



The University of the State of New York

The State Education Department

State Review Officer

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No. 23-204

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:

The Law Firm of Tamara Roff, PC, attorneys for petitioners, by Jessica T. Carbonaro, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Brian Davenport, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition costs at the Lamplighter Hebrew Academy (Lamplighter) for the 2021-22 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited here in detail. Briefly, a CSE convened on May 12, 2021, to formulate the student's IEP for the 2021-22 school year (kindergarten) (see generally Dist. Ex. 6). The May 2021 CSE recommended ICT services for the student in English language arts (ELA), math, social studies, and science, as well as two 30-minute sessions per week of occupational therapy (OT), two 30-minute sessions per week of physical therapy (PT), and one 30-minute session per week of individual and one 30-minute session per week of group (2:1) speech-language therapy (Dist. Ex. 6 at pp. 14-15). In a prior written notice dated June 11, 2021, the district notified the parents of the particular public school site to which it assigned the student to attend for the 2021-22 school year (see Dist. Ex. 8). The parents disagreed

with the recommendations contained in the May 2021 IEP, as well as with the assigned public school site, and, as a result, by letter dated August 18, 2021, they notified the district of their intent to unilaterally place the student at Lamplighter for the 2021-22 school year and to seek public funding for the student's placement (see Parent Ex. B).

In a due process complaint notice, dated May 8, 2023, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2021-22 school year on the basis that the district: failed to evaluate the student in all areas of suspected disability; convened an inappropriately composed CSE; failed to consider the full continuum of services and predetermined the IEP recommendations; precluded the parents from meaningful participation in the CSE process; included inappropriate present levels of performance, management needs, and annual goals in the IEP; recommended integrated co-teaching (ICT) services in a class that was too large for the student; failed to provide for individual and small group instruction on the IEP; and recommended insufficient promotional criteria (see Parent Ex. A). For relief, the parents sought district funding of the costs of the student's attendance at Lamplighter for the 2021-22 school year (id. at p. 3).

On June 8, 2023, the parties appeared before an IHO with the Office of Administrative Trials and Hearings (OATH) for a prehearing conference (see Pre-Hr'g Conf. & Order). An impartial hearing convened on July 13, 2023 and concluded on July 27, 2023 after two days of proceedings (Tr. pp. 1-168). In a decision dated August 16, 2023, the IHO determined that the district offered the student a FAPE for the 2021-22 school year and dismissed the parents' due process complaint notice (IHO Decision at pp. 33-34, 46). Although the IHO found that the district offered the student a FAPE, the IHO made further findings that the unilateral placement was appropriate but that equitable considerations did not weigh in favor of an award of tuition reimbursement (id. at pp. 34-44).

IV. Appeal for State-Level Review

The parents appeal, alleging that the IHO erred in finding that the district offered the student a FAPE for the 2021-22 school year. Specifically, the parents allege that the IHO erred in finding that the district met its burden of proof without any testimonial evidence to support its recommendations. Additionally, the parents claim that the IHO's conclusion that the district offered the student a FAPE was based on "incomplete and speculative testimony" of the Lamplighter educational director (director). The parents also claim that the IHO erred in finding that the May 2021 CSE did not need additional evaluations and contend that the CSE should have evaluated the student's behavioral, academic, cognitive, and PT needs. Further, the parents argue that the IHO erred in finding that ICT services were appropriate to meet the student's needs and improperly relied on testimony of the Lamplighter director to support the recommendation for ICT services.¹

¹ As the parent has not appealed from the IHO's determinations that the May 2021 CSE was properly composed, that the district did not predetermine the recommendations included in the May 2021 IEP or deny the parents meaningful participation, and that the annual goals in the May 2021 IEP were "specific, measurable, and directly related to Student's individualized need," these determinations have become final and binding on the parties and will not be addressed on appeal (IHO Decision at pp. 14-15, 19-25; 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v];

Next, the parents contend that the IHO incorrectly concluded that equitable considerations would have barred an award of tuition reimbursement. The parents also argue that the IHO erred in concluding that the undated Lamplighter contract and the parent's testimony failed to establish an obligation to pay tuition. Lastly, the parents contend that the "manner in which [the] impartial hearing was conducted frustrated the [parents'] due process rights." Specifically, the parents assert that the IHO denied the parents' attorney the opportunity to ask redirect questions of the Lamplighter director and the parent after the IHO's questioning of the witnesses. As relief, the parents seek a finding that the district failed to offer the student a FAPE for the 2021-22 school year and request district funding of the costs of the student's tuition at Lamplighter for 2021-22 school year.

