "must conform to the form requirements in section 279.8 of this Part" (id.). State regulation requires, in relevant part, that a request for review shall set forth:

> (1) the specific relief sought in the underlying action or proceeding;
>
> (2) a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review; and
>
> (3) citations to the record on appeal, and identification of the relevant page number(s) in the hearing decision, hearing transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number.

(8 NYCRR 279.8[c][1]-[3]).

In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or in the dismissal of a request for review by an SRO (8 NYCRR 279.8[a]-[b]; 279.13; see T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015], aff'd, C.E. v Chappaqua Cent. Sch. Dist., 2017 WL 2569701 [2d Cir. June 14, 2017], quoting Foman v. Davis, 371 U.S. 178 [1962]).

The district is correct that the parent's request for review tersely lists the issues presented for review and does not detail the asserted grounds for reversal. In addition, while the request for review cites the hearing record in a recitation of background facts, it does not cite the underlying facts in the hearing record in support of an allegation that the IHO erred in some respect. While issues for review were more detailed in the parent's memorandum of law, as the district points out, it has long been held that a memorandum of law is not a substitute for a request for review, which is expected to set forth the petitioner's allegations of the IHO's error with appropriate citation to the IHO's decision and the hearing record (8 NYCRR 279.8[c][3]; [d]; see, e.g., Application of a Student with a Disability, Appeal No. 15-070).

In this instance, however, there is no indication that the deficiencies in the request for review prevented the district from being able to formulate an answer to the issues raised on appeal or that the district suffered any prejudice as a result (see Application of a Student with a Disability, Appeal No. 18-028; Application of a Student with a Disability, Appeal No. 18-012; Application of a Student with a Disability, Appeal No. 15-069; Application of a Student with a Disability, Appeal No. 15-058).

Although the parent's failure to comply with the practice regulations will not ultimately result in a dismissal of her appeal, the parent—and her counsel—is cautioned that, while a singular failure to comply with the practice requirements of Part 279 may not warrant an SRO exercising his or her discretion to dismiss a request for review or reject a memorandum of law (8 NYCRR 279.8[a]; 279.13; see Application of a Student with a Disability, Appeal No. 16-040), an SRO may be more inclined to do so after a party's repeated failure to comply with the practice requirements (see Application of a Student with a Disability, Appeal No. 18-010; Application of a Student with a Disability, Appeal No. 17-101; Application of a Student with a Disability, Appeal No. 16-060; see also Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040).

2. IHO Conduct—Burden of Proof

The parent claims that language in the IHO's decision shows that the IHO improperly shifted the burden of proof to the parent.

As noted above, under State law, the burden of proof has been placed 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 Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d

Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 76 [2d Cir. 2014]; R.E., 694 F.3d at 184-85).

Here, the hearing record does not indicate that the IHO misapplied the burden of proof (see IHO Decision at pp. 2-6). Instead, the IHO correctly identified the appropriate burden of proof in his decision (id. at p. 3) and weighed the evidence adduced at the impartial hearing and resolved the primary disputed issues in the district's favor (see id. at pp. 2-6). Although the parent disagrees with the conclusions reached by the IHO, such disagreement does not demonstrate that the IHO failed to correctly apply the burden of proof in his analysis.

With respect to the specific language identified by the parent as representing the IHO's misapplication of the burden of proof, the IHO indicated that "[b]ased on the testimony about the program offered by the [district], which was not rebutted," the IEP addressed the student's needs (IHO Decision at p. 5). In this statement, the IHO merely indicated that the parent did not contradict the district's evidence that the IHO found persuasive (id. at pp. 4-5; see Application of a Student with a Diability, Appeal No. 17-020). With respect to the IHO's statement that "no facts were presented at the hearing showing that [the district program] ha[d] not been meeting [the student's] needs" (IHO Decision at p. 6), this represented less than optimal language. However, to the extent the IHO relied on evidence of the student's progress (or lack thereof) in the district's program, this represents impermissible retrospective evidence, which has not been factored in my review (see R.E., 694 F.3d at 186).[8] In any event, even assuming the IHO misallocated the burden of proof to the parent, the error would not require reversal insofar as the hearing record does not support a finding that this was one of those "very few cases" in which the evidence was in equipoise (Schaffer v. Weast, 546 U.S. 49, 58 [2005]; M.H., 685 F.3d at 225 n.3). Rather, an independent review of the entire hearing record supports the IHO's ultimate determination that the district offered the student a FAPE for the 2017-18 school year (see 34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]).

