



The University of the State of New York

The State Education Department

State Review Officer

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No. 16-069

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

Appearances:

Jaspan Schlesinger, LLP, attorneys for petitioner, Carol A. Melnick, Esq., of counsel

Family Advocates, Inc., attorneys for respondent, RosaLee Charpentier, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from a decision of an impartial hearing officer (IHO) which determined that the educational program recommended by its Committee on Special Education (CSE) for respondent's (the parent's) daughter for the 2015-16 school year was not appropriate. The appeal must be sustained.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

When the hearing began, the student was 16 years old and had missed much of the 2015-16 school year due to chronic lateness and absenteeism (Dist. Ex. 55). According to school records obtained by a private evaluator, the student had a long history of frequent absences and tardiness beginning in second grade (Dist. Ex. 61 at p. 2). The hearing record reflects that among other methods to address the student's absenteeism, the CSE had considered counseling for the student, but the parent consistently refused the service (Dist. Exs. 5 at p. 6; 7 at pp. 1-2).¹ During the 2014-

¹ Although counseling was considered at CSE meetings and offered to the parent, counseling was not listed on any of the student's IEP's as a service until the August 2014 CSE meeting (Dist. Exs. 4 at p. 2; 5 at p. 2; 7 at p. 2; 9 at p. 1; 14 at pp. 1, 8).

15 school year, the parent conceded that she did "have difficulty" getting the student to attend school regularly (Dist. Ex. 7 at p. 2). The district school psychologist initiated counseling in March 2015 (Dist. Ex. 63 at p. 1). Attendance records reflect that during the 2014-15 school year, the student was late 27 times and absent 81 times (Dist. Ex. 55). As of April 28, 2016, the student had been late 24 times and absent 83 times during the 2015-16 school year (id.).

On May 5, 2015, school staff met in a "building level meeting" with the parent to discuss support options to assist the student with attending school (Dist. Ex. 8 at p. 1). According to the meeting summary, the district's school psychologist reported that the student appeared anxious and overwhelmed and therefore she recommended that the CSE discuss an in-district therapeutic day school placement for the student (Dist. Exs. 8 at p. 1; 63 at pp. 1-2). The hearing record reflects that the parent rejected discussion of a change in placement and that she further stated that the student did not have emotional needs (Parent Ex. A, Dist. Ex. 8 at p. 1). Also during the building level meeting the parent stated that the student was "feeling too coddled" and expressed a desire to declassify the student (Dist. Ex. 8 at p. 1). Following the building level meeting, the parent wrote to the school to further express her rejection of the recommendation for a therapeutic day school and expressed her belief that counseling should be removed from the student's IEP and that the student was a sweet, happy child who did not belong in "an emotional disability school" (Parent Ex. A).² On May 6, 2015, the parent called the school psychologist to inform her that counseling sessions were to discuss the work the student needed to make-up and that the student was not to discuss her feelings or home life with the school psychologist (Parent Ex. A; Dist. Exs. 63 at p. 2). The hearing record reflects that among other methods to address the student's absenteeism, the district filed a petition in the Family Court to have the student adjudicated as a person in need of supervision (PINS) on May 6, 2015 (Parent Ex. B).

On June 10, 2015, the CSE convened to conduct the student's annual review and to develop an IEP for the 2015-16 school year (Dist. Ex. 9 at p. 1). The CSE found the student eligible for special education as a student with a learning disability, and recommended a 15:1 special class for science and an integrated co-teaching (ICT) classroom for social studies (id. at pp. 1, 8).³ According to the summary of the CSE meeting, the student was "failing all of her 9th grade classes due to excessive absences" (id. at p. 1). At the time of the meeting, the student was attempting to complete missed school work in order to be eligible for summer school (id.). The summary also reflected that members of the CSE, as well as the student's teachers and providers, had met numerous times to assist the student with improving attendance and managing school work (id.). The parent participated in the meeting by telephone and requested that individual counseling be removed from the IEP (id.). Teacher input described the student as "very capable," but concerns were expressed regarding the student's ability to meet course requirements (id.). The meeting summary reiterated that concerns regarding the student had resulted in a series of building level and CSE meetings over the course of the year, as school staff had attempted to assist the student in managing her school work and improving her attendance (id.).

² It appears that counseling services were initiated with the student in March 2015, although they were not listed on her IEP (see Dist. Exs. 7; 63 at p. 1).

³ Citation to the district's exhibits is made according to the pagination of the exhibit rather than the pagination of the document itself.

The parent filed a due process complaint notice on July 21, 2015 (Dist. Ex. 12). The parent rejected the student's proposed program for the 2015-16 school year, alleging that it was the same program that had failed in the prior school year (id. 12 at p. 1). The parent claimed that the student's IEP did not contain a clear description of the student's disability and did not contain evaluative information (id.). The parent also asserted that the district failed to address the student's need to improve attendance and improperly instituted a person in need of supervision (PINS) proceeding against the student (id. at p. 2). As relief, the parent sought an "appropriate evaluation," a new IEP and compensatory educational services (id.).

The CSE reconvened on August 27, 2015 to revise the student's IEP for the 2015-16 school year after the student had not earned any credits during summer school (Dist. Ex. 14). The CSE continued the June 2015 CSE recommendations for an ICT class for social studies and a 15:1 special class for science and added a 15:1 special class for social studies, one daily 45-minute resource room to target organizational skills, and one 30-minute session of group counseling per week (compare Dist. Ex. 8 at p. 9, with Dist. Ex. 14 at pp. 1, 8).

On September 3, 2015, the parent requested that resource room and the social studies special class be removed from the IEP, and that an ICT math class and an ICT social studies class be added (Dist. Ex. 16). On September 8, 2015, the parent requested that the student be moved into a friend's earth science class (Dist. Ex. 17). The hearing record indicates that the IEP was amended by agreement without a CSE meeting to accommodate the parent's September 3, 2015 request (Dist. Ex. 16), but the parent's September 8, 2015 request was not adopted due to the impact that it would have on the rest of the student's class schedule (Dist. Ex. 17).

On September 25, 2015, the CSE reconvened for a program review to assess the student's performance and discuss the current program and services (Dist. Ex. 19 at p. 1). Although the parent was invited to the meeting and it was scheduled at her preferred time, the parent did not attend (id.). The September 2015 CSE minutes reflected that the committee had planned to complete a functional behavioral assessment (FBA) and behavior intervention plan (BIP) with input from the parent and student (id., Dist. Ex. 20 at p. 2, Parent Ex. I at pp. 1-2).