In an answer, the district generally denies the material allegations contained in the request for review.² The district argues that the May 2021 CSE developed a "procedurally and substantively appropriate IEP" that offered the student a FAPE. The district asserts that the May 2021 CSE had sufficient evaluative information from the January 2021 preschool IEP, the parents, and the participation of the special education itinerant teacher (SEIT) and preschool classroom teacher to describe the student's present levels of performance. In addition, the district asserts that it met its burden of proof by relying solely on documentary evidence. Lastly, the district argues that equitable considerations did not favor the parents as the parents failed to cooperate with the district in obtaining a social history update and offered "evasive testimony" regarding their financial obligation to pay the Lamplighter tuition.

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

see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). In addition, in their appeal, the parents do not pursue other claims originally raised in their due process complaint notice, such as those relating to the appropriateness of the present levels of performance, management needs, and promotional criteria included in the May 2021 IEP (see Parent Ex. A). Consequently, these claims have been abandoned and will not be further discussed (8 NYCRR 279.8[c][4]).

² The district does not cross-appeal from the IHO's finding that Lamplighter was an appropriate unilateral placement, and, accordingly, that finding has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z., 2013 WL 1314992, at *6-*7, *10).

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]).³

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. Preliminary Matters

1. Conduct of the Impartial Hearing

Initially, regarding the parents' claims about the conduct of the impartial hearing, it is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, according each party the right to be heard, and shall not, by words or conduct, manifest bias or prejudice (e.g., Application of a Student with a Disability, Appeal No. 12-064). An IHO may not be an employee of the district that is involved in the education or care of the child, may not have any personal or professional interest that conflicts with the IHO's objectivity, must be knowledgeable of the provisions of the IDEA and State and federal regulations and the legal interpretations of the IDEA and its implementing

³ 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).

regulations, and must possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]).

An IHO must provide all parties with an opportunity to present evidence and testimony, including the opportunity to confront and cross-examine witnesses (34 CFR 300.512[a][2]; 8 NYCRR 200.5[j][3][xii]). While an IHO is required to exclude evidence and may limit the testimony of witnesses that he or she "determines to be irrelevant, immaterial, unreliable or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]-[e]), it is also an IHO's responsibility to ensure that there is an adequate and complete hearing record (see 8 NYCRR 200.5[j][3][vii]). Further, State regulation provides that nothing shall impair or limit the IHO in his or her ability to ask questions of counsel or witnesses for the purpose of clarifying or completing the hearing record (8 NYCRR 200.5[j][3][vii]). Moreover, it was well within the IHO's discretion to attempt to control the hearing by excluding evidence or testimony that the IHO finds to be irrelevant, immaterial, or unduly repetitious and by limiting the witnesses who testify to avoid unduly repetitious testimony (see 8 NYCRR 200.5[j][3][xii][c]-[e]).

Here, both the Lamplighter director and the parent testified by affidavit in lieu of direct testimony, and they were available at the impartial hearing to swear to the truth and accuracy of their affidavits (Tr. pp. 25-26, 57, 59; see Parent Exs. Q-R). The district cross-examined both witnesses and the parents' attorney questioned both witnesses on redirect examination (Tr. pp. 26-48, 60-67). After confirming that neither party had further questions of the Lamplighter director, the IHO proceeded to ask questions of the witness over the objections of the parents' attorney (Tr. pp. 49-55). In response to the questioning pursued by the IHO, the director testified that it was "possible" the student would have made progress under the May 2021 IEP but that, in her opinion, the progress would not have been "optimal" (Tr. pp. 53-55). After the IHO's questioning, the parents' attorney asked for a "brief redirect" based on the IHO's questions which the IHO denied (Tr. p. 55). The parents contend that they needed to ask further questions of the Lamplighter director to clarify her testimony about the use of the word "optimal" when discussing the likelihood that the student would have made progress in an "ICT classroom." Similarly, the IHO questioned the parent over the objections of the parents' attorney about her payment obligations for the Lamplighter tuition (Tr. pp. 67-80). The parents' attorney requested the opportunity for redirect questions with respect to the payment of the Lamplighter tuition which the IHO denied (Tr. p. 81).

