The University of the State of New York

The State Education Department
State Review Officer
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No. 12-232

Application of a STUDENT WITH A DISABILITY, by his legal guardian, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education, Ilion Central School District

Appearances:
Legal Services of Central New York, Inc., attorneys for petitioner, Susan M. Young, Esq., of counsel

Ferrara, Fiorenza, Larrison, Barrett & Reitz, PC, attorneys for respondent, Susan T. Johns, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which determined that the educational program respondent's (the district's) Committee on Special Education (CSE) had recommended for their son for the 2012-13 school year was appropriate. The district cross-appeals from that portion of the IHO's decision which ordered the district to identify a pharmacological evaluator to review the student's then-current prescriptions and dosages. The appeal must be dismissed. The cross-appeal must be sustained in part.

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 nine-year-old student in this case the student demonstrates delays in cognition, academics, social/emotional skills, language, activities of daily living (ADL), attention, and motor skills (Dist. Ex. 23 at pp. 4-5, 7-10). The student had a history of behavioral issues noted prior to age three (Dist. Exs. 3 at p. 1; 23 at p. 4). The student received early intervention (EI) services at Upstate Cerebral Palsy (UCP) consisting of speech-language therapy, occupational therapy (OT), and physical therapy (PT) (id.). When the student was five years old, he received psychiatric and

counseling services and was treated with various medications (Tr. pp. 134-35). At that time, the student received diagnoses of pervasive developmental disorder (PDD), mood disorder, mild mental retardation, and attention deficit hyperactivity disorder (ADHD) (Tr. pp. 19, 130-31, 136; Dist. Ex. 23 at p. 3; Parent Ex. 2 at p. 3).

The student attended kindergarten in an 8:1+1 special class in another school district for the beginning of the 2008-09 school year (Dist. Ex. 3 at p. 1; see also Tr. p. 131). Around May 2009, the student moved to the district and finished kindergarten (Dist. Ex. 3 at p. 1; see also Tr. p. 131). For the 2009-10 school year, the student began the first grade in a 12:1+1 special class (Tr. pp. 37, 131). The hearing record indicates that, since at least September 2009, the student had been treated by a psychiatrist and prescribed anywhere from three-to-six medications at a time to address his behaviors (Dist. Exs. 3 at p. 1; 4 at p. 1; see also Tr. p. 136). For the 2010-11 school year (second grade), the student was placed in a district 12:1+1 "developmental readiness" class, provided with a 1:1 aide, and received related services consisting of speech-language therapy, PT, and OT (Dist. Ex. 4 at p. 1).

Noting an escalation of the student's behaviors in early 2011—including hitting, swearing, and threatening harm to others— a March 2011 CSE recommended and the student attended an 8:1+1 "adjustment class" placement in a Board of Cooperative Educational Services (BOCES) program with a 1:1 aide and related services for the 2011-12 school year (Dist. Ex. 6 at pp. 1-2). Following the student's involvement in a violent incident at the BOCES placement, the CSE convened on June 8, 2011 and recommended a 6:1+3 special class placement at a State-approved nonpublic day school program with related services consisting of speech-language therapy, PT, OT, and counseling (Dist. Exs. 7 at p. 1; 10 at pp. 1, 9).[1] The June 2011 IEP specified Tradewinds Education Center (Tradewinds) of UCP as the particular nonpublic day school to which the district assigned the student to attend for the 2011-12 school year (id. at pp. 1, 11). In September 2011, the student began attending Tradewinds for his third grade (Dist. Ex. 13). By letter dated September 28, 2011, the parent requested that the CSE conduct a program review (id.). On October 28, 2011, the CSE convened and determined that the student's then-current 6:1+3.5 special class placement at Tradewinds was appropriate (Dist. Ex. 14 at pp. 1-2).

On April 24, 2012, the CSE convened to conduct the student's annual review and to develop an IEP for the 2012-13 school year (see Dist. Ex. 19 at pp. 1-2). Finding the student eligible for special education and related services as a student with multiple disabilities, the April 2012 CSE recommended a 12-month school year program in a 6:1+3.5 special class placement at a State-approved nonpublic day school (id. at p. 1; see also Dist. Ex. 20 at p. 1).[2, 3] The April 2012 IEP

[1] At the time of the June 2011 CSE meeting, the student was receiving care at a psychiatric hospital, which the student began receiving on May 17, 2011 (Dist. Exs. 9 at p. 1; 11 at p.1; see also Dist. Ex. 10 at p. 2). Following the student's discharge from the psychiatric hospital on June 10, 2011, the student was home tutored for the remainder of the 2010-11 school year (see Dist. Exs. 9 at p. 1; 10 at p. 2; see also Dist. Ex. 11 at p. 1).

