The University of the State of New York

The State Education Department
State Review Officer
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No. 21-226

Application of the BOARD OF EDUCATION OF THE ELDRED 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:
Shaw, Perelson, May & Lambert, LLP, attorneys for petitioner, by Michael K. Lambert, Esq.

Michael Gilberg, Esq., attorney for respondents

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Franklin Academy (Franklin) for part of the 2019-20 school year. The parents cross-appeal from the IHO's determination which denied their request for full tuition reimbursement at Franklin for the 2019-20 and 2020-21 school years. The appeal must be sustained. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The student has received diagnoses of autism spectrum disorder, attention deficit hyperactivity disorder (ADHD) inattentive type, specific learning disorder with impairment in

reading and impairment in written expression, and chronic kidney disease (Parent Ex. A at pp. 2, 17-18; Dist. Exs. 39 at pp. 1, 3; 41 at p. 4).[1]

The student received speech-language therapy through the Early Intervention Program (EIP) and continued to receive speech-language therapy through the Committee on Preschool Special Education (CPSE) (Parent Ex. A at pp. 1-2). On October 31, 2013, a CSE determined the student's initial eligibility for school-aged special education services as a student with an other health-impairment (see generally Dist. Ex. 3). From October 2013 (second grade) and continuing through the 2017-18 school year (sixth grade), each of the CSEs for the respective school years recommended related services, supplementary aids and services, and testing accommodations to address the needs of the student (Dist. Exs. 3 at pp. 1, 7-9; 4 at pp. 1, 10-11; 5 at pp. 1, 8-10; 6 at pp. 1, 8-10; 7 at pp. 1-2, 8-10; 8 at pp. 1, 11-13; 9 at pp. 1, 11-13; 10 at pp. 1, 15-18). On January 12, 2018, district staff conducted a functional behavioral assessment (FBA) and developed a behavioral intervention plan (BIP) to address the student's difficulties with antagonizing and disruptive behaviors during unstructured times (Dist. Exs. 10 at pp. 1, 2; 89).

A CSE convened on May 30, 2018 to conduct the student's annual review and develop an IEP for the 2018-19 school year (seventh grade) (see generally Dist. Ex. 11). Finding the student remained eligible for special education as a student with an other health-impairment, the May 2018 CSE recommended that the student receive a 10-month program of integrated co-teaching (ICT) services in English language arts (ELA), math, science, and social studies together with daily resource room services (Dist. Ex. 11 at pp. 1, 10, 11; see Dist. Ex. 10 at p. 1). The May 2018 CSE also recommended two 30-minute sessions per month of small group (5:1) counseling and two 30-minute sessions per month of individual counseling (Dist. Ex. 11 at pp. 1, 10). Additionally, the May 2018 CSE recommended supplementary aids and services consisting of refocusing and redirection, checks for understanding, preferential seating, copy of class notes, use of word processor, word banks, a multisensory teaching approach, and allowing the student time to generate a response (id. at pp. 10-11). Further, recommendations were made for access to a portable word processor, one occupational therapy (OT) consultation per quarter, and testing accommodations (id. at pp. 11-12).

On September 26, 2018, a CSE convened to conduct a review meeting at the parents' request (see generally Dist. Ex. 12). In addition to the previous recommendations for ICT services in ELA, math, science and social studies and daily resource room services, the September 2018 CSE recommended a 30-minute 12:1 special class in reading (FastForWord program) every other day (compare Dist. Ex. 11 at pp. 1, 10, with Dist. Ex. 12 at pp. 1-2, 12). The related services, supplemental aids and services, assistive technology, and testing accommodations all remained the same as the May 2018 IEP except that the September 2018 CSE additionally recommended that the student have access to speech-to-text software as needed (compare Dist. Ex. 11 at pp. 10-12, with Dist. Ex. 12 at pp. 12-14).

[1] According to an August 2019 psychiatric evaluation report, the student had initially received a diagnosis of anxiety disorder, which was later "dropped" as it was thought that the student's anxiety could have been part of the autism spectrum diagnosis (Dist. Ex. 41 at pp. 2-3, 5; see Parent Ex. A at p. 2). At the time of the report, it was "unclear" if the student had "generalized anxiety" although the psychiatrist acknowledged that the student did "get anxious about school, most recently in the context of being bullied" (Dist. Ex. 41 at p. 5).

On January 4, 2019, a CSE meeting was held to review the results of a speech-language evaluation (Dist. Ex. 13 at pp. 2-5; see Dist. Ex. 38).[2] The speech-language pathologist reported to the CSE that the student exhibited difficulty with working memory and phonological awareness and segmentation (Dist. Exs. 13 at p. 2; 38 at pp. 1, 3). Due to the student's "overall mild auditory processing impairment and mild language impairment," which impacted his "ability to write clear and concise text," the January 4, 2019 CSE recommended adding one 30-minute session per week of small group (5:1) speech-language therapy to his IEP (compare Dist. Ex. 12 at pp. 1, 12, with Dist. Ex. 13 at pp. 1, 15). In addition to the supplementary aids and services previously included on the student's IEP, the January 4, 2019 CSE recommended that the student be provided an additional set of books (compare Dist. Ex. 12 at pp. 12-14, with Dist. Ex. 13 at p. 15). Also at the January 4, 2019 meeting, the CSE discussed that the student was exhibiting defiant behaviors (shutting down and refusing to do work), and on January 11, 2019 the school psychologist updated the student's FBA and BIP (Dist. Ex. 13 at pp. 1, 2; see Dist. Ex. 90). Thereafter, the CSE convened a program review on January 17, 2019 to review the OT evaluation (sensory profile) results (Dist. Ex. 13 at pp. 1-2, 5; see Dist. Ex. 37).

The CSE convened a program review on March 15, 2019 to discuss parental concerns; however, no changes were made to the program recommendations on the student's IEP (compare Dist. Ex. 13 at pp. 1, 14-18, with Dist. Ex. 14 at pp. 1-2, 15-19).

After a disciplinary incident on May 9, 2019, the student was suspended for five school days (Dist. Ex. 55).[3] Following the suspension, the student was removed from school by his parents for the remainder of the 2018-19 school year (Parent Exs. N at p. 2; P at p. 1; Dist. Exs. 15 at p. 2; 90 at p. 14).

A CSE convened on June 24, 2019 for the student's annual review and to develop an IEP for the 2019-20 school year (eighth grade) (see generally Dist. Ex. 15). At the June 2019 CSE meeting, the parents' attorney requested that the student's classification be changed from other health-impairment to autism and expressed "DASA concerns" (id. at p. 2).[4] In addition, the parents, through their attorney, requested OT, speech-language, psychiatric, and FBA independent educational evaluations (IEEs) (id.). For the 10-month 2019-20 school year, the June 2019 CSE recommended that the student receive ICT services in ELA, math, social studies, and science, daily resource room services, and 30-minutes of 12:1 special class instruction in the FastForWord reading program every other day (id. at pp. 1, 20, 22). In addition, the June 2019 CSE recommended related services of two 30-minute sessions per month of small group (5:1)

[2] The January 4, 2019 CSE meeting information summary indicates that the CSE was also looking to review the results of the November 2018 OT evaluation; however, the occupational therapist was not available and the CSE decided to reconvene at a later time when she could be present (see Dist. Exs. 13 at pp. 2, 3; 37).

[3] There appears to be some confusion whether there were one or two incidents involving the student on May 9, 2019. The incident depicted in a video (Dist. Ex. 127) occurred on May 9th at 11:19 a.m. (see Dist. Ex. 113). Later that same day at 12:06 p.m., the student hit another student and upon questioning did admit to striking the other student, for which he received the five day out of school suspension (Dist. Exs. 55; 109).

[4] The Dignity for All Students Act (DASA) imposes specific obligations on school districts with regard to the prevention and investigation of harassment and bullying (Educ. Law §§ 10-18).

counseling, two 30-minute sessions per month of individual counseling, and two 30-minute sessions per week of small group (5:1) speech-language therapy (id. at p. 21). In addition to the supplementary aids and services recommended when the CSE last convened in May 2019, the June 2019 CSE recommended check-in and check-out for organization (compare Dist. Ex. 14 at pp. 16, with Dist. Ex. 15 at p. 21). Further, the June 2019 CSE recommended continuing the special transportation accommodation of seating in the front of the bus (compare Dist. Ex. 14 at p. 19, with Dist. Ex. 15 at p. 23).