The hearing record reflects that an impartial hearing officer (IHO 1) was appointed in response to the parent's July 21, 2015 due process complaint notice (Dist. Ex. 34 at p. 1). IHO 1 made several attempts to schedule a hearing between August 2015 and October 2015 (id.). IHO 1 was notified on October 7, 2015 that the parties had reached a settlement and that the parent would withdraw her due process complaint notice (id.).

On October 9, 2015, the CSE again convened for a program review, intending to review the BIP with the parent and student (Dist. Ex. 27 at p. 1). The parent and student were invited to the meeting, but did not attend (id.). The hearing record reflects that the student's BIP was completed and signed on October 19, 2015 (Dist. Ex. 20 at p. 3).⁴

The parent and the district entered into a stipulation of settlement and general release agreement on October 15, 2015 (Dist. Ex. 26). Pursuant to the resolution agreement, the district

⁴ The parent's signature is not dated. The student signed the BIP on October 26, 2015. The district staff signed the BIP on October 19, 2015 (Dist. Ex. 20 at p. 3).

agreed to fund an independent neuropsychological evaluation and to review it at a subsequent CSE meeting (id. at p. 2). The agreement also required that the district withdraw its PINS petition and that the parent withdraw her July 21, 2015 due process complaint notice and support the student's BIP (id. at pp. 2-3). The agreement purports to settle all claims from the beginning of time through the execution of the agreement (id. at pp. 3-6).

By letter dated, October 22, 2015, counsel for the parent informed IHO 1 that the matter had not settled and requested a hearing date (Dist. Ex. 34 at p. 1). The district responded by alleging that the matter was indeed settled (id.). By decision dated December 4, 2015, IHO 1 found that she had no authority to address the implementation of a settlement agreement and that the matter was settled when it was executed on October 15, 2015 (id. at pp. 2-3). As such, IHO 1 dismissed the parent's July 21, 2015 due process complaint notice with prejudice (id. at p. 3).

On December 23, 2015, the CSE reconvened to conduct a program review (Dist. Ex. 35 at p. 1). The parent did not attend, but was reached by telephone and stated that she would not attend any meetings until the IEE was completed (id.). A summary of the December 2015 CSE meeting indicated that the remaining committee members discussed revising the current BIP to define an "attending day" to mean a school day for which the student has been present for five of the eight periods (id.). The summary also noted that since signing the BIP on October 26, 2015, the student had not attended a full, eight-period school day (id.). Of the 38 full school days that had elapsed, the student was absent 17 times and tardy 19 times (id.).

A. Due Process Complaint Notice

By due process complaint notice dated February 23, 2016, the parent again rejected the student's proposed program for the 2015-16 school year, alleging that it was the same program that had failed in the prior school year (Dist. Ex. 42 at p. 1). The parent raised essentially the same claims as in her July 21, 2015 due process complaint notice, and further alleged that the student was school phobic, needed counseling upon arrival at school and at home, and required transition planning (compare Dist. Ex. 42, with Dist. Ex. 12). The parent also claimed that the student required vocational training and that the student's social-emotional goals were inadequate (Dist. Ex. 42 at p. 2). Additionally, the parent asserted that parent training and counseling should have been included on the student's IEP and that the district was not abiding by the stipulation of settlement (id.). The parent also alleged that the CSE convened without her and without proper notice to her and further that she was manipulated into waiving her right to participate in CSE meetings (id. at p. 3). As relief, the parent sought a smaller school with an alternative educational program that would address school avoidance, social isolation, and low self-esteem (id.). The parent requested that the district be compelled to both fund and implement the recommendations of an independent neuropsychological evaluation (id.). Lastly the parent requested compensatory academic, psychological, and vocational services (id.).

B. Impartial Hearing Officer Decisions

By letter, dated February 26, 2015, the district appointed a second impartial hearing officer (IHO 2) to conduct a hearing (Dist. Ex. 43). Counsel for the parent contacted IHO 1 by letter, dated February 29, 2016, and requested that IHO 1 re-open the hearing that she had dismissed on December 4, 2015 (Dist. Ex. 57 at p. 65). In a decision dated, April 13, 2016, IHO 1 first

determined that she had the authority to re-open the hearing, and then found that the regulation requiring the appointment of the same impartial hearing officer did not apply because the parent did not withdraw her prior complaint, it was dismissed by IHO 1 with prejudice on December 4, 2015 (id. at pp. 8, 16). IHO 1 dismissed the proceeding with prejudice (id. at p. 16).⁵

After a prehearing conference held on April 28, 2016, the parties proceeded to an impartial hearing on May 9, 2016 before IHO 2, which concluded on July 13, 2016, after seven days of proceedings (see Tr. pp. 1-1351).⁶

In a decision, dated September 3, 2016, IHO 2 determined that the parent's claims which accrued prior to the execution of the stipulation of settlement on October 15, 2015 were precluded and considered whether the district offered the student a FAPE from October 15, 2015 through the end of the 2015-16 school year (IHO Decision at pp. 63-67). Despite finding that the parties' agreement settled the parent's IEP challenges and assertions regarding the adequacy of the evaluative information available to the August 2015 CSE, IHO 2 went on to determine that the district's evaluative information was so inadequate that it rendered the student's classification in question (id. at pp. 70-79). Although, not raised in either due process complaint notice, IHO 2 determined that the district had denied the student a FAPE beginning on October 15, 2015, because the CSE knew or should have known that the student's classification was emotional disturbance (id. at pp. 77-79). IHO 2 then ordered the district to retroactively change the student's IEP to reflect a change in classification from learning disabled to emotional disturbance as of October 15, 2015 (id. at pp. 79, 89). IHO 2 acknowledged that neither the district nor the parent believed the student's non-attendance was related to the student's disability; however, based on a private neuropsychologist's diagnosis of a social anxiety disorder and recommendation for residential placement, IHO 2 ordered that the student's IEP be revised, retroactively to October 16, 2015, "to reflect a program of therapeutic residential academic placement with the resources to address the student's anxiety disorder" (id. at pp. 79-86, 89).