B. July 2017 IEP

The crux of the parties' dispute is the parent's allegation that the district failed to develop an appropriate IEP for the 2017-18 school year and that the recommended placement and program were insufficient to address the student's serious social/emotional needs.[9]

[8] Nevertheless, for the reasons discussed below, the recommendations of the July 2017 CSE were appropriate for the student at the time they were made (see K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 85 [2d Cir. July 14, 2013] [recognizing that the inquiry was not whether the "SRO relied on impermissible retrospective evidence, but whether sufficient permissible evidence, relied on by the SRO, support[ed] the SRO's conclusion that the IEP offered [the student] a reasonable prospect of educational benefits"]; P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141 [2d Cir. May 21, 2013] [removing "retrospective testimony from the balance" of the evidentiary analysis]).

[9] In her request for review, the parent challenged both the "development" of the student's IEP at the July 2017 CSE meeting and the IEP's content (see Req. for Rev. ¶ 12). With respect to the development of the IEP, in her memorandum of law, the parent alludes to additional allegations that relate to the CSE's failure to grapple with evaluative information and program recommendations from the student's private therapists, among other things. Such allegations, raised by the parent for the first time on appeal are outside the scope of the impartial hearing

The CSE convened on July 26, 2017 to review the student's present levels of performance, develop annual goals, identify necessary supports, and determine a program recommendation for the student for the 2017-18 school year (Dist. Ex. 1 at pp. 2-9). The July 2017 CSE was comprised of a social worker, a school psychologist who also served as the district representative, a special education teacher, the student, and the student's father, with the district's special education director attending telephonically (Tr. p. 32; Dist. Ex. 1 at p. 15). Indications from the IEP are that the July 2017 CSE considered various measures of the student's academic skills in reading and mathematics, a November 2016 IEP, the April 2017 FBA, the June 19, 2017 letter from the student's psychiatrist, and a July 2017 BIP (Dist. Ex. 1 at pp. 1-3).[10] The school psychologist testified that the July 2017 CSE also considered classroom reports, counseling reports, a note from the psychiatrist, the FBA/BIP, a psychoeducational evaluation done "a number of years ago," and documentation from the inpatient psychiatric unit where the student had been treated (Tr. pp. 38-39).[11, 12]

The July 2017 IEP present levels of performance identified the student's needs, which fell predominantly in the area of social/emotional skills (see Dist. Ex. 1 at pp. 1-4). Academically the

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and, therefore, outside of the scope of review (see 20 U.S.C. § 1415[c][2][E][i]; [f][3][B]; 34 CFR 300.508[d][3]; 8 NYCRR 200.5[i][7][i]; [j][1][ii]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012] [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]"]). However, to the extent the parent's arguments pertain to her primary assertion that the CSE made recommendations for the student that were insufficiently therapeutic, they are discussed herein.

[10] Although the July 2017 IEP references a November 2016 IEP and a July 2017 BIP (see Dist. Ex. 1 at p. 3), neither the IEP nor the BIP was offered into evidence during the impartial hearing. Further, although the hearing record includes additional sources of information about the student's needs, including a March 2016 classroom observation, a November 2016 teacher report, a December 2016 BIP, and a March 2017 letter from the student's psychiatrist (Dist. Exs. 7-10), there is no indication in the hearing record that the July 2017 CSE had these documents available to it, and I decline to speculate as to whether or not the CSE considered this evaluative information in its development of the IEP (L.O. v. New York City Dep't of Educ., 822 F.3d 95, 110-11 [2d Cir. 2016]).

[11] The hearing record does not suggest the presence of a more recent psychoeducational evaluation report than one from December 2015, which was the only one entered into evidence (see Dist. Ex. 11). At the time of the December 2015 psychoeducational evaluation, the evaluator indicated that the student was generally well-related, exhibited "good insight" into himself and the surrounding environment, expressed preferences for leisure activities, reportedly enjoyed spending time with family, and appeared to be "well behaved" (id. at p. 2). The report reflected the parent's statement that, at the time, the student had made significant improvements regarding behavior at school, such that he no longer needed the support of a 1:1 paraprofessional (id.). Additionally, the student's teachers did not mention any behavior concerns exhibited at school, he got along well with staff and students, participated in class, and always offered to help (id.). Nevertheless, the parent reported that the student continued to present with behavior difficulties at home such as fighting with siblings, exhibited some disrespectful behaviors, and that the student and the family received services from an "outside" therapist (id.). The evaluator remarked that "some attentional concerns were mentioned" and that the student had age appropriate social/emotional skills with "some attention and acting out behaviors" (id. at pp. 2-3).

[12] The hearing record also does not include any classroom or counseling reports, as referenced by the school psychologist, but does include discharge paperwork from a hospital dated June 27, 2017 (Dist. Ex. 2). The prior written notice sent by the district to the parent only listed the April 2017 FBA as the evaluative information considered by the July 2017 CSE (Dist. Ex. 3 at p. 2).

student was described as "very bright," easily able to grasp new concepts, operating mostly on grade level in mathematics, and recently achieving grade level in the area of reading (id. at p. 2). The July 2017 IEP indicated that, in mathematics, at times, the student made small calculation errors and struggled with some concepts of fractions but that word problems were the student's biggest struggle (id.). With respect to reading, the July 2017 IEP noted that the student's vocabulary was weak, which inhibited comprehension of higher level sentences, but that he comprehended above grade-level text when it was read to him (id.). The July 2017 IEP indicated that the student's reading comprehension diminished when reading independently, noting that the student needed to be prompted to work on speed of reading and self-monitoring for understanding (id.).