It would have been preferable had the IHO given the parents' attorney an opportunity to further question the witnesses after he completed his examination. However, in this instance, the IHO's failure to do so does not warrant reversal of the IHO's decision. While the IHO cited testimony of the director regarding the progress the student would have made in the district's recommended program (see IHO Decision at pp. 29-30, 34), putting aside the testimony elicited by the IHO, the evidence in the hearing record ultimately supports the IHO's conclusions regarding the district's offer of a FAPE. Further, given the determination that the district offered the student a FAPE, it is unnecessary to consider the testimony elicited by the IHO regarding the parents' tuition payments to Lamplighter.

While the IHO's failure to allow further examination of the witnesses does not represent ideal hearing practice, an independent review of the entire hearing record reveals that overall the impartial hearing was conducted in a manner consistent with the requirements of due process (see

20 U.S.C. § 1415[g][2]; 34 CFR 300.514[b][2]). In this instance, due to the IHO's failure to allow further examination of the witnesses in response to the IHO's line of questioning, the testimonial evidence elicited in response to the IHO's examination will be disregarded. For the reasons discussed below, however, this does not warrant reversal of the IHO's determination that the district offered the student a FAPE for the 2021-22 school year.

2. Burden of Proof

Turning to the parents' allegations regarding the burden of proof, the IHO addressed the lack of district witnesses and stated that, in determining whether testimonial evidence was required, it was first necessary to review "the information included in the [d]istrict's documentary evidence, specifically the IEP" (IHO Decision at p. 31). The IHO also opined that the student's individual needs, including any "complexities related to those needs," should be considered in determining whether testimonial evidence was required (*id.*). The IHO explained that a "student with intense educational and supportive needs would require more robust documentation as compared with another student who might not require those extensive supports" (*id.*). Upon review, the IHO found "that the CSE appropriately documented parental concerns, and its recommendations" (*id.* at pp. 31-32). The IHO found that this matter did not involve "complex educational programs and services" which may have required additional testimonial evidence to explain the district's reasons for the recommendations (*id.* at p. 32).

Under the IDEA, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005] [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]). However, under State law, the burden of proof has been placed 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 Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 76 [2d Cir. 2014]; R.E., 694 F.3d at 184-85). Ordinarily, however, which party bore the burden of persuasion in the impartial hearing becomes relevant only if the case is one of those "very few" in which the evidence is equipoise (Schaffer, 546 U.S. at 58; Reyes v. New York City Dep't of Educ., 760 F.3d 211, 219 [2d Cir. 2014]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 225 n.3 [2d Cir. 2012]; T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 933 F. Supp. 2d 554, 565 n.6 [S.D.N.Y. 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *5 [S.D.N.Y. Mar. 19, 2013]; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 4 [2d Cir. Jan. 8, 2014]).

The IHO's rationale, particularly as it discussed a varying amount of evidence required based on the complexity of the student's needs or programming, is too general; rather, a fact specific analysis must be made in each case where a district's offer of a FAPE to a student with a disability is challenged; in order to prevail the district must ensure that the hearing record includes evidence addressing the particular issues raised by the parents in their due process complaint notice. The sufficiency of the evidence presented should be determined after weighing the relative strengths and weakness of the parties' evidence in light of the allegations and the relevant legal standards.

Here, the district's presentation of evidence was not robust insofar as it offered documentary evidence during the impartial hearing but declined to call any witnesses to present testimonial evidence (see Tr. pp. 14-16, 22-23; Dist. Exs. 1-8). The district's counsel presented opening and closing statements in which he argued that the district offered the student a FAPE for the 2021-22 school year (see Tr. pp. 17-19, 111-18). While this bare presentation is not encouraged and, as the IHO noted, in many instances, may result in a finding that the district failed to meet its burden of proof, under the specific circumstances of this case and given the nature of the claims pursued by the parents on appeal, the district's evidence is sufficient to establish the appropriateness of the May 2021 IEP, as set forth below.⁴

B. FAPE

1. Sufficiency of Evaluative Information

Turning to the dispute regarding the sufficiency of evaluative information before the May 2021 CSE, a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services' needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).⁵

⁴ If a district intends to rest its case on documentary evidence alone, the district should offer into evidence all documentation pertaining to the evaluation of the student and the CSE's recommendations, including prior written notices (34 CFR 300.503[a]; 8 NYCRR 200.5[a]; see also L.O. v. New York City Dep't of Educ., 822 F.3d 95, 110-11 [2d Cir. 2016] [discussing the consequences of a CSE's failure to adequately document evaluative data, including that reviewing authorities might be left to speculate as to how the CSE formulated the student's IEP]). Here, the district offered the May 2021 prior written notice into evidence (Dist. Ex. 7). In addition, while the hearing record does not include CSE meeting minutes, the IEP itself memorializes the CSE's discussion and the rationale for its recommendation (see Dist. Ex. 6 at pp. 3, 20-21).