[2] The student's eligibility for special education programs and related services as a student with multiple disabilities is not in dispute (see 34 CFR 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

[3] Although the recommended "6:1+3.5 special class" placement is not defined in the record, absent any evidence to the contrary, this placement ratio appears to refer to six students, one full-time special education teacher, three full-time paraprofessionals, and one half-time paraprofessional.

specified Tradewinds as the particular nonpublic day school to which the district assigned the student to attend for the 2012-13 school year (see Dist. Ex. 19 at p. 1). In addition, the April 2012 CSE recommended related services that consisted of three 30-minute sessions per week of individual speech-language therapy, two 30-minute sessions per week of individual OT, two 30-minute sessions per week of individual PT, and one 30-minute session per week of individual counseling (id. at pp. 1, 9; see Tr. p. 30). The April 2012 IEP also indicated that the student required a behavioral intervention plan (BIP) (Dist. Ex. 19 at p. 5). The April 2012 CSE also recommended support for management needs, such as refocusing and redirect, participation in a toileting program, annual goals, and special transportation (Dist. Ex. 19 at pp. 6-9, 11). At the April 2012 CSE meeting, the mother requested a follow-up meeting to discuss the possibility of a "residential placement, with her attorney present" (id. at p. 1).

On May 15, 2012, the CSE reconvened to discuss the possibility of a residential placement for the student (Dist. Ex. 23 at p. 1; see also Tr. p. 31). The May 2012 CSE meeting attendees included: a district representative; a district school psychologist; the district's attorney; a Medicaid service provider; the parent, the parent's advocate, the parent's attorney, and staff from Tradewinds, which included the student's then-current special education teacher, a curriculum specialist, a behavior specialist, and a social worker (Dist. Ex. 23 at p. 1; see also Tr. p. 47). Following the discussion about a possible residential placement for the student, the May 2012 CSE determined that no changes should be made to the student's 2012-13 placement, as set forth in the April 2012 IEP, because the student had made progress since enrolling at Tradewinds in September 2011 and because the 6:1+3.5 special class placement was the least restrictive environment (LRE) for the student (Dist. Exs. 23 at p. 2; 20 at p. 1; 24 at p. 1). By prior written notice dated May 15, 2012, the district informed the parent that it had recommended that the student continue to receive special education services at Tradewinds in a 6:1+3.5 special class for the 2012-13 school year (Dist. Exs. 20 at p. 1; 24 at p. 1).

A. Due Process Complaint Notice

By due process complaint notice dated June 12, 2012, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (see Dist. Ex. 1 at pp. 1-5). More specifically, the parent asserted that the 6:1+3.5 special class placement in a State-approved nonpublic school day program was not appropriate for the student and that the May 2012 CSE should have recommended a residential placement (id. at pp. 4-5). In support thereof, the parent stated: that the student's behavior had become increasingly aggressive towards others, as well as self-injurious in nature; that the student had failed to make any progress during the 2011-12 school year at Tradewinds; that the student demonstrated a decreased interest in preferred activities; that the student was frequently sleeping during the school day as a result of the high dosage of medications prescribed to the student in an effort to stabilize his behaviors and moods at home; and that the student's difficulties within the home environment were, therefore, impacting his ability to be successful in school (id. at pp. 4-5). With regard to the student's behavior at home, the parent alleged: that the student had no safety awareness and would elope from home; had "hurt other residents" in their apartment complex; and had acted aggressively towards others including his newborn sibling (id.). As relief, the parents requested that the CSE recommend a residential placement for the student at Tradewinds for the 2012-13 school year (id. at p. 5).

B. Impartial Hearing Officer Decision

After a prehearing conference on July 11, 2012, an impartial hearing convened on September 12, 2012 (Tr. pp. 1-212; see IHO Ex. 1 at p. 1). In a decision dated November 12, 2012, the IHO determined that the district offered the student a FAPE for the 2012-13 school year and denied the parent's request for a residential placement (see IHO Decision at pp. 24-25). Specifically, the IHO determined that the 6:1+3.5 special class placement in the State-approved nonpublic school day program, recommended by the May 2012 CSE, "was reasonabl[y] calculated to provide educational progress in the [LRE]" (id. at p. 24).

In concluding that the placement recommended by the CSE was appropriate, the IHO found that the student's disruptive behaviors at Tradewinds had declined and were less intense and less frequent than earlier reported (IHO Decision at p. 19). The IHO found that the student had progressed towards the short-term objectives included on the student's IEP, indicating overall progress (id. at p. 24). For example, the IHO noted that in the toileting domain, in previous school years the student had one toileting "accident" per week; however, as the 2011-12 school year progressed, the student had made "toileting" progress because he had but "one accident" during the 2011-12 school year (id. at p. 22).