The student did not return to the district schools for the 2019-20 school year (Parent Exs. TT at p. 3; UU at p. 1). On or about September 6, 2019, district staff met with the parents and discussed a safety plan the district had developed in the event the student returned to the district (Tr. pp. 271-72, 1875-82; Dist. Ex. 59). The parents did not believe the plan was adequate and did not sign the plan in order for it to be implemented (Tr. pp. 1535-36; Dist. Ex. 59 at pp. 2-4).

On October 17, 2019, the parents notified the district of their intent to unilaterally place the student at Franklin for the remainder of the 2019-20 school year at public expense as the parents alleged that the district could not provide a program that met the student's academic, emotional, social, or safety needs (Parent Ex. Q).[5] The student began attending Franklin on November 4, 2019 (Parent Ex. R at p. 1; see Dist. Exs. 114-115).

On November 20, 2019, a CSE convened to review the results of the IEEs (speech-language, OT, psychiatric) (see generally Dist. Ex. 16). Another discussion was had pertaining to the student's classification with the parents' attorney again requesting a change of classification from other health-impairment to autism (id. at pp. 6-7). The CSE recommended continuing the classification of other health-impairment (id. at p. 7). The November 2019 CSE continued to recommend daily ICT and resource room services and 12:1 special class reading instruction every other day, together with counseling and speech-language therapy (compare Dist. Ex. 15 at pp. 1, 20-21, with Dist. Ex. 16 at pp. 1, 27). The November 2019 CSE recommended the same supplementary aids and services as the June 2019 CSE (compare Dist. Ex. 15 at p. 21 with Dist. Ex. 16 at pp. 27-28). In addition, the November 2019 CSE recommended one 30-minute session per week of individual OT and one 30-minute session per week of small group (3:1) social skills training (Dist. Ex. 16 at p. 27). Also recommended by the CSE was a once monthly indirect OT consultation and a quarterly 60-minute indirect counseling consultation (id. at p. 28).

A CSE convened on May 7, 2020 for an annual review and to develop the student's IEP for the 2020-21 school year (see generally Dist. Ex. 17). The meeting information summary attached to the IEP indicated that the parents had limited information from Franklin pertaining to the student's academics beyond what was in the progress reports and the CSE recommended that the annual goals from the November 2019 IEP be carried over for the 2020-21 school year (compare Dist. Ex. 16 at pp. 25-27, with Dist. Ex. 17 at pp. 2, 12-14). The May 2020 CSE continued to recommend ICT services for ELA, math, social studies, and science; resource room services; 12:1 special class reading instruction; counseling, speech-language therapy, OT, and social skills group training (compare Dist. Ex. 16 at p. 27, with Dist. Ex. 17 at pp. 1, 14). According to the meeting

[5] Franklin is an out-of-State nonpublic residential school which has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

information summary, the May 2020 CSE also recommended a shared aide to accompany the student "during all non-core classes and less structured time" (Dist. Ex. 17 at p. 2).[6] The supplementary aids and services remained the same as the November 2019 IEP (compare Dist. Ex. 16 at pp. 27-28, with Dist. Ex. 17 at pp. 14-15). The student continued attending Franklin through the 2020-21 school year (see Dist. Ex. 116).

A. Due Process Complaint Notice

In a due process complaint notice, dated December 9, 2020, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2018-19, 2019-20, and 2020-21 school years (see generally Dist. Ex. 1).

In general, the parents alleged that the district failed to develop and implement an appropriate IEP for each of the three school years at issue (Dist. Ex. 1 at p. 2). The parents asserted that the student was without a proper placement such as Franklin since the 2018-19 school year (id.). The parents further alleged that the district failed to ensure the student's safety, develop appropriate IEPs to meet the student's needs, properly evaluate, or address all areas of the student's disability (id.). It is the contention of the parents that the district did not "accept" the student's diagnosis of autism thereby failing to properly address the student's needs (id. at pp. 2, 4-5, 22).

Another issue raised by the parents was that beginning with the June 2019 CSE meeting, the district refused to change the student's classification from other health-impairment to autism despite the student receiving an autism diagnosis multiple times over the years (Dist. Ex. 1 at pp. 3, 14-15). At the November 20, 2019 CSE meeting the parents again requested a change of the student's classification from other health-impairment to autism and asserted that in failing to change the classification the CSE dismissed the student's autism "as a real disability" (id. at pp. 12, 15, 22). In connection with the May 7, 2020 CSE meeting the parents alleged that the CSE again failed to change the student's classification of other health-impairment to autism (id. at p. 13).

Additionally, the parents made some specific allegations with respect to the various IEPs. In connection with the FBA developed in January 2018, the parents claim that the behaviors to be addressed, i.e., antagonizing and inappropriate behaviors, were "typical" of students with autism and therefore the district did not understand or address these behaviors as part of the student's disability or with the appropriate interventions (Dist. Ex. 1 at pp. 4-5, 15, 22). The parents also alleged that during the January 4, 2019 CSE meeting the student's special education teacher stated she would not provide the student with notes before class, which was in direct contravention with the September 2018 IEP (id. at p. 5). Additionally, at this same meeting the parents alleged that staff had not shown the student how to use his speech to text program (id. at p. 6). The parents contended that at the June 24, 2019 CSE meeting the CSE refused to consider an out of district placement when "it was clear another school would be less restrictive" for the student (id. at p. 9). The parents alleged that the October 2019 speech-language IEE found "pragmatic language

[6] The recommendation for a shared aide was not listed in the section of the IEP that summarized the recommended special education programs and related services (see Dist. Ex. 17 at pp. 1, 14-15). According to the CSE meeting information summary, the parents and the parents' attorney expressed their disagreement with the recommendation for shared aide services (id. at p. 2).

challenges" that affected "both [the student's] receptive and expressive language which the district's speech evaluations failed to identify" and the student required more speech-language interventions than the district previously recommended (id. at pp. 11-12). Additionally, the parents contended that the May 2020 CSE's recommendation for a shared aide during non-core classes would "make him stand out and feel different from his peers and make him a further target for bullying" (id.).

In connection with a 2017 private neuropsychological evaluation, the parents contended that the district largely ignored the recommendations made therein (Dist. Ex. 1 at p. 3). The parents had another private evaluation conducted in December 2018 that again confirmed the student's diagnosis of autism and made recommendations pertaining to the student's social skills, speech-language intervention, and "sensory vulnerabilities"; however, the parents alleged that the district again ignored these recommendations (id. at p. 5). Further, the student underwent another neuropsychological evaluation on July 13, 2020, and the parents alleged that the district was provided the neuropsychological evaluation report but "disregarded" it and sought to conduct its own evaluations (id. at pp. 13-14).

One of the main concerns raised by the parents in their due process complaint notice was that the student was bullied by both staff and peers and the district dismissed their concerns and blamed the student for the bullying (Dist. Ex. 1 at pp. 2, 16). In the 24-page due process complaint notice the parents alleged numerous incidents of bullying and behavioral referrals the student received (id. at pp. 3-13). As a result of the bullying the parents alleged that the student suffered depression and a fear of attending school which created a hostile environment for the student (id. at pp. 2-3). The parents also made several claims that the district did not timely respond to the DASA complaints they filed (id. at pp. 4-5, 8, 16-18, 22). Another concern of the parents was an incident that occurred on May 9, 2019, wherein the student was involved in an altercation with another student (id. at p. 6). As a result of the May 9th incident, the parents alleged that the school was a hostile environment, and that the student could no longer be safe in the district (id. at p. 7).

On September 6, 2019, the district offered a safety plan for the student, but the parents alleged that the safety plan was inadequate and "placed too much responsibility" on the student (Dist. Ex. 1 at pp. 10-11, 17). Specifically, the parents alleged that the safety plan placed a burden on the student to report bullying when the student's autism prevented him from reading social cues "to be able to determine when another student [wa]s bullying him" and that this was another example of the district "not understanding [the student's] disability" (id. at p. 11). Furthermore, according to the parents, the safety plan singled the student out and made him appear "different" from his peers (id. at pp. 11, 17).

The parents alleged that the district committed "retaliatory action" towards the student and his parents by calling child protective services (CPS) allegedly in response to the parents' complaints of bullying (Dist. Ex. 1 at pp. 16-17). In addition, the parents alleged that the district "harassed" the parents by continually sending them notices to reevaluate the student (id. at pp. 18-19).