⁵ While State regulations do not specify what assessments a district must complete in order to conduct a

On March 2, 2021, the district requested parental consent to conduct a "Turning 5 Re-evaluation," and on March 4, 2021, the parent gave consent (Dist. Ex. 3). Although as discussed below the CSE had difficulty completing the student's classroom observation and social history, to the extent the parents allege that the evaluative information available to the May 2021 CSE was inadequate, the evidence in the hearing record shows that the CSE had sufficient information about the student's needs to develop an appropriate IEP.

Review of the classroom observation report shows that the evaluator could not complete the observation because the district was not encouraging "[f]ace-to-face assessments" due to the COVID-19 pandemic (Dist. Ex. 5). Rather, the document stated that the student was attending a general education class and received SEIT services, speech-language therapy, OT, and PT, and contained information from the student's Turning 5 progress report (id.). According to the classroom observation, the Turning 5 progress report stated that the student had made moderate progress towards his IEP goals with the provision of special education services in the following developmental domains: cognitive, social/emotional, adaptive, fine/gross motor, and communication (id.). Additionally, the classroom observation reflected reports that the student was friendly, happy, and demonstrated the ability to identify and label body parts, clothing, and simple objects; make and maintain eye contact; respond to his name and answer what and who questions; show interest in books and toys; follow basic directions; and use words for pragmatic functions (id.). Further, the student demonstrated limited vocabulary and he had difficulty responding to questions, following directions, using words to tell about past events, answering complex questions using three to four words, and using descriptive words (id.). The classroom observation also indicated that the student continued to have difficulty focusing on tasks (id.).

According to the May 2021 IEP, the student's preschool classroom teacher and SEIT provider participated in the CSE meeting by telephone (Dist. Ex. 6 at p. 22). The May 2021 IEP reflected the preschool classroom teacher's report that the student needed "reminders to slow down" and had difficulty focusing during class (id. at p. 2). The student's preschool classroom teacher indicated that the student was "up to par" with respect to shapes, colors, letters, and numbers, was "very good with WH questions," and was able to write his first name independently (id.). The preschool classroom teacher reported, at the May 2021 CSE meeting, that the student had difficulty focusing during lessons regardless of the number of adults in the classroom, and, at those times, he required assistance from his SEIT provider (id.). Additionally, the classroom teacher stated that the student wrote "on the floor with markers, pic[ked] up items off the floor, [and] [took] things that [did not] belong to him" (id.). The May 2021 IEP stated that the student's SEIT provider reiterated that the student knew all of the uppercase letters, numbers 1-20, was able to write his first name but did not fluently write his last name, and "[i]n a large classroom," had difficulty processing what was taught and retaining previously taught information (id.).

As for the classroom observation, the district submitted documentary evidence which indicated that it was unable to conduct a classroom observation due to the COVID-19 pandemic (see Dist. Ex. 5). In a question and answer guidance regarding the provision of services to students

reevaluation, State regulations do list the required components of an initial evaluation: a physical examination, a psychological evaluation, a social history, a classroom observation of the student, and any other "appropriate assessments or evaluations" as necessary to determine factors contributing to the student's disability (8 NYCRR 200.4[b][1]).

with disabilities during school closures related to the COVID-19 pandemic, the State Education Department indicated that "if an evaluation . . . requires a face-to-face in-person assessment or observation, the evaluation would need to be delayed until school reopens" but that, on a case-by-case basis a remote observation of the student could be considered ("Supplement #1 - Provision of Services to Students with Disabilities During Statewide School Closures Due to Novel Coronavirus (COVID-19) Outbreak in New York State," at pp. 3-4, Office of Special Educ. Mem. [Apr. 2020], available at <http://www.p12.nysed.gov/specialed/publications/2020-memos/special-education-supplement-1-covid-qa-memo-4-27-2020.pdf>). Here, while the district did not conduct a classroom observation, as discussed above, input from the student's teachers provided information about the student's academic performance in the classroom in his areas of difficulty (see 8 NYCRR 200.4[b][1][iv])

