



# The University of the State of New York

## The State Education Department

State Review Officer

[www.sro.nysed.gov](http://www.sro.nysed.gov)

No. 23-015

### **Application of the BOARD OF EDUCATION OF THE LONG BEACH CITY 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:**

Volz & Vigliotta, PLLC, attorneys for petitioner, by Michael G. Vigliotta, Esq.

Law Offices of Susan Deedy & Associates, attorneys for respondent, by Richard F. Corrao, Esq.

### **DECISION**

#### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from a decision of an impartial hearing officer (IHO) which denied the district's request for an interim alternative educational setting (IAES) for the student and a psychiatric evaluation of the student. Respondent (the parent) cross-appeals from the portions of the decision that found there was a substantial likelihood the student would harm himself or others if he was returned to his then-current placement and that Family of Kidz was an appropriate IAES for the student. The appeal must be sustained in part. 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**

For the 2020-21 school year (kindergarten), the student attended a board of cooperative educational services (BOCES) 6:1+1 special class (Parent Ex. K at p. 1; see Parent Ex. A at pp. 5-6). The parent expressed concern over "the make-up of the [the student's] peer cohort" as she felt it "appeared to be socially and academically inappropriate" given the functional level of the other students (Parent Ex. A at p. 5-6). In addition, the BOCES class was reportedly unable to manage the student's behaviors (Parent Ex. A at p. 7; see Parent Exs. C at p. 1; K at p. 1). In spring 2021, the CSE recommended that the student be placed in the BOCES "intensive support program" (ISP)

which included specific teachers and social workers and an on-staff psychiatrist (Tr. Vol. VI at pp. 10-11; see Parent Ex. A at p. 7).<sup>1</sup> According to the parent, although the student's IEP was amended to reflect the change to the ISP, the student remained in the same class with the same teacher and classmates but at her request the student's counselor was changed (Tr. Vol. VI at pp. 10-11; Parent Ex. A at p. 7).

The student began the 2021-22 school year in the same BOCES 6:1+1 ISP he attended the prior school year (Parent Ex. K at p. 2; Dist. Ex. 16 at p. 1; see Parent Ex. A at pp. 7, 8). A district school psychologist evaluated the student on multiple dates in October and November 2021 (Dist. Ex. 16 at p. 1). In the resulting psychological evaluation report, dated November 7, 2021, the school psychologist recommended that the district complete a psychiatric evaluation of the student due to reported and observed physical and verbal aggression and reported and observed sexual comments, and the district requested parental consent to obtain this evaluation (Tr. Vol. V at pp. 11, 17; Dist. Exs. 14; 16). The school psychologist also indicated in her report that the parent was not in agreement with the student's placement, that she felt the student was picking up poor behavior from other students, and that he was "far behind academically [] which wasn't the situation previously" (Dist. Ex. 16 at p. 1). According to the school psychologist, the parent "want[ed] [the student] out of BOCES immediately" (id.).

The parent removed the student from the BOCES placement in November 2021 due to concerns about the student's safety and anxiety within the placement and suspicions of sexual and physical misconduct within the school (Parent Ex. K at p. 2). The CSE convened on December 1, 2021 and recommended that the student receive home instruction (Tr. Vol. VI at pp. 18, 22; Parent Ex. K at p. 2). The student began receiving services in December 2021 and remained on home instruction until in or around February or March 2022 when he began receiving five hours per week of instruction consisting of approximately "two hours of home instruction and a half hour of counseling" two days per week in a district school building (Tr. Vol. VI at pp. 18, 22; Parent Ex. K at p. 2).<sup>2</sup>

On May 20, 2022 the CSE convened and found the student remained eligible for special education as a student with an emotional disability (Parent Ex. D at p. 1).<sup>3</sup> The CSE recommended that for the remainder of the school year the student attend a 12:1+2 special class in a district school three times per week for three hours and 15 minutes, receive individual behavior intervention services at school three times per week for three hours and 15 minutes, and receive counseling in a small group at school one time per six-day cycle for 30 minutes, and individual

---

<sup>1</sup> There are transcripts of three days of hearings as part of this proceeding with four separate transcripts for one of those days; for ease of reference the transcripts are identified by volume number rather than date (Tr. Vol. I at pp. 1-62 [December 2, 2022]; Tr. Vol. II at pp. 1-73 [December 8, 2022]; Tr. Vol. III at pp. 1-64 [December 12, 2022]; Tr. Vol. IV at pp. 1-44 [December 12, 2022]; Tr. Vol. V at pp. 1-58 [December 12, 2022]; Tr. Vol. VI at pp. 1-99 [December 12, 2022]).

<sup>2</sup> By parent report, the December 2021 CSE recommended sending packets to State-approved center-based programs and at a subsequent meeting in January 2022 the CSE "wanted" to send a packet to Family of Kidz (Tr. Vol. VI at pp. 18-19; Parent Ex. A at p. 13).

<sup>3</sup> The May 2022 IEP uses the term "emotional disturbance"; however, as the State changed the term "emotional disturbance" to "emotional disability" as of July 27, 2022, the term "emotional disability" is used in this decision (see 8 NYCRR 200.1[zz][4]).

counseling at school one time per six-day cycle for 30 minutes (Parent Exs. D at pp. 1, 8; E at p. 1).<sup>4</sup> In addition, the CSE recommended that the student receive individual counseling at home two times per week for 45 minutes and the parents receive parent counseling and training at home two times per month for one hour (Parent Exs. D at pp. 1, 8; E at p. 1).

The parent's private evaluator conducted a neuropsychological evaluation of the student on multiple dates in June and July 2022 (Parent Ex. K at pp. 1, 12; see Dist. Ex. 7 at p. 1). Administration of the Wechsler Abbreviated Scale of Intelligence-Second Edition (WASI-2) yielded a full-scale IQ of 111, which the neuropsychologist described as falling within the "lower limits of the [h]igh [a]verage range" (Parent Ex. K at p. 4). However, the neuropsychologist noted that the student's overall neuropsychological profile showed "significantly" variable functioning within attention and executive functioning abilities, impulsivity in motor planning and poor attention to detail in written form, and notable anxiety (Parent Ex. K at pp. 4, 6-7). The neuropsychologist offered diagnoses of ADHD-combined presentation, specific learning disorder with impairment in written expression (dysgraphia), and generalized anxiety disorder (Parent Ex. K at pp. 6-7).

