The University of the State of New York

The State Education Department
State Review Officer
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No. 24-158

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:
Law Offices of Regina Skyer and Assoc., LLP, attorneys for petitioners, by Jaime Chlupsa, Esq. and Linda A. Goldman, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Michael P. Heitz, 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 determined that respondent (the district) offered their son appropriate educational programming and denied their request to be reimbursed for their son's tuition costs at The Quad Preparatory School (Quad Prep) for the 2023-24 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 in detail here. The student has received diagnoses of mild autism spectrum disorder (autism), attention deficit hyperactivity disorder (ADHD)–combined type, and specific learning disorder with impairment in written expression (Parent Ex. C at pp. 16-17).

In October 2022, the parents referred the student to the CSE to determine whether the student was eligible for special education as a student with a disability (Parent Ex. M ¶ 7). On January 5, 2023, the CSE convened and found the student eligible for special education services

as a student with autism (see generally Dist. Ex. 2).[1] The January 2023 CSE recommended that the student receive a program of integrated co-teaching (ICT) services in English language arts (ELA), math, and social studies to commence on January 20, 2023, as well as two 60-minute sessions per year of group parent counseling and training (Dist. Ex. 2 at pp. 12, 17).

On June 3, 2023, the parents entered into an enrollment contract for the student's attendance at Quad Prep for the 2023-24 school year (see Parent Ex. I).[2]

Thereafter, the CSE reconvened on June 26, 2023 to conduct a requested review and discuss the parents' concerns regarding the student's mental health (see generally Dist. Ex. 3). As a result, the June 2023 CSE recommended ICT services in ELA, math, and social studies together with one 30-minute session per week of individual counseling, one 30-minute session per week of group counseling, and one 30-minute session per week of individual occupational therapy (OT) (Dist. Ex. 3 at pp. 11, 16-17).

The parents disagreed with the recommendations contained in the June 2023 IEP, and, as a result, notified the district of their intent to unilaterally place the student at Quad Prep for the 2023-24 school year and seek public funding for that placement (see Parent Ex. B).

In a due process complaint notice, dated November 10, 2023, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year (see Parent Ex. A). The parents alleged that the ICT services were inappropriate as the student required a "small, therapeutic special education program" and that the district and/or the June 2023 CSE did not conduct or rely on sufficient evaluative information in determining the student's present levels of performance; failed to recommend speech-language therapy; failed to recommend additional OT services; denied the parents meaningful participation in CSE process; recommended insufficient supports for the student's management needs; developed vague and unmeasurable goals; and failed to address the student's social/emotional needs (Parent Ex. A at pp. 2-3). As relief, the parent sought funding for the student's placement at Quad Prep and transportation (id. at p. 4).

The matter was assigned to an IHO with the Office of Administrative Trials and Hearings (OATH), and a prehearing conference was held on December 11, 2023, a status conference was held on January 16, 2024, and an impartial hearing was conducted on February 12, 2024 (Tr. pp. 1-81). In a decision dated March 21, 2024, the IHO determined that the district offered the student a FAPE for the 2023-24 school year, and that Quad Prep was not an appropriate unilateral placement, and therefore, denied the parents' request for relief (IHO Decision at pp. 23-28). The IHO found that the district met its burden of proof and found that the failure to conduct a speech-language evaluation or recommend speech-language services did not deny the student a FAPE; that the OT recommendation met the student's needs; that the student did not require a behavioral intervention plan (BIP); that the recommended management needs, annual goals, and present

[1] The student's eligibility for special education as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

[2] The Commissioner of Education has not approved Quad Prep as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

levels of performance were sufficient; and that ICT services were the least restrictive environment for the student (id. at pp. 23-26).

IV. Appeal for State-Level Review

The parents appeal. The parties' familiarity with the particular issues for review on appeal in the parents' request for review and the district's answer thereto is also presumed and, therefore, the allegations and arguments will not be recited here. The parents allege that the IHO did not hold the district to its burden to show that the June 2023 IEP was appropriate and reasonably calculated to address the student's needs. The parents assert that the recommendation for ICT services without a BIP could not meet the student's needs and was detrimental to the student's mental health, which included the student's expressions of suicidal ideation to the parents, and that the district did not produce a witness to explain the disparity between what the district staff experienced in school versus what the student's private psychologist and parents experienced outside of school. The parents also argue that the district failed to conduct and rely on sufficient evaluative information and failed to recommend additional OT services and speech-language therapy. Additionally, the parents assert that the IHO should have found that Quad Prep was an appropriate unilateral placement and, as a result, awarded the parents tuition reimbursement.