Next, the March 25, 2021 social history update reflected that on March 11, 2021, "follow-up phone calls were made to [the parent] to remind her of the [s]ocial [h]istory meeting" and that on March 15, 2021, the district social worker sent a "[n]otice of [s]ocial [h]istory" to the parent (Dist. Ex. 4). According to the social history, on March 25, 2021, the social worker attempted to complete a social history update; however, the parent "did not respond" (id.). The social history update referenced a bilingual social history dated December 14, 2018, and to "refer to this document for background and other additional information" (id.; see Dist. Ex. 1). The social history update included information about the student's then-current preschool and special education program and noted that the student had "made progress towards his IEP goals" given the provision of special education services (id.). State regulation defines a "social history" as "a report of information gathered and prepared by qualified school district personnel pertaining to the interpersonal, familial and environmental variables which influence a student's general adaptation to school, including but not limited to data on family composition, family history, developmental history of the student, health of the student, family interaction and school adjustment of the student" (8 NYCRR 200.1[tt]). Given the reference in the March 2021 report to the December 2018 social history—which, in turn, contained information about the student's family history and composition and the student's development (see Dist. Exs. 1; 4)—in combination with the parent's contribution during the CSE meeting, the CSE had sufficient information about the student's history such that the lack of an updated social history does not, in this instance, warrant a finding that the evaluative information before the May 2021 CSE was insufficient.

Turning to the information in the May 2021 IEP, review of the student's present levels of performance and individual needs shows that they were based on the January 2021 IEP, a SEIT progress report dated January 15, 2021, parent report, preschool classroom teacher report, a speech-language therapy progress report dated January 3, 2021, a Turning 5 progress report dated January 27, 2021, and discussion held during the CSE meeting (Dist. Ex. 6 at pp. 1-6).⁶ Specific to the student's cognitive skills, the May 2021 IEP reflected information from the January 2021

⁶ The hearing record does not contain the January 2021 SEIT progress, speech-language therapy progress, or Turning 5 reports (see Parent Exs. A-R; Dist. Exs. 1-8). According to the May 14, 2021 prior written notice, the student's May 2021 IEP was based on a classroom observation dated April 20, 2021, a social history update dated March 25, 2021, and the January 27, 2021 IEP (Dist. Ex. 7 at pp. 1-2; see Dist. Exs. 2; 4; 5). The January 2021 SEIT progress, speech-language therapy progress, and Turning 5 reports all predate or are concurrent with the January 27, 2021 IEP; however, the hearing record does not include prior written notice detailing the evaluative information considered by the January 2021 CSE.

IEP, which indicated that the student "made progress" in his cognitive development, and he demonstrated age-appropriate cognitive skills despite his distractibility and frustration when "topics [were not] to his liking" (*id.* at p. 1). Additionally, the IEP noted that the student's score on the Brigance Diagnostic Tool cognitive development domain was in the 3.9-4.3 range (*id.*).⁷ The IEP reflected that the student could identify all of his body parts; farm and zoo animals; shapes; colors; numbers one through ten; and upper-case letters "A" through "F" both receptively and expressively (*id.*). Next, the IEP indicated that the student counted by rote to 10, understood concepts such as big/little and long/short, improved in his listening skills, and was able to remain focused in a group setting and an individual setting given instruction on a topic he enjoyed (*id.*). At the meeting, the teachers reported that the student was "comparable, academically, to his peers," and the SEIT provider indicated that the student "love[d] doing projects and completing table top activities (*id.* at pp. 4, 5). The IEP also reflected reports that the student lost focus in group settings, i.e., circle time, had a difficult time attending and participating in group learning environments, and required a lot of redirection and encouragement from teachers and therapists (*id.* at p. 1). Discussion at the CSE meeting indicated that the student's difficulty with maintaining focus impeded "his academic functioning and engagement" (*id.* at p. 4). Additionally, the parent expressed concern that at home the student had difficulty focusing on work for more than five minutes, after which time he did not want to complete work (*id.* at pp. 2, 4).

According to the May 2021 IEP, the speech-language therapist's January 3, 2021 progress report indicated that results of an administration of the Preschool Language Scale-Fifth Edition (PLS-5) and behavioral observation of the student during structured and non-structured tasks revealed that the student was able to receptively recognize actions in pictures, understand the use of objects, some spatial concepts, and quantitative concepts, and was able to make inferences and identify a variety of colors (Dist. Ex. 6 at pp. 1-2). However, the student was not able to receptively follow two or three step directions, or understand other spatial concepts including in front of, behind or under, pronouns, analogies, negatives in sentences, and "sentences with post noun elaboration" (*id.* at p. 2). Expressively, the student used present progressive (verb + ing) forms, answered questions logically (i.e., where did you eat lunch?), explained how an object is used, and used prepositions (in, on, under) when answering questions (*id.*). He did not yet name described objects without visual supports or use grammatical markers (*id.*). The IEP reflected reports that the student's phonological skills were age appropriate, and his fluency and voice were "judged to be within normal limits" (*id.*). The IEP indicated that moderate progress had been made, but that more time was needed for the student's goals to be reached (*id.*). Additionally, the IEP reflected the SEIT progress report which indicated that the student exhibited "strength" in communication, specifically with his "ability to use complete sentences when requesting items" (*id.* at p. 4).