Although the initial May 2022 IEP did not include a recommendation for 12-month services, it appears that there was a second CSE meeting in May 2022 that recommended 12-month services and that the student attended a district public school "for a shortened week and on truncated days" (Tr. Vol. V Tr. at p. 18-19; Dist. Ex. 6 at p. 1).

In July 2022, the student had a behavioral incident that according to the coordinator for special education necessitated the use of "physical support to keep [the student] safe" (Tr. Vol. V at pp. 46-47).

On July 21, 2022, the CSE convened for the student's annual review and to develop his IEP for the 2022-23 school year (Tr. Vol. V at p. 19; Parent Ex. F).<sup>5</sup> In addition, the CSE reviewed the independent neuropsychological evaluation obtained by the parent (Tr. Vol. V at pp. 19-20). The July 2022 CSE changed the student's educational disability classification to other health-impairment in consideration of his diagnoses of generalized anxiety disorder, ADHD, and specific learning impairment in writing (Tr. Vol. V at p. 23; Parent Ex. F at p. 3).

For July and August 2022, the CSE recommended that the student attend a 12-month, school-based program that consisted of a 12:1+2 special class for three hours per day for three days per week, individual behavior intervention services for three hours per day for three days per week, one 30-minute session of small group counseling per week and one 30-minute session of individual counseling per week (Parent Ex. F at pp. 15-16). The CSE also recommended that the student receive two 45-minute sessions of individual counseling in the student's home per week, and that the parents receive two 60-minute sessions of parent counseling and training per month (id.).

---

<sup>4</sup> The student's behavior intervention services were provided by a special education teacher through an agency contracted by the district (see Tr. Vol. II at pp. 28-29; Dist. Exs. 4 at pp. 1, 11).

<sup>5</sup> The reported behavioral incident occurred prior to the July 2022 CSE meeting (Tr. Vol. V at p. 46).

For the 10-month portion of the 2022-23 school year, beginning in September 2022, the July 2022 CSE recommended that the student attend a 12:1+2 special class five hours per day and receive one 30-minute session of individual counseling per six-day cycle, and two 30-minute sessions of small group counseling per six-day cycle (Parent Ex. F at p. 14). The CSE also recommended that the parents receive two one-hour sessions of parent counseling and training per month (id.). The July 2022 CSE did not recommend behavior intervention services, instead the CSE recommended that the student be provided with a one-to-one aide to support him throughout the school day (Tr. Vol. II at pp. 39-40; Parent Exs. D at p. 8; F at pp. 14-15). While the July 2022 CSE did not recommend a behavioral intervention plan (BIP) for the student, the IEP noted that "[a]s per the private evaluator, it is recommended that [functional behavioral assessment (FBA)] and subsequent BIP be initiated in the fall after placement in a new classroom with a new schedule, staff and peers to address any potential behaviors that may impede learning" (Parent Ex. F at p. 12). The IEP further noted that "[t]he CSE w[ould] request consent to conduct an FBA in the fall" (id.).

On September 9, 2022, the student had a behavioral incident in which he was physically aggressive, and which resulted in the district using the "crisis team" (Tr. Vols. I at pp. 26-27, 33; II at p. 61).

The student had another behavioral incident on September 12, 2022, in which he was less physically aggressive but engaged in cursing, defiant behavior, and screaming, including screaming in other student's faces (Tr. Vol. I at p. 33).

On September 13, 2022, the student had a behavioral incident in which he threw chairs, eloped from the classroom, and hit and kicked staff (Tr. Vols. I at pp. 28, 30-31; III at pp. 5-6). As a result of this incident, the student was issued a five-day out-of-school suspension for engaging in conduct that was disorderly or insubordinate and engaging in conduct that was violent (Dist. Ex. 11).

The following day, on September 14, 2022, the district issued a prior written notice seeking parental consent to conduct an FBA noting that the student had, since the start of the school year, exhibited unsafe behavior and acts of aggression toward staff (Dist. Ex. 13 at p. 1). The prior written notice also indicated that on July 28, 2022, the district had requested parental consent to evaluate the student's receptive and pragmatic language skills, fine motor skills, and visual perceptual skills but that it had not yet received consent to do so (id.). The parent did not provide consent for the proposed evaluation and instead requested that the district provide an independent FBA due to her general distrust of the district staff to conduct it (Tr. Vols. V at pp. 28-29; VI at pp. 50-51).

The student returned to school on September 21, 2022 but had a behavioral incident that began on the school bus and continued in the school building (Dist. Ex. 9). The student was issued a five-day out of school suspension for engaging in conduct that was disorderly or insubordinate, engaging in conduct that was violent, and engaging in misconduct on the school bus (id.). The parent appealed the suspension, asserting that the student's behavior was a manifestation of his disability (Tr. Vol. VI at p. 47).

The district scheduled a superintendent's hearing for September 30, 2022, that was moved to October 11, 2022; however, after arriving at the meeting, on October 11, 2022, the parent requested an adjournment and left the building (Tr. Vol. VI at p. 71; Dist. Ex. 9 at p. 3). The student's father remained and discussed a potential resolution with district representatives (Tr. Vol. VI at p. 73). The parent later returned to the building after noticing her spouse's car in the parking lot and was given a proposed settlement agreement to review; however, she did not sign a settlement agreement (Tr. Vol. VI at pp. 73-74; Parent Ex. I at p. 1; Dist. Ex. 7 at p. 5). The proposed settlement agreement contained a provision waiving the parents' rights to a manifestation review and an IAES hearing (Dist. Ex. 7 at p. 4).

On October 11, 2022, the district issued a prior written notice requesting parental consent to complete the requested FBA and conduct a psychiatric evaluation of the student (Dist. Ex. 15). The prior written notice again noted that the district had requested, but not received, parental consent to conduct further evaluation of the student's receptive and pragmatic language, fine motor, and visual perceptual skills (Dist. Ex. 15 at pp. 1-2).