By the end of the hearing, the parent had moved with the student to another state, causing the district to make a motion to dismiss on mootness grounds, arguing that the district had no obligation to the student or parent as of August 20, 2016, based on the relocation and that the student had been enrolled in a new school district as a general education student (Petition Ex. A at p. 1-2). IHO 2 dismissed the district's motion, finding that the scope of relief available to him extended beyond the 2015-16 school year and could not be moot (IHO Decision at pp. 66-67; Petition Ex. C). IHO 2 also dismissed the parent's claim for compensatory educational services "without prejudice" because those claims were not ripe for his review (IHO Decision at p. 89).

⁵ In her decision, dated December 4, 2015, IHO 1 determined that the stipulation of settlement was effective on October 15, 2015, when it was fully executed (Dist. Ex. 57 at p. 64). In her decision, dated April 13, 2016, IHO 1 determined that the stipulation of settlement was effective on November 12, 2015, when it was approved by the district's board of education (id. at pp. 15-16).

⁶ Page number 398 appears twice in the transcript of the proceeding; however, neither page contained testimony.

IV. Appeal for State-Level Review

The district appeals and argues that IHO 2 erred by denying the district's motion to dismiss and exceeded his authority by addressing issues not raised in the due process complaint notice and as well as issues settled by the parties' agreement. The district contends that the August 2015 CSE's recommendations were appropriate based on the information available to it. The district also argues that IHO 2 correctly dismissed the parent's claim for compensatory educational services; however, the district alleges that the claim should have been dismissed with prejudice and requests an SRO to do so.

In an answer, the parent generally admits or denies the district's allegations and requests that the IHO decision be upheld in its entirety.⁷ The parent objects, however, to one of the exhibits annexed to the district's petition⁸ because it was submitted to IHO 2 after the record close date.

In a reply, the district denies the allegations set forth in the parent's answer and argues that the exhibits annexed to its petition are either part of the hearing record or incorporated by reference to them in IHO 2's denial of the district's motion to dismiss. Also in its reply,⁹ the district articulates the standard for consideration of additional evidence, but makes no request of an SRO to consider them.

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

⁷ The parent has not interposed a cross-appeal contesting the IHO's failure to award additional compensatory education. Accordingly, for the purposes of this proceeding this aspect of the IHO's decision has become final and binding upon the parties (see 34 CFR 300.514 [a]; 8 NYCRR 200.5 [j][5][v]; see also C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *9 [S.D.N.Y. Mar. 28, 2013]; M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

⁸ Annexed to the district's petition are six exhibits. The district's petition does not contain a request for an SRO to consider these documents as additional evidence.

⁹ State regulation provides that "[n]o pleading other than the petition or answer will be accepted or considered by a State Review Officer of the State Education Department, except a reply by the petitioner to any procedural defenses interposed by the respondent or to any additional documentary evidence served with the answer" (8 NYCRR 279.6). In its reply, the district responds to its own use of additional documentary evidence.

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]).

Except for in circumstances not applicable here, the burden of proof is on the school district during an impartial hearing (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Preliminary Matters

1. Scope of Impartial Hearing

At the outset, I must first determine which claims are properly before me. Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]; see, e.g., N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584 [S.D.N.Y. 2013]; see B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 2014 WL 2748756, at *1-*2 [2d Cir. June 18, 2014]). Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on new issues raised sua sponte (see Dep't of Educ. v. C.B., 2012 WL 220517, at *7-*8 [D.Haw., Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

The district objects to the IHO's decision regarding the student's disability classification and a review of the hearing record supports the district's contention that IHO 2 exceeded his jurisdiction by sua sponte raising and retroactively changing the student's disability classification

as the parent did not raise this issue in either her July 21, 2015 due process complaint notice or her February 23, 2016 due process complaint notice (compare Dist. Ex. 12 at pp. 1-4, and Dist. Ex. 42 at pp. 1-3, with IHO 2 Decision at pp. 3, 4-5, 67, 74-79).¹⁰ The only statement in the parent's due process complaint notice that could be read as raising the student's disability classification is an allegation that the "IEP ... does not contain any clear description of [student's] disability" (Dist. Ex. 42 at p. 1). However, that allegation appears to relate to the parent's contention that the district did not conduct appropriate evaluations of the student (*id.*). Additionally, to the extent that the IHO addressed classification as a reason for finding that the district did not assess the student to determine the cause of her absenteeism, the relevant inquiry is whether the district addressed the student's issues with attendance rather than the student's disability classification and is addressed as such herein (20 U.S.C. § 1412[a][3] ["Nothing in this chapter requires that children be classified by their disability so long as each child . . . is regarded as a child with a disability under this subchapter"]; 34 CFR 300.111; M.R., 2011 WL 6307563, at *9 [finding that once a student's eligibility is established "it is not the classification per se that drives IDEA decision making; rather, it is whether the placement and services provide the child with a FAPE" (emphasis in original)]; see also Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011] [finding that "the particular disability diagnosis affixed to a child in an IEP will, in many cases, be substantively immaterial because the IEP will be tailored to the child's specific needs"]). Consequently, IHO 2's finding that the student's classification must be retroactively changed was outside the scope of the hearing.

2. Scope of Review-Additional Evidence

The district has annexed six exhibits to its petition, but has not explicitly submitted them as additional documentary evidence for consideration on appeal. The parent objects to the use of any exhibits which are not part of the hearing record. Generally, documentary evidence not presented at an impartial hearing will be considered in an appeal from an IHO's decision only if the additional evidence could not have been offered at the time of the impartial hearing and is necessary to render a decision (8 NYCRR 279.10[b]; see, e.g., L.K. v. Northeast Sch. Dist., 932 F. Supp. 2d 467, 468-69 [S.D.N.Y. 2013]). Upon review of this evidence, it is apparent that at least two of the exhibits should have been made a part of the hearing record. On September 1, 2016, counsel for the district wrote to both IHO 2 and counsel to the parent to confirm that the parent had moved to another state with the student (Petition Ex. A at p. 1). This fact caused the district to move to dismiss the parent's February 23, 2016 due process complaint notice as moot

¹⁰ The Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H., 685 F.3d at 250-51; see N.K., 961 F. Supp. 2d at 585; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *9 [Aug. 5, 2013]; B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at *5-*6 [S.D.N.Y. May 14, 2013]). A review of the hearing record reveals that the district did not elicit testimony regarding the student's classification or attempt to obtain a strategic advantage to defeat a claim raised in the due process complaint notices; therefore, the district did not "open the door" to these issues under the holding of M.H. (see A.M., 964 F. Supp. 2d at 283; J.C.S., 2013 WL 3975942, at *9; B.M., 2013 WL 1972144, at *6). A further review of the hearing record shows that the district did not agree to an expansion of the issues in this case, and although the parent filed two similar due process complaint notices, the parent did not seek to further amend the February 23, 2016 due process complaint notice to include this as an issue for the district to defend or for the IHO to resolve (see Dist. Ex. 12 at pp. 1-4, and Dist. Ex. 42 at pp. 1-3).