Finally, the parents argued that Franklin was an appropriate residential placement for the student (Dist. Ex. 1 at pp. 19, 23). In their due process complaint notice the parents conceded that the student "d[id] not require a residential placement" but asserted that there was no other

appropriate placement within commuting distance for the student (id. at p. 20). The parents argued that the residential component of the placement has allowed the student to "improve his social skills and remediate some of the emotional damage and social deficits caused by the bullying" within the district (id.). The parents also claimed that the student has shown progress academically and as a result of proper behavior interventions his behaviors have reduced (id. at pp. 20-21). Furthermore, the parents argued that equitable considerations weighed in favor of an award of tuition reimbursement as they cooperated with the district (id. at pp. 21, 23).

As relief, the parents sought tuition reimbursement for the student's placement at Franklin for the 2019-20 and 2020-21 school years, together with mileage costs for the transportation of the student during both school years (Dist. Ex. 1 at p. 23). Additionally, the parents requested placement of the student at Franklin for the "balance" of the student's education through the 2023-24 school year "with a possible gap year in 2024-25" together with transportation for each of those school years (id.). Further, the parents sought reimbursement of the July 13, 2020 private neuropsychological evaluation, the student's therapy beginning from May 14, 2019 at two sessions per month, and homeschooling for the beginning of the 2019-20 school year (id.).

In a letter dated January 11, 2021, the district submitted an answer to the parents' due process complaint notice (see generally Dist. Ex. 2). Generally, the district denied the claims contained within the due process complaint notice and asserted that the CSEs' developed "well thought out, structured and effective" IEPs "that were reasonably calculated to meet the [s]tudent's educational needs in the least restrictive environment" (id. at pp. 1-3). The district also asserted that the classification of other health-impairment was appropriate (id. at p. 3). Further, the district asserted that it did not engage in retaliatory actions or harassment against the student or his parents (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened on March 1, 2021 and concluded on July 8, 2021 after 10 days of proceedings resulting in a decision dated October 1, 2021 (Tr. pp. 1-3088).[7, 8]

At the outset of the decision, the IHO clarified that the issues were limited in the case as follows: "alleged misclassification of [the] [s]tudent as [other health-impair[ed]], rather than [a]utistic, the impact of this on his programming, whether [the] [s]tudent was denied a FAPE because of alleged bullying, and retaliation and harassment" (IHO Decision at p. 18). In addition, the IHO noted that the parents' due process complaint notice did not contain allegations pertaining to the parents' meaningful participation and proper evaluation of the student and that, therefore, those issues would not be addressed in the decision (id. at pp. 18, 27).

[7] On February 11, 2021, the IHO set forth a scheduling order for the conduct of the impartial hearing (see Interim IHO Order at pp. 1-6).

[8] The IHO issued an amended decision bearing the same date. According to the district, the IHO amended her decision for the purpose of clarifying two points in the original decision and such amendments did not affect the substance of the original decision (Req. for Rev. at p. 2). For purposes of this decision, citations to the IHO decision refer to the amended decision.

The IHO first addressed the issue of classification and whether the services offered to the student "met the standard under the IDEA to provide an appropriate program and services to address [the] [s]tudent's needs, regardless of the classification" (IHO Decision at pp. 19-20). For the 2018-19 school year, the IHO recognized that the parents did not request a change in classification to autism during the CSE meetings held that for that school year (May 30, 2018; September 26, 2018; January 4, 2019; January 17, 2019; March 15, 2019) (id. at pp. 20-23). The IHO held that for the 2018-19 school year the student's classification remained other health-impairment and the district's witnesses "credibly" testified that the "program developed was based on [the] [s]tudent's needs, [and] addressed his needs with the appropriate program recommendations, related services, goals, modifications and accommodations" (id. at p. 23). The IHO found nothing in the hearing record to demonstrate that the district did not address the student's "unique educational needs" (id.). However, the IHO held that the district "failed to adequately address concerns about bullying" and therefore, the district failed to offer the student a FAPE for the 2018-19 school year (id. at pp. 23, 48).

The IHO next reviewed the 2019-20 school year and pointed out that the first request for a change in classification was raised at the June 2019 CSE meeting (IHO Decision at p. 23). The IHO agreed with the district's recommendation that the student be deemed eligible for special education as a student with an other health-impairment and held that the CSE "took into account all of [the] [s]tudent's needs, [and] determined that the classification of [other health-impairment] was more appropriate" (id. at p. 25). The IHO further held that the IEPs during the 2019-20 school year addressed the student's needs in the areas of reading, social/emotional, and attention (id.). The IHO held that the June 2019 IEP "did not appropriately address bullying issues" and failed to offer the student a FAPE for the 2019-20 school year, but the district did address the bullying in September 2019 (id.). Accordingly, the IHO held that the district "partially" failed to offer the student a FAPE for the 2019-20 school year, specifically for the period between the June 24, 2019 CSE meeting and September 6, 2019 safety plan meeting (id. at pp. 25, 48).

Next, the IHO examined the 2020-21 school year (IHO Decision at pp. 26-27). The IHO acknowledged the parents' argument that the July 2020 private neuropsychological evaluation report stated that the student should be classified as a student with autism (id. at p. 26). But the IHO noted that this July 2020 neuropsychological evaluation report was not available to the May 2020 CSE (id.). The IHO further held that based upon the "evaluative information" available to the May 2020 CSE and the fact that the CSE offered additional support to the student during unstructured time "and otherwise addressed his needs," the May 2020 IEP met the FAPE requirements for the 2020-21 school year (id. at pp. 26, 48).

The IHO then addressed the parents' concerns pertaining to bullying and whether the district's failure to address the bullying resulted in a denial of FAPE to the student (see IHO Decision at pp. 27-36). Initially, the IHO held that the district's claims that it was not aware of the bullying had "no merit," but the IHO found that the district did take actions to address the parents' concerns (id. at p. 27). Additionally, the IHO recognized that the parents' claims pertaining to the district's DASA investigation were not within her jurisdiction (id. at pp. 27-28).[9]

[9] While DASA specifically indicates that it does not "preclude or limit any right or cause of action provided under

With respect to the claims that the student was bullied, the IHO cited to T.K. v. New York City Department of Education, 779 F. Supp. 2d. 289, 316, 318 (E.D.N.Y. 2011), as the test for whether the bullying resulted in a denial of FAPE (IHO Decision at p. 28). The IHO held that the hearing record established that the student was bullied, and the district was "on notice of the bullying" (id. at pp. 29, 35). The IHO also found that prior to September 2019 "the bullying substantially restricted [the] [s]tudent's educational opportunities" (id. at p. 35). Additionally, the IHO held that the district did take steps to address the parents' concerns pertaining to bullying but that it was not until September 2019 that the district made "significant recommendations" pertaining to the bullying (id. at pp. 35-36). The IHO further determined that the hearing record demonstrated the district was not "deliberately indifferent" to the parents' bullying claims and took steps to "implement measures" after the June 2019 CSE meeting including a shared aide, out of district placement, and safety plan all of which were rejected by the parents (id. at p. 36). Accordingly, the IHO held that the parents were not entitled to relief for the bullying claims for part of the 2019-20 school year and the entire 2020-21 school year (id.).

Then, the IHO addressed the parents' claims of retaliation by the district (IHO Decision at p. 36). The basis for the parents' claim of retaliation was that the district purportedly called CPS in response to the parents' bullying complaints (id.). The IHO held that there was no evidence in the hearing record as to who made the call to CPS or the nature of the CPS referral and "there [was] no showing either that its actions were retaliatory, or, what the effect of the alleged punitive filing would be on the provision of FAPE" (id.). The IHO next addressed the parents claim that they did not receive all of the student's educational records in response to a request under the Family Educational Rights and Privacy Act (FERPA) which impeded their ability to "meaningfully participate" in their son's educational planning (id. at pp. 36-37). However, the IHO noted that the parents conceded that FERPA complaints were not under the jurisdiction of the IHO (id. at p. 36). Finally, the IHO addressed, the parents' claim that the district harassed them by making repeated requests to reevaluate the student (id. at p. 37). The IHO concluded that the parents failed to make a claim of harassment under the IDEA (id.).

The IHO then addressed the appropriateness of Franklin (see IHO Decision at pp. 37-42). The IHO reviewed the evidence in the hearing record and held that not only did the parents show that the student made progress at Franklin but also that it met the student's "unique educational needs" (id. at p. 41). The IHO determined that "[a]lthough more evidence could have been provided" by the parents pertaining to the program at Franklin, the program addressed the student's "language, academic, and social emotional needs" and he made progress both academically and socially (id. at pp. 41-42). Accordingly, the IHO held that the parents met their burden of proof to establish the appropriateness of Franklin (id. at p. 42).