On October 12, 2022, the district sent the parent a letter indicating that the superintendent's hearing that was originally scheduled for September 30, 2022, was rescheduled for October 19, 2022 (Dist. Ex. 9 at p. 4).

On October 18, 2022, the parent filed a request for an expedited due process hearing (see Parent Ex. A). In it, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2021-22 and 2022-23 school years (id. at p. 25). In her request, the parent invoked the student's right to pendency and requested a bifurcated hearing (id.). As relief, the parent requested an order directing the district to fund an FBA, a BIP, an occupational therapy (OT) evaluation, and a speech-language evaluation "to be performed by a provider of the Parent's choosing" (id.). Additionally, the parent requested a determination "of whether [the student's] recent 2022-2023 suspensions were manifestations of his disability and whether there [wa]s a need for placement in an IAES" (id.).

The superintendent's hearing occurred on October 19, 2022, at which time the student's father signed a stipulation of settlement waiving parental rights to a manifestation review; waiving his rights to an IAES hearing; providing consent for an FBA, psychiatric evaluation, and release of records; and completing an application for an IAES (Dist. Exs. 7 at pp. 1, 4, 5, 9; 9 at p. 4). The parent subsequently asserted that the student's father did not have the authority to make sole educational decisions pursuant to a June 11, 2021, post-nuptial agreement (Parent Ex. H at pp. 22-24). On October 26, 2022, an order to show cause was issued by a matrimonial part of the New York State Supreme Court prohibiting removal of the student from his public school or home instruction pending further order from the court or an impartial hearing officer and staying any action taken under the October 19, 2022, stipulation of settlement until further order of the court (Tr. Vol. VI at p. 49; Parent Ex. G at p. 2).

On November 2, 2022, the district filed a due process complaint notice requesting an order placing the student in an IAES and other relief as further outlined below (Dist. Ex. 1).

On November 18, 2022, the IHO appointed to conduct the impartial hearing related to the parent's October 2022 hearing request ordered that the student's placement for the pendency of that

proceeding "shall reflect the educational recommendations of the May 20, 2022 IEPs" (Dist. Ex. 6 at p. 7). The student remained on home instruction from the September 21, 2022 suspension through the November 18, 2022 order of pendency, at which time he returned to school on the truncated schedule recommended in the May 2022 IEP (Tr. Vols. III at p. 30; VI at p. 37).

### **A. Due Process Complaint Notice**

In a due process complaint notice dated November 2, 2022, the district alleged that the student was substantially likely to cause injury or harm to himself or others and requested an expedited due process hearing in accordance with 8 NYCRR 201.8 and 8 NYCRR 201.1 (Dist. Ex. 1 at pp. 1, 6). The district alleged multiple incidents where the student placed himself or others at risk of harm (id. at pp. 4-5). The district argued that the student's mother refused to consent to the district conducting a functional behavioral assessment (FBA) or a psychiatric evaluation of the student (id. at pp. 6). The district stated that the student required a more restrictive setting to protect himself and others from his allegedly violent outbursts (id. at 4, 6).

As relief, the district requested that pendency be changed to home instruction until the expedited impartial hearing was concluded (Dist. Ex. 1 at p. 7). The district further requested an order directing the student to attend an IAES for forty-five school days in accordance with 8 NYCRR 201.8(b) (id.). The district specified that it was seeking an order finding that if the student remained in his current placement, he would be substantially likely to harm himself or others (id.). The district requested that the IHO order that Family of Kidz constituted an appropriate IAES setting for the student (id.). The district requested that the IHO order the district to conduct an FBA and a psychiatric evaluation (id.). In the event that the IHO did not determine that Family of Kidz was an appropriate IAES setting, the district requested that the IHO order the CSE to reconvene to determine an appropriate IAES setting for the student (id.).

### **B. Impartial Hearing Officer Decision**

The expedited hearing was held on December 2, 2022, December 8, 2022, and December 12, 2022 (see Tr. Vol. I-VI).

On the first day of the hearing, December 2, 2022, the student had a behavioral incident in school that involved aggressive and violent behavior, which necessitated the use of "a supportive hold" and a "shelter in place" order, and also resulted in the district calling for emergency services (Tr. Vol. IV at pp. 12-14, 33). A few days later, on December 6, 2022, the student had another behavioral incident that involved aggressive behaviors and threats of violence against a specific district staff member (Tr. Vol. II at p. 11-12). During the hearing, the district presented witnesses who provided testimony about the student's behavior, arguing that his presence in the district schools presented safety concerns to the student, his fellow students, and staff (Tr. Vols. II at pp. 13; III at p. 50; IV at pp. 32, 40-41).

In a decision dated December 20, 2022, the IHO denied the district's request for an IAES, in part because the IHO found that the student's pattern of behavior "was not addressed pursuant to a modification of the IEP" (IHO Decision at pp. 9, 11, 15). The IHO determined that "clearly," the student could not be returned to school without additional supports, including a BIP and FBA (id. at p. 9). However, the IHO noted that the student was receiving services pursuant to pendency

based on the May 2022 IEP and the majority of the student's behaviors occurred prior to the implementation of pendency and without the supports provided in the May 2022 IEP (*id.*). The IHO then referenced guidance that indicates that in addition to showing that there was a substantial likelihood of injury to the student or others, the district "'must also show it 'has done all that it reasonably can to reduce the risk that the child will cause injury'["] (*id.* at p. 10). The IHO determined that although the district established that the student's behavior created a substantial risk of injury to himself and others in the school, the district did not show, apart from requests for evaluations, that it attempted any measures to address the student's behaviors (*id.* at p. 11). Regarding the district's proposed IAES placement, Family of Kidz, the IHO determined that it would have been an appropriate IAES for the student (*id.* at p. 12). The IHO reviewed the alternative placement proposed by the parent and found that it was presented as a remedy for a denial of a FAPE, rather than as an interim placement, and accordingly, the IHO found that it may be addressed as part of the parent's due process complaint notice rather than in the current proceeding (*id.* at pp. 12-13). The IHO ordered the district's CSE to "immediately reconvene to add additional behavioral interventions, including the development and implementation of a detailed specific transition plan" (*id.* at p.15). The IHO further ordered that the district "conduct and implement" an FBA and a BIP as soon as possible and denied the district's request for a psychiatric evaluation of the student with a provider of the district's choice (*id.*).<sup>6</sup>