(*id.* at pp. 1-2). By decision with exhibits dated September 3, 2016, IHO 2 denied the district's motion (Petition Ex. C). Neither the district's motion to dismiss, nor IHO 2's decision on the motion were included in the hearing record; however, according to State regulation they should have been made a part of the hearing record (8 NYCRR 200.5[j][5][vi][b], [c]). The remaining four exhibits to the petition are either already part of the hearing record (Petition Exhibit D), or are not necessary to render a decision (Petition Exs. B, E-F).

3. Scope of Review – Stipulation of Settlement

In view of the relief requested by the district, and the parties' stipulation of settlement, only a certain subset of issues raised in the parent's February 23, 2016 due process complaint notice remain to be addressed in this appeal. In her due process complaint notice, the parent alleged that the district failed to offer the student a FAPE for the 2015-16 school year, because its CSE continued to recommend the same inappropriate program it had recommended in prior years (Dist. Ex. 42 at p. 1). The parent claimed that the student's IEP did not describe the student's disability, did not contain evaluative information, and did not contain appropriate goals (*id.*). The parent alleged that the student was school phobic, needed counseling upon arrival at school and at home, and required a smaller school with an alternative educational program that would address school avoidance, social isolation, and low self-esteem (*id.*). The parent also alleged that a number of procedural violations were committed by the district's CSE in the development of the student's IEPs. The district appeals IHO 2's consideration of issues it argues were settled as part of the prior due process hearing before IHO 1, including the district's agreement to fund and review an independent educational evaluation (IEE).

As noted above, the parent and the district entered into a stipulation of settlement on October 15, 2015 settling the issues raised in the parent's July 21, 2015 due process complaint notice (Dist. Ex. 26). Based on the execution of the settlement agreement, IHO 1 dismissed the parent's July 21, 2015 due process complaint notice with prejudice (Dist. Exs. 34 at p. 3; 57 at p. 16). As noted by IHO 2, the parent decided not to appeal IHO 1's decision in the prior matter and IHO 2 therefore limited the scope of this hearing only to matters that arose after the execution of the stipulation of settlement on October 15, 2015 (IHO Decision at pp. 63-64).

Pursuant to the stipulation, the district agreed to fund an independent neuropsychological evaluation and to convene a CSE to review the evaluation (*id.* at p. 2). The district further agreed to withdraw its PINS petition (*id.*). The parent agreed to withdraw the July 21, 2015 due process complaint notice and to support the student's behavior contract and BIP (*id.* at p. 3). According to the IDEA, the "purpose of the [resolution] meeting is for the parent of the child to discuss the due process complaint, and the facts that form the basis of the due process complaint, so that the [district] has the opportunity to resolve the dispute that is the basis for the due process complaint" (20 U.S.C. § 1415[f][1][B][i][IV]; 34 CFR 300.510[a][2]; 8 NYCRR 200.5[j][2][i]). Additionally, a settlement agreement that resolves claims raised in a due process proceeding precludes a party from raising identical claims in a subsequent due process proceeding (S. Kingstown Sch. Comm. v. Joanna S., 2014 WL 197859, at *1 [D.R.I. January 14, 2014], aff'd and remanded, 773 F.3d 344 [1st Cir. 2014]; see Somoza v. New York City Dept. of Educ., 475 F. Supp. 2d 373, 387 [S.D.N.Y. 2007], rev'd on other grounds, 538 F.3d 106 [2d Cir. 2008] [settlements in the IDEA setting are a preferred method for dispute resolution; however, waiver of IDEA claims must be knowing and voluntary as judged by the totality of the circumstances]).

Applying this to the present case, the parent's request for an IEE and challenges to the IEP developed prior to October 15, 2015 must be deemed resolved. Furthermore, any claims that derive from the district's alleged failure to adequately evaluate the student must also be deemed resolved. The hearing record reflects that the parent's claim that the student's IEPs did not contain any evaluative information is based on a dispute about a request for an IEE and sufficiency of the evaluative information considered by the CSE. Given that the parent's claims relating to insufficiency of evaluative information distill from her dissatisfaction with the results of the district's triennial evaluation, those claims were resolved by the stipulation of settlement, and there was no reason to resolve them further through the impartial hearing process. Thus, any inadequacies in the district's evaluation of the student and in the resulting IEPs created on or before October 15, 2015, were also resolved and should not have been considered by IHO 2. Based on the foregoing, the issue properly before me on appeal is whether or not the district offered the student a FAPE from October 15, 2015 through the end of the 2015-16 school year.

B. FAPE

1. Sufficiency of Evaluative Information

As set forth above, IHO 2 correctly determined that the parent's claims which accrued on or before October 15, 2015 were precluded from review by the parties' stipulation of settlement. Nevertheless, IHO 2 proceeded to find that the district's recommended classification, program, and placement were inappropriate and resulted in a denial of a FAPE to the student for the 2015-16 school year. IHO 2 came to this conclusion, despite the parties having settled the parent's claims raised in the parent's July 21, 2015 due process complaint notice related to the evaluative information available to the CSE (see Dist. Exs. 12; 26); IHO 2 determined that the district failed to properly evaluate the student, and knew or should have known that the evaluations available to it were "academically useless" in terms of their understanding of the nature and source of the student's most pressing needs, her school avoidance (IHO 2 Decision at pp. 73-79). As this matter was addressed by the IHO on the merits, notwithstanding my determination above that this issue was settled as part of the prior due process complaint notice, it is illustrative to discuss why IHO 2's conclusions are contrary to the evaluative information available in the hearing record.