The IHO also found that the student's needs at home were not intertwined with his educational needs and that Tradewinds was not responsible for the student's lethargy (IHO Decision at pp. 19, 24). The IHO noted that, although the student's physician had recommended a residential placement based upon the student's large size and upon the goal of protecting the parent's physical safety, there was no medical evidence in the hearing record linking the physician's recommendations to the student's educational needs (id. at p. 19). The IHO also found that there was no evidence in the hearing record to establish that, with proper supervision of trained residential staff at Tradewinds, the student's medications could be reduced if the student were to be placed in a residential program (id. at pp. 22, 24). The IHO also opined that the parent's inability to commit to a routine regiment schedule that the student needed was "not a basis to recommend residential placement" (id. at p. 24).

Finally, the IHO ordered to the CSE to reconvene within 30 days to (1) "identify a pharmacological evaluator to review the student's current prescriptions and dosage in order to decrease the student's sleeping in school"; and (2) determine whether additional accommodations would be appropriate to minimize the student's sleeping in the classroom (IHO Decision at p. 25). The IHO also ordered the CSE to reconvene upon completion of the "pharmacological" evaluation to review and make a recommendation based upon that evaluation (id.).

IV. Appeal for State-Level Review

The parent appeals and argues that the IHO erred in finding that the district offered the student a FAPE for the 2012-13 school year. Specifically, the parent argues that the student the May 2012 CSE should have recommended a residential placement for the student. Contesting the findings of the IHO, first, the parent argues that evidence of an increase in the student's aggressive and self-injurious behavior during spring 2012 demonstrates that the student was not making progress in the day program at Tradewinds and should have been placed in a residential facility for the 2012-13 school year. Second, the parent submits that the IHO erred in finding that the

student had made overall progress at Tradewinds during the 2011-12 school year because, since spring 2012, the student had failed to make behavioral, academic, or functional progress. Third, the parent also argues that there is no evidence in the hearing record demonstrating how the CSE proposed to address the student's aggressive and self-injurious behaviors. Fourth, the parent argues that the IHO erred in finding that the student's psychiatric needs were not intertwined with his educational needs and argues that even the IHO recognized that the student's medications administered to him in the evenings to manage the student's violent and unpredictable behaviors have an adverse impact on the student's education and his ability to make progress during the school day. Consequently, the parent seeks an order reversing these portions of the IHO's decision and directing the CSE to reconvene and recommend a residential placement for the student at Tradewinds.

In an answer, the district responds to the parent's petition by admitting and denying the allegations raised and asserting that the IHO correctly determined that the district offered the student a FAPE for the 2012-13 school year.[4] In support thereof, the district argues that, to the extent that the student exhibited an increase in aggressive or self-injurious behaviors, those behaviors were relatively minor in severity and frequency and were also capable of being addressed within the classroom and by implementation of the BIP developed for the student. The district also avers that the 6:1+3.5 special class placement was appropriate because the student had demonstrated significant progress since entering Tradewinds in September 2011. The district also argues that there is no evidence in the hearing record establishing that the student's underlying behaviors at home limited the student's ability to progress during the day program. The district also claims that the parent's request for a residential placement derives from the parent's inability to access additional resources for the care and supervision of the student outside of the educational setting at Tradewinds.

The district also cross-appeals the IHO's decision insofar as the IHO ordered the district to identify a pharmacological evaluator to undertake a review of, and evaluate, the student's medication. Specifically, the district argues that an evaluation to review the student's prescribed medications is not an evaluation recognized or authorized under the IDEA and the IHO exceeded his authority in ordering the district to evaluate the extent to which the student was being medicated. As relief, the district requests that the portion of the IHO's order directing the district to recommend a pharmacological evaluation be annulled. In an answer to the district's cross-appeal, the parent generally admitted and denied various allegations made by the district and requests that the district's cross-appeal be dismissed.

[4] The district attached a supplemental exhibit A to its answer to which the parent objects. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (8 NYCRR 279.10[b]; see, e.g., Application of a Student with a Disability, Appeal No. 13-238; Application of a Student with a Disability, Appeal No. 12-185; Application of the Dep't of Educ., Appeal No. 12-103; see also L.K. v. Northeast Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). In this case, I decline to accept the additional documentary evidence, as it was available at the time of the impartial hearing and is not necessary in order to render a decision in this case.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with

disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. May 2012 IEP

Generally, the parent argues that the May 2012 IEP was not appropriate because the student required a residential placement. The district rejects this contention and asserts that the 6:1+3.5 special class placement at the State-approved nonpublic school was appropriate for the student given his needs. Upon review of the evidence in the hearing record, there is no reason to disturb the IHO's conclusion.