Regarding social/emotional development, the May 2021 IEP reflected information from the January 2021 IEP that the student had made progress in his social/emotional development and that he was "a friendly and sociable child" (Dist. Ex. 6 at p. 4). The student was reported to have friends in class and interacted well with many of them, and had improved his ability to sustain positive peer exchanges, share, and take turns with peers when requested (*id.*). However, the student became self-directed when something did not go his way or was not to his liking, at which

⁷ Results of an administration of the Brigance Diagnostic Tool to the student were reflected in the January 2021 IEP, but the IEP did not indicate the date the assessment was conducted (Dist. Ex. 2 at p. 3).

time he became upset and refused to comply (*id.*). Additionally, the student preferred to play by himself during center time and needed modeling and encouragement to play with peers at that time (*id.*). Also, the May 2021 IEP indicated that the student had difficulty expressing his wants, needs, and feelings to his peers and adults (*id.*). Results of the Brigance Diagnostic Tool indicated that the student's social development score was in the 3.6 to 4.0 age range (*id.*). The May 2021 IEP stated that the SEIT provider's "baseline observation from January to February 2021" revealed that, at that time, the student was able to raise his hand, answer questions related to a topic or a story during circle time, respond when called on, transition to the next activity, share toys in centers with his peers, and ask for help from his teacher when something was bothering him (*id.*). Further, the IEP reflected the SEIT provider's report that the student regressed "after his teacher was absent for a week" and that he had "a very difficult time attending circle time," as he needed to be redirected multiple times, did not participate, and had difficulty answering "wh" questions related to the theme (*id.*). Additionally, the student "had a hard time" following classroom rules, wandered around the classroom until redirected, was possessive of his toys and refused to share on his own, and forgot how to problem solve and ask for help (*id.*). Specifically, the SEIT provider stated that the student needed "constant review," and that she was "very concerned that [the student] [would] forget all [of] the skills taught at the beginning of the [school] year" (*id.*).

The May 2021 IEP reflected information from the January 2021 IEP, which indicated that the student had made progress in his fine motor skill development (Dist. Ex. 6 at p. 5). The May 2021 IEP indicated that the student completed various puzzles without assistance and lacing activities given step by step directions (*id.*). Further, the student scribbled spontaneously, improved his ability to hold a crayon for drawing and writing with verbal cues, imitated circular, vertical, and horizontal strokes, and continued to learn letter and number formation given tactile input (*id.*). Additionally, the student was able to write his name independently but needed help with writing other letters in the alphabet, presented with weak motor skills when using a pencil, and cut with scissors following a straight line (*id.*).

Regarding gross motor skills, according to the May 2021 IEP, the student was ambulatory and demonstrated the ability to run, throw a ball overhand with relative accuracy, and walk up and down stairs "placing alternating feet" (Dist. Ex. 6 at p. 5). The IEP noted that at times, the student lost his balance when walking or running on both even and uneven surfaces and that he was not able to balance on one foot for short periods of time or "walk forward heel to toe without losing balance" (*id.*). Reflecting scores reported on the January 2021 IEP, the May 2021 IEP noted the student's score on the fine motor/physical development domain of the Brigance Diagnostic Tool was in the 3.9 to 4.3 age range (*id.*). According to the May 2021 IEP, the student did not receive PT during the 2020-21 school year due to the COVID-19 pandemic (*id.* at p. 6). The May 2021 IEP reflected the parent's opinion that the student no longer required PT because his teachers had worked with him (*id.*). However, district staff informed the parent that they were reluctant to "terminate" PT absent a recommendation from the student's physical therapist, and the CSE continued to recommend PT services (*id.* at pp. 6, 14). The IEP indicated that the parent and the teachers agreed with the recommendation that upon the student's return to school and consultation with the physical therapist, the parent would discuss whether PT should continue (*id.* at p. 6). As such and contrary to the parents' assertions, the student did not require a PT evaluation at the time the May 2021 IEP was developed in order to receive a FAPE.