On October 15, 2015, the IEP in place for the student was the result of a CSE meeting held on August 27, 2015 and amendments made by agreement between the parent and the district staff on September 3, 2015 (see Dist. Exs. 14, 16). The student's program consisted of ICT classes in ninth and tenth grade social studies, math, biology and small group counseling once per week for 30 minutes (compare Dist. Ex. 14 at p. 1, with Dist. Ex. 16). As supplementary aids and services, the student's program reflected checks for understanding, refocusing and redirection, support for organizational skills, and copies of class notes (Dist. Ex. 14 at pp. 8-9).

The evaluative information considered by the August 27, 2015 CSE was largely obtained during the student's triennial evaluation during the 2013-14 school year (Dist. Ex. 14 at p. 3; see Dist. Exs. 1- 3). The IEP and prior written notice indicates that the CSE considered a June 2014 psychoeducational evaluation,¹¹ a March 2014 social history update, a February 2014 classroom

¹¹ The August 2015 IEP utilized the May 2014 initial completion date of the psychoeducational evaluation, rather than the revised June 2014 date (Dist. Exs. 3 at p. 1; 14 at p. 3). For consistency, the June 2014 revised date is

observation, a June 2012 attendance report, and a May 2012 neuropsychological evaluation (Dist. Ex. 14 at pp. 3, 14).¹² A February 28, 2014 classroom observation indicated that the student was observed during a 45-minute ICT English class (Dist. Ex. 2 at pp. 1-2). The observation noted that the student arrived to class on time, appeared focused, but had been absent the previous day (id.). The report further stated that the student responded well to directions, worked independently, and that her interactions with peers and adults were appropriate (id. at p. 1).

According to a March 3, 2014 social history, the parent described the student as a "typical teen," who had difficulty preparing for finals because she struggled "to find [and] pull all info[rmation] together to study..." (Dist. Ex. 1 at p. 2). The parent also stated her belief that the student continued to have a weakness in writing and described the student as "avoidant" (id.).¹³ The parent further stated that the student had friends, enjoyed cheerleading and playing on the iPad, did her homework independently, did not have chores and liked to sleep in (id.). Lastly, the parent indicated that the student "probably could be in" a regular math class (id.).

A psychoeducational evaluation completed May 1, 2014 and revised June 5, 2014 by the district's school psychologist, reflected that the student's teachers considered her to be a capable student, but her poor attendance significantly impacted her academic performance (Dist. Ex. 3 at p. 1). The student's teachers also reported that missing large blocks of classroom teaching and failing to timely complete assignments made it very difficult for the student to pass tests (id.). The student used a planned study skills period to complete missed class work or to take missed tests, instead of studying current classroom material (id.). As of May 1, 2014, the student had been late 30 times and absent 48 times (id.). Additionally, the student had missed or been late to her first period class 80 times (id.).

The school psychologist administered cognitive, achievement, and executive functioning testing, and utilized an emotional and behavioral self-assessment tool (Dist. Ex. 3 at p. 1). According to the Wechsler Intelligence Scale for Children-IV (WISC-IV), the student's full scale IQ was within the average range of intellectual ability and consistent with prior testing (id. at p. 2). The student's performance reflected verbal comprehension and perceptual reasoning skills within the average range (id.). The student's processing speed fell within the low average range, which indicated weakness in the student's ability to process new or novel information quickly and accurately (id.). The parent requested that the student's cognitive ability also be assessed non-verbally (id. at p. 4). The Test of Nonverbal Intelligence-Fourth Edition (TONI-4) was administered and the resulting scores were consistent with those attained by the student on the WISC-IV (id.).

On the Behavior Rating Inventory of Executive Function (BRIEF), the student's scores fell within the average range, indicating that the student did not demonstrate executive dysfunction in the eight domains measured (Dist. Ex. 3 at pp. 4-5). The school psychologist noted a relative

used throughout this decision.

¹² Neither the June 2012 attendance report nor the May 2012 neuropsychological were made a part of the hearing record.

¹³ The June 2014 psychological evaluation report indicates that the parent reported the student as tending to avoid tasks involving written expression because it was a weakness for her (Dist. Ex. 3 at p. 1).

weakness in the student's ability to initiate and plan or organize her school work within the home, and that her chronic absences and tardiness contributed to difficulties in these areas (*id.* at p. 5). According to the Wechsler Individual Achievement Test-3rd Edition (WIAT-III), the student performed within the average range on all subtests, except math problem solving, where she demonstrated weakness in "basic skills, everyday applications, geometry and algebra" (*id.*). The student's word reading and spelling skills were areas of relative strength as measured by the WIAT-III (*id.*).

The school psychologist noted that the student behaved appropriately during testing, appearing anxious and curious about her performance initially, then appearing "much more comfortable" after the first session (Dist. Ex. 3 at p. 2). The school psychologist also indicated that the student maintained appropriate attention, interest, and motivation during testing sessions, leading the school psychologist to conclude that testing yielded reliable results with regard to the student's current cognitive, academic, and social-emotional functioning (*id.*).

Concerning the student's social-emotional functioning, the evaluation report stated that the student got along well with teachers and peers and was active in cheerleading (Dist. Ex. 3 at p. 6). When questioned by the school psychologist about her history of poor attendance, the student "smiled and said that she doesn't like to get up in the morning" because she stays up late, attending cheerleading twice a week until 9:00 pm and does not begin her homework until she gets home (*id.*). The student also told the school psychologist that "until now," she had not considered the potential consequences of not going to school (*id.*). The student completed the adolescent self-report of personality (SRP-A) component of the Behavior Assessment System for Children, Second Edition (BASC-2) (*id.* at p. 7). The student's scores on both clinical and adaptive scales were well within the average range, with little variability shown on each subscale (*id.* at pp. 7-8). The student also scored within the average range on the Emotional Symptoms Index of the BASC-2 (*id.* at p. 7). According to the school psychologist, this indicated that the student's overall emotional development was within the average range and consistent with same-aged peers (*id.* at p. 7).