#### **IV. Appeal for State-Level Review**

The district appeals, arguing that the IHO erred in denying the district's request to place the student in an IAES. The district alleges that the IHO was correct in determining that the student poses a safety risk because his actions are substantially likely to result in injury to himself or others in the district, but that the IHO should have determined that an IAES placement was proper instead of determining that the district "did not take all reasonable steps to reduce the risk of substantial injury." The district argues that the IHO's decision to deny the IAES placement was based on a flawed application of a circuit court case from another jurisdiction and asserts that the IHO failed to properly consider the district's "extensive testimony" regarding the actions it took to reduce the student's risk to himself and others.

The district asserts that it gave extensive testimony that it had provided the parent with consent forms for an FBA and a psychological evaluation, but that the parent refused to sign them and that the IHO was wrong to require the district to provide the student with additional supports when the parent prevented the district from performing an FBA and thereby creating a BIP. The district also argues that the IHO's refusal to order a psychiatric evaluation was in error as a psychiatric evaluation is necessary to fully understand the student's needs and how to address them. The district emphasizes that the IHO's failure to grant the district its requested IAES placement for the student subjects the student, the district students, and the district staff to a substantial risk of harm based on the student's violent behaviors.

In an answer with cross-appeal, the parent requests that the IHO's decision not to order an IAES be upheld and asserts that the IHO erred in determining that the student posed a substantial

---

<sup>6</sup> The IHO noted in her decision that she "decline[d] to force [the] Parent to consent to an additional evaluation, especially since, according to the parties, there [wa]s an agreement in principle regarding a psychiatric evaluation" (IHO Decision at p. 14).



risk of harm to himself or others and that Family of Kidz was an appropriate IAES for the student. The parent further alleges that the district failed to show that a psychiatric evaluation of the student was necessary and requests that the IHO's denial of the requested psychiatric evaluation be upheld. The parent attaches additional evidence regarding events that occurred subsequent to the issuance of the IHO's decision, including a January 2023 CSE meeting, emails regarding the district conducting evaluations, including an FBA of the student, and the parent's affidavit.

In its answer to the parent's cross-appeal, the district requests that the cross-appeal be dismissed for failure to comply with the State practice regulations. In the event that the parent's cross-appeal is not dismissed for failure to comply with the practice regulations, the district argues that the IHO correctly held that the student was substantially likely to cause injury to himself or others and that the IHO properly determined that Family of Kidz was an appropriate IAES for the student. The district argues that the parent's affidavit and her additional documentary evidence should be disregarded. The district further alleges that its request for an IAES placement has not been rendered moot by the passage of time.<sup>7</sup>

## **V. Applicable Standards**

The procedures under the IDEA (20 U.S.C. §§ 1400-1482) relevant to this matter involve the process by which school officials may effect a disciplinary change in placement of a student with a disability (20 U.S.C. § 1415[k]; Educ. Law §§ 3214[3][g]; 4404[1], [4][b]; 34 CFR 300.530; 8 NYCRR Part 201). A disciplinary change in placement means a "suspension or removal from a student's current educational placement that is either: (1) for more than 10 consecutive school days; or (2) for a period of 10 consecutive days or less if the student is subjected to a series of suspensions or removals that constitute a pattern because they cumulate to more than 10 school days in a school year" (8 NYCRR 201.2[e]; see 20 U.S.C. § 1415[k][1][B]; 34 CFR 300.530[b][2]; [c]; 300.536[a]). If a district is considering a disciplinary change in placement for a student with a disability, the district must conduct a manifestation determination review (MDR) meeting "within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct" (20 U.S.C. § 1415[k][1][E][i]; 34 CFR 300.530[e][1]; 8 NYCRR 201.4[a]). The manifestation team must review all relevant information in the student's file including the student's IEP, any teacher observations, and any relevant information provided by the parents to determine if: "(1) the conduct in question was caused by or had a direct and substantial relationship to the student's disability; or (2) the conduct in question was the direct result of the school district's failure to implement the IEP" (8 NYCRR 201.4[c]; see 20 U.S.C. § 1415[k][1][E][i][1],[2]; 34 CFR 300.530[e][1][i][ii]). If the result of the MDR is a determination that the student's behavior was not a manifestation of his or her disability, "the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner in which they would

---

<sup>7</sup> The district also filed a reply to the parent's answer with cross-appeal; however, the State regulation limits the scope of a reply to "any claims raised for review by the . . . answer with cross-appeal that were not addressed in the request for review, to any procedural defenses interposed in an . . . answer with cross-appeal or to any additional documentary evidence served with the answer" (8 NYCRR 279.6[a]). In this instance, the district's proposed procedural defense as well as its response to the parent's additional evidence were included in its answer to the parent's cross-appeal and the reply did not respond to any issues raised for the first time in the parent's answer with cross-appeal. As such, the district's reply fails to comply with the practice regulations and will not be considered.

be applied to children without disabilities" (20 U.S.C. § 1415[k][1][C]; 34 CFR 300.530[c]; see Educ. Law § 3214[3][g][vi]; 8 NYCRR 201.7[d]). However, if the result of an MDR is a determination that the student's behavior was a manifestation of his or her disability, the CSE is required to conduct an FBA and implement a BIP or, if the student already has a BIP, review the BIP and modify it as necessary to address the behavior (20 U.S.C. § 1415[k][1][F][i]-[ii]; 34 CFR 300.530[f][1][i]-[ii]; 8 NYCRR 201.3). Except under "special circumstances," the district must also return the student to the placement from which he or she was removed or suspended, unless agreed otherwise by the parent and district as part of the modification of the BIP (20 U.S.C. § 1415[k][1][F][iii]; Educ. Law § 3214[3][g][3][viii]; 34 CFR 300.530[f][2]; 8 NYCRR 201.4[d][2][ii]).<sup>8</sup>