With respect to activity of daily living skills, according to the May 2021 IEP, the student was able to wash his own hands and face without assistance, help with cleaning up toys in the classroom, dress himself by putting on his coat, verbally express his toileting needs, wipe his nose, and sleep through the night (Dist. Ex. 6 at p. 5). The CSE identified management needs of the student including strategic seating to minimize distractions, refocusing and redirection to task, repetition, rephrasing and simplification of information and directions, modeling of behaviors, multi-modal approach to learning, check in with the student to ensure he was on task and focused, and understood what was being asked of him; and graphic organizers for all subject areas (id. at p. 6).

Therefore, as described in detail above, the hearing record shows that the May 2021 CSE considered the preschool IEP developed just four months prior along with input provided by the student's then-current teachers and related service providers and the concerns of the parents (see Dist. Exs. 2; 6 at pp. 1-6, 22). Thus, even if the district was required to but failed to conduct a social history, a classroom observation, or other specific assessments of the student, the evidence in the hearing record shows that the May 2021 CSE had sufficient information about the student in order to find the student eligible for special education and develop an IEP. Accordingly, even if the district committed a procedural violation of the IDEA, the hearing record does not support a finding that it rose to the level of denying the student a FAPE.

2. ICT Services

Turning to the merits of whether the May 2021 CSE's recommendation for ICT services was appropriate, State regulation defines ICT services as the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students and states that the maximum number of students with disabilities receiving ICT services in a class shall be determined in accordance with the students' individual needs as recommended on their IEPs, provided that the number of students with disabilities in such classes shall not exceed 12 students and that the school personnel assigned to each class shall minimally include a special education teacher and a general education teacher (8 NYCRR 200.6[g]).

In her written testimony, the parent indicated that she shared her concern that the student struggled with distractibility and needed a smaller class with the May 2021 CSE and that, therefore, a recommendation for ICT services for the 2021-22 school year would not be appropriate (Parent Ex. R ¶ 4). Further, the parent stated that, at the time of the May 2021 CSE meeting, the student was in a preschool program with a "1:1 SEIT provider" and related services (id.). The parent opined that "[t]he [district's proposed] ICT classroom would have had significantly less support as it had fewer adults and was not a full-time special educational program" and would be "far too large for [the student]" (id.). The parent further stated her concern that the recommended ICT services would not have met the student's needs on the basis that "the student to staff ratio" would have been too large "to provide the individualized, 1:1 and small group instruction that [the student] required," which in turn would have "exacerbate[d] his struggles with distractibility and his problem behaviors" (id. ¶ 6).

Within the May 2021 IEP, the CSE acknowledged the parents' concerns, which were shared by the student's preschool classroom teacher and the student's SEIT, regarding the student's ability to focus and maintain attention within the classroom (Dist. Ex. 6 at pp. 4, 5). The IEP indicated

that no concerns were stated in terms of the student's interactions with his peers but noted the classroom teacher reported that the student took things that did not belong to him (id. at p. 5).

The May 2021 IEP indicates that, at the CSE meeting, the student's SEIT recommended that the student attend a general education classroom with special education teacher support services (SETSS) for the 2021-22 school year based on her understanding that the student would be attending a private school for the 2021-22 school year and the private school did not have ICT services (Dist. Ex. 6 at p. 2). However, the IEP reflects that, since the student did not, at that time, have an acceptance letter to a private school, the CSE was "making an appropriate recommendation based on the community school program and [the student's] needs" (id. at pp. 2-3).

The May 2021 IEP memorialized the CSE's rationale for the recommendation for ICT services (Dist. Ex. 6 at p. 3).⁸ According to the May 2021 IEP, the CSE considered other placement options for the student, which included a general education class placement with SETSS and a 12:1+1 special class placement (id.). Notwithstanding the recommendations of the student's SEIT, the CSE rejected a general education class placement with SETSS for the student finding it insufficient to meet the student's needs, noting specifically that, although the student's performance was "comparable to his same-aged peers academically, [the student] present[ed] with difficulties maintaining focus and engagement academically" (id.). The IEP further indicated that the student benefited from a special education teacher in all core academic classes for refocusing, redirection, and reteaching of lessons, whereas SETSS "for a period a day or a few periods a day" would not have met his needs (id.). In addition, the CSE stated that the student would have also benefitted from the individualized supports throughout the day as a class with ICT services included both large and small group instruction (id.). The CSE also rejected a 12:1+1 special class placement finding it was too restrictive for the student as he had "age appropriate academic skills" (id.).