The July 2017 IEP indicated that the student would benefit from support in completing assignments and developing reading vocabulary, and noted that the student's greatest challenge toward academic progress was maintaining attendance and participating in class because the student left class when frustrated and missed periods of instruction, which impacted his academic performance (Dist. Ex. 1 at p. 2). The July 2017 IEP noted that, although the student demonstrated the ability to work independently and did well when in a positive mood, the student did not complete work when unmotivated and that missing assignments impacted his grades (id.). The July 2017 IEP indicated that the student had the potential to achieve consistently good grades but that his social/emotional skill challenges were an obstacle to academic success (id.). The July 2017 IEP included one ELA goal to address the student's writing needs and two mathematics goals to address his difficulty with word problems related to fractions, ratios, and rate reasoning (id. at p. 7).

Regarding the student's social/emotional challenges, the July 2017 IEP noted that the student presented with "significant psychiatric and conduct issues" and referenced the June 2017 psychiatrist's letter, acknowledging the diagnoses of disruptive behavior disorder and mood disorder with ongoing behavioral issues (Dist. Ex. 1 at p. 3; see Dist. Ex. 5). The July 2017 IEP also reported that the student had a history of psychiatric hospitalizations for reactive aggression and oppositional behaviors with the most recent hospitalization occurring in June 2017 after being physically aggressive at school (id.).

The July 2017 IEP referenced the April 2017 FBA, which identified the student's primary behavioral issues as elopement and physical aggression toward peers and adults (Dist. Ex. 1 at pp. 2-3; see Dist. Ex. 6 at p. 2). More specifically, the July 2017 IEP described the student as being physically aggressive toward other people: using his shoulders or chest to push into other children or adults when he was frustrated and engaging in hitting others with either open or closed hands (Dist. Ex. 1 at p. 3).[13] The July 2017 IEP noted that the student exhibited these behaviors when

[13] The April 2017 FBA further identified the student's aggression toward non-persons as "close fist hitting or kicking lockers/desks," and pushing desks toward others (Dist. Ex. 6 at p. 2). Additionally, the April 2017 FBA indicated that the student presented with disruptive behaviors such as leaving his seat for prolonged periods of time to walk around the room, using objects in class at inappropriate times, tapping on a desk, throwing objects across the room, making disconnected comments, and using an increased volume that was not appropriate for the setting (id.). The April 2017 FBA described behaviors that included “non-consensual and threatening” verbal or written communication ("X teacher should die," I want to shoot X in the face," "I want to blow up X" or threats of getting a staff member fired) (id.). The April 2017 FBA also noted the student followed, pursued, or showed up uninvited at a classroom or other locations frequented by a staff member (id.). Although the April 2017 FBA

frustrated with redirection or correction (id.).[14] The July 2017 IEP also noted that the July 2017 BIP—which was not offered as evidence at the impartial hearing—indicated that the student had regressed during the school year, that there had been more incidents of physical aggression, and that the student had fallen behind academically (id.). Additionally, the July 2017 IEP indicated that the student demonstrated deficits in the areas of self-regulation, cognitive flexibility, and social thinking (id.).

With regard to the student's counseling services, the July 2017 IEP noted that, although the student initially enjoyed working with a mentor in counseling, demonstrated an understanding of concepts of social/emotional learning, and was able to articulate what was needed to manage frustration, his attendance at his counseling sessions had declined in recent months (Dist. Ex. 1 at p. 3). Further, the July 2017 IEP noted that the student identified and labeled emotions but was unsuccessful in applying the strategies that he learned and practiced in counseling to real life situations (id.). The July 2017 IEP indicated that the student demonstrated positive participation during counseling sessions but struggled to reflect on situations where he exhibited challenging behavior or to talk about his challenges (id.). Additionally, the IEP relayed that the student was goal-oriented, yet there was a disconnect between what the student envisioned for his life and the behavioral changes he needed to make to achieve his goals (id.). Finally, the IEP indicated that, although the student could identify and discuss strategies for his behavior, he struggled to enact those strategies (id.).[15]

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noted that there were fewer incidents of physical aggression upon the student's return to school after the nearly one-month psychiatric hospitalization, it also indicated that the student continued to struggle to stay in class on a consistent basis and that his previous on grade-level performance in English language arts (ELA) and mathematics was falling behind due to large durations or high frequency elopements from classes (id.).