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any local, state or federal ordinance, law or regulation including but not limited to any remedies or rights available under the [IDEA]" (Educ. Law § 17 [2]), neither DASA nor its implementing State regulations confer jurisdiction to an administrative hearing officer appointed under the IDEA to determine that a public school district or its personnel have violated DASA. In addition, there is no authority in the IDEA, DASA, or any corresponding statutes or regulations stating that a district's failure to comply with DASA would be a determining factor in whether a student had received a FAPE (see Motta v. Eldred Cent. Sch. Dist., 141 A.D.3d 819, 820 [3d Dep't 2016] [holding that the Dignity for All Students Act does not create a private right of action]; Benacquista v. Spratt, 2016 WL 6803156, at *8-*9 [N.D.N.Y. Nov. 17, 2016]; C.T. v. Valley Stream Union Free Sch. Dist., 2016 WL 4368191, *13 [E.D.N.Y. Aug. 16, 2016]).

Next, the IHO conducted a balancing of the equitable considerations in connection with the parents' request for tuition reimbursement (see IHO Decision at pp. 42-45). As for the 2019-20 school year, the IHO held that the "[d]istrict made efforts to address bullying during the 2019-[20] school year," albeit not until after the June 24, 2019 annual review, and, further that the hearing record lacked evidence regarding the parents' application to and enrollment of the student in Franklin; therefore, the IHO ordered the district to pay 25 percent of the tuition for the 2019-20 school year (see id. at pp. 34, 44-45, 48).

The IHO held that since the student was offered a FAPE for the 2020-21 school year, the balancing of equities was "irrelevant" for that school year (IHO Decision at pp. 43, 48). However, the IHO analyzed the parents' conduct during the 2020-21 school year pertaining to consenting to evaluations, releasing information from Franklin to the district, and requesting the district to reconvene after a July 2020 private neuropsychological evaluation (id. at pp. 43-44). The IHO held that if she had found a violation of FAPE for the 2020-21 school year, tuition reimbursement would have been reduced by half (id. at p. 44).

Finally, the IHO addressed the parents' other requests for relief. The IHO discussed the parents' request for reimbursement of the July 2020 private neuropsychological evaluation (IHO Decision at pp. 45-46). The IHO held that there were no evaluations conducted by the district that the parents disagreed with and, moreover, that the parents had refused to permit the district to conduct any evaluations of the student (id. at p. 46). As such, the IHO denied the parents' request for reimbursement of the July 2020 private neuropsychological evaluation (id. at pp. 46, 48). The IHO briefly discussed the parents' request for prospective relief in the form of tuition from the 2021 through 2025 school years, which she denied as the parents failed to provide any "legal justification" for such relief (id. at pp. 46, 48). Finally, the IHO determined that since the parents presented no evidence for the requested relief of reimbursement for private counseling, payment for future counseling, and reimbursement for the costs of homeschooling, their requests were denied (id. at pp. 47-48).

IV. Appeal for State-Level Review

The district appeals on four specific bases:

1. Whether the IHO erred in finding that the district failed to address the parents' concerns pertaining to bullying for the time period between June 24, 2019 and September 6, 2019;

2. Whether the IHO erred in finding that the parents were entitled to an award of 25 percent of the tuition at Franklin for the 2019-20 school year for the denial of a FAPE during the period between June 24, 2019 and September 6, 2019;

3. Whether the IHO erred in finding that the parents met their burden of demonstrating the appropriateness of Franklin; and

4. Whether the IHO erred in finding that the equitable considerations supported an award of 25 percent tuition at Franklin for the 2019-20 school year.

In an answer and cross-appeal, the parents specifically respond to each of the district's arguments on appeal.[10] As for their cross-appeal, the parents contend that the IHO erred in finding that the district offered the student a FAPE for 2019-20 school year after September 6, 2019, that the district offered the student a FAPE for 2020-21 school year, and that the parents were not entitled to full tuition reimbursement for the 2019-20 and 2020-21 school years.

The parents claim that the equitable considerations weighed in favor of an award of full tuition reimbursement for the following reasons: the district's attorney's behavior at the impartial hearings and CSE meetings was unprofessional and constituted bullying; the IHO admitted documents that were beyond the scope of the parents' subpoenas; the IHO failed to compel requested documents from the district; the district failed to produce the superintendent for testimony after being subpoenaed; the district committed obstruction; and the district made derogatory comments toward the student and parents. Furthermore, the parents argue that the IHO erred in not allowing admission of Exhibit "X" which was a social media post, which according to the parents, demonstrated a pattern of bullying and abuse against the student and parents. Related to these arguments, the parents annexed two exhibits to their answer and cross-appeal for consideration as additional evidence.[11]

Moreover, the parents contend that the IHO failed to address the issue regarding the student's eligibility category. The parents further cross-appeal the IHO's finding that the student was not entitled to district funding of the costs of the student's attendance at Franklin for the 2021-22 school year, and that the parents were not entitled to reimbursement for the July 2020 private neuropsychological evaluation.

In a reply and answer to the cross-appeal the district generally denies the parents' allegations. The district argues that both the answer and cross-appeal fail to comply with the

[10] Although not raised by the district, the parents' attorney verified the answer and cross-appeal. State regulations provide that "[a]ll pleadings and papers submitted to a[n] [SRO] in connection with an appeal must be endorsed with the name, mailing address, and telephone number of the party submitting the same or, if a party is represented by counsel, with the name, mailing address, and telephone number of the party's attorney" (8 NYCRR 279.7[a]). All pleadings must be signed by an attorney, or by a party if the party is not represented by an attorney (8 NYCRR 279.8[a][4]). Additionally, all pleadings shall be verified by a party (8 NYCRR 279.7[b]). Since the district did not raise this procedural deficiency and there being no prejudice, I shall not reject the answer and cross-appeal, however, counsel for the parents is now cautioned that his verification of the pleadings is unacceptable and the parents must verify pleadings in appeals to the Office of State Review (8 NYCRR 279.7[b]).

[11] The first proposed exhibit is an affidavit of one of the parents seeking to introduce a document that was excluded from evidence at the impartial hearing (Tr. pp. 1230, 2248-52, 2255-64). The affidavit purports to describe the exhibit but fails to attach the referenced exhibit to the affidavit. The second exhibit contains two subpoenas with affidavits of service, which according to the parents, demonstrate that a witness and documents were not produced by the district. Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. 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]). The parents' proffered additional evidence was available at the time of the hearing and is not necessary in order to render a decision in this matter. Therefore, I decline to consider the parents' proposed exhibits.

practice regulations because they fail to set forth citations to the hearing record and seeks a dismissal of the answer and cross-appeal on that basis (see 8 NYCRR 2179.8[c]).

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created"

(Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), 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]).[12]

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).

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

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

VI. Discussion

A. Preliminary Matters

1. Compliance with Practice Regulations

The district requests that the parents' answer with cross-appeal be dismissed for failure to comply with the regulations governing practice before the Office of State Review. State regulation requires that pleadings include "citations to the record on appeal, and identification of the relevant page number(s) in the hearing decision, hearing transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number" (8 NYCRR 279.8[c][3]). In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or a determination excluding issues from the scope of review on appeal (8 NYCRR 279.8[a]-[b]; see Davis v. Carranza, 2021 WL 964820, at *12 [S.D.N.Y. Mar. 15, 2021] [upholding an SRO's conclusions that several claims had been abandoned by the petitioner]; M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]; T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015], quoting Foman v. Davis, 371 U.S. 178 [1962]).

As the district argues, the parents' answer and cross-appeal includes minimal "citations to the record on appeal" (see Reply & Answer to Cr.-Appeal at ¶¶ 1, 5). However, since the district did not allege prejudice for the parents' failure to use citations to the hearing record and the district was able to prepare and file a reply and answer to the cross-appeal, I decline to exercise my discretion to dismiss the answer and cross-appeal on this basis but again caution the parents' counsel to carefully review and comply with the practice regulations pertaining to pleadings.

2. Scope of Review

The practice regulations require that parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]).

Turning to which claims are properly before me on appeal, neither the district nor the parents appeal the IHO's findings that the district denied the student a FAPE for the 2018-19 school year or the IHO's denial of the parents' request for relief in the form of prospective funding of the student's attendance at Franklin after the 2021-22 school year, reimbursement for private

counseling, payment for future counseling, or reimbursement for the costs of homeschooling the student (see IHO Decision at p. 48; Answer to Cr. Appeal at p. 3 n.1). Therefore, the IHO's determinations on these issues have become final and binding on the parties and will not be reviewed on appeal (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see also M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

B. Disability Classification

The parents assert in a cross-appeal that the IHO "never answered" the issue pertaining to the student's classification (Answer with Cross Appeal at p. 8). The parents argue, without citation to the record, that they "produced voluminous evidence" as to why the student's classification should have been autism and not other health-impairment (id.). They contend that the student's social deficits were "more consistent" with autism than other health-impairment (id.). The parents also allege that the district refused to discuss a change in classification and based its decision to find the student eligible for special education as a student with an other health-impairment on the student's kidney disease which did not require "specialized instruction" (id.).