The school psychologist recommended review of the evaluation by the CSE, noted the student's weaknesses in math problem solving and processing speed, and stressed the need for the student to attend school every day for the entire school day (Dist. Ex. 3 at p. 8). The school psychologist also recommended that the parent establish a set bed time for the student and to restrict her access to electronic devices one hour before going to bed (*id.*). Additionally, the school psychologist encouraged the parent to check the student's homework daily, to establish incentives for the student to complete her homework and to go to school on time every day, and to withhold cheerleading when the student did not comply (*id.*).¹⁴

¹⁴ The June 2014 IEP, December 2014 IEP, and May 2015 IEP reflected some of the recommendations relating to the student's non-attendance made by the school psychologist in her June 2014 psychoeducational evaluation (compare Dist. Ex. 3 at p.8 with Dist. Exs. 5 at p. 6; 7 at p. 6; 8 at p. 6). Although the psychologist's report encouraged the parent to establish a set bedtime, check the student's homework daily, establish incentives for going to school on time, and withhold cheerleading when the student was late or did not attend school, the IEPs were more directive, stating that it was "crucial" for the parent to do these things in order to prevent the non-attendance cycle from starting (*id.*).

In addition, the hearing record reflects that the district sought input from the student's teachers, the parent, and the student in its attempts to understand the causes of the student's attendance issues. A summary of a September 2015 CSE meeting reflected that the CSE had planned to complete an FBA and develop a BIP with input from the parent and student (Dist. Exs. 19 at p. 1; 20 at p. 2, Parent Ex. I).¹⁵ In particular, the committee sought input from the parent regarding antecedent behaviors that trigger the student's school avoidance, since they occurred in the home (Parent Ex. I). The BIP and summary of the September 2015 CSE meeting reflected that of the 15 days during which school had been in session for the 2015-16 school year, the student was absent 42% of the time and tardy 63% of the time (Dist. Exs. 19 at p. 1; 20 at p. 1).¹⁶

As discussed above, the October 2015 settlement agreement required the district to pay for a neuropsychological evaluation conducted by an independent evaluator and convene a CSE to review the results and required the parent to "support the BIP" (Dist. Ex. 26 at pp. 2-3).

The hearing record reflects that the student's BIP was completed and signed on October 19, 2015 (Dist. Ex. 20 at p. 3).¹⁷ According to a worksheet used to develop the BIP, the parent was given a functional analysis screening tool to complete, to identify what triggered the student's school avoidance on October 19, 2015 (Parent Ex. P at p. 1). Notes on the worksheet indicate that the parent asked to complete the form at home and the district requested that the parent do so by November 12, 2015 (Parent Ex. P at p. 1; Dist. Ex. 30). The functional analysis screening tool was divided into two sections, one where the informant (in this case the parent) was asked to answer four questions related to the informant/client's (the student's) relationship and a second section designed to elicit information about the problem behavior (id.). The parent answered two of the informant/client relationship questions and then wrote "N/A" next to the remaining questions (id.).¹⁸ The parent testified that she reviewed the BIP with school staff and that they gave her a form to take home and fill out but she expected a telephone call to review it (Tr. pp. 1176-77).

A private neuropsychologist evaluated the student in January and February 2016 and completed a one-page summary of her findings on February 17, 2016 (Parent Ex. V1; Dist. Exs. 41; 61 at p. 1). Although dated February 2016, the district did not receive a copy of the complete independent neuropsychological evaluation until April 27, 2016 (Dist. Ex. 61 at pp. 1-12).

Despite acknowledging that the district did not receive the independent neuropsychological evaluation until after the relevant CSE meeting, IHO 2 determined that it conveyed an accurate understanding of the student as of October 15, 2015, and reflected what the district would have known had it undertaken a comprehensive and appropriate psychological assessment (IHO

¹⁵ On September 25, 2015, the CSE convened for a program review to assess the student's performance and discuss the current program and services (Dist. Ex. 19 at p. 1). Although the parent was invited to the meeting and it was scheduled at her preferred time, the parent did not attend (id.).

¹⁶ On October 9, 2015, the CSE reconvened for a program review, intending to review the BIP with the parent and student (Dist. Ex. 27 at p. 1). The parent and student were invited to the meeting, but did not attend (id.).

¹⁷ The parent's signature is not dated. The student signed the BIP on October 26, 2015. The district staff signed the BIP on October 19, 2015 (Dist. Ex. 20 at p. 3).

¹⁸ The parent answered "N/A" to questions such as, "Do you interact with the person daily?" "In what situations

Decision at p. 83). I disagree. First, the evaluative information set forth in the independent neuropsychological evaluation, was not available to the CSE, and therefore should not have been used to assess the CSE's recommendations at the time they were made (see C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] ["a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]; see R.E., 694 F.3d at 193). Second, the neuropsychological evaluation took place five months into the school year and was not necessarily an accurate representation of the student as of the date of the August 2015 CSE meeting, which took place prior to the start of the school year. For example, the neuropsychologist noted a couple of changes over the course of the 2015-16 school year in testified that, at the time she saw the student, the student's attendance had dropped off to the point where interviewing the student's teachers regarding how the student performed in school was no longer important and the student also had stopped participating in cheerleading practice (Tr. pp. 658, 661-62).¹⁹ Additionally, although the neuropsychologist testified that she believed the student "most likely always had some social anxiety" (Tr. p. 670), she also explained that the student's social anxiety created a cycle where the student became "more withdrawn, less functional, and more isolated" over time (Tr. pp. 712-13). Under these circumstances, it is dubious to use the February 2016 neuropsychological evaluation to assess the student's functioning at the time of the August 2015 CSE meeting.

Additionally, the neuropsychologist failed to adequately explain how her diagnostic impression of a social anxiety disorder and recommendations for a residential placement were derived from results of the objective testing conducted during the private neuropsychological evaluation (see Dist. Ex. 61).²⁰ Upon review, the neuropsychologist conducted the same or similar cognitive and achievement testing as the district, obtaining nearly identical results (compare Dist. Ex. 61 at pp. 9-10, with Dist. Ex. 3 at pp. 3-6).

With regard to social-emotional functioning, which IHO 2 found particularly revelatory, the independent neuropsychologist utilized the same BASC-2 self-report of personality component as the district and reported results, that with one exception, were generally consistent with the June 2014 psychoeducational evaluation (compare Dist. Ex. 61 at p. 11, with Dist. Ex. 3 at pp. 7-8). The student's scores on the district's administration of the BASC-2 SRP-A placed her well within the average range in both clinical and adaptive scales, with little variability shown within each subscale (Dist. Ex. 3 at p. 7). Similarly, the student's scores on the independent neuropsychologist's administration of the BASC-2 SRP-A placed her within the average range in both clinical and adaptive scales, with some variability within each subscale, but no findings of

do you usually interact with the person?" (Dist. Ex. 30).