[14] The April 2017 FBA indicated that the student had skill deficits in the areas of emotional/self-regulation, cognitive flexibility, and social thinking; he struggled to think rationally when frustrated and to manage irritability and anxiety in an age-appropriate manner (Dist. Ex. 6 at p. 2). Further, the April 2017 FBA noted that the student had challenges in interpreting information accurately, could over-generalize or personalize information, did not seek attention in appropriate ways, often did not understand how his behavior affected other people, and struggled to empathize with others (id.). The April 2017 FBA reported that the "trigger" of the elopement was variable but was more frequent when the student was corrected and he became frustrated with the correction (id. at p. 3). At the time of the FBA, the student averaged zero to three elopement episodes per week lasting 30 minutes to multiple class periods, and the severity of the elopement behavior was rated as a 4/5, described as "disrupts other classrooms or common areas of the school" (id. at pp. 3-4). With respect to physical aggression, the April 2017 FBA indicated that there was an increased likelihood of the behavior toward female peers and adults and that, although when the behavior occurred was variable, a trigger was receiving a verbal correction after he had left the classroom (id. at p. 3). The FBA also noted that the frequency of the physical aggression occurred variably, in that "he c[ould] go two weeks without incident but has had 3 incidents of physical aggression in a single day," and the severity was ranked 5/5 indicating that the behavior caused or threatened to cause physical injury to self, other, or severe property destruction (id. at pp. 3-4). The April 2017 FBA indicated the functions of the behaviors were to gain attention, avoid attention, power/control, or escape/avoidance of a task, and noted that the student lacked the emotional and self-regulation, cognitive flexibility, and social thinking skills necessary to achieve outcomes in a more adaptive manner (id. at p. 4).

[15] The July 2017 IEP indicated the student was taking medication for the interfering behaviors and for mood regulation (Dist. Ex. 1 at p. 4). The July 2017 IEP also noted that the parent voiced concerned about the student's medication and the fact that the student was sleepy at times (id.).

To address the student's social/emotional needs, the July 2017 CSE recommended one 40-minute session per week of individual counseling and one 40-minute session of group counseling per week to work on anger management and stress reduction techniques and the ability to identify triggers, use self-calming techniques, develop pro-social self-regulation techniques, and build social skills (Dist. Ex. 1 at pp. 4, 8). With respect to supports for the student's management needs, the July 2017 IEP indicated the student required a 1:1 paraprofessional to monitor his behavior throughout the day, praise for positive behavior, an incentive system with points, preferential/proximity seating, a social skills program, crisis management, and behavioral interventions (id. at p. 4). Management needs included in the IEP also referred to "FBA and BIP interventions," including frequent communication between school staff and the parents, use of least invasive corrections, minimization of situations that increased the student's frustration, use of a daily behavioral/reflection tracker and a break system (i.e., a pre-determined number of breaks during the school day), assignment of classroom jobs, and removal of the student from class when he exhibited aggression (id.; see Dist. Ex. 6 at pp. 6-7).

The July 2017 IEP included three counseling goals (Dist. Ex. 1 at p. 6). The first goal targeted the student's ability to accurately identify situations and circumstances that resulted in hitting, kicking, or pushing (id.). The second goal addressed the student's ability to enact chosen strategies for emotional control in situations where he had previously become physically aggressive (id.). The third goal provided that, after identifying "value-based goals," the student would create a plan for goal attainment that included potential resources and barriers (id.).

In consideration of the student's social/emotional and academic needs, the July 2017 IEP indicated that the student required a setting with a strong behavioral support system and an intensive pupil staff ratio in order to access the curriculum, noting that the student presented with significant behavior issues, which interfered with his acquisition of the curriculum (Dist. Ex. 1 at p. 5). As noted above, the CSE recommended a 12-month program 8:1+1 special class placement in a specialized school for the 2017-18 school year (Dist. Ex. 1 at pp. 8, 11). State regulation provides that an 8:1+1 special class placement is intended to address the needs of students "whose management needs are determined to be intensive, and requiring a significant degree of individualized attention and intervention" (8 NYCRR 200.6[h][4][ii][b]). The school psychologist testified that the CSE recommended an 8:1+1 special class in a specialized school because it would provide a small educational setting with only eight children with behavioral and emotional needs similar to those of the student, which along with counseling twice per week and a 1:1 paraprofessional, represented a "very intensive" staffing ratio to address the student's needs (Tr. p. 42). The school psychologist testified that the 8:1+1 special class would benefit the student because his previous charter school class was large and did not include programmatic supports built into the program, which was not "structured enough" for the student (Tr. pp. 44-45). In addition to providing a small environment with an intensive ratio, the recommended 8:1+1 special class in a specialized school offered structured classes, behavioral programs, and teachers who would be better able to deal with the student's behavior than the staff at the student's previous charter school (Tr. pp. 44-45, 48-49). Accordingly, the psychologist testified that the CSE concluded it was the best setting for the student (Tr. pp. 44, 48-49). The July 2017 CSE documented that the CSE considered ICT services for the student but rejected that option, citing that the student's significant behavioral and emotional needs warranted a more intensive student-to-staff ratio, as well as more behavioral supports (Dist. Ex. 1 at p. 13). Although a therapeutic school setting was recommended by the student's psychiatrist in the June 2017 letter and requested