An IAES is "a temporary educational placement, other than the student's current placement at the time the behavior precipitating the IAES placement occurred" (8 NYCRR 201.2[k]). As part of a disciplinary proceeding, a superintendent may remove a student with a disability to an IAES if the student's conduct involved serious bodily injury, weapons, illegal drugs or controlled substances (20 U.S.C. § 1415[k][1][G][i]-[iii]; 34 CFR 300.530[g]; 8 NYCRR 201.7[e]). Additionally, if a district requests an expedited hearing, an IHO may order a placement to an IAES even if the student is not subject to a disciplinary proceeding if the IHO determines "that maintaining the current placement of the student is substantially likely to result in injury to the student or to others" (8 NYCRR 201.8[a], [c]; see 20 U.S.C. § 1415[k][3][A]-[B]; Educ. Law § 3214[3][g][3][vii]; 34 CFR 300.532[c]; 8 NYCRR 201.11). An MDR meeting must be conducted within 10 school days after a superintendent or IHO decides to place a student in an IAES (see 8 NYCRR 201.4[a][1]-[2]). A student who is placed in an IAES shall "continue to receive educational services so as to enable that student to continue to participate in the general education curriculum . . . and to progress toward meeting the goals set out in the student's IEP" (8 NYCRR 201.2[k][1]; see 20 U.S.C. § 1415[k][1][D][i]; 34 CFR 300.530[d][1][i]; 8 NYCRR 201.10[d]).

## **VI. Discussion**

### **A. Preliminary Matters – Compliance with Practice Regulations and Additional Evidence**

The district contends that the parent's cross-appeal should be dismissed for failure to comply with State regulations. The district alleges that the parent's answer and cross-appeal failed to clearly specify why she was challenging the IHO's decision, failed to identify the findings that the parent believed were wrong, failed to number the issues separately, and failed to make citations to the hearing record or the IHO's decision. The district also argues that the additional evidence attached to the parent's answer with cross-appeal should not be considered.

The regulations governing practice before the Office of State Review require that "[a] respondent who wishes to seek review of an impartial hearing officer's decision may cross-appeal from all or a portion of the decision by setting forth the cross-appeal in an answer served" (8 NYCRR 279.4[f]). A cross-appeal shall clearly specify the reasons for challenging the impartial hearing officer's decision, identify the findings, conclusions, and orders to which exceptions are

---

<sup>8</sup> A district and parents may agree to a change in the student's placement (20 U.S.C. § 1415[k][1][F][iii]; 34 CFR 300.530[f][2]; 8 NYCRR 201.4[d][2][ii]).

taken, or the failure or refusal to make a finding, and shall indicate the relief sought by the respondent" (8 NYCRR 279.4[f] [emphasis added]). Furthermore, 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]; 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]; J.S. v. New York City Dep't of Educ., 2017 WL 744590, at \*4 [S.D.N.Y. Feb. 24, 2017] [agreeing with an SRO that the parents' "failure to advance specific arguments in support of their conclusory challenge constituted waiver of those issues"]).

In this instance, review of the parent's answer with cross-appeal shows that the parent responds specifically to a number of the allegations raised in the district's request for review and that the parent's allegations include some citations to the hearing record and to the IHO's decision. Nevertheless, rather than separate the issues being cross-appealed, in one paragraph the parent merely indicates that she "cross appeals to the extent [the] IHO [] erred in ruling that the Student is a substantial risk of harm to himself and others and that Family of Kidz may be appropriate" (Answer with Cross-Appeal ¶45). Accordingly, the answer with cross-appeal is not entirely in compliance with the practice regulations. However, there is no indication that the district was unable to respond to the parent's cross-appeal in its answer to the cross-appeal and any minor deviation from the practice regulations by the parent does not warrant a dismissal of the answer with cross-appeal in this instance (8 NYCRR 279.8). Therefore, I decline to exercise my discretion to dismiss the parent's answer with cross-appeal.

The district also objects to the additional evidence presented by the parent with her answer with cross-appeal, asserting that "[s]ince the issue on appeal concerns whether the IHO's decision was correct at the time it was rendered, any subsequent information should not have any bearing on the SRO's decision" (Answer to Cross-Appeal ¶ 32). 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]).

In this case, the parent submits a copy of the student's January 5, 2023 IEP, showing that the CSE reconvened on January 5, 2023 to create a new IEP because "[a]s ordered by the IHO, an FBA is being conducted" and noted that the student was "currently supported by a positive

behavior support plan" (Answer with Cross-Appeal Ex. B at p. 7).<sup>9</sup> This document did not exist prior to the IHO rendering her decision in this matter and is relevant to the issues discussed.

The parent also submits an affidavit, which discusses events surrounding the other documentary evidence submitted (Answer with Cross-Appeal Ex. A). In addition, the parent submits email correspondence between herself and the district's coordinator of elementary special education and intervention services in February 2023 (Answer with Cross-Appeal Ex. C). However, as the email correspondence and the affidavit contain assertions that the district was not given the opportunity to cross-examine or rebut, they will not be considered as part of this proceeding. However, because the January 2023 IEP is a document created by the district, thereby giving the district control of its contents, there is no compelling reason why the district would need an additional opportunity to present evidence regarding the IEP itself. The district has had the opportunity to present its argument on appeal as to whether the IEP is relevant to this proceeding. As the January 2023 IEP is the student's most current IEP, it will be considered as part of these proceedings.

## **B. IAES Placement**

The district asserts that the IHO erred in denying the district's request to place the student in an IAES (Req. for Rev. at pp. 1-2). Specifically, the district argues that despite reaching the conclusion that the student's behaviors were likely to result in injury to the student, other students, or a staff member, the IHO did not determine that an IAES was warranted, instead finding that the district did not take all reasonable steps to reduce the risk of substantial injury (id. at p. 2).