1. Student's Progress During the 2011-12 School Year

Initially, turning to the parent's argument that the IHO erred in finding that a residential placement was not necessary for the student because the student made progress at Tradewinds, the evidence in the hearing record belies the parent's position (see IHO Decision at p. 25). A student's progress under a prior IEP is a relevant area of inquiry for purposes of determining whether an IEP has been appropriately developed, particularly if the parents express concern with respect to the student's rate of progress (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66, 2013 WL 3155869 [2d Cir. June 24, 2013]; Adrianne D. v. Lakeland Cent. Sch. Dist., 686 F.Supp.2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, *14-*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation" at p. 18 [NYSED Office of Special Education, December 2010]). The fact that a student has not made progress under a particular IEP does not automatically render that IEP inappropriate, nor does the fact that an IEP offered in a subsequent school year which is the same or similar to a prior IEP render it inappropriate provided it is based upon consideration of the student's current needs at the time the IEP is formulated (see Thompson R2–J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153–54 [10th Cir.2008]; Carlisle Area Sch. v. Scott P., 62 F.3d 520, 530 [3d Cir. 1995]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *10 [S.D.N.Y. Dec. 8, 2011]; D. D-S v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *12 [E.D.N.Y. Sept. 2, 2011], aff'd, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 650 [S.D.N.Y. 2011]; Schroll v. Bd. of Educ. Champaign Cmty. Unit Sch. Dist. #4, 2007 WL 2681207, at *3 [C.D. Ill. Aug. 10, 2007]). Conversely, "if a student had failed to make any progress under an IEP in one year," at least one court has been "hard pressed" to understand how the subsequent year's IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch., 62 F.3d at 534 [noting, however, that the two IEPs at issue in the case were not identical as the parents contended]).

Here, since the student's October 2011 IEP (which largely continued the recommendations from the May 2011 IEP), implemented during the 2011-12 school year, also recommended a 6:1+3.5 special class placement at a state-approved nonpublic day school program, along with related services consisting of speech-language therapy, PT, OT, and counseling, review of the student's progress under such program is an appropriate consideration in reviewing the appropriateness of the placement included in the student's May 2012 IEP (Dist. Exs. 14 at pp. 1, 9; 23 at pp. 1, 10-11).

The evidence in the hearing record supports the IHO's finding that the student made overall progress at Tradewinds and that the student's progress during the 2011-12 school year was a relevant inquiry (see IHO Decision p. 23). With regard to evidence demonstrating the student's progress toward the 2011-12 IEP annual goals and short-term objectives, the student's special education teacher testified and the student's report card indicated that the student continued to work on short-term objectives, such as, for example, pre-primer reading and solving single-digit addition (see Tr. at pp. 85-86; Dist. Ex. 26 at pp. 2-3). At the impartial hearing, the special education teacher responded, "he is," when asked whether the student was making progress toward his short-term objectives (Tr. pp. 84-85). The October 2011 IEP contained one academic annual goal toward which the student did not demonstrate much progress—specifically, the goal of identifying 50 pre-primer sight words with 100-percent accuracy (Dist. Ex. 14 at p. 6). The 2011-12 Tradewinds report card reflected a third quarter progress comment indicated the student identified 8 to 11 sight words (Dist. Ex. 26 at p. 2). While the October 2011 IEP's annual goal related to sight words may have been somewhat ambitious for the student, focus should be placed on the extent to which the student had progressed toward achieving the annual goals, rather than on the number of IEP goals the student "achieved" (see Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *31, *36 [N.D.N.Y. Sept. 29, 2009] [noting the student's progress despite not meeting some goals and explaining that the CSE was obligated to provide the student the opportunity to make meaningful progress in the LRE]).