In an answer, the district denies the parents' material allegations contained in the request for review. The district asserts that it met its burden of proof that it offered the student a FAPE for the 2023-24 school year. In addition, the district asserts that the student did not demonstrate behaviors that would warrant conducting a functional behavioral assessment (FBA) or development of a BIP. The district also asserts that it was not required to rely on the recommendations of outside evaluations that the student required additional OT or speech-language therapy. Lastly, the district argues that the student made academic gains with ICT services during the prior school year and ICT services were appropriate for the student to make progress.

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]).[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

Upon careful review, the hearing record reflects that the IHO, in a well-reasoned and well-supported decision, correctly reached the conclusion that the district offered the student a FAPE for the 2022-23 school year (IHO Decision at pp. 23-27). The IHO accurately recounted the facts of the case (id. at pp. 4-13), identified the issues to be resolved (id. at pp. 13-14), set forth the proper legal standard to determine whether the district offered the student a FAPE for the 2023-24 school year (id. at pp. 14-20) and applied that standard to the facts at hand (id. at pp. 23-27). The decision shows that the IHO carefully considered the testimonial and documentary evidence presented by both parties and, further, that she weighed the evidence and properly supported her conclusions. Furthermore, an independent review of the entire hearing record reveals that the impartial hearing was conducted in a manner consistent with the requirements of due process and that there is not a sufficient basis presented on appeal to modify the determinations of the IHO (see 20 U.S.C. § 1415[g][2]; 34 CFR 300.514[b][2]). Thus, as explained below, while my reasoning may have differed on some points, the conclusions of the IHO described above are hereby adopted with additional discussion of the parents' allegations on appeal noted below.

The parents' main contention on appeal is that the IHO erred in finding that the district met its burden notwithstanding that the district did not present witness testimony. However, the IHO addressed the lack of district witnesses and stated that, although "it would be better if the district offered witnesses to meet its burden, parties' burdens at the impartial hearing c[ould] be met with documentary evidence alone" and while here there was no witness testimony from the district's

[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).

educators "their reasoning and supportive evidence [wa]s described in detail in the district's documentary evidence" (IHO Decision at pp. 23, 26). The IHO found that "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" (id. at p. 23; see 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 stated that the parents' allegations pertaining to the sufficiency of the recommended program were not credible or supported by the hearing record (IHO Decision at p. 23). Furthermore, in finding that the district met its burden through documentary evidence, the IHO identified the evidence presented by the district that she relied on in making her FAPE determination and correctly stated the legal standard with respect to burden of proof (id. at pp. 5-13, 20, 23).

Consistent with the IHO's determinations, 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. To be clear, there was no procedural requirement that the district call witnesses at the impartial hearing in order to address the parents' due process complaint notice, especially after the district submitted extensive documentation that is required under the procedures of the IDEA itself.[4] Thus, as discussed further below, the district's documentary evidence is sufficient to establish the appropriateness of the June 2023 IEP.[5]

A. Sufficiency of Evaluative Information

First, the evidence in the hearing record supports the IHO's determination that the CSE had sufficient evaluative information available at the June 2023 meeting to develop the student's IEP

[4] If the parents felt that there were particular facts or events during the CSE process that were relevant that should have come to light and were not captured by or, more importantly, contradicted the documentary evidence offered by the district, the parents, as participants in the impartial hearing process, were free to try to establish a different version of the facts, offer contrary documentation, or "compel the attendance of witnesses and to confront and question all witnesses at the hearing" such as other witnesses, including but not limited to district personnel that participated in the June 2023 CSE (8 NYCRR 200.5[j][3][xii]). The IHO was authorized to issue subpoenas for this purpose if necessary (8 NYCRR 200.5[j][3][iv]).

[5] 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 June 2023 prior written notice into evidence (see 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. 3 at pp. 1-4).

for the 2023-24 school year (IHO Decision at pp. 23-24).[6, 7] The June 2023 CSE had before it the student's then-current functioning levels from a June 2023 teacher report, a written report from a June 2023 classroom observation, a February 2023 private OT evaluation report, input from the parents who participated at the meeting, and a June 2023 letter from the student's private psychologist (see Parent Exs. D; E; M ¶¶ 9-10, 14-16; Dist. Exs. 3 at pp. 1-3, 17; 7; see also Dist. Exs. 4; 5).[8] Further, the IHO correctly noted that, since it had been only six months since the student's initial IEP, the student not due for a triennial evaluation by the district and the parents had not requested any evaluations (IHO Decision at p. 23; see generally Dist. Exs. 2; 3).

B. Special Factors—Interfering Behaviors

The parents assert that it was incumbent upon the district to explain how the IEP could meet the student's needs without a BIP for the student given reports that the student expressed he might harm himself or others if forced to go to school. With respect to the parents' assertion that the CSE inappropriately failed to develop a BIP for the student, the IHO acknowledged that the student was exhibiting behaviors in the home, but noted there was "no evidence that the student's behavior at school was impeding his learning or that of others such that a BIP was necessary" (IHO Decision at p. 24). Additionally, the IHO found that the student's distractibility and sensory needs were addressed by the recommended management needs (id.).

State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider developing a BIP for a student that is based upon an FBA (8 NYCRR 200.4[d][3][i], 200.22[a]-[b]). Additionally, a district is required to conduct an FBA in an initial evaluation for students who engage in behaviors that impede their learning or that of other students (8 NYCRR 200.4[b][1][v]).

With regard to a BIP, the special factor procedures set forth in State regulations note that the CSE shall consider the development of a BIP for a student with a disability when:

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[6] 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]). 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]).

[7] The parents obtained a private neuropsychological evaluation of the student in August 2023 (see Parent Ex. C) which was not provided to the district until September 2023 (see Parent Ex. G), and therefore, could not considered during the June 2023 CSE meeting.

[8] I note that the June 27, 2023 prior written notice listed only the June 15, 2023 classroom observation as the evaluative information used by the June 2023 CSE, but as discussed above, the CSE incorporated other reports into the student's June 2023 IEP (Dist. Exs. 3 at pp. 1-4; 7 at p. 1).

> (i) the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions;
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> (ii) the student's behavior places the student or others at risk of harm or injury;
>
> (iii) the CSE or CPSE is considering more restrictive programs or placements as a result of the student's behavior; and/or
>
> (iv) as required pursuant to [8 NYCRR 201.3]

(8 NYCRR 200.22[b][1]). A school district's failure to develop a BIP in conformity with State regulations does not, in and of itself, automatically render the IEP deficient, as the IEP must be closely examined to determine whether it otherwise addressed the student's interfering behaviors (see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 80 [2d Cir. 2014]; F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 6-7 [2d Cir. Jan. 8, 2014]; M.W. v. New York City Dep't of Educ., 725 F.3d 131, 139-41 [2d Cir. 2013]; R.E., 694 F.3d at 190).

The June 2023 teacher report and IEP indicated that the student responded well to praise, participated well in class discussions, cooperated with others, and produced "high quality work" when "highly motivated by praise" or interest (Dist. Exs. 3 at p. 2; 4 at p. 2). The June 2023 IEP reported that, according to the student, his favorite time of day was recess, though it could be loud (Dist. Ex. 3 at p. 2). According to the June 2023 teacher report and IEP, the student related well to adults but also had friendships with the peers in his class and he enjoyed playdates with them (Dist. Exs. 3 at p. 2; 4 at p. 3). Socially, the student was described as doing well at school and responding well to redirection and adult feedback and as having the ability to joke around with teachers and friends and a good sense of humor (Dist. Exs. 3 at p. 2; 4 at p. 3).

Regarding his behavior at school, the June 2023 IEP described the student as appearing comfortable in the school setting and advocating for himself when needed (Dist. Ex. 3 at p. 2). Further, the June IEP indicated that the student had a "strong sense of right and wrong," and may interject himself into a situation if he had perceived someone doing the wrong thing (id.). He also could become frustrated by a "perceived social slight" at times and had difficulty expressing himself in times of stress or understanding the perspective of others (id.). According to the student's teacher, he frequently arrived upset to the classroom but was able to calm down and engage with the class work within a few minutes (Dist. Ex. 4 at p. 3). Further, he was described as needing redirection to stay on task but did not frequently exhibit anger or frustration at school (id.). His teacher indicated that he would access the "cool down corner" to calm down if frustrated (id.). The teacher reported that the student rarely complained about the noise level at school but, if he did, he requested to move his desk or asked the teacher to ask others to quiet down (id.). The student's teacher reported that at school the student had never displayed or threatened violence to himself or others, and only exhibited extreme frustration during transition times, particularly to and from school/home (id.). Additionally, the teacher reported that "[t]here seem[ed] to be a disconnect between [the student's] behavior in school and at home," and acknowledged the parents' reports that it was a struggle to get the student to school, and "he threaten[ed] violence towards himself and others instead of coming to school" (id.).

With regard to the student's behavior at home, the parent reported in her direct testimony by affidavit that the student had begun showing signs of "school refusal," refusal to participate in after-school activities, and increased irritability in January 2023 (Parent Ex. M ¶ 8). Further, she noted that his level of distress escalated in March 2023 and that the student verbally expressed upsetting phrases about school (id. ¶ 10). In addition, the student frequently did not sleep at night, locked himself in his bedroom, refused to eat, and kicked walls and doors (id