In her answer and cross appeal, the parent argues that the IHO erred in her determination that the student posed a substantial risk of harm to himself and others "during the time at issue or poses such a risk now, over two months after [the IHO's] Decision was handed down" (Answer with Cross-Appeal at pp. 1, 10). The parent implies that the student was not a substantial risk of harm because the district did not take reasonable actions to reduce the risk of harm to the student or others around him (id. at p. 5). The parent also cross-appeals the IHO's finding that Family of Kidz was an appropriate IAES for the student (id. at pp. 1, 10).

As an initial matter, it must be noted that an IHO may only order that a student be placed in an IAES when the IHO determines that "maintaining the current placement of the student is substantially likely to result in injury to the student or others" (8 NYCRR 201.8[a]). Additionally, State regulation provides that a district may repeat the process to continue a student's placement in an IAES "if the school district believes that returning the student to the original placement is substantially likely to result in injury to the student or others" (8 NYCRR 201.8[b]).

In this matter, the student's "original placement" was the recommended program at the time the district initiated this proceeding with the November 2022 due process complaint notice (Dist. Ex. 1). At that time, the student's recommended program, as set forth in the July 2022 IEP,

---

<sup>9</sup> The parent did not number the documents attached to her answer with cross-appeal and memorandum of law. For ease of reference, they will be referred to as exhibits attached to the parent's answer with cross-appeal (Answer with Cross-Appeal Exs. A [Parent's Affidavit dated February 21, 2023]; B [January 2023 IEP]; C [February 2023 email correspondence]).

included a 12:1+1 special class daily with the support of a 1:1 aide, individual counseling, small group counseling, and parent counseling and training (Parent Ex. F at pp. 14-15).

As noted above, while in this placement, the student had multiple behavioral incidents (Tr. Vols. II at p. 61, 65; Dist. Exs. 9; 11). The district school social worker who worked with the student testified that during an incident on September 9, 2022, the student hit her and on September 12, 2022, there was an incident that was less physically aggressive but included cursing, defiance and screaming, including screaming in other student's faces (Tr. Vol. I at p. 33). The district social worker testified that on September 13, 2020, she was called to the student's classroom as a member of the crisis team "at least two times" because the student had multiple behavioral incidents (Tr. Vol. I at pp. 28-31). She reported that the student screamed curse words at his teacher, threw chairs, hit and kicked staff, and swung objects such as a ruler at staff (Tr. Vol. I at p. 29). The student also attempted to leave the classroom and tried to go into areas of the building he was not permitted in, and when his path was blocked, began "hitting people, kicking, screaming and cursing" (Tr. Vol. I at p. 30). The other students in the class were moved out of the classroom to another room "to maintain their safety as well as [the student's] safety" (Tr. Vol. I at pp. 31-32). The assistant principal testified that she was hit in the torso and chest during the September 13, 2022 incident (Tr. Vol. IV at p. 14). The student was consequently issued a five-day out-of-school suspension for engaging in disorderly and violent conduct that included throwing chairs at his teacher, punching her in the stomach and arms, slapping her arms, kicking her shins, throwing pencils at her face, and engaging in aggressive acts toward other school staff (Dist. Ex. 11). The suspension notice noted that this behavior caused disruption of the normal operation of the school, as the other students in the class twice had to be moved to a separate location and the crisis team was required to be present throughout the day (*id.*).

According to school staff, following his suspension, the student returned to school on September 21, 2022, and on the way to school was involved in another behavioral incident on the school bus (Tr. Vols. III at pp. 49-50; IV at p. 16). During this incident the student repeatedly kicked the seat in front of him disrupting the student in front of him, hit the bus window with the buckle of his seatbelt, hit the roof and windows of the bus with a broom, attempted to open the emergency exit door, climbed on top of the seats in an attempt to open the emergency hatch on the roof, and hit school staff (Tr. Vols. III at p. 50; IV at pp. 16-17; Dist. Exs. 36-42; 44-46). The assistant principal testified that she had to call a "lockdown" later the same day because the student was "hitting and kicking and became physically aggressive with adults in the hallway," noting that the lockdown was changed to a "shelter in place" once the student had moved out of the hallway (Tr. Vol. IV at pp. 11-12; Dist. Exs. 18; 19). The student was consequently issued a second 5-day out-of-school suspension (Dist. Ex. 9). The September 21, 2022 suspension notice cited disorderly conduct that required the crisis team to be present throughout the day and restricted movement of the other students, violent conduct such as punching and kicking, throwing objects at staff, and attempting to push over a filing cabinet, and misconduct on the school bus as reasons for the student's suspension (*id.*).

The district social worker confirmed that following the September 21, 2022 suspension, the student remained on home instruction (Tr. Vols. III at p. 30; *see* Dist. Ex. 6 at p. 4).

In a November 18, 2022 interim order of pendency, the IHO determined that because the parent was challenging the appropriateness of the July 2022 IEP, the student's May 2022 IEP

established his pendency placement; the student subsequently returned to the district elementary school in the program recommended in the May 20, 2022 IEP (Tr. Vol. III at p. 30; Dist. Ex. 6 at p. 7).

As noted above, the IHO determined that the majority of the student's behavioral incidents occurred prior to the implementation of the pendency order (IHO Decision at p. 9). However, as argued by the district, the IHO also noted that the student was involved in multiple incidents directly after he returned to the district and received services under the pendency placement (Req. for Rev. ¶ 17; see IHO Decision at p. 7).

Review of the hearing record shows that on December 2, 2022, the student had a behavioral incident that, according to the assistant principal, resulted in having to call a shelter in place because the student was "dysregulated in the classroom" and she "had to call EMTs and 911 that day" (Tr. Vol IV at pp. 12-13). The student threw chairs and desks in the classroom and kicked a whiteboard "to the point that it had shattered" (Tr. Vol. IV at p. 13). The district coordinator for special education testified that the student was placed in "a supportive two-person seated hold" and 911 was called because of "how dysregulated he was" and additionally reported that she was hit in the shoulder area (Tr. Vol. IV at pp. 13-14, 33).