by the parent at the July 2017 CSE meeting, the July 2017 IEP does not reflect that the CSE explicitly considered a day treatment or partial hospitalization program for the student (Dist. Exs. 1 at pp. 4, 13; 5).[16] While the school psychologist testified that there were hospital schools and day treatment programs that "one would consider more therapeutic" than the recommended 8:1+1 special class in a district specialized school (Tr. pp. 54-55), she also testified about the therapeutic nature of the recommended program (Tr. pp. 52-55).

When asked to explain why the 8:1+1 special class was considered a "therapeutic program," the school psychologist testified that July 2017 CSE considered the recommended 8:1+1 special class program therapeutic "in its essence" because it had a "therapeutic kind of component," in that it offered behavior management, very intensive staffing ratios, teachers trained in dealing with students with behavior management and emotional issues, counseling services, and 12-month services (Tr. pp. 52-55). The school psychologist testified that the CSE would consider hospital schools or day treatment programs if a student was "really struggling" in a district specialized school and "really ha[d] issues there" (Tr. pp. 54-55). The school psychologist stated that, because this student was coming from a large general education setting, the CSE's recommendation for an 8:1+1 special class in a specialized school seemed appropriate (Tr. p. 55).

The school counselor from the public school site to which the student was assigned to attend testified that the school had a crisis management team and the program followed a points or positive behavior intervention system (PBIS) management program (Tr. pp. 57, 59, 61-62, 70, 97).[17, 18] The school counselor described PBIS as a behavior modification program where the students earned points and were given rewards toward good behavior, school work, and academic "rhythm," noting that all the students in the school participated in PBIS program (Tr. pp. 61-62, 97). Regarding how problem behaviors were managed, the school counselor testified that, when a student exhibited such behaviors, a paraprofessional would "give [that student] a break and take a walk" and, if the behavior escalated, that student would "either go[] to the crisis team for some conference or . . . to the counselor" (Tr. pp. 63-64). If a behavior persisted, that student would spend five to ten minutes with his paraprofessional in the reflection room to calm him or herself (Tr. p. 64). The counselor testified that, if the student exhibited behavior that resulted in destruction to school property, the 1:1 paraprofessional or the teacher would redirect the student by taking him for a walk, removing him to the hallway, or speaking with him, and either the

[16] The school psychologist testified that the July 2017 CSE did not consider a community school placement because the student had been in community schools previously and the CSE felt the student "needed a more intensive staffing ratio than a regular community school could offer," and the class with the smallest student-to-staff ratio available in the district's community schools was a 12:1+1 special class (Tr. pp. 45-46).

[17] As noted above, the July 2017 IEP provided, among other things, that the student would receive supports such as counseling, a 1:1 paraprofessional, an incentive system with points, crisis management, behavioral interventions, a system of breaks, removal of the student from class when he exhibited aggression, and positive behavioral interventions (Dist. Ex. 1 at pp. 4-5, 8). Accordingly, because this testimony described such supports in the district classroom the student attended, it does not constitute after-the-fact testimony used to "rehabilitate a deficient IEP"; instead, the testimony "explains or justifies the services listed in the IEP" and, thus, may be considered (R.E., 694 F.3d at 186).

[18] The school counselor testified that there was a crisis management team on each floor who had walkie talkies as did the all the administrative staff (Tr. pp. 75-76).

paraprofessional or the teacher would alert the crisis management team (Tr. pp. 71-72). If the behavior escalated, the crisis management team would remove the student to the reflection room and speak with the student (Tr. p. 72). The school counselor testified that removing the student from class was dependent on the state the student was in but, if it was necessary, the crisis team would be called immediately and they would try to deescalate the student with verbal interventions first and, only if needed, they would hold the student to remove him (Tr. p. 74). If the behavior continued to escalate, the counselor would step in and talk with the student and provide redirection to get him back to baseline (Tr. p. 72). To address the student's work refusal and resultant aggressive behavior, the school counselor testified that a staff member would give the student breaks before the work refusal escalated (Tr. pp. 72-73). To address the student's elopement behavior, the IEP provided a 1:1 paraprofessional who would "shadow" the student all day, and in the event the student ran away from the paraprofessional, the crisis team would be contacted (Tr. pp. 74-75, 95). The special education teacher from the assigned public school site also testified that staff at the school do a lot of talking with the students to understand their problems and support them to make good decisions, letting the students know they have other resources besides getting physical or violent, such as talking to an adult (Tr. pp. 94-95).