Contrary to the parents' allegation in their cross-appeal, the IHO did consider the parents' claim that the CSEs improperly found the student eligible for special education as a student with an other health-impairment (see IHO Decision at pp. 19-27). Indeed, upon careful review, the hearing record reflects that the IHO, in a well-reasoned and well-supported decision, carefully considered the testimonial and documentary evidence presented by both parties and, further, weighed the evidence and properly supported her conclusions that the district did not deny the student a FAPE based on the CSEs' determinations that the student was eligible for special education as a student with an other health-impairment during the 2018-19, 2019-20 and 2020-21 school years, and that there is no reason appearing in the hearing record to modify those determinations of the IHO (see 20 U.S.C. § 1415[g][2]; 34 CFR 300.514[b][2]; IHO Decision at pp. 19-27).

Generally, with respect to disputes regarding a student's particular disability category or classification, federal and State regulations require districts to conduct an evaluation to "gather functional developmental and academic information" about the student to determine whether the student falls into one of the disability categories under the IDEA, as well as to gather information that will enable the student to be "involved in and progress in the general education curriculum" (34 CFR 300.304[b][1]; see 8 NYCRR 200.4[b][1]). Courts have given considerably less weight on identifying the underlying theory or root causes of a student's educational deficits and have instead focused on ensuring the parent's equal participation in the process of identifying the academic skill deficits to be addressed though special education and through the formulation of the student's IEP (see Carrillo v. Carranza, 2021 WL 4137663, at *15 [S.D.N.Y. Sept. 10, 2021] [describing the issue of a student's disability classification "a red herring" and noting that, where "[n]o one disputes that this child qualifies for special education services under IDEA. . . for our purposes, the precise disability category in which [he] is classified is irrelevant"]; Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011] [noting the IDEA's strong preference for identifying the student's specific needs and addressing those needs and that a student's "particular disability diagnosis" in an IEP "will, in many cases, be immaterial" because the IEP is tailored to the student's individual needs]; Draper v. Atlanta Indep. Sch. Sys., 480 F. Supp. 2d 1331, 1342 [N.D. Ga. 2007]; see also Application of a Student with a Disability, Appeal No. 21-056;

Application of the Dep't of Educ., Appeal No. 12-013; Application of a Student with a Disability, Appeal No. 09-126 [noting that "a student's special education programming, services and placement must be based upon a student's unique special education needs and not upon the student's disability classification"]). "Indeed, '[t]he IDEA concerns itself not with labels, but with whether a student is receiving a free and appropriate education'" (Heather S. v. State of Wisconsin, 125 F.3d 1045, 1055 [7th Cir.1997]).

CSEs are not supposed to rely on the disability category to determine the needs, goals, accommodations, and special education services in a student's IEP. That is the purpose of the evaluation and annual review process, and this is why 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 (see 34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]). Once a student has been found eligible for special education, the present levels of performance sections of the IEP for each student is where the focus should be placed, not the label that is used when a student meets the criteria for one or more of the disability categories. At this juncture, when the student's eligibility for special education is not in dispute, the significance of the disability category label is more relevant to the LEA and State reporting requirements than it is to determine an appropriate IEP for the individual student.[13]

"Other health-impairment" means:

> having limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that is due to chronic or acute health problems, including but not limited to a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, diabetes, attention deficit disorder or attention deficit hyperactivity disorder or tourette syndrome, which adversely affects a student's educational performance.

(see 8 NYCRR 200.1[zz][10]).

"Autism" is described in State regulation as follows:

> a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age 3, that adversely affects a student's educational

[13] The disability category for each eligible student with a disability is necessary as part of the data collection requirements imposed by Congress and the United States Department of Education upon the State, which require annual reports of [t]he number and percentage of children with disabilities, by race, ethnicity, limited English proficiency status, gender, and disability category, who fall in over a dozen other subcategories (20 U.S.C. § 1418[a]; 34 CFR 300.641). The Local Education Agency (LEA) must, in turn, annually submit this information to the SEA though its SEDCAR system (see, e.g., Verification Reports: School Age Students by Disability and Race/Ethnicity" available at http://www.p12.nysed.gov/sedcar/forms/vr/1819/pdf/vr3.pdf; see also Special Education Data Collection, Analysis & Reporting available at http://www.p12.nysed.gov/sedcar/data.htm).

> performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. The term does not apply if a student's educational performance is adversely affected primarily because the student has an emotional disturbance as defined in paragraph (4) of this subdivision. A student who manifests the characteristics of autism after age 3 could be diagnosed as having autism if the criteria in this paragraph are otherwise satisfied.

(see 8 NYCRR 200.1[zz][1]).

At the outset of her discussion of the student's classification, the IHO properly defined the issue as whether the IEPs, regardless of the particular classification arrived at by the CSEs for the student, provided him with an appropriate program and services to meet his needs (IHO Decision at p. 20). The IHO determined that the district provided "extensive testimony" to support its contention that the student was properly classified as a student with an other health-impairment (id.). As stated by the IHO, the parents on the other hand, only presented one witness at the hearing—the evaluator who conducted the July 2020 neuropsychological evaluation—who recommended that the student should be classified as a student with autism (IHO Decision at pp. 20, 26; Parent Ex. A at pp. 18-19). Next, the IHO looked at the issue of the student's classification for each year under review (see IHO Decision at pp. 20-26).

In connection with the 2018-19 school year, the IHO explained that review of the IEPs showed that the parents did not request a change in the student's classification at any of the four meetings held during that school year (May 30, 2018, September 26, 2018, January 17, 2019, March 15, 2019) (IHO Decision at pp. 20-21). The IHO recognized that for the 2018-19 school year the student was transitioning to seventh grade and as a result the CSE recommended "significantly more services" to meet the student's needs, including resource room services, ICT services, and special class for reading every other day (id. at p. 21; compare Dist. Ex. 10 at p. 15-16, with Dist. Ex. 11 at pp. 10-11, and Dist. Ex. 12 at pp. 12). The IHO held that the "[d]istrict's witnesses all testified credibly that the program developed was based on [the] [s]tudent's needs, addressed his needs with the appropriate program recommendations, related services, goals, modifications and accommodations" and additional evaluations were conducted at the request of the parents to "address concerns with sensory issues, social-emotional and behavioral issues and language difficulties" (IHO Decision at p. 23). With respect to the 2018-19 school year the IHO found that there was nothing in the hearing record demonstrating that the district failed to address the student's "unique educational needs" (IHO Decision at p. 23). The parents have not set forth a clear challenge to the IHO's underlying determination that, putting aside the disagreement over the disability category, the IEPs otherwise addressed the student's needs.

For the 2019-20 school year, the IHO discussed the two CSE meetings: June and November 2019 (IHO Decision at pp. 23-25). The June 2019 CSE declined the parents' initial request to change the student's classification to autism at that time (Dist. Ex. 15 at pp. 1-2; see IHO Decision at p. 23). The parents made another request for a change in classification during the November 2019 CSE meeting and after discussion the CSE again declined to change the student's

classification (Dist. Ex. 16 at pp. 1, 6-7; see IHO Decision at p. 24). The CSE chairperson testified that a DSM-5 diagnosis of autism does not automatically make it appropriate to classify a student as a student with autism and it was the student's "functionality," his needs, and various diagnoses which supported the classification of other health-impairment (see Tr. pp. 118-20). In contrast, the neuropsychologist who conducted the July 2020 evaluation testified that the student's classification should be changed from other health-impairment to autism because the student's "symptoms" of autism and the impact they could have "cognitively, behaviorally, [and] socially" was the "primary thing to likely get in the way of his education" (Tr. p. 2558; Parent Ex. A at pp. 18-19).[14] However, the neuropsychologist also indicated that the student could be considered under the designation of other health-impairment given his prior diagnoses of ADHD and specific learning disorder (Tr. pp. 2668-70; Parent Ex. A at pp. 18-19). Additionally, the psychiatrist who prepared the September 2019 psychiatric evaluation report testified that the recommended program, which at the time consisted of in-school group counseling, ICT services, resource room services, special class reading instruction, and speech-language therapy, as well as a BIP, was appropriate (Tr. pp. 2444-45; see Dist. Exs. 15 at pp. 20-21; 41). The IHO concluded that for the 2019-20 school year the CSEs took into consideration all the student's needs, determined that other health-impairment was an appropriate classification, and that the IEPs addressed the student's needs in reading, social/emotional development and attention (IHO Decision at p. 25). Again, the parents have not interposed a direct challenge to the IHO's finding that the IEPs addressed the student's needs.