The district social worker reported that the student had another behavioral incident on December 6, 2022 during which he was "agitated and dysregulated," hit staff, and "destroy[ed] things in classrooms" (Tr. Vol. II at p. 11). According to the social worker, the student made several attempts to elope from the classroom into the hallway and stairwell and when his route was blocked, he hit staff, including hitting the assistant principal with a book (Tr. Vols. II at p. 13-14; IV at p. 14; Dist. Ex. 26). While staff were attempting to deescalate the student, he was given a white board, on which he wrote an expletive directed at the building principal "and drew a picture of the knife next to it and then erased it" (Tr. Vol. II pp. 12-13). The social worker testified that the student later said, "I want to kill [the building principal] with a knife," which triggered an assessment by district mental health staff and a transmission of mental health crisis resources to the parent (Tr. Vol. II at pp. 14-15, 18-19; Dist. Ex. 28).

Speaking to the student's behavior on full days versus truncated days, the district school social worker testified that she had not observed any difference in the student's behavior on truncated days, noting that he "exhibited the same kind of aggressive, violent behaviors and dysregulation whether it [was] a full day or truncated day" (Tr. Vol. III at p. 45). Notably, the first behavior incident of the 2022-23 school year described in the hearing record occurred in July 2022 when the student was receiving a truncated school day and resulted in the use of "physical support" by school staff because "they felt he was going to harm himself or hurt himself from punching the computer or the filing cabinet" (Tr. Vol. V at pp. 18-19, 46-47; VI at p. 25).

Here, the evidence in the hearing record confirms the IHO's determination that the student exhibited aggressive and violent behaviors through the early part of the 2022-23 school year, such that returning the student to his then-current program was substantially likely to result in injury to the student or others. As such, the parent's cross-appeal is dismissed.

According to the additional evidence included with the parent's Answer, the CSE met on January 5, 2023 and changed the student's program to a truncated program noticeably similar to

the program reflected in the student's May 20, 2022 IEP which had been implemented as pendency, but the January 2023 IEP included a truncated schedule for different hours during the day and provided for an individual attendant for the student's transportation by bus (Answer with Cross-Appeal Ex. B at pp. 4-15). The January 2023 IEP has an implementation date of January 9, 2023, so it appears as though the student's current placement is pursuant to the January 2023 IEP (*id.* at p. 5).

In its Answer to Cross-Appeal, the district highlights multiple "dangerous and violent behaviors by the Student" contained in the hearing record, all occurring prior to the January 2023 IEP (Answer to Cross-Appeal ¶¶ 17, 18). However, the district does not explain why the student should not be educated in the student's most recently developed educational program as identified in the January 2023 IEP. The January 2023 IEP reports that the student was being supported by a positive behavior support plan in his placement and that "an FBA [wa]s being conducted" and that "[t]he CSE w[ould] convene to review the findings of the FBA and to develop a [BIP]" (Answer with Cross-Appeal Ex. B at p. 7). Accordingly, while the overall program as recommended in the May 2022 and January 2023 IEPs were similar, the January 2023 included additional supports directed at the student's most pressing behavioral needs (compare Parent Ex. D with Answer with Cross-Appeal Ex. B). Additionally, because the IHO issued her decision in this matter in December 2022, the hearing record does not reflect how the student is performing in his presumed current educational placement identified in the January 2023 IEP, or possibly under a subsequent IEP developed after completion of an FBA and BIP. Therefore, given that the student is no longer in the placement that was in effect at the time the district first sought to place him in an IAES, and scant evidence exists in the current record as to how the student is functioning in his current placement, which presumably is the one recommended for him by the CSE in the January 2023 IEP, it is not possible at this juncture and on the record before me to make a determination as to whether returning the student to his now-current educational placement would be substantially likely to result in injury to the student or others.

In summary, controlling in this matter are State regulations which direct that it is appropriate to change the placement of a student with a disability to an IAES when it is determined that "maintaining the current placement of the student is substantially likely to result in injury to the student or others" (8 NYCRR 201.8[a]). The hearing record reveals that the July 2022 IEP was the student's current placement on November 2, 2022 when the district filed its request for an expedited due process hearing (see Parent Ex. F; Dist. Ex. 1 at p. 1). The student reverted to the May 2022 IEP after the November 18, 2022 Interim Order of Pendency (Dist. Ex. 6 at pp. 7-8). District staff testified that the student continued to display violent and disruptive behaviors following the student's return to the May 2022 IEP's truncated schedule (Tr. Vol. III at p. 45). Despite this testimony, State regulations are clear that determining the appropriateness of an IAES request hinges on the student's current placement. By all accounts, the student's current placement is the new January 2023 IEP, not the July 2022 IEP that was current on the date the district filed its request for an expedited due process hearing, nor the interim pendency placement of which the district provided ample testimony. Therefore, the district's request for an order placing the student in an IAES is denied.<sup>10</sup>

---

<sup>10</sup> If the district believes that maintaining the student in his current educational placement is substantially likely to result in injury to the student or others, the district is at liberty to file an expedited due process hearing request

### C. Psychiatric Evaluation

Federal and State regulations provide that parental consent is not required to conduct a reevaluation if the district can demonstrate that it "made reasonable efforts to obtain such consent," and the student's parent "failed to respond" (34 CFR 300.300[c][2]; see 8 NYCRR 200.5[b][1][i][b]). Federal and State regulations also permit the use of consent override procedures, specifically through due process, if the parent refuses to consent to a reevaluation (34 CFR 300.300[c][1][ii]; 8 NYCRR 200.4[a][8]; 200.5[b][3]). Thus, if the district follows the necessary consent procedures for reevaluation but a parent does not respond, the district may reevaluate a student despite the failure to respond. Federal and State regulations also require the district to document in "a detailed record" its "reasonable efforts" to obtain a parent's written informed consent (8 NYCRR 200.5[b][1]; see 34 CFR 300.300[a][1][iii], [c][1], [d][5]). As explained in one district court case, "[a]lthough a parent always retains the right to withhold consent for further evaluations, after consent is withheld, the school district cannot be held liable for denying a FAPE" (V.M. v. N. Colonie Cent. Sch. Dist., 954 F. Supp. 2d 102, 118 [N.D.N.Y. 2013]). However, in some circumstances, a district may seek to override a parent's lack of consent to evaluate a student, but such consent override procedures are permissive, not mandatory (see id.).