Additional evidence in the hearing record reflects the student's progress during the 2011-12 school year, including the testimony of the student's 2011-12 Tradewinds special education teacher and the March 30, 2012 Tradewinds report card, which reflected the student's progress during all three quarters of the 2011-12 school year (Tr. pp. 87, 90-91; Dist. Ex. 26 at pp. 1-12). For example, the report card reflected that during the second quarter, the student had mastered the annual goal that addressed the student's ability to "eliminate physically aggressive/abusive behaviors for seven consecutive days" and that, by the third quarter, the student mastered his annual goal, which addressed his ability to "wipe his mouth when needed during mealtimes" (Dist. Ex. 26 at pp. 2-3). In addition, the special education teacher testified that the student demonstrated social progress, as he was "very social" with the staff and interested in some of the students and "chatty" (Tr. p. 91). In addition to reflecting the student's progress toward his annual goals, the Tradewinds report card reflected the student's performance with several life skills, social skills, and coping skills with increasing success and lessening need for prompting (Dist. Ex. 26 at p. 1). The report card also indicated that the student had attained third-quarter progress marks in the areas of PT, OT, and speech-language therapy and included provider comments, largely reflecting that the student made progress but continued to work on his short-term objectives in these areas (see Dist. Ex. 26 at pp. 4-7). The report card also indicated the student's progress marks in music, adaptive physical education, and art (see Dist. Ex. 26 at pp. 8-9, 12). Moreover, the student presented with a full scale IQ of 60, which is in the "extremely low" range of functioning (Dist. Exs. 3 at p. 3; 23 at p. 1). As such, based on the student's intellectual functioning, the student's limited progress was commensurate with his ability (see H.C., 528 Fed. App'x at 67 [noting that under the IDEA, "'a child's academic progress must be viewed in light of the limitations imposed by the child's disability'"], quoting Mrs. B., 103 F.3d at 1121). Finally, consistent with the IHO's finding, the evidence in the hearing record indicates that the student's independence in toileting skills had improved since June 2011 when he had one accident per week to October 2011 when the student was able to use the restroom given reminders throughout the day and wash his hands

independently given prompts to do so (compare Dist. Ex. 10 at p. 6, with Dist. Ex. 14 at pp. 2, 5; see IHO Decision at p. 22).

Notwithstanding the student's progress overall during the 2011-12 school year, the parent points to an increase in the student's aggressive and dangerous behavior at home, which necessitated a number of medications prescribed to the student (Tr. p. 138). As a result of the student's shift in behaviors, the parent argues that the student was lethargic at school, exhibited disinterest, and fell asleep during the school day—all of which, according to the parent, impeded the student's educational progress and affected the student's opportunity to access his educational program. The evidence in the hearing record does confirm that the student's behaviors changed in early 2012.

For example, in February 2012, the Tradewinds report card indicated that the student continued to do well in school but was more agitated on a day-to-day basis than he had been "in the past couple of months" (Dist. Ex. 26 at p. 10). It was reported that the student had been "less willing" to complete his academic assignments and had become "angry" when prompted to use the restroom (id.). While the report card noted that the student engaged in 11 episodes of self-injurious behavior and two episodes of aggression and that in some cases he continued to engage in self-injurious behavior even after the triggering demand was taken away, it also reflected that the student continued to be friendly toward peers/staff and that he attended all specials and therapy sessions (id.). The report card indicated that the severity of the student's self-injurious behavior was often very light and, even when upset, the episodes did not last in duration (id.). The 2011-12 Tradewinds report card indicated that the frequency of the student's behavior had further increased in March 2012 relative to February 2012, with 18 episodes of self-injurious behavior (an increase of seven incidents), and three episodes of aggression (an increase of one incident); however, the report card indicated that the intensity of the episodes continued to be "light" and the duration remained "short" (Dist. Ex. 26 at p. 10). The report card noted that classroom and clinical staff noticed an increase in the student's "target behaviors" and that he had been less active during both preferred and non-preferred activities (id.). After a medication change that month, staff noted that the student had been very tired in school, unfocused, and not at his normal level of coordination (id. at p. 11). It was reported that the student missed specials on a "couple of occasions" that month due to lethargy and that he could not stay awake in class (id.). However, the report card also noted that the student continued to have positive interactions with peers, staff, but had "been less likely to engage in such situations in the past month (id.). In addition, the report card reflected that classroom/clinical staff would continue to monitor the student's behavior to follow his progress since the medication change (id.).

The evidence in the hearing record indicates that, on March 26, 2012, the parent attended a meeting with the student's special education teacher, a teacher's assistant, a school aid, a behavior specialist, a behavior specialist assistant, and a Medicaid service provider, to discuss the student's recent "regression at school" (Parent Ex. A). The minutes for that meeting indicate that "the classroom and clinical teams" agreed that the student had exhibited regression "over the past week" after a medication change, which had been initiated as a result of the student's behavior at home (id.). The minutes described the student's behaviors, which included that he was lethargic, walked at a much slower pace, and fell asleep throughout the school day, which caused him to miss lessons and group activities (id.). Also, the meeting minutes reflected the student's lack of coordination

and complaints about his legs and stomach hurting, as well as decreased interest in preferred activities (id.).