Turning to the parent's preference for a therapeutic setting, which the student's father expressed at the July 2017 CSE meeting (Dist. Ex. 1 at pp. 4, 13), the CSE reviewed the June 19, 2017 letter from the student's psychiatrist addressed "To Whom it May Concern" that indicated the student, who was under her care, was administered medication for disruptive behavior and mood disorder and received individual therapy (Dist. Ex. 5).[19] The psychiatrist indicated that the student had a history of psychiatric hospitalization for reactive aggression and oppositionality, and had ongoing behavior disturbance and reactive aggression at school despite their efforts to stabilize the student in an out-patient setting (id.). According to the psychiatrist's June 2017 letter the student had previously been placed in a charter school, private school, public school, and a district special school "without success" and, therefore, needed "more support behaviorally" and for skill development than he was currently getting (id.). Further, the psychiatrist recommended "a more therapeutic school setting," indicating that the student would benefit from "more intensive treatment" such as a day treatment or partial hospitalization program given the student's recent aggression toward a teacher (id.). Lastly, the psychiatrist indicated that the student's mental health services had been "doing our best" to adjust the student's medication but opined that the student "clearly needs psychosocial support" as well (id.).

[19] As noted above, there is no indication that the July 2017 CSE had before it the psychiatrist's March 16, 2017 letter addressed "To Whom it May Concern," which indicated that the student had been discharged from a psychiatric inpatient unit that morning (Dist. Ex. 7). In the March 2017 letter, the student's psychiatrist reported that the student was treated for disruptive behavior and reactive aggression, was "on medication," and was taking part in individual therapy (id.). The psychiatrist recommended program accommodations at school to "help [the student] achieve his potential" including: instituting a paraprofessional to guide the student to use coping and anger management skills when frustrated and to assist with communicating feelings and needs; access to a guidance counselor with empathic support; assistance with social skills/communicating needs; access to the resource room when he is frustrated to prevent escalation; and extended time on assignments (id.).

While the psychiatrist's June 2017 letter did not provide specific details regarding the components of a "therapeutic school setting" (Dist. Ex. 5), State regulation defines day treatment programs as nonresidential programs, certified by the Office of Mental Health, designed for the purpose of providing a comprehensive array of services for mentally ill students with disabilities through integrated mental health and special education programs (8 NYCRR 200.14[a][1]; see 14 NYCRR 587.11).[20] The student's mental health clinician described a therapeutic school setting as having mental health services, including a therapist on site—possibly an onsite psychiatrist—and support for skills such as emotional regulation and effective interpersonal communication skills (Tr. p. 128).[21] A forensic social worker depicted a therapeutic program as one that provided wraparound clinical services like psychiatric medication management on site, different types of therapists such as clinical social workers, therapists, psychologists, and a treatment team that is essentially working together to develop a plan for the student (Tr. p. 139).[22] The forensic social worker noted that a therapeutic program is for students with significant mental health needs that impact academic functioning (Tr. pp. 139-40).

Although the school psychologist testified that July 2017 CSE considered the recommended 8:1+1 special class program therapeutic "in its essence" (Tr. pp. 52-55), upon reviewing State regulations and testimony offered by the parent's witnesses during the impartial hearing, the July 2017 IEP was more directed at providing support for behavioral and management needs than mental health services. However, the student's needs as known to the CSE were primarily related to his behavioral needs. The June 2017 letter from the student's private psychiatrist stated that student needed "more support behaviorally" and for skill development than he was currently getting (Dist. Ex. 5) and the April 2017 FBA identified school-based behaviors—including elopement and reactive aggression resulting in physical action against peers and adults—

[20] According to State regulation, "[e]ligibility for admission to a day treatment program serving children shall be based on a designated mental illness diagnosis, plus either an extended impairment in functioning due to emotional disturbance or a current impairment in functioning with severe symptoms," such as: behaviors threatening life, personal injury, or significant property damage or placing the child at substantial risk of removal from the household; serious suicidal symptoms; psychotic symptoms; or moderate and severe functional limitations over 12 months (14 NYCRR 587.11[b]; see 14 NYCRR 587.4[a][4], [8]). For admission to a partial hospitalization program, the child's designated mental illness diagnosis must have "resulted in dysfunction due to acute symptomatology which requires medically supervised intervention to achieve stabilization and which, but for the availability of a partial hospitalization program, would necessitate admission to or continued stay in an inpatient hospital" (14 NYCRR 587.12[b]).

[21] During the impartial hearing, both the district and the parent's witnesses articulated their views of what a therapeutic program might include. Since the CSE did not discuss the possibility of a therapeutic program for the student per se, the committee members did not have these sorts of insights available to them when making recommendations for the student and, accordingly, the after-the-fact characterizations do not carry much weight. However, as the nature of a therapeutic program is at the heart of the dispute in this matter, testimony about the nature of such a program has been considered.