¹⁹ According to the neuropsychologist, the student reported that she was not participating in cheerleading in tenth grade because she missed one of the tryout sessions and the coach did not like her and did not want her to be on the team (Tr. p. 663-64; Dist. Ex 61 at p. 4).

²⁰ The neuropsychologist defines a social anxiety disorder as "a condition where social interaction and social environments, settings and situations where the person is likely to encounter other people are extremely anxiety-provoking" (Tr. p. 631). She further noted that with the disorder there was an intense sensitivity to criticism and a fear of being embarrassed that eclipsed other kinds of processing (Tr. pp. 631-32).

clinical significance were noted, except for the student's attitude toward teachers (Dist. Ex. 61 at p. 11).

The June 2014 psychoeducational evaluation indicates that the district's school psychologist administered the SRP-A on April 29, 2014 (Dist. Ex. 3 at p. 7). The school psychologist included the student's scores on the individual subscales in addition to five composite scores (Emotional Symptoms Index, Internalizing Problems, School Problems, Personal Adjustment, Inattention/Hyperactivity)(Dist. Ex. 3 at pp. 7-8). The district's school psychologist reported clinical subscale T-scores for the student ranging from 34 to 52, which she reported were all within the average range (Dist. Ex. 3 at pp. 7-8). On the adaptive subscales, the district's school psychologist reported T-scores for the student ranging from 47 to 60, which she also reported were all within the average range (*id.*). Similarly, the student's composite scores were 36 for Internalizing Problems, 40 for School Problems, 39 for Inattention/Hyperactivity and 55 for Personal Adjustment, all within the average range (*id.*). On the ESI, the student scored a 36, which according to the school psychologist was in the average range and suggested that the student's overall emotional development was in the average range (Dist. Ex. 3 at p. 7).

The independent neuropsychologist administered the BASC-2 SRP-A in February 2016 (Dist. Ex. 61 at p. 2). The independent neuropsychologist only provided the individual subscale scores for the School Problems composite and reported the student's total score for the remaining four composites (*id.* at p. 10). The student scored 46 for Internalizing Problems, 40 for Inattention/Hyperactivity, and 59 for Personal Adjustment, all falling within the average range (*id.*). On the School Problems composite, the independent neuropsychologist reported clinical subscale T-scores of 55 for Attitude to School, 82 for Attitude to Teachers and 42 for Sensation Seeking, and a composite T-score of 63 (*id.*). For the ESI, the independent neuropsychologist reported a composite T-score of 44 for the student, which according to the neuropsychologist's report, was not deemed to be clinically significant (Dist. Ex. 61 at p. 11).

The district's school psychologist reported that the student got along well with her teachers and peers and that the student herself attributed her attendance issues to late cheerleading practices, homework, and an aversion to getting up in the morning. (Dist. Ex. 3 at p. 6). Similarly, the neuropsychologist indicated that the parent reported no concerns about depression, anxiety, or irritability, that the student denied feeling anxious or depressed, and that there was no indication of mood or behavioral issues in the academic records, which consistently described the student as pleasant and socially successful (Dist. Ex. 61 at p. 6). Testimony by the student's 2015-16 special education teacher that the student appeared to be comfortable in the class setting and did not appear to be suffering from school phobia or social anxiety in class supports those descriptions of the student (Tr. pp. 816, 818, 821-23). Nevertheless, the neuropsychologist explained that the student's BASC-2 and MACI²¹ responses reflected social performance anxiety, low self-esteem, emotional immaturity, eating disorder, and a negative attitude toward school (Dist. Ex. 61 at p. 7).

²¹ The neuropsychologist also reported utilizing the MACI, which the district did not use to assess the student. However, the neuropsychologist failed to report the student's scores or range of functioning as measured by this assessment in her evaluation, despite relying on them to determine the student's condition (Dist. Ex. 61 at pp. 1-12).

Considering that the assessment results obtained by the independent neuropsychologist yielded almost no findings of clinical significance and that once the student was at school she did not experience mood or behavioral issues and participated in school activities, I find the neuropsychologist's conclusion that the student's functioning was so severely impaired by a social anxiety disorder that she required placement in a residential setting to be contrary to the hearing record (compare Dist. Ex. 61 at p. 8, with Tr. pp. 816, 818, 821-23; see Parent Ex. Y at p. 1; Dist. Exs. 2 at pp. 1-2, 3 at p. 6, 9 at pp. 1, 5-6, 10 at p. 1, 14 at pp. 5-6, 19 at pp. 1, 6-7). The neuropsychologist's conclusion is irreconcilable with the otherwise unrefuted descriptions of the student's pleasant affect and appropriate behavior when present in school (Parent Ex. Y at p. 1; Dist. Exs. 2 at pp. 1-2; 3 at p. 6; 9 at pp. 1, 5-6; 10 at p. 1; 14 at pp. 5-6; 19 at pp. 1, 6-7).

Based on the foregoing, the district had sufficient information regarding the student at the August 2015 CSE meeting to identify the student's needs related to her disability. Additionally, IHO 2's reliance on a private neuropsychological evaluation conducted five months after the start of the school year to refute the information available at the time of the CSE meeting was an improper use of retrospective evidence and even if considered against the evidence available to the CSE it did not weigh so significantly as to render the available information regarding the student's ability to function while in school inadequate.

2. Appropriateness of Program and Placement

IHO 2 further determined that the district failed to recommend an appropriate placement, which resulted in a denial of a FAPE to the student for the 2015-16 school year. Specifically, IHO 2 determined that the district knew or should have known, as of October 15, 2015, that the student's primary disability was a social anxiety disorder and that the district should have crafted an IEP designed to address such a disorder.

As addressed above, the neuropsychologist's diagnosis of a social anxiety disorder must be considered along with the information available to the CSE, which more accurately described the student's functioning in school. Upon review, the August 2015 IEP and September 2015 IEP amendments were appropriate.