The parent testified that, since the recent birth of the student's sibling, the student had engaged in increasingly negative behaviors at home, including one incident of aggression toward the baby (Tr. p. 161-62; see Dist. Ex. 23 at p. 2). In response to the increase, the parent testified that the student's medication, which had been discontinued in fall 2011, was resumed in March 2012 (Tr. p. 159-63). Although at the impartial hearing the parent testified that the student was aggressive "all the way around," and that the student "was probably more aggressive in March [2012]," she further testified that she did not have the [teacher] communication log in front of her and she was not able to distinguish which months he was more aggressive (Tr. pp. 160-61). The special education teacher testified that, although she could not pinpoint exactly, for a couple of months, the frequency of self-injurious behavior "was maybe two times a month" (Tr. p. 83).

The district representative testified that, overall, since the student started attending Tradewinds, his violent outbursts and aggression toward others had decreased significantly (Tr. p. 55). The special education teacher testified that she did not have to contact the behavior specialist for support because she did not have problems with the student (T. p. 99). However, the teacher testified that she had daily contact with the parent through a communication book (Tr. p. 101). When asked if the aggressive behaviors that were described as occurring at home carried over into school, the special education teacher testified, "no" (Tr. p. 127). She testified that his behavior is "two opposite ends of what we see at school and what [the parent] report[ed] that she [saw] at home" (Tr. pp. 110-11). At the impartial hearing, when asked to elaborate as to her knowledge of the parent's experiences, the special education teacher testified he was very aggressive, engaged in many self-injurious behaviors, had several tantrums, showed dangerous actions such as eloping to neighbors' houses and going into the houses and that the student did not demonstrate any safety awareness (Tr. p. 111; see also Tr. p. 192).

Based on the foregoing, there is evidence in the hearing record to support a finding that the change in the student's medication precipitated the student's inconsistent behaviors during March 2012. As described above, the student was prescribed different medications in the past but continued to make progress. As discussed further below, it was reasonable for the May 2012 CSE to give the student time to adjust to the new medications prior to changing his placement, particularly given the fact that the hearing record includes no document available to the CSE addressing the effect of the medications. Accordingly, upon review of the hearing record, I find that the evidence supports a finding that, notwithstanding the inconsistency in the student's negative behaviors during March 2012, the student exhibited overall meaningful progress in school academically, socially, and behaviorally during the 2011-12 school year, which as noted above, is relevant to the examination of the similar program recommended during the 2012-13 school year.

2. 6:1+3.5 Special Class Placement in a Nonpublic School Day Program

Turning to the parent's preference for a residential placement for the student, a residential placement is one of the most restrictive educational placements available for a student, and such a restrictive placement is not appropriate unless it is required for a student to benefit from his or her educational program (Walczak, 142 F.3d at 122; Mrs. B., 103 F.3d at 1121-22). Behavioral problems do not afford a basis for concluding that a student requires a residential placement absent

evidence that the student was otherwise regressing educationally in a day program as a result of those problems (see M.H. v. Monroe-Woodbury Cent. Sch. Dist., 296 Fed. App'x 126, 128, 2008 WL 4507592 [2d Cir. Oct. 7, 2008] [denying reimbursement for a residential program where there was no evidence of regression in the child's day program placement and no testimony by certified experts that supported the parents' fears of relapse]; Walczak, 142 F.3d at 131-132 [finding a residential placement not appropriate where student made meaningful social and academic progress in a day program]; C.T. v. Croton-Harmon Union Free Sch. Dist., 812 F. Supp. 2d 420, 433 [S.D.N.Y. 2011]; cf. Mrs. B., 103 F.3d at 1121-22 [finding a residential placement necessary where behavioral problems resulted in the student not advancing more than one grade level in any subject in three years while attending a day program with a therapeutic component]). The Second Circuit has stated that "[w]hile some children's disabilities may indeed be so acute as to require that they be educated in residential facilities, it is appropriate to proceed cautiously whenever considering such highly restrictive placements. . . . The norm in American public education is for children to be educated in day programs while they reside at home and receive the support of their families" (Walczak, 142 F.3d at 132). Here, as set forth above, the evidence in the hearing record does not support the conclusion that the student required a residential placement.

In this case, the evidence in the hearing record establishes that the May 2012 CSE engaged in a "lengthy discussion" over the possibility of placing the student in a residential program (Dist. Ex. 23 at p. 2). Although the parent "felt that it was warranted" and continues to advance on appeal that the May 2012 CSE should have recommended a residential placement, the district representative testified that the CSE did not have enough "educational evidence" to recommend a more restrictive setting (Tr. p. 52).[5] The district representative also testified that the Tradewinds staff had not indicated that the student was in need of a more restrictive setting or that his current program was not appropriate (Tr. pp. 32-33). In addition, the district representative testified that the May 2012 CSE would have considered a residential placement for a student only after other less restrictive placement options on the continuum were exhausted (Tr. pp. 53). She further testified that, if the student was not successful in the day program and the staff was not able to meet his needs due to behavior or academics and they expressed that the student needed a more restrictive placement, then at that point it could be considered (Tr. pp. 53-54).