[22] The forensic social worker testified for the parent and indicated she assists families in finding school placements, understanding evaluative information, and getting connected with services (Tr. pp. 136-37). In so doing, the forensic social worker indicated she visited a variety of school programs including public schools, district specialized schools, as well as approved and nonapproved nonpublic schools (Tr. p. 138).

that the July 2017 IEP addressed (see Dist. Exs. 1; 6).[23] Moreover, the student's mental health clinician testified that a behavior management-based program could be effective or beneficial for the student if staff had experience working with students with his diagnosis, incorporated skills into the daily routine, and had therapists on site—facets the program recommended by the July 2017 CSE appeared to share (compare Tr. p. 128, with Tr. pp. 57-58, 62, 65-66, 70, 85, 89-92, 95-96). While it is undisputed that the student was hospitalized and exhibited serious behaviors related to mental health diagnoses during the time leading up to the July 2017 CSE meeting, the CSE responded to the student's behavioral and social/emotional needs with a program that was reasonably calculated to enable him to make progress appropriate in light of his circumstances (Endrew F., 137 S. Ct. at 1001). Accordingly, the evidence in the hearing record supports the IHO's determination that the July 2017 IEP offered the student a FAPE.

As a final matter, the parent raises an additional concern regarding the IHO's analysis which requires comment. The parent correctly points out that the IHO stated that the recommended special class in a specialized school placement was less "restrictive" than the therapeutic day treatment program in a nonpublic school sought by the parent (see IHO Decision at pp. 5, 6). Generally speaking, class size and the level of adult support are unrelated to the IDEA's LRE requirement (34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; R.B. v. New York Dep't of Educ., 603 Fed App'x 36, 40 [2d Cir. Mar. 19, 2015] [stating that "[t]he requirement that students be educated in the [LRE] applies to the type of classroom setting, not the level of additional support a student receives within a placement"; see T.C. v. New York City Dep't of Educ., 2016 WL 1261137 at *13 [S.D.N.Y. Mar. 30, 2016] [stating that "[a] less restrictive environment refers to the ratio of special education to general education students in the same classroom, not the ratio of special education students to teachers"]). In that sense, as the parent argues, the district specialized school and the nonpublic school offer the student the same access to nondisabled peers. However, when determining an appropriate placement on the educational continuum, a CSE is also required to first determine the extent to which the student can be educated in a public school setting before considering a nonpublic school option (see E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *15 [E.D.N.Y. Aug. 19, 2013] [explaining that "[u]nder the law, once [the district] determined that [the public school setting] was the least restrictive environment in which [the student] could be educated, it was not obligated to consider a more restrictive environment, such as [a nonpublic school]"]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *8 [S.D.N.Y. Mar. 19, 2013] [finding that "[o]nce the CSE determined that [the public school setting] would be appropriate for the [s]tudent, it had identified the least restrictive environment that could meet the [s]tudent's needs and did not need to inquire into more restrictive options such as nonpublic programs"]). Thus, as the IHO alluded to, a directive that required placement of the student in a nonpublic school would impede the important statutory

[23] On appeal, the parent indicates that one reason the student required a therapeutic setting was to address occurrences of suicidal ideation. Although the student's mental health clinician testified that the student had reported suicidal thoughts "in May 2013 to 2014" and that his "last suicidal ideation was in November 2017" (Tr. p. 127), the psychiatrist's June 2017 letter did not mention suicidal ideation and there is no other evidence that the CSE was notified that the student had ever had such thoughts. Even so, while the CSE did not have information before it which would have warranted specific mention of this in the IEP, the school counselor at the assigned public school nonetheless testified that, in the event the student expressed suicidal ideation, the parent would be called immediately, emergency medical services would be called, administration would be involved, and the psychologist would evaluate the student (Tr. p. 73).

purpose of attempting, whenever possible, to have disabled students access the public school system through placement in a public school (see Walczak, 142 F.3d at 132 [noting that the preference for educating students in the least restrictive environment applies even when no mainstreaming with nondisabled peers is possible]; see also 34 CFR 300.116[b][3], [c]; 8 NYCRR 200.1[cc]; 200.4[d][4][ii]; Cooke Ctr. For Learning & Dev. v. Mills, 19 A.D.3d 834, 836 [3rd Dep't 2005] [noting that "federal law prefers a 'public' education, where a 'child is educated in the school that he or she would attend if nondisabled,' if possible"]; In re Pelose, 66 A.D.3d 1342, 1344 [4th Dep't 2009] [noting that the "central purpose of the IDEA . . . and article 89 of the Education Law is to afford a 'public' education for children with disabilities"]). Accordingly, the IHO's references to the relative restrictiveness of the programs does not constitute a basis for disturbing the IHO's determinations in this instance.