As described above, the CSE convened on June 10, 2015 to conduct an annual review and plan for the 2015-16 school year (Dist. Ex. 9 at p. 1). The summary of the June 2015 CSE meeting reflects that at the time of the meeting the student was failing her classes and was in the process of making up work in order to be eligible for summer school (id.; see Dist. Ex. 10 at pp. 1-3). Concerns regarding the student had resulted in a series of building level and CSE meetings as staff had attempted to assist the student in managing her school work and improving her attendance (Dist. Ex. 9 at p. 1). The parent indicated that she did not want the student to receive counseling, but acquiesced to the committee's suggestion that the student would benefit from counseling services available in the building (id.; see Dist. Ex. 63 at p. 2). The school psychologist's record of contact with the student was discussed at the June 2015 CSE meeting and her notes reflect that she was in favor of a more supportive and therapeutic placement, but the parent denied that the student's "overwhelmed" feelings were psychological in nature and the parent objected to a more supportive placement (Dist. Ex. 63 at p. 3).

The CSE convened again in August 2015, to review the student's courses and to revise the student's IEP based on new information that the student did not earn any credits during summer school (Tr. p. 155; Dist. Ex. 14 at p. 1). The August 2015 CSE recommended one daily 45-minute session of ICT services for social studies and one daily 45-minute session of a 15:1 special class placement for both science and social studies (Dist. Ex. 14 at pp. 1, 8).²² To address the student's deficits regarding organizational skills, the August 2015 IEP recommended one daily 45-minute session of resource room in a group of five (Tr. p. 156; Dist. Ex. 14 at pp. 1, 8). To further address the student's organizational skill deficits as well as deficits in processing speed, the August 2015 IEP included the following modifications: check-ins for understanding (student encouraged to ask clarifying questions), refocusing and redirection, support for organizational skills (assistance maintaining notebooks and agenda), and a copy of class notes (Dist. Ex. 14 at pp. 8-9). To address the student's "overwhelmed" feelings, the August 2015 IEP recommended one 30-minute session per week of counseling in a group of five (id. at pp. 1, 8). The August 2015 IEP included a social-emotional annual goal focusing on identifying student strengths and weakness and study skills, and annual goals focused on arriving "on time" for class, independently seeking adult assistance regarding assignments, and timely homework completion (id. at pp. 7, 8). The August 2015 IEP identified that the student needed strategies, including positive behavioral interventions, supports and other strategies to address behaviors that impede the student's learning (id. at p. 6). Under management needs the August 2015 IEP acknowledged the student's attendance issues and school work avoidance, stated the importance of the student attending school regularly, and identified resource room and after school extra help as supports the student could utilize (id.). The August 2015 IEP also included a coordinated set of transition activities which were designed to improve the student's self-sufficiency, independence and school attendance (id. at pp. 10-11).

In addition to the program offered as part of the August 2015 IEP, the hearing record reveals that during the 2015-16 school year the district made additional attempts to address the student's attendance issues. In September 2015, the district conducted an FBA and developed a BIP, which targeted the student's attendance issues (Dist. Ex. 20 at pp. 1-3; Parent Ex. I at pp. 1-2). In September 2015, the CSE was convened to assess the student's current performance, evaluate the current program and services, update the current IEP, and finalize the BIP with input from the parent and the student (Dist. Ex. 19 at p. 1). The committee noted that attendance and tardiness continued to be an issue for the student (id.). The summary of the September 2015 CSE meeting stated that the student had refused the offered building-level counseling sessions (id. at p. 2). In October 2015, a CSE meeting was scheduled as a program review and as a second attempt to review the BIP, which was developed to assist the student in improving her ability to attend school (Dist. Ex. 27 at pp. 1, 14). By October 26, 2015, the BIP, along with a corresponding student contract agreement regarding attendance, was signed and agreed upon by all parties (Dist. Exs. 20 at pp.1-3; 28).

In December 2015, the CSE scheduled a meeting to evaluate the effectiveness of the BIP; however, the parent did not attend the meeting stating that she would not attend a meeting until the independent neuropsychological evaluation was completed (Dist. Ex. 35 at p. 1). The committee discussed the student's BIP and potential revisions; however, no revisions were made because the team wanted the student and parent to be a part of any changes (id.). An attempt was

²² The record reflects that the student was to take global history 9 and global history 10 simultaneously (Dist. Ex. 14 at p. 1).

made to schedule another CSE meeting for February 2016, but the parent canceled the meeting (Dist. Exs. 36 at p. 1; 36A).

The hearing record reflects that the CSE continued to meet after the parent filed her due process complaint notice in this matter and convened on March 31, 2016 to discuss the student's progress and placement and to review the one-page summary provided by the neuropsychologist who conducted the IEE (Dist. Ex. 51 at p. 1; see Dist. Ex. 41). The March 2016 IEP included changes made to the student's program in response to the information in the February 2016 evaluation summary, such as the addition of individual counseling, parent training, and social-emotional annual goals to address the student's attendance issues and any stress, feelings, or fears which may have interfered with the student's ability to attend school (Dist. Ex. 51 at pp. 1, 2, 9, 10).²³ In addition, the meeting comments indicated that the team agreed to consider a more supportive placement option for the student which would address her attendance issues (Dist. Ex. 51 at p. 2; see Tr. pp. 575-76; Dist. 9 at p. 2).

Based on the foregoing, the hearing record supports finding that during the timeframe after the parties entered into the October 15, 2015 stipulation of settlement, the district took appropriate steps to address the student's needs, including those related to the student's non-attendance. The district was responsive to the evaluative information available to it in convening CSEs, seeking information from the parent and the student, and altering its recommendations based on the available information (see Dist. Exs. 9; 14; 16; 19 - 20; 23; 27; 28; 35-36; 444; 48; 51; 63-64).

VII. Conclusion

A review of the evidence in the hearing record reveals that the district offered the student a FAPE from October 15, 2015 through the end of the 2015-16 school year.

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

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated September 3, 2016 is modified by reversing those portions which determined that the district failed to offer the student a FAPE for the 2015-16 school year and ordered the district to revise the student's IEP.

Dated: **Albany, New York**
 November 10, 2016

CAROL H. HAUGE
STATE REVIEW OFFICER

²³ Although the March 2016 IEP's meeting comments noted the addition of parent training, this service is not included on the IEP under special education programs and related services (Dist. Ex. 51 at pp. 1, 2, 10).