The hearing record further indicates that the May 2012 CSE (and the preceding April 2012 CSE) considered the student's behaviors described above in reaching the recommendations included in the IEPs (see Dist. Exs. 19 at p. 1; 23 at p. 2). Notes included on the April 2012 IEP indicated that the student exhibited 11 self-injurious behaviors, but the behaviors were reportedly minor, such as the student slapping his own hand (Dist. Ex. 19 at p. 1). Although the April 2012 IEP noted the student exhibited aggressive behaviors approximately three times/month, the special education teacher testified that the student "had probably" been aggressive about three or four times since she had started working with him in December 2011 (Tr. at p. 79; Dist. Ex. 19 at p. 1).

[5] When a CSE determines that a nonpublic residential placement is appropriate due to the nature or severity of the student's disability, State regulations require the CSE to document that residential services are necessary to meet the student's educational needs as identified in the student's IEP, including a proposed plan and timetable for enabling the student to return to a less restrictive environment or a statement of reasons for why such a plan is not currently appropriate (8 NYCRR 200.6[j][1][iii][d]). State law also requires that in order to properly recommend a residential placement, a district must make the determination that there is no appropriate nonresidential school available consistent with the needs of the student (Educ. L. § 4402[2][b][2]).

The April 2012 CSE meeting minutes reflected that counseling was added to the IEP for the summer and fall of 2012 to address the behavior concerns (Dist. Ex 19 at p. 1). The district representative testified that, at the time of the April 2012 CSE meeting, the behaviors described occurred mainly in the home environment, such as aggression toward family members and siblings (Tr. p. 25; see Dist. Ex. 19 at p. 1).

Notes included on the May 2012 IEP reported that the student's behaviors decreased in April and that the student had three episodes of aggression/self-injurious behavior incidents in May, two of which were on the same day with one student (see Tr. p. 32; Dist. Ex 23 at p. 2). At the May, 2012 CSE meeting, the parent reported that the student exhibited highly unpredictable and aggressive behavior at home (Dist. Ex. 23 at p. 2). The May 2012 IEP also noted the student's medication dosage and indicated it had been increased in order "to assist in keeping the student safe in his home environment" (id.). The notes on the May 2012 IEP also include information from the special education teacher that the student needed 1:1 assistance to complete academic tasks and fell asleep frequently (id.). However, she further testified that, "other than that, the behaviors since he started the program had really decreased significantly" (Tr. p. 32). The May 2012 IEP indicated that the student had shown minimal disruptive behavior during the school day, that he transitioned well between activities, and he was "usually willing" to engage in any activity or task (Dist. Ex. 23 at p. 6).

Consistent with the shift in the student's behaviors described above, the district representative testified that, over time, the student had been on various medications and, as his behaviors changed, the medications had changed with them (Tr. p. 19). She further reported that, in the past, the student had instances of several behavioral outbursts that had been difficult to control, and that was the reason the CSE changed his educational placement to the 6:1+3.5 special class at the nonpublic school day program for the 2011-12 school year (Tr. p. 19). The district representative indicated that the May 2012 CSE again opted for the 6:1+3.5 special class placement in the day program because, in the past, when the student attended a 12:1+1 special class, an 8:1+1 special class, and a home tutoring placement, the student had exhibited various behaviors such as hitting, kicking staff, spitting, throwing objects, and punching himself in the head (Tr. p. 20). The May 2012 CSE meeting minutes indicate that the CSE concluded that there was not enough evidence presented to recommend a residential placement, the student made progress since entering the Tradewinds program in September 2011, and no changes were recommended at that time (Dist. Ex. 23 at p. 2).

Furthermore, despite the shift in the student's behavior in or around March 2012, and, assuming for the sake of argument, that the student exhibited inconsistent progress during this time, this, alone, would not by itself justify a residential placement given the evidence in the hearing record. In Mrs. B., the Second Circuit concluded that a residential placement was appropriate for the student because it was necessary for the student to benefit from her educational program (Mrs. B., 103 F.3d at 1121). The facts of Mrs. B., however, are distinguishable from the present case in that the academic performance of the student in Mrs. B. had "stalled" or regressed for nearly three years despite the student being of average to slightly below-average intelligence (id.).