Based on the foregoing, the May 2021 CSE recommended ICT services for ELA, math, science, and social studies (Dist. Ex. 6 at p. 14). Within the effect of student needs on involvement and progress in the general education curriculum section of the IEP, the IEP noted that the student presented with executive functioning, fine and gross motor, and expressive and receptive language delays and that, therefore, the student's needs "warrant[ed]" [s]pecial [e]ducation supports and services to maneuver the [g]eneral [e]ducation curriculum at th[at] time" (id. at p. 6). In addition to ICT services, the CSE recommended the following related services on a weekly basis: two 30-minute sessions of individual OT; two 30-minute sessions of individual PT; one 30-minute session of individual speech-language therapy; and one 30-minute session of speech-language therapy in a group of two (id. at pp. 14, 15). To further address the student's needs, the May 2021 CSE recommended the following management needs: strategic seating to minimize distractions; refocusing and redirection to task; repetition, rephrasing, and simplification of directions/information; modeling of behaviors; multi-modal approach to learning; check-ins to ensure student was on task, focused, and understanding what was being asked of him; and graphic organizers for all subject areas (id. at p. 6).

⁸ The CSE's rationale for rejecting other placement options for the student was reiterated in a May 2021 prior written notice (Dist. Ex. 7 at p. 2).

While, on appeal, the parents point to the student's behaviors as another basis for their view that ICT services would not have met the student's needs, review of the present levels of performance in the IEP and the parent's testimony regarding the concerns she shared with the CSE, does not support the view that the CSE had grounds to believe the student's behaviors would have interfered with his learning or that of others or that the recommended ICT services would not have provided sufficient support to address the student's social/emotional and behavioral needs.⁹ As summarized above, the May 2021 IEP, while acknowledging that the student tended to become self-directed when things did not go his way and had difficulty following classroom rules, noted the student's progress in the social/emotional realm, described his positive interactions with peers, reflected his ability to engage in classroom activities, and further noted that he asked for teacher help when something was bothering him but forgot to problem solve and ask for help when things did not go his way (Dist. Ex. 6). As the IHO found, in the management needs section of the May 2021 IEP, supports targeted the student's behavioral needs, such as redirection and modeling of behaviors (see Dist. Ex. 6 at p. 6; IHO Decision at p. 8). In review of the May 2021 IEP, the recommended supports directed at addressing the student's behaviors, in conjunction with the presence of a special education teacher throughout the day pursuant to the recommendation for ICT services, appear to have been reasonable.

To be sure, the hearing record indicates that, after the May 2021 CSE and during his attendance at Lamplighter for the 2021-22 school year, the student was struggling with behavior and sensory issues, which at times interfered with his ability to learn (Parent Exs. H at pp. 1-6; I at pp. 1-3; J at p. 3; M at pp. 1-6; N at pp. 1-2; Q ¶¶ 9, 13, 17, 25; R ¶¶ 2, 6, 10). However, information about the student's behavioral needs after the May 2021 CSE cannot be relied on to retrospectively assess the CSE's recommendations (see C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [finding that "a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events . . . that seek to alter the information available to the CSE"], citing R.E., 694 F.3d at 186-87).

Based on the foregoing, the evidence in the hearing record supports the IHO's conclusion that the May 2021 CSE's recommendation for ICT services in combination with related services including OT, PT, and speech-language therapy and additional supports described in the management needs, was reasonably calculated to enable the student to make progress in light of his circumstances. However, given the student's presentation of needs during the 2021-22 school

⁹ On appeal, the parents go so far as to allege that the CSE should have recommended the development of a behavioral intervention plan (BIP) for the student; however, the parents did not raise the CSE's failure to develop a BIP for the student as an issue to be addressed at the impartial hearing (see Parent Ex. A). 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 provides that a party requesting a due process hearing "shall not be allowed to raise issues at the due process hearing that were not raised in the notice . . . unless the other party agrees" (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Accordingly, except with respect to the parents' concerns that the ICT services would not have met the student's needs, including his behavioral needs, I will not address the allegation about the CSE's failure to develop a BIP for the student, which is raised for the first time on appeal.

year at Lamplighter, if it has not already done so, going forward, the district may want to consider whether a functional behavioral assessment (FBA) of the student should be conducted.

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's decision that the district offered the student a FAPE for the 2021-22 school year, the necessary inquiry is at an end.

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

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
November 13 2023**

**STEVEN KROLAK
STATE REVIEW OFFICER**