Lastly, for the 2020-21 school year, the IHO addressed the one CSE meeting held on May 7, 2020 (IHO Decision at p. 26). At the May 2020 CSE meeting shared aide services were recommended for the student during non-core classes and less structured time, which the parents refused (Dist. Ex. 17 at p. 2; see IHO Decision at p. 26). Therefore, the IHO held that the fact that the CSE offered more support to the student and continued to address his needs, there was no basis to change the student's classification and the IEP "met the requirements for FAPE under the IDEA" (IHO Decision at p. 26).

Furthermore, the IHO held that the evidence presented by the district at the impartial hearing demonstrated that the classification of other health-impairment "was determined based on the total needs of [the] [s]tudent, including his ADHD, learning difficulties and medical concerns, as well as [his] [autism] diagnosis" (IHO Decision at p. 26). The IHO held that the parents "did not set forth any specific needs that were not met" by the IEPs in dispute and did not show that the IEPs failed to address the student's needs (id.). Ultimately, the IHO determined that "the mere failure to change the eligibility category is not a denial of FAPE, and it is unclear what effect this mere failure to change the name of the classification [had] on [the] [s]tudent's programming" (id.).

Here, the review of the evidence in the hearing record reflects that the CSEs' program and services recommendations were driven by the student's needs and not his classification, and

[14] In her decision the IHO references that the psychiatrist testified about classification, however, upon inspection of the hearing record it was the private neuropsychologist who opined regarding the student's classification as the psychiatrist was not familiar with classifications under the IDEA (compare IHO Decision at p. 24, with Tr. pp. 2382-83, 2668-70).

supports the IHO's finding that the CSEs' decision to find the student eligible for special education as a student with an other health-impairment was not a denial of a FAPE (IHO Decision at p. 26).

C. Bullying

The district argues that the IHO erred in finding a denial of FAPE for the period between June 24, 2019 and September 6, 2019. The parents, on the other hand, cross-appeal from the IHO's findings that the district offered the student a FAPE after September 6, 2019 through the remainder of the 2019-20 school year and for the 2020-21 school year. One of the central issues the parents raise is that the student was subjected to bullying by the district staff and peers and the district failed to provide the student with a safe environment.

Under certain circumstances, if a student with a disability is the target of bullying, such bullying may form the basis for a finding that a district denied the student a FAPE (Dear Colleague Letter: Bullying of Students with Disabilities, 61 IDELR 263 [OSERS 2013] [stating that bullying that results in a student with a disability not receiving meaningful educational benefit constitutes a denial of a FAPE and that districts have an obligation to ensure that students who are targeted by bullying behavior continue to receive a FAPE pursuant to their IEPs]; see Smith v. Guilford Bd. of Educ., 226 Fed. App'x 58, 63-64 [2d Cir. June 14, 2007] [indicating that bullying might, under some circumstances, implicate IDEA considerations]; M.L. v. Fed. Way. Sch. Dist., 394 F.3d 634, 650-51 [9th Cir. 2005] [finding that "[i]f a teacher is deliberately indifferent to teasing of a disabled child and the abuse is so severe that the child can derive no benefit from the services that he or she is offered by the school district, the child has been denied a FAPE"]; Shore Reg'l High Sch. Bd. of Educ. v. P.S., 381 F.3d 194, 199-201 [3d Cir. 2004] [reviewing whether the district offered the student "an education that was sufficiently free from the threat of harassment to constitute a FAPE"]; Dear Colleague Letter: Responding to Bullying of Students with Disabilities, 64 IDELR 115 [OCR 2014]; Dear Colleague Letter: Harassment and Bullying, 55 IDELR 174 [OCR 2010] [stating that "a school is responsible for addressing harassment incidents about which it knows or reasonably should have known"]; Dear Colleague Letter: Prohibited Disability Harassment, 111 LRP 45106 [OCR/OSERS 2000]).[15] In determining whether allegations related to bullying rise to the level of a denial of FAPE, the United States Department of Education has clarified that:

> A school should, as part of its appropriate response to the bullying, convene the IEP Team to determine whether, as a result of the effects of the bullying, the student's needs have changed such that the IEP is no longer designed to provide meaningful educational benefit. If the IEP is no longer designed to provide a meaningful educational benefit to the student, the IEP team must then determine to what extent additional or different special education or related

[15] New York State has addressed bullying in schools through the Dignity for All Students Act, which imposes specific obligations on school districts with regard to the prevention and investigation of harassment and bullying (Educ. Law §§ 10-18). The law defines bullying as "the creation of a hostile environment by conduct or by threats, intimidation or abuse" that, among other things, interferes with a student's educational performance, mental, emotional, or physical well-being, causes a student to fear for his or her physical safety, or causes physical or emotional harm (Educ. Law § 11[7]).

> services are needed to address the student's individual needs; and revise the IEP accordingly.

(Dear Colleague Letter, 61 IDELR 263).

Additionally, in determining whether allegations related to bullying and harassment rise to the level of a denial of FAPE, one district court in New York has found that "students have a right to be secure in school" under the IDEA and that bullying may constitute the denial of a FAPE if "it is likely to affect the opportunity of the student for an appropriate education" (T.K. v. New York City Dep't of Educ., 779 F. Supp. 2d 289, 308, 316-17 [E.D.N.Y. 2011]). The District Court in T.K. developed a test to determine whether bullying resulted in the denial of a FAPE as follows: "(1) was the student a victim of bullying; (2) did the school have notice of substantial bullying of the student; (3) was the school 'deliberately indifferent' to the bullying, or did it fail to take reasonable steps to prevent the bullying; and (4) did the bullying 'substantially restrict' the student's 'educational opportunities'?" (T.K., 779 F. Supp. 3d at 316, 318; see also T.K. v. New York City Dep't of Educ., 32 F. Supp. 3d 405, 417-18 [E.D.N.Y. 2014], aff'd, 810 F.3d 869 [2d Cir. 2016]). Moreover, the court in T.K. found that "where there is a substantial probability that bullying will severely restrict a disabled student's educational opportunities . . . an anti-bullying program is required to be included in the IEP" (T.K., 779 F. Supp. at 421-22). Accordingly, if a student requires the supports related to bullying in order to receive a FAPE, the plans or supports should be described or at the very least referenced in the IEP, else a district may be hard-pressed to defend an IEP with evidence outside of its four-corners (see R.E., 694 F.3d at 185-86). In addition, with respect to additional steps that a district might take to address bullying about which it is on notice, the United States Department of Education has identified the following nonexclusive actions: "separating the accused harasser and the target; providing counseling for the target and/or harasser, or taking disciplinary action against the harasser" (Dear Colleague Letter, 55 IDELR 174 [OCR Oct. 26, 2010]). However, when assessing a district's response to allegations of bullying, it is also useful to recognize the general principle that while "[s]chools are under a duty to adequately supervise the students in their charge . . . [s]chools are not insurers of safety, however, for they cannot reasonably be expected to continuously supervise and control all movements and activities of students" (Mirand v. City of New York, 84 N.Y.2d 44, 49-50 [1994]; see Stephenson v. City of New York, 19 N.Y.3d 1031, 1033-034 [2012]).

While the IHO for the most part conducted a thorough and well-reasoned analysis of the bullying issue (see IHO Decision at pp. 27-36), she nonetheless erred in her ultimate determination that the parents were entitled to reimbursement for 25% of the costs for the student's attendance at Franklin during the 2019-20 school year as relief for the district's denial of a FAPE to the student for that year. The IHO relied on the test in T.K. to determine whether the bullying resulted in a denial of FAPE (id. at p. 28). First, the IHO concluded that the student was bullied, and the district was aware of the bullying (id. at p. 29). Not only did the parents file two DASA complaints, but the parents' concerns pertaining to bullying were referenced in several IEPs (IHO Decision at p. 29; see Dist. Exs. 11 at p. 8; 12 at p. 9; 13 at p. 11; 14 at p. 12; 110-111). The IHO weighed the evidence relating to incidents of bullying relayed by the parents at the impartial hearing and the district staff's impression of those incidents (IHO Decision at pp. 32-34; Tr. pp. 574, 1124; 1127, 1466-67, 1474-75, 1502, 1505-06, 1565-66, 1589-90, 2978-80, 2984, 2991, 2994-95, 3005-08). Additionally, evidence in the hearing record demonstrates that the parents had conversations with

the superintendent regarding their concerns (IHO Decision at p. 34; Tr. pp. 2202-06, 2275; Parent Exs. P at p. 2; MM).

Before reviewing the remainder of the IHO's analysis, I will address the IHO's finding that the district denied the student a FAPE for the time period of June 24, 2019 through September 6, 2019 given the district's failure to sufficiently address the student's needs that arose from the bullying that he was experiencing in the district schools (IHO Decision at pp. 23, 25, 27, 29). The IHO held that the June 2019 CSE "did not appropriately address bullying issues" at the annual review meeting and therefore, the June 2019 IEP failed to offer the student a FAPE for the 2019-2020 school year, until that time when a meeting was held with the parents and district staff on September 6, 2019 to discuss a safety plan for the student (IHO Decision at pp. 25, 35-36; see Dist. Ex. 59). However, prior to the June 2019 CSE meeting, the parents had removed the student from the district's school (Parent Exs. N at p. 2; P at p. 1; Dist. Ex. 90 at p. 14). The last day of school for the 2018-19 school year was projected as June 26 or 27, 2019 according to the various IEPs developed during the 2018-19 school year (see Dist. Exs. 11 at pp. 1, 11; 12 at pp. 1, 13; 13 at p. 1; 14 at p. 1). Moreover, the June 2019 CSE did not recommend that the student receive 12-month services during summer 2019 (see Dist. Ex. 15 at p. 22). As stated by the district in its request for review, the first day of the program recommended at the June 2019 CSE meeting was September 3, 2019 (Req. for Rev. at p. 5; Dist. Ex. 15 at pp. 20-21). The meeting to discuss a safety plan for the student took place on September 6, 2019, at which point, the IHO found that the district had adequately addressed the student's needs related to bullying and offered the student a FAPE (see IHO Decision at p. 34; Dist. Ex. 59). Therefore, the period of time for which the IHO found that the district denied the student a FAPE encompassed, at most, four days during the 2019-20 school year (Req. for Rev. at p. 5). Moreover, the parents made their decision to unilaterally place the student at Franklin in October 2019, after the September 2019 safety plan meeting, and the student began attending Franklin on November 4, 2019 (Parent Exs. Q; R at p. 1). Thus, at the time the parents made their decision to unilaterally place the student, the safety plan had already been developed and discussed, and the IHO's award of tuition reimbursement may not stand based solely on the recommendations of the June 2019 IEP which were supplanted by the CSE's recommendations in September 2019, well in advance of the parent's unilateral placement of the student at Franklin. To the extent there was a FAPE denial for those four days, which was cured immediately thereafter by the September 2019 CSE's recommendations, the parents have not made a claim for any compensatory education or other relief for that time period and, as noted above, had not yet placed the student unilaterally and incurred any tuition or other costs that were reimbursable.

As for the IHO's analysis of the district's handling of the bullying as of September 2019, the IHO applied the third part of the test in T.K. which ″was whether the school [was] 'deliberately indifferent' to the bullying, or did it fail to take reasonable steps to prevent the bullying" (IHO Decision at p. 33). The IHO pointed to the September 6, 2019 meeting, at which district staff discussed a safety plan for the student (IHO Decision at p. 34; see Tr. pp. 271-72).[16] The meeting

[16] I am aware of no authority for the proposition that a CSE is required to include a "safety plan" in an IEP where there has been a history of bullying, and neither the Second Circuit nor the district court decisions in T.K. provide that a CSE is required to develop a safety plan specifically or that an "anti-bullying program" is synonymous with a safety plan (see T.K. v. New York City Dep't of Educ., 810 F.3d 869 [2d Cir. 2016]; T.K., 32 F. Supp. 3d 405; T.K., 779 F.Supp.2d 289)

included the parents and went through 11 points on how district staff could help the student (IHO Decision at p. 34; see Dist. Ex. 59). The purpose of the safety plan was "to provide a safe and secure learning environment that [was] free from harassment, intimidation, or bullying" of the student (Dist. Ex. 59 at p. 1). The further purpose was to provide "support and interventions" for the student's "emotional and physical safety" in school and to prevent any retaliation against the student (id.). The safety plan described that the student was permitted to call home or go to a teacher or administrator when he felt "harassed, intimidated or bullied" (id.). It also allowed the student to leave class early to travel to his classes without students in the hallways and meet weekly with his guidance counselor to ensure the safety plan was working (id.). The parents rejected the safety plan (Tr. p. 273). Additionally, the district offered to engage the Center for Discovery for a "social skills training" group which was also rejected by the parents (IHO Decision at p. 34; Tr. pp. 116-17; Dist. Exs. 16 at pp. 1, 5, 27; 17 at p. 1). The CSE recommendation for the social skills training group was based upon the school psychologist reporting that the student had "poor social skills" that impacted his interactions with peers, and he had difficulty "taking responsibility for his actions" (Dist. Ex. 16 at p. 5). Additionally, according to the IHO, the CSE offered the student placement in another school district which had a program similar to the program offered at the November 2019 CSE meeting, but that placement was also refused by the parents (IHO Decision at p. 34; Tr. pp. 120-21, 160-61; Dist. Ex. 16 at pp. 5-6). Later at the May 2020 CSE meeting, the CSE recommended shared aide services for the student during unstructured time which was rejected by the parents (IHO Decision at p. 34; Tr. pp. 248-49; Dist. Ex. 17 at p. 2).

Moreover, to the extent the bullying incidents were related to the student's longstanding social-emotional needs, IEPs since the 2018-19 school year offered the student varying supports to address his social/emotional functioning and behavioral concerns expressed by the parents, none of which are challenged by the parents. Beginning in January 2018, the district's CSE chairperson and school psychologist developed and implemented a BIP to address the student's behaviors that were "antagonizing and disruptive to others" when he was "unable to obtain or denied access to desired person, item or activity" (Tr. p. 527; Dist. Ex. 89 at p. 3). The CSE hypothesized that these behaviors occurred in "[l]ess structured class times (transitions, special classes) or during recess" (Tr. p. 533; Dist. Ex. 89 at p. 3). Additionally, the CSE recommended both individual and small group counseling to the student for the 2018-19 school year to address the antagonizing behaviors (Tr. pp. 54-55; Dist. Ex. 11 at p. 10). Later in January 2019, the CSE chairperson and school psychologist conducted an updated FBA and BIP to address the student's defiance in refusing to participate in a class assignments/activities or complete work in class (Tr. pp. 89, 562; Dist. Exs. 13 at p. 2; 90 at p. 6). Again, for the 2019-20 school year, the CSE continued to recommend individual and small group counseling to help the student build relationships, use "socially appropriate coping strategies when faced with a negative peer situation," to take responsibility for his own actions, and work on his ability to see how "his actions impact[ed] his relationships with both peers and adults" (Dist. Ex. 15 at pp. 1, 16, 21). Additionally, the May 2020 CSE also recommended small group and individual counseling with a social skills training group (Dist. Ex. 17 at pp. 1, 14).

Finally, the IHO discussed the last part of the T.K. test which requires consideration of whether bullying "substantially restricted" the student's "educational opportunities" (IHO Decision at p. 35). The IHO stated that neither party addressed the issue in their closing briefs and the parents' due process complaint notice failed to allege that the bullying "substantially restricted" the student (id.). But the IHO held that since the parents removed the student from school in May

2019 because they did not feel that the student was safe, "it is clear, that prior to September 2019, the bullying substantially restricted [the] [s]tudent's educational opportunities" (id.). On this point, the student's mother testified that the student would come home from school crying every day (Tr. p. 1615). She further testified that the student would state he hated his life, had no friends, no one liked him, and the teachers were out to get him (id.). However, the evidence in the hearing record indicates that the student attended school in seventh grade and was only absent on four occasions prior to a vacation in April 2019, and then an extended absence when the parents removed the student from school after the May 9, 2019 incident (Tr. pp. 756-57; see Dist. Exs. 87, 135). In addition, during the seventh grade the student was involved in school band, game club, fishing club, track, and soccer, and volunteered at school sponsored activities (Tr. pp. 100-03, 202-03, 224-25, 240; see Dist. Exs. 132, 138). The district's CSE chairperson, school psychologist, seventh grade special education teacher, and the student's seventh grade ELA teacher testified that the bullying was not found to impact his education as he was participating in activities and progressing academically and socially (Tr. pp. 131-32, 201-02, 680-81, 758-59, 1150-51). The CSE chairperson together with other district witnesses testified that the behavior data collection demonstrated that the student's behaviors were improving (Tr. pp. 165-66, 230-31, 565-66, 753-56). However, despite some of the contradictory evidence regarding the impact of the bullying incidents on the student's educational opportunities, the IHO correctly found that the parents removed the student form the school toward the end of the 2018-19 school year based on their concerns for the student's safety due to the bullying, and that the CSE offered the student a FAPE for the 2019-20 school year by creating a safety plan and otherwise revising its recommendations to address the bullying issue at the September 6, 2019 meeting.

In sum, the IHO held that the district did take "steps to address the bullying incidents that they were aware of, and were not 'deliberately indifferent' to [the] [p]arents['] claims of bullying" and further implemented "measures to address [s]tudent concerns after the June 24, 2019" CSE meeting, and therefore, the parents were "not entitled to relief for their bullying claims for the part of the 2019-2020 school year and the entirety of the 2020-2021 school year" (IHO Decision at p. 36). Given that the relevant authority and guidance concerning the bullying of special education students, including the T.K. case relied on by the IHO, recognizes that districts have an obligation to ensure that students who are targeted by bullying behavior continue to receive a FAPE pursuant to their IEPs, to determine whether, as a result of the effects of the bullying, the student's needs have changed such that the IEP is no longer designed to provide meaningful educational benefit, to determine to what extent additional or different special education or related services are needed to address the student's individual needs and to modify the IEP or otherwise recommend appropriate anti-bullying support, the IHO correctly found that the district provided the student with an appropriate educational program as of September 6, 2019 when it created a safety plan for the student and otherwise addressed his bullying concerns with appropriate recommendations.

However, although the IHO's reasoning was largely correct for the reasons described above, her finding that the student was denied a FAPE due to the district's failure to address bullying from June 24, 2019 through September 6, 2019 must be reversed given that the parents are not entitled to any tuition reimbursement as a remedy for the approximately four school days which preceded the CSE's September 6, 2019 meeting and recommendations. Moreover, as discussed above, the evidence in the hearing record supports the IHO's conclusion that for the remainder of the 2019-20 school year following the September 2019 CSE meeting and for the

entirety of the 2020-21 school year, the district took appropriate steps to ameliorate bullying and the student was not denied a FAPE on that basis.

D. Reimbursement for the Private Evaluation

The parents contend that the IHO erred in denying reimbursement for a July 2020 private neuropsychological evaluation. In furtherance of this argument, the parents claim that they "had a lack of trust" in the district and "wanted an updated evaluation to demonstrate how [the student] was progressing in anticipation of this hearing" (Answer at p. 4). The parents additionally argue that it was unclear when the student's reevaluation was due and the "parents were due an IEE anyway" (id. at p. 5).

Based upon the foregoing arguments, it is unclear whether the parents seek reimbursement for the costs of the private evaluation as a remedy for a denial of a FAPE or as a publicly funded independent educational evaluation (IEE) under the IDEA's procedures. As to the former, the evidence in the hearing record supports a finding that the district offered the student a FAPE during the 2019-20 and 2020-21 school years and, therefore, no relief is warranted relating thereto. As to the latter, the evidence in the hearing record also does not demonstrate that the parent is entitled to reimbursement of the private evaluation as an IEE.

The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]). Guidance from the United States Department of Education's Office of Special Education Programs (OSEP) indicates that if a parent disagrees with an evaluation because a child was not assessed in a particular area, "the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs" (Letter to Baus, 65 IDELR 81 [OSEP 2015]; see Letter to Carroll, 68 IDELR 279 [OSEP 2016]). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either (1) ensure that an IEE is provided at public expense; or (2) initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). Additionally, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]).

The district conducted a psychoeducational evaluation of the student in November and December 2016, as well as a speech-language evaluation in December 2018, OT evaluations in May 2017, May 2018, and November 2018, and FBAs in January 2018 and January 2019 (Dist. Exs. 33-34; 36-38; 89-90). In addition, the parents obtained a private evaluation of the student that was conducted between September and November 2017 and which included cognitive and academic testing, which was incorporated into the student's IEPs beginning in December 2017 (Dist. Ex. 35; see Dist. Ex. 10 at pp. 1-3). The district agreed to fund IEEs including independent psychiatric, speech-language, and OT evaluations, which were conducted between August and November 2019 (Dist. Exs. 40-42; 58 at p. 1). Thereafter, the district began planning to conduct a reevaluation of the student. According to the student's IEPs, the projected date for the student's reevaluation was due on or about November 2, 2020 (Dist. Exs. 10 at p. 1; 11 at p. 1; 12 at p. 1; 13 at p. 1; 14 at p. 1; 15 at p. 1; 16 at p. 1; 17 at p. 1).[17] During the May 2020 CSE meeting the CSE began discussions about the reevaluation and stated that evaluations would start in the fall (Dist. Ex. 17 at p. 2). In response, counsel for the parents requested that the district fund an updated neuropsychological evaluation prior to the district conducting the reevaluation (Tr. p. 133; Dist. Ex. 17 at p. 2). The parents did obtain a private neuropsychological and educational evaluation of the student on July 13, 2020 (see Parent Ex. A). Between July and December 2020, the district sought the parents' consent to conduct the reevaluation, but the parents refused to consent to the district's reevaluation of the student (Tr. pp. 140-42; see Dist. Exs. 73-80, 82). In an October 26, 2020 email, the parents provided the district a copy of the July 2020 private neuropsychological and educational evaluation report (Tr. p. 142; Dist. Ex. 80 at pp. 1-2).

Based on the foregoing, the IHO correctly recognized that there were no evaluations conducted by the district for the parents to disagree with (IHO Decision at p. 46). For those evaluations conducted prior to or during 2019, the parents already obtained an IEE (Dist. Exs. 40-42; 58 at p. 1), and, as noted above, parents are only entitled to one IEE at public expense each time the district conducts an evaluation with which the parent disagrees (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]). Thereafter, prior to the parents' request for another IEE, the district neither conducted any evaluations for the parents to disagree with nor refused to conduct evaluations requested by the parents. The IHO acknowledged the parents' argument that the reevaluation was "unnecessary as private evaluations would meet the requirements under the IDEA," and therefore, if this was the parents' position then "there was no need for a private evaluation [at] the [d]istrict's expense" (IHO Decision at p. 46). Based upon the foregoing, the IHO denied the parents' request for reimbursement of the private neuropsychological evaluation (id.).

The Second Circuit has clarified in that a parent has a "right" to a publicly funded IEE, but that:

> [T]his right arises in response to school action, it does not preempt it. Nor does it give parents the first and final word. The school, as a beneficiary of federal funds, has the right and obligation to conduct an evaluation in the first instance and to prove that its evaluation

[17] The evidence in the hearing record is unclear with regard to the basis of the November 2, 2020 projected date for re-evaluation.

> was appropriate. Only when those established procedures fall short does a parent get an IEE at public expense.

(D.S. Trumbull Bd. of Educ., 975 F.3d 152, 165-66 [2d Cir. 2020] [internal citations omitted]). Accordingly, the IHO did not err in finding that the parents were not entitled to reimbursement for the privately obtained neuropsychological evaluation.

VII. Conclusion

As described above, the evidence in the hearing record does not support the IHO's determinations that the district denied the student a FAPE for the time period from June 24, 2019 to September 6, 2019 or that reimbursement for a portion of the costs of the student's attendance at Franklin during the 2019-20 school year beginning in November 2019 should have been awarded to remedy any such denial. Having determined that the district offered the student a FAPE for the 2019-20 and 2020-21 school years, the necessary inquiry is at an end and there is no need to reach the issues of whether the student's unilateral placement at Franklin was appropriate or whether equitable considerations support an award of tuition reimbursement (Burlington, 471 U.S. at 370; M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; E.E. v. New York City Dep't of Educ., 2014 WL 4332092, at *10 [S.D.N.Y. Aug. 21, 2014]; D.D-S., 2011 WL 3919040, at *13). Finally, I find no basis to disturb the IHO's denial of prospective placement or funding at Franklin for the 2021-22 school year.

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated October 1, 2021, is modified by reversing those portions which found the district failed to offer the student a FAPE for the period between June 24, 2019 and September 6, 2019 and which ordered the district to fund 25 percent of the costs of the student's tuition, room and board, and transportation expenses at Franklin for the 2019-20 school year.

Dated: **Albany, New York**
January 5, 2022

CAROL H. HAUGE
STATE REVIEW OFFICER