Moreover, to address the student's behaviors and academic needs, the May 2012 IEP included additional supports and services. In particular, with respect to counseling, the May 2012

IEP included an annual goal and short-term objectives designed to improve the student's ability to self-monitor and rate his feelings accurately (Dist. Exs. 22; 23 at p. 8). Furthermore, the May 2012 IEP included multiple strategies to address the student's academic management needs and to support his ability to access the curriculum in the 6:1+3.5 special class setting, including verbal prompts for focus, light support to the hand for writing, encouragement, redirection, prompts to increase the student's vocal volume and to communicate his requests to staff, and a scheduled toileting program (Dist. Exs. 17; 23 at pp. 1, 4-6, 10).

The May 2012 IEP further reflected that the student had a BIP to help increase his ability to communicate his wants, needs, and emotions while decreasing his target behaviors of aggression and self-injurious behavior (Dist. Ex. 23 at p. 6). The February 2012 BIP included a goal to help the student increase his ability to communicate while decreasing incidents of aggression and self-injurious behavior (Dist. Ex. 17 at p. 1). The special education teacher testified that the plan was revised in February, the BIP worked effectively, and the student did not present with any safety concerns (Tr. pp. 76, 78). She further testified that the student hit staff three or four times, but he did not hit peers (Tr. pp. 77-78). She testified that the three or four times the student hit staff "it was mild, usually one or two hits" (Tr. p. 78). With regard to swearing or verbal abuse, the special education teacher testified that the student "probably" engaged in such behaviors three or four times when he got aggressive and he used two or three swear words (Tr. p. 79). She further testified that redirecting him did not work, but he stopped on his own, and the behaviors lasted less than a minute (Tr. p. 79-80). She also testified that the student demonstrated tantrums in the classroom on average once a month where he would cry, put his head down, or refuse to do work, but strategies such as five-minute breaks, verbal prompting, or incentives worked for the student (Tr. p. 81).

In view of the foregoing, there is insufficient evidence in the hearing record to demonstrate that the student's special education needs were so severe that they could only be appropriately addressed in a residential placement. Even assuming, for the sake of argument, that the student could have made greater progress in a residential setting if he was removed from the public school and placed in a private residential setting, that is not sufficient to overcome the district's obligation under the IDEA to offer a less restrictive alternative within the public school system in which he is likely to experience more than trivial advancement. Based upon the foregoing, the evidence in the hearing record demonstrates that, in light of the student's academic, language, and social/emotional needs, the CSE's decision to recommend a 6:1+3.5 special class placement in a nonpublic school day program—together with the academic management needs and related services—was reasonably calculated to enable the student to receive educational benefits for the 2012-13 school year.

B. Pharmaceutical Evaluation

Turning to the district cross-appeals the IHO's decision ordering the CSE to reconvene within 30 days to identify a pharmacological evaluator to review the student's current prescriptions (IHO Decision at p. 25), based on the evidence described above, the IHO correctly determined that the CSE should have additional information about these student's needs. However, rather than a pharmacological evaluation, the evidence in the hearing record supports a finding that the CSE would benefit from a psychiatric evaluation of the student, which should include a review of the

student's medication and information regarding the effect of such medications on the student's ability to receive educational benefit.

In general, under State regulations an individual evaluation includes any procedures, tests, and other appropriate assessments or evaluations as may be necessary to determine whether a student has a disability and the extent of his or her special education needs (8 NYCRR 200.1[aa]). Further, 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, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). 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]; see Application of the Dep't of Educ., Appeal No. 07-018).

Here, as discussed in detail above, the evidence in the hearing record reflects that the student underwent "several" medication changes during the 2011-12 school year and in March 2012, just prior to the April and May 2012 CSE meetings (Dist. Ex. 23 at p. 2). However, there is a lack of documentary evidence in the hearing record describing how the student's prescribed medications affect the student's ability to access the educational program recommended by the CSE. Given this lack of information, there is no reason to disturb the IHO's order directing the district to conduct an evaluation of the student in order to provide more information about the student's needs that may not be identified through the already completed evaluations. Indeed, a psychiatric evaluation could provide the district with further insight into the student's needs (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; 8 NYCRR 200.4[b][1]). Furthermore, a psychiatric evaluation would further assist the district with meeting its obligation to appropriately assess the student in all areas related to the student's disabilities (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]).[6]

Therefore, assuming the district has not already facilitated the evaluation ordered by the IHO and, the parent provides consent, the district is ordered to conduct a psychiatric evaluation of the student, which should include a review of the student's medication and information regarding the effect of such medications on the student's ability to receive educational benefit.

VII. Conclusion

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

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED IN PART.

[6] The parent is also encouraged to share with the district any evaluative information and psychiatric evaluations that may have been privately obtained.

IT IS ORDERED that the district conduct a psychiatric evaluation of the student, as described above.

Dated: **Albany, New York**
July 28, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER