



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-490

Application of the BOARD OF EDUCATION OF THE PINE BUSH 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:

Thomas, Drohan, Waxman, Petigrow & Mayle, LLP, attorneys for petitioner, by Neelanjan Choudhury, Esq.

Sussman & Goldman, attorneys for respondent, by Michael H. Sussman, 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 determined that the educational programs and services recommended by its Committee on Special Education (CSE) for respondent's (the parent's) son for the 2023-24 school year were not appropriate. The appeal must be sustained.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The student has received diagnoses of oppositional defiant disorder (ODD), post-traumatic stress disorder (PTSD), attention deficit hyperactivity disorder (ADHD), anger disorder, and anxiety disorder (Dist. Ex. 1 at p. 15). In April 2022 the student was hospitalized for three weeks "due to self harm," after which he attended an "Intensive Day Treatment (IDT) program" at a Board of Cooperative Educational Services (BOCES) starting on May 3, 2022 through the end of the 2021-22 school year (fifth grade) (id. at pp. 1, 2, 15).

The student was referred to the CSE for an initial evaluation due to social/emotional concerns, and on July 13, 2022 the CSE convened and determined the student was eligible for

special education as a student with an other health-impairment (Dist. Exs. 1 at p. 1; 2 at p. 1).¹ The July 2022 CSE noted that the student "ha[d] anger issues and there [was] a trauma history," but that cognitively the student was "solid[ly] average" and demonstrated "good solid academic skills" (Dist. Ex. 2 at p. 1). CSE meeting information indicated that when the 2022-23 school year began, the student's mother would sign a release for the student's psychologist to communicate with the district's education team (*id.*). The July 2022 CSE recommended that the student receive 15 30-minute sessions per year of individual psychological counseling services, 15 30-minute sessions per year of small group psychological counseling services, and access to support staff daily as needed (*id.* at p. 6).

The student attended the district's middle school during the 2022-23 school year (sixth grade) (Dist. Ex. 5). On March 23, 2023, the CSE convened for the student's annual review and to develop an IEP for the 2023-24 school year (Dist. Ex. 3 at p. 1). Meeting information indicated that the CSE discussed that the student was "extremely intelligent and capable," although he "lack[ed] organizational skills and class readiness" (*id.*). The March 2023 IEP meeting information also noted that the student "receive[d] outside counseling twice per week (individual and family counseling)" and that during moments of social conflict he was "impulsive and reactive" (*id.*). The March 2023 CSE recommended that the student receive 15 30-minute sessions per year of individual psychological counseling services, 15 30-minute sessions per year of small group psychological counseling services, access to support staff daily as needed, and refocusing and redirection daily as needed (*id.* at p. 6). During the 2022-23 school year, the student received eight discipline referrals, three of which resulted in an in-school suspension (Dist. Ex. 6 at p. 1).

The student attended the district's middle school during the 2023-24 school year (seventh grade) (Dist. Exs. 22; 36). On September 19, 2023, the CSE reconvened at the parent's request due to "concerns regarding behavioral issues at school and in the home setting" (Dist. Ex. 6 at p. 1). The September 2023 CSE recommended that the student receive 15 30-minute sessions per year of individual psychological counseling services, 20 30-minute sessions per year of small group psychological counseling services, access to support staff as needed daily, refocusing and redirection as needed daily, and debriefings of behavior incidents as needed daily (*id.* at p. 7). The CSE also determined that "[a] weekly report on academics and behavior will be sent home by his teachers" (*id.* at p. 1).

On December 7, 2023, the student was given a warning after shoving another student in the hallway (Dist. Ex. 40 at p. 6). On January 5, 2024, when transitioning out of a classroom between periods, the student engaged in a verbal altercation with a female student resulting in the student receiving two days of in-school suspension for an act of verbal aggression (*id.*).

On February 1, 2024, the student made a serious safety threat that resulted in the student receiving a five day out-of-school suspension (Dist. Ex. 36). Via letter dated February 5, 2024, the district informed the parent that it had scheduled and invited the parent to attend a CSE manifestation determination review (MDR) meeting on February 8, 2024 to determine whether the

¹ The student's eligibility for special education as a student with an other health-impairment is not in dispute (*see* 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

student's recent misconduct was a manifestation of his disability (Parent Ex. A at p. 1). On February 8, 2024, the CSE convened an MDR regarding the student's threatening statements (see Dist. Ex. 25). The CSE met with the student's mother with her attorney present and "discussed [the student's] improvement th[at] school year as well as his diagnoses that contribute[d] to his OHI classification" (*id.* at p. 1). The CSE reported that it "determined based on the fact that the class had just discussed lockdowns and due to his impulsivity the alleged behavior is a manifestation of [the student's] disability" (*id.*). The CSE noted that the "[a]ttorney for the parent shared familial issues that likely ha[d] an impact on [the student's] functioning" and that "[a] letter was also provided by his outside therapist for CSE consideration" (*id.*).² The CSE concluded that "[d]ue to the CSE finding the behavior to be a manifestation, consent for [a functional behavioral assessment] FBA will be sent to mom" (*id.*).

On February 9, 2024, the student engaged in an act of physical aggression while on the school bus which resulted in a three day in-school suspension (Dist. Ex. 40 at p. 6). In a letter dated February 16, 2024, the district notified the parent that it would be convening the CSE due to the parent's request that the CSE discuss the student's educational needs (Parent Ex. C at p. 1). On the morning of February 28, 2024, the student engaged in an act of verbal aggression with two female students in the cafeteria and, as a result, the student received a three day in-school suspension (Dist. Ex. 40 at p. 7).

Later on February 28, 2024, the CSE convened and the "[p]arent expresse[d] concerns about [the student's] behavior at school and in her home" and explained that she believed that the student "need[ed] a different placement" (Parent Ex. C at p. 1; Dist. Ex. 29 at p. 1). The CSE noted that "[t]he parent and school staff have different observations of [the student's] performance and functioning" (Dist. Ex. 29 at p. 1). The CSE reported that the district had just received the parent's consent to perform an FBA and that once the FBA was completed, the CSE would reconvene to review the assessment and to determine if a behavioral intervention plan (BIP) was necessary (*id.*). The February 2024 IEP recommended that the student receive 15 30-minute sessions per year of individual psychological counseling services, 20 30-minute sessions per year of small group psychological counseling services, access to support staff as needed daily, refocusing and redirection as needed daily, and debriefings of behavior incidents as needed daily (*id.* at p. 7).

A. Due Process Complaint Notice

In a due process complaint notice dated March 25, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (Dist. Ex. 34). The parent asserted that the student's "current IEP and school program [we]re not addressing his noted social and emotional needs, causing significant academic regression" (*id.* at p. 1). The parent argued that the student needed a program that addressed his severe emotional needs and that would specifically address his emotional well-being and his social interactions (*id.* at p. 2). The parent requested a due process hearing "to determine the nature of interventions required for [the student] and the proper setting and program for him" (*id.*).

² In a letter dated February 7, 2024, the student's private therapist indicated that the student "require[d] a more structured and therapeutic setting in order to succeed academically and socially" (Dist. Ex. 24).

B. Events Post-Dating the Due Process Complaint

On April 10, 2024, the district concluded its data collection for the student's FBA (Dist. Ex. 40 at p. 1). The FBA report noted that "[d]ata was collected for a total of 11 school days" and that the student's "[t]eacher aides collected data during hallway transitions and lunch/recess" (id. at p. 2).³ The results summary section of the FBA stated that the student "did not exhibit aggressive behaviors during the data collection period" and concluded that "[d]ue to the low level of occurrence and behaviors largely situational and reactions to isolated events, a pattern [wa]s not established" (id. at pp. 2, 4). Further, the FBA reflected data from the student's discipline referrals for the 2023-24 school year up to April 22, 2024 (id. at pp. 2, 6-7). In addition to the five behavioral incidents described above, on April 19, 2024 the student engaged in another act of verbal aggression with a female student resulting in his parent being called, and on April 22, 2024, the student engaged in an act of verbal aggression with another student on the bus resulting in the parent being called (id. at p. 7).

The CSE convened on May 9, 2024 "to review the FBA," including that the student did not exhibit aggressive behaviors during the data collection period and while there were "incidents" they "were at a low occurrence" (Dist. Ex. 46 at p. 1). Meeting information indicated that "[t]he team was recently able to speak with [the student's private psychologist] which provided helpful ideas" (id.). The CSE determined that "[a] formal BIP [wa]s not recommended at th[at] time" (id.). The May 2024 CSE recommended that the student receive 15 30-minute sessions per year of individual psychological counseling services, 20 30-minute sessions per year of small group psychological counseling services, access to support staff as needed daily, refocusing and redirection as needed daily, and debriefings of behavior incidents as needed daily (id. at p. 6).

C. Impartial Hearing Officer Decision

An impartial hearing convened on June 5, 2024 and concluded on July 22, 2024 after four days of proceedings (Tr. pp. 34-887).⁴ In a decision dated September 22, 2024, the IHO found that the district was responsible for the student's well-being at school to the extent that it could provide help (IHO Decision at pp. 12, 27). The IHO acknowledged that the parent did not specifically raise the argument that the student was incorrectly classified; however, determined that the district had ample notice that the student should have been evaluated for a classification of emotional disability (id. at p. 15). Next, the IHO found that there was inadequate "evaluative data to determine that 20 hours of school counseling per year [wa]s sufficient to alleviate the trauma experienced by the [s]tudent which [wa]s likely the root cause of the severe behavior in school" (id.). The IHO held that the evidence showed that the recommended counseling services were insufficient to meet the student's unique needs and therefore, "[t]he lack of sufficient evaluative data to base an IEP on, as well as insufficient and inappropriate service recommendations [we]re evidence that the IEP [wa]s not procedurally and substantively valid" (id. at p. 16).

³ The FBA indicated that the district collected data from "03/13/2024 – 04/10/2024" (Dist. Ex. 40 at p. 1).

⁴ The parties convened for pre-hearing conferences on May 7, 2024 and May 16, 2024 (Tr. pp. 1-33).

Regarding the FBA, the IHO held that the 11-day FBA data collection period was insufficient to fully capture the student's behavioral issues and resulted in the district failing to recognize the necessity of a BIP (IHO Decision at pp. 16-17). The IHO held that the district denied the student a FAPE by failing to create a BIP (id. at p. 19). The IHO next determined that the student displayed significant regression academically, and that the behavioral incidents the student engaged in lead the IHO to find that the benefits of the student being in the least restrictive environment (LRE) were outweighed by the student's need for a specialized, smaller school setting (id. at pp. 20, 25). The IHO held that the student was a victim of bullying and had engaged in such behavior, and that the student's current services were inadequate and ineffective to prevent the student from engaging in negative and antisocial behavior (id. at p. 26). Therefore, the IHO found that the district denied the student a FAPE for the 2023-24 school year and that the district's middle school placement was not appropriate as the student's LRE (id. at p. 27). The IHO ordered the district to immediately reconvene the CSE to contact State-approved therapeutic schools for the purpose of the student's enrollment for the 2024-25 school year, and ordered the district to fund evaluations of the student in all areas of suspected disability (id.).

IV. Appeal for State-Level Review

The district appeals, alleging that the IHO erred in finding that the district denied the student a FAPE for the 2023-24 school year. Specifically, the district argues that the IHO exceeded her jurisdiction by ruling on issues not contained in the parent's due process complaint, namely: the student's disability classification, the need for additional evaluations, the CSE's decision not to develop a BIP, and the student's placement for the 2024-25 school year. The district argues that the IHO applied the wrong legal standard in determining whether the student was denied a FAPE, specifically, that the IHO erred by determining that FAPE was denied based on events that occurred after the IEP was developed, and held that it was the district's obligation to provide for the "[s]tudent's well-being" while in school. The district asserts that the IHO erred in finding that the student requires an out-of-district placement and argues that the IHO was without jurisdiction to either award a prospective out-of-district placement for the 2024-25 school year or determine the need for an out-of-district placement for the 2023-24 school year.

In an answer, the parent admits, denies, or otherwise responds to the district's material allegations, and asserts that the district is not entitled to any of the relief sought pursuant to its appeal.

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. 386, 399 [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., 580 U.S. at 404). 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., 580 U.S. at 403 [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]).⁵

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. FAPE 2023-24 School Year

The district asserts that the evidence in the hearing record does not support the IHO's findings regarding the extent of the student's needs and the adequacy of the IEP developed for the 2023-24 school year. The district specifically argues that the IHO's findings regarding the severity of the student's emotional difficulties, the frequency and severity of incidents of antisocial behavior, and the effect those behaviors had on the student's ability to access the curriculum are not supported by the hearing record. The district further argues that the IHO relied on evidence of the student's behaviors during the 2021-22 school year, before his classification as a student with a disability and receipt of special education services. The parent argues that the IHO correctly found that the program recommended for the student for the 2023-24 school year did not have the scope of intensive counseling services the student required to deal with his trauma and allow him to make academic, social and emotional progress. The evidence in the hearing record supports the district's argument.⁶

⁵ 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., 580 U.S. at 402).

⁶ As noted by the district, it also appears that the IHO sua sponte expanded her FAPE analysis to include issues not raised in the parent's due process complaint notice, such as the student's disability classification, the need for additional evaluations, the CSE's decision not to develop a BIP, and the student's placement for the 2024-25 school year. Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). The IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. §

As discussed above, the CSE convened in March 2023 for the student's annual review (see Dist. Ex. 3). The March 2023 IEP reflected evaluative information which included a June 2022 psychoeducational evaluation report, May 2022 social history, and January 2022 medical health records, as well as input from the parent, the special education teacher, the school psychologist and the social worker (*id.* at p. 1). Regarding the student's academic needs, the March 2023 IEP described the student as "extremely intelligent and capable," with a full scale IQ of 113, and that he had "great articulation skills, both verbal and written" (*id.* at pp. 1, 2). The March 2023 IEP noted that while the student was "extremely bright . . . he [wa]s not working up to his potential . . . due to his lack of organizational skills, as well as his unwillingness to remain focused on academic tasks" (*id.* at p. 3). According to the IEP, the student tended to be "defiant and oppositional" when given directions, which impacted his ability to follow routines and tolerate activities that required structure (*id.*). The March 2023 IEP stated that the student had good verbal and written articulation skills, enjoyed reading and had a creative mind, had "a wonderful sense of vocabulary" and could apply it across content areas, enjoyed learning, was insightful and made meaningful connections during classroom discussions, and had very strong math skills (*id.*). His academic needs included the need for assistance with organization and time management, reminders about "learning readiness behaviors," prompting during transitions and when lethargic or sleepy (*id.* at pp. 3-4).

Speaking to the student's social/emotional needs, the March 2023 IEP reported that the student could identify his emotions, triggers, and coping strategies but during social conflict, was "impulsive and reactive" (Dist. Ex. 3 at p. 1). The IEP reflected reports that the student took "multiple medications that [we]re likely not being taken consistently . . . which ha[d] impacted his behavior" and that the student received both individual counseling and family counseling weekly outside school (*id.*). According to the IEP, the student could identify peers whom he thought of as friends and also identify the qualities in others that made them good friends (*id.* at p. 4). He struggled with understanding the choices of others when they differed from the choices he would make (*id.*). The student "pride[d] himself on performing well academically . . . [and] benefit[ed] from support with processing undesired feedback or consequences" (*id.*). The IEP indicated that the student was able to "reflect when given time to process a situation – he typically show[ed]

1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (*R.E.*, 694 F.3d 167 at 187-88 n.4; see also *B.M. v. New York City Dep't of Educ.*, 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]). Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (*Application of a Child with a Handicapping Condition*, Appeal No. 91-40; see *John M. v. Bd. of Educ. of Evanston Tp. High Sch. Dist.* 202, 502 F.3d 708, 713 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on new issues raised sua sponte (see *Dep't of Educ., Hawai'i v. C.B.*, 2012 WL 220517, at *7-*8 [D. Haw., Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]). As my independent review of the hearing record supports a finding that the IHO improperly made determinations based on claims not raised in the due process complaint notice or otherwise properly before her, and particularly in light of my conclusion herein that the district offered the student a FAPE substantively and procedurally for the 2023-24 school year, such determinations are annulled pursuant to my order contained herein that those portions of the IHO's decision finding that the district denied the student a FAPE for the 2023-24 school year must be reversed.

remorse if poor judgment had been exercised and [wa]s able to move forward" (id.). Additionally, the IEP noted that the student appeared "somewhat immature, in comparison to his peers" (id.). The March 2023 IEP noted that the student needed to "know that there [we]re adults in the school who w[ould] support him," and needed to "continue[] to work on applying acquired coping strategies to in the moment periods of frustration . . . [and] benefitted from processing situations [] which he perceive[d] to be unfavorable" (id.). Further, the IEP indicated that the student also "need[ed] assistance with accepting constructive criticism and considering the perspectives of others" (id.).

Related to the student's physical development, the March 2023 IEP stated that the student's physical development needs were within age-appropriate expectations except for difficulty managing his belongings and maintaining proper spatial relationships in and around his workspace (Dist. Ex. 3 at p. 4). According to the March 2023 IEP, the student "display[ed] inconsistencies between appearing to be driven by a motor and appearing to be lethargic" (id.).

The March 2023 CSE identified strategies to address the student's management needs, including support in following structured routines and making transitions, reminders regarding social and physical boundaries, assistance with organization and task completion, guidance around picking up on visual and verbal cues, and assistance with impulse control and taking ownership of his actions and consequences, and included two annual goals related to the student acknowledging his role/actions in a real or perceived situations, and discussing and assessing a problem situation and identifying available choices/solutions and the projected outcomes or consequences of each choice (Dist. Ex. 3 at pp. 4-5). To address the student's needs for the 2023-24 school year, the CSE recommended that the student receive 15 30-minute sessions of individual psychological counseling per year and 15 30-minute sessions of small group (5:1) psychological counseling per year (id. at p. 6).⁷ The March 2023 CSE also recommended supplementary aids and services to the student which included access to support staff as needed throughout the school day and refocusing and redirection as needed during the school day (id. at p. 5).

At the parent's request, the CSE reconvened for a program review on September 15, 2023 (Dist. Ex. 6 at p. 1). The September 2023 meeting information reflected the parent's concern regarding the student's behavioral issues at school and at home; specifically, that the student's behavior was "not being addressed sternly enough in a way that [was] beneficial to him and [the parent] want[ed] to discuss alternative options" (id.). The September 2023 meeting information reflected reports that the student was doing well in all his classes, was enthusiastic about learning, was on-task and liked to share in class, and was "overall, a joy to have in the classroom" (id.). On the i-Ready, the student had "scored in the 95th percentile for math and 91st percentile for reading" (id.). The September 2023 meeting information stated that according to the school counselor, the student had matured since the previous school year, and she acknowledged the "positive impact of having a now constant living situation, medication intake, and routine ha[d] made" (id.). The school psychologist reported that the student struggled to generalize skills demonstrated in the

⁷ At this juncture, it must be noted that despite the IHO's determination that LRE was second to the student's emotional needs, the district was mandated to consider placing the student with his nondisabled peers in light of the IDEA's LRE requirements (see 20 U.S.C. § 1412[a][5][A]; 34 CFR 300.107, 300.114[a][2][i], 300.116[a][2], 300.117; 8 NYCRR 200.1[cc], 200.6[a][1]). The March 2023 IEP reflects that the district identified the student's emotional and behavioral needs and recommended counseling and strategies to address his management needs in a general education classroom (see Dist. Ex. 3).

counseling office to unstructured situations, such as lunch and recess (id.). The September 2023 meeting information also reflected the student's outside therapist's concern regarding the student's lack of empathetic responses toward peers during social conflicts, to which the school psychologist responded that the student "[wa]s able to reflect when given time to process a situation and typically demonstrate[d] empathy afterwards" (id.). The September 2023 meeting information noted that the CSE had reviewed the student's discipline record from the 2022-23 school year, during which he received eight disciplinary referrals, three of which resulted in in-school suspension, and further noted that the parent "question[ed] the effectiveness of the consequences on curbing behavior" (id.). The September 2023 meeting information also reflected that the parent requested an FBA, however, "after explaining all options, [the parent] was unsure if she wanted it done at [that] time" (id. at p. 2). The IEP stated that consent would be emailed to the parent, and she could decide if and when she wanted the district to conduct an FBA (id.). The September 2023 meeting information also noted that the parent wanted to "revisit alternative placement if [the student's] behavior worsen[ed]" (id.).

The hearing record shows that in response to the parent's concerns, the September 2023 CSE recommended increasing the student's group counseling to 20 30-minute sessions of small group psychological counseling per year, with emphasis on perspective taking and increased communication between school, home, and the student's outside therapist (Tr. p. 168; Dist. Ex. 6 at pp. 1, 7; see Dist. Ex. 3 at p. 1). In addition to increased group counseling services, the September 2023 CSE recommended the delivery of weekly reports (parent contact form) from the student's teachers regarding his academics and behavior (Dist. Ex. 6 at p. 1). The September 2023 CSE also recommended additional supplemental aids and services for the student that included debriefing with school counseling staff after behavioral incidents, which would be communicated to the parent (id. at pp. 1-2, 7).

Regarding the student's counseling service, the school psychologist who provided the student's group counseling testified that each counseling session included an activity focused on social skills, an activity focused on conflict resolution, and, if time allowed a game or group discussion (Tr. pp. 320-21, 324-25). She testified that she had "a great rapport" with the student, and he had "always been willing to join group counseling sessions" and had "made great progress" (Tr. p. 326). The student was "always a willing participant, he [wa]s always happy to come down, he [wa]s usually the first one to arrive, he [wa]s very witty, lighthearted . . . [and] [got] along with his group members" (Tr. p. 327). According to the school psychologist, at the beginning of the 2023-24 school year the student "always liked to have the last word" and struggled with perspective taking, but through counseling sessions had "developed a skill of kind of being tolerant of other people's opinions" and did not have any conflict with peers during group counseling (Tr. pp. 333-34). The school psychologist testified that she worked closely with the school social worker who provided the student's individual counseling and also communicated with the student's outside counselor twice during the 2023-24 school year (Tr. pp. 346-48).

The school social worker who provided the student's individual counseling testified that during counseling sessions the student was "[c]ooperative, eager, [and] flexible" (Tr. pp. 738, 744, 747). Each session included a check-in about the student's mood and feelings, and an opportunity to share and process anything that was on his mind, and then they would "go on about [their] session" (Tr. pp. 748-49). The social worker testified that there were also "various times throughout the school year" when the student requested to meet with her, including after a behavior

incident in February 2024 that resulted in a disciplinary consequence (Tr. pp. 751-53; see Dist. Ex. 35). According to the social worker, the student displayed remorse after behavioral incidents and was willing to talk with the people who might have been hurt by his actions or words (Tr. pp. 755). The social worker's notes from individual counseling sessions reflected both the student's additional requests to meet and debriefing sessions after some behavioral incidents (compare Dist. Ex. 35, with Dist. Exs. 36; 57).

In arguing that the counseling provided by the district was inadequate to meet the student's needs, the parent relies heavily on the testimony of her own therapist. The parent's therapist testified that she had met the student in passing on a few occasions, though not since spring of 2023, but had never provide therapy services for him, and was aware of his needs only through parent report, a discussion with the student's outside therapist, and review of reports (Tr. pp. 597, 624-25, 628-29, 649). The parent's therapist also testified that she had never been to the district's middle school, and had not spoken to any employees assigned there, including any of the student's teachers or related service providers (Tr. p. 629). According to the parent's therapist, the counseling services recommended in the September 2023 IEP were not appropriate for the student first because the sessions would never actually be 30 minutes in length because by the time the student got to the counselor's office and "settled to start talking" there would only be 15 minutes left to work with the student (Tr. pp. 609-11). The parent's therapist also testified that "somebody would really have to be trained on trauma-informed care to address something that [the student] might be explaining to them" and there wouldn't be enough time to do that when you had already lost half the time (Tr. p. 610). However, the student's social worker testified that counseling sessions with the student, who came to the office on his own, were a full 30 minutes and class periods were longer than that (Tr. pp. 748-49).

The social worker additionally testified that she was trained in trauma informed therapy through training and coursework in clinical counseling, and had worked with individuals who had been subjected to trauma (Tr. pp. 772-73, 785). She testified that although she was aware that the student had a history of trauma, she did not know the specific details regarding the type of trauma (Tr. p. 786). According to the social worker, she had never spoken to the student about his trauma, and he had never raised the topic during counseling sessions (Tr. p. 774). She testified that she had reached out to the parent during the prior school year to get information on the student's trauma but the parent "did not disclose" (Tr. pp. 786-87).

When asked if she had ever shared information with school staff regarding the student's specific trauma, the parent testified that she had "not gotten into the details with school officials" and although there was a "summary" provided as part of the student's referral to the therapeutic program the student attended in elementary school, she did not share the student's records with the CSE (Tr. pp. 857-58).

While the September 2023 IEP reflected the parent's concern about the student's behavior, the hearing record shows that school staff were not overly concerned about the student's behavior in school during the 2023-24 school year. The student's ELA teacher, who was also the student's academic team leader, testified that she had not observed, nor had members of the academic team reported, that the student engaged in aggressive, argumentative, defiant, or threatening behavior, cheating, deception, or stealing, which were reported in the June 2022 psychoeducational evaluation report (Tr. pp. 69, 72, 114-17; see Dist. Ex. 1). The team leader further testified that

some of the behaviors reported in the 2023-24 weekly parent contact forms, such as coming to class without supplies, not having homework, and sleeping in class, interrupting in class, and arguing with a teacher were "teachable moments where we like[d] to have conversation with the student and to help them understand how they c[ould] grow in that situation," but "probably would [not] be reported to a parent" (Tr. pp. 274-75; see Dist. Ex. 10). The team leader testified that neither she, nor any of the other teachers on the academic team believed that the behaviors identified in the parent contact forms were severe enough that the student should not be in the class (Tr. pp. 275-76). The student's social studies teacher testified that the student had worked in pairs with other students during the school year and did not have any issues, nor did his partners report any issues (Tr. pp. 453, 462-63). Additionally, the social studies teacher testified that the student had not engaged in any behaviors that were atypical of a seventh grade male student or problematic in either the social studies class or in the study hall he supervised, and that the student did not appear to be ostracized or isolated in study hall (Tr. pp. 469-71).

The school psychologist testified that the student had friends who liked him and strong connections with staff members, and all of his teachers had reported in team meetings that they enjoyed working with him (Tr. p. 361). When she observed the student in the wider school community, he was typically "always polite, he always s[aid] hello . . . [and] present[ed] as a typical middle schooler" (Tr. p. 362). The social worker testified that she participated in meetings of the student's academic team "bi-weekly, maybe twice a month" and if there was a significant concern for any of the students on that team, she would join more frequently (Tr. p. 761). According to the social worker, "the majority" of the times she attended a meeting of the student's academic team, "the student was not one of the students of focus," because his behavioral concerns weren't as great as some of the other students on the team (Tr. pp. 762-63).

Although the student's academic team was not overly concerned about his behavior, the hearing record shows that the student had seven or eight disciplinary referrals during the 2023-24 school year for behaviors that included inappropriate or rude, discourteous, or disrespectful speech or behavior, a threat, and serious school misconduct (see Dist. Exs. 6 at p. 1; 36; 40; 57). Three of the discipline referrals resulted in the student receiving either after-school detention, a counseling referral, or a warning, three resulted in in-school suspensions, and one resulted in five days of out-of-school suspension (see Dist. Exs. 36; 57). The five-day suspension led to an MDR for a threat that was a violation of the district's code of conduct (Dist. Ex. 25 at p. 1). The MDR report reflects that the MDR team discussed the student's improvement during the 2023-24 school year and the diagnoses he had received contributing to his classification as a student with an other-health impairment, and determined that the student's behavior was a manifestation of his disability (id.). The MDR report noted that the parent shared familial issues that likely had an impact on the student's functioning (id.). The MDR report also noted that the student's outside therapist provided a letter for consideration (Dist. Ex. 25 at p. 1; see Dist. Ex. 24). In the February 2024 letter, the outside therapist stated that "in the two most recent school incidents, [the student's] impulsivity and lack [of] ability to regulate resulted in [the student] making statements that were not premeditated, but reactive; containing information that reflected things he had overheard discussed by others earlier in the day" (Dist. Ex. 24 at p. 2). The February 2024 letter additionally stated that the student "fail[ed] to consider the consequences of his statements in the moment, or even hours later"; however, the social worker testified that in conversations with the student, he was remorseful and "would want to seek . . . a restorative conversation with anyone he [felt] like he might have harmed with his words or actions" (Tr. pp. 755-60; Dist. Ex. 24 at p. 2).

According to the testimony of the school psychologist, the MDR determination that the student's behavior was a manifestation of his disability "triggered the FBA process," and the district initiated a functional behavioral analysis of the student's behavior (Tr. p. 336). The school psychologist testified that she identified the target behavior of verbal and physical aggression based on the parent's concerns at prior CSE meetings (Tr. pp. 339-40). The district collected data over a period of 11 days and across a variety of school settings, including in school hallways, during lunch and on the bus, and the student exhibited no instances of the target behavior (Tr. p. 340; Dist. Ex. 40 at p. 2). The school psychologist testified that while there were no episodes of the target behavior during data collection, she noted one unrelated behavior—taking candy from a jar without permission—and used the school discipline referrals as supplemental data (Tr. pp. 340-42). According to the school psychologist, the CSE discussed the behavioral data collected and found that "due to the low occurrence of those behaviors, a behavior plan was not warranted" (Tr. p. 343). She further testified that for the development of a behavioral intervention plan (BIP) to be warranted, the student's behavioral needs must "have a substantial impact on their classroom performance" and in the student's case, the target behaviors only occurred on four percent of the school days attended to that point in the school year (Tr. pp. 344-45).⁸

Over the course of the 2023-24 school year, the student's academic team completed weekly parent contact forms (see Dist. Exs. 7-21; 23; 26; 28; 30-33; 39; 41-42; 45; 47-48; 50; 58-60). The team leader testified that the team met daily to discuss students, changes in schedules, upcoming events, and concerns, and the parent contact form was filled in every Friday by each teacher on the team (Tr. pp. 87-88). According to the team leader, the team and the parent determined that the parent contact form would be the best way to communicate concerns regarding the student's sleeping in class and missing homework (Tr. p. 90). A review of the parent contact forms shows they reflected the student's difficulties with impulsivity, attention, coping strategies, sleepiness in class, and organization, but also highlighted his academic strengths and positive contributions to classroom discussions, and reported weekly averages that largely remained in the 80's and 90's from week to week (see Dist. Exs. 7-21; 23; 26; 28; 30-33; 39; 41-42; 45; 47-48; 50; 58-60). During weeks where the student's average dipped noticeably, the teachers' comments generally reflected that he was missing work either due to behavioral suspensions or other absences (Dist. Ex. 26; 28; 30-33).

The hearing record further revealed that although the student's average in academic classes fluctuated from week to week, his academic performance was strong. The student's report card for the third quarter of the 2023-24 school year showed that he was passing all of his classes with grades mostly in the 80's and 90's and a quarterly average of 85 (Dist. Ex. 43). Speaking to the student's academic performance, the team leader testified that the student's i-Ready scores for the 2023-24 school year in math and reading were at or above grade level expectations and explained that on the i-Ready math assessment, the student's performance was the highest of the 103 students on his academic team, and he was the 11th highest on the i-Ready reading assessment (Tr. pp. 254-56; see Dist. Exs. 52-55).

⁸ While the parent's therapist testified that the appropriate duration of data collection for an FBA is "anywhere from four to 12 weeks ... that's a directive straight from Albany" this is not consistent with any requirement set forth in State regulation (Tr. pp. 604-05).

In this case, the evidence in the hearing record reflects that the IHO erred in finding that the district's IEPs for the 2023-24 school year failed to adequately address the student's social/emotional and academic needs. While it is understandable that the parent's concerns with the student's educational programming were informed by her knowledge of the student's trauma and his behavior both at home and at school, the available evaluative information and input from teachers and staff which took into account the student's cognitive abilities, access to nondisabled peers, progress in his in-school counseling and academics and the nature and frequency of his behavioral incidents in school resulted in IEPs that were reasonably calculated to provide the student with educational benefit in light of his particular circumstances and individual needs. While I encourage the district and the parent to continue to work together as they have been, including by providing open channels of communication between the parent, district teachers, providers and staff and the student's and family's outside therapists as needed, having landed upon the appropriate spot on the educational continuum with similarly appropriate related services and supports, the district provided the student with a FAPE and there was no requirement that the CSE also consider significantly more restrictive placements such as a therapeutic day treatment program or residential placement, to the extent that a placement along those lines may have been preferable to the parent. Accordingly, based on the discussion above, I conclude that the hearing record establishes that the district offered the student a FAPE for the 2023-24 school year.

VII. Conclusion

Having determined that the evidence in the hearing record does not support the IHO's finding that the district failed to offer the student a FAPE for the 2023-24 school year, the necessary inquiry is at an end.

I have considered the parties' remaining contentions and find they are unnecessary to address in light of my above determinations.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated September 22, 2024, is modified by reversing those portions which found that the district failed to offer the student a FAPE for the 2023-24 school year, and which ordered the district to investigate nonpublic school placements for the 2024-25 school year and fund evaluations of the student in all areas of suspected disability.

**Dated: Albany, New York
December 3, 2024**

**CAROL H. HAUGE
STATE REVIEW OFFICER**