C. Implementation

The parent argues on appeal that the district did not meet its burden to show that the assigned public school site could properly implement the student's IEP. In her memorandum of law, the parent elaborates on the claim, asserting that the district did not establish that the assigned public school site "could implement [the student's] BIP or provide adequate services to the Student that would enable him to meet his annual counseling goals." In response, the district contends that the IHO correctly concluded that student "appeared to be doing well" at the school and that the public school could implement both the IEP and the student's BIP. Further, the district asserts that the parent's concerns about the implementation of the IEP and the BIP do not rise to the level of a "material deviation" from the IEP sufficient to result in a finding of a denial of FAPE.

Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if there was more than a de minimis failure to implement all elements of the IEP, and instead, the school district failed to implement substantial or significant provisions of the IEP (Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]; see also Fisher v. Stafford Township Bd. of Educ., 289 Fed. App'x 520, 524 [3d Cir. Aug. 14, 2008]; Couture v. Bd. of Educ. of Albuquerque Pub. Schs., 535 F.3d 1243 [10th Cir. 2008]; Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 [8th Cir. 2003]). Accordingly, in reviewing failure to implement claims under the IDEA, courts have held that it must be ascertained whether the aspects of the IEP that were not followed were substantial or "material" (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007] [holding that a material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled student and the services required by the student's IEP]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73, 75-76 [D.D.C. 2007] [holding that where a student missed a 'handful' of speech-language therapy sessions as a result of the therapist's absence or due to the student's fatigue, nevertheless, the student received consistent speech-language therapy in accordance with his IEP, and the district's failure to follow the IEP was excusable under the circumstances and did not amount to a failure to implement the student's program]).

The parent identifies evidence in the hearing record suggesting portions of the July 2017 IEP had not yet been implemented at the district public school the student attended at the time of

the impartial hearing. First, both the district guidance counselor and the student's teacher testified that they had not yet implemented the student's BIP (Tr. pp. 65, 92-93). Additionally, the parent points to testimony from the student's teacher suggesting that the student was not receiving the full two 40-minute counseling sessions per week mandated by the July IEP (Tr. p. 104; Dist. Ex. 1 at p. 8). The parent also asserts that the July 2017 IEP counseling goals could not be implemented even if the student received the mandated amount.

Comment about the scope and nature of the parent's claim is necessary. The student began attending the placement recommended in the July 2017 IEP for the 2017-18 school year in or around October 2017 (see Tr. p. 62).[24] The parent's due process complaint notice, dated August 2, 2018, predated this time frame (IHO Ex. I at p. 2); further, the due process complaint notice did not include any claim related to implementation or the district's capacity to implement the IEP (see id.).[25] There was some testimony about implementation of the IEP from the district witnesses at the impartial hearing in November 2017, after the student had attended the program for "about a week," and neither party produced any significant additional information about the implementation of the program at the subsequent February hearing date (see Tr. pp. 62, 129, 132-33, 143). Accordingly, even assuming that the claim was properly within the scope of the impartial hearing—notwithstanding that the claim did not appear in the due process complaint notice (see 20 U.S.C. § 1415[c][2][E][i]; [f][3][B]; 34 CFR 300.508[d][3]; 8 NYCRR 200.5[i][7][i]; [j][1][ii]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012])—as a result of the district opening the door to the issue at the impartial hearing (see M.H., 685 F.3d at 250-51), the evidence in the hearing record is insufficient to support a finding that there was a material deviation from the July 2017 IEP during the 2017-18 school year, and I decline to find that the district failed to offer the student a FAPE on the parent's asserted basis.

VII. Conclusion

Having found that the district met its burden to demonstrate that it offered the student a FAPE during the 2017-18 school year, the necessary inquiry is at an end. Given that the student's July 2017 IEP projected that the student's next annual review would occur in July 2018, it is entirely possible that the CSE is poised to develop a new program for the student contemporaneously with the issuance of this decision (see Dist. Ex 1 at p. 1). While the district met its burden in the present matter, if it has not already done so, the CSE is encouraged to review the student's progress during the 2017-18 school year closely and, if necessary, consider whether the student requires placement in a therapeutic day treatment program in order to receive

[24] Although this is not explicitly stated in the hearing record, it appears that the student's entrance into the district public school was delayed by the one of the student's psychiatric hospitalizations (see Parent Mem. of Law at p. 5).

[25] The Second Circuit has held that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 245 [2d Cir. 2015]; see Y.F. v. New York City Dep't of Educ., 659 Fed. App'x 3, 5 [2d Cir. Aug. 24, 2016]; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. Mar. 16, 2016]; B.P. v. New York City Dep't of Educ., 634 Fed. App'x 845, 847-49 [2d Cir. Dec. 30, 2015]).

educational benefit for the upcoming 2018-19 school year. I have considered the parties' remaining contentions and find that I need not reach them in light of the determinations made herein.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
July 9, 2018

CAROL H. HAUGE
STATE REVIEW OFFICER