In her decision the IHO affirmed that the district repeatedly attempted to obtain consent for a psychiatric evaluation (IHO Decision at p. 14). She noted that "[a] psychiatric evaluation may be beneficial to the student's needs" but stopped short of ordering the evaluation (id.). The IHO further declared that "there [was] an agreement in principle regarding a psychiatric evaluation" (id.). The district asserts that the IHO erred in not ordering a psychiatric evaluation (Req. for Rev. at pp. 9-10). The district specifically disagrees with the IHO's determination that a psychiatric evaluation was not necessary because the student had been evaluated by a psychologist and denies that the parties had an agreement in principle (id. at p. 9). Notwithstanding the discussion between the parties regarding a preferred evaluator, the hearing record does not include any indication that the parent has provided consent for this evaluation.

State regulations require that the committee on special education identify what additional information is necessary to determine whether any additions or modifications to the special education services are needed to enable the student to meet the measurable annual goals set out in the IEP and to participate, as appropriate, in the general curriculum (8 NYCRR 200.4[b][5][ii][d]).

In the November 2022 due process complaint notice, the district asserted that the district "required a psychiatric evaluation [of the student] in order to, among other things, determine if the [s]tudent's serious and significant emotional or behavioral conduct has a psychological cause which can be addressed through special education services" (Dist. Ex. 1 at p. 6).

In reviewing the student's educational history leading up to the district's request for a psychiatric evaluation and the district's reasoning behind the request, the hearing record supports

---

based on evidence pertinent to his placement under the January 2023 IEP or any subsequent IEP that has been developed, seeking an IAES for the student; however, at this point it may be beneficial to wait for the completion of the FBA, and its review by the CSE, in the event that has not yet occurred.



a finding that the district requires the evaluation to identify the student's needs and to recommend an appropriate program for the student, such that use of the consent override procedures was warranted.

In spring 2021, due to the "the frequency and intensity of [the student's] behaviors, the CSE recommended that [the student] be ... placed into its Intensive Support Program ("ISP")" (Parent Ex. A at p. 7). The ISP was described as a program "for students with significant emotional difficulties with an on-site psychiatrist, psychiatric social workers and coordinator. Services include[d] psychiatric supervision and ongoing parent counseling to address emotional and behavioral issues that interfere[d] with the achievement of educational goals" (*id.*).

The student was evaluated by the district school psychologist in October 2021 and she recommended a psychiatric evaluation "due to reported and observed physical and verbal aggression and reported and observed sexual comments" (Tr. Vol. VI at pp. 53-54; Dist. Ex. 16 at p. 12). The district coordinator for special education testified that upon receiving the recommendation from the school psychologist she "requested that a psychiatric evaluation be conducted ...[and] ...generated a prior written notice to request consent to do so" (Tr. Vol. V at pp. 10-11). The October 19, 2021 prior written notice confirms that the district sought consent to conduct a psychiatric evaluation because "[the student's] behaviors through the school day and on the school bus [were] a cause of concern," noting that the student "[was] engaging in frequent verbal aggressions which include[d] themes of killing and sexual content" and "engage[ed] in frequent physically aggressive behaviors both toward peers and adults" (Dist. Ex. 14). The parent testified that she did not consent to this evaluation (Tr. Vol. VI at p. 53).

The district again attempted to obtain consent for a psychiatric evaluation on October 11, 2022 citing acts of aggression by the student towards his classroom teacher, the assistant principal and the behavior consultant and additionally requested consent as part of the stipulation of settlement signed by the student's father on October 19, 2022 (Dist. Exs. 7 at pp. 4, 6, 9; 14 at p. 1, 4; 15 at p. 1). The parent did not provide consent to either of these requests but during the hearing asserted that "I am not objecting to [a psychiatric evaluation of the student], as long [as] I feel that the person is not going to be one sided and connected to the district" (Tr. Vols. V at p. 13-14; VI at pp. 77-78).

Here, the hearing record shows that the school psychologist who evaluated the student in November 2021 recommended that the student have a psychiatric evaluation. The district provided the parent with the form to consent to a psychiatric evaluation on October 11, 2021 and October 19, 2022 (Dist. Exs. 14 at pp. 1, 4; 15 at pp. 1, 4). The district made reasonable attempts to obtain the parent's consent to a psychiatric evaluation and documented its history of such attempts. The parent's objection to the evaluation based on a disagreement as to who should choose the evaluator was not reasonable as she did not identify any specific objections to a district selected evaluator and it is the district's obligation to ensure the student is evaluated in all areas of suspected disability.<sup>11</sup> Additionally, the district has documented a need for a psychiatric evaluation of the student and that it will be beneficial to the district in determining an appropriate special education

---

<sup>11</sup> If the parent disagrees with the results of the district's evaluation of the student, the parent may request an independent educational evaluation (IEE) of the student "conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child" (34 C.F.R. § 300.502[a][1]).

program and services for the student. Accordingly, the IHO's decision declining to override the parent's lack of consent and order a psychiatric evaluation is reversed.

## **VII. Conclusion**

Based on the above, the hearing record demonstrates that the student will not be returned to his placement at the time the district filed its due process complaint notice in this matter. As such, the district's appeal requesting an order directing that the student be placed in an IAES is denied. As the hearing record supports the need for the student to undergo a psychiatric evaluation, the IHO's order declining to order a psychiatric evaluation of the student is reversed. Because the hearing record supports the IHO's finding that the student presents a substantial risk of harm to himself and others if returned to the program recommended in the July 2022 IEP, the parent's cross-appeal is dismissed.

I have considered the parties' remaining contentions and find that they need not be addressed in light of the determinations made herein.

**THE APPEAL IS SUSTAINED IN PART.**

**THE CROSS-APPEAL IS DISMISSED.**

**IT IS ORDERED** that the impartial hearing officer's decision dated December 20, 2022, is modified to grant the district's request for override of the parent's consent and the district is directed to have a psychiatric evaluation of the student conducted.

**Dated:** Albany, New York  
March 27, 2023

\_\_\_\_\_  
**CAROL H. HAUGE**  
**STATE REVIEW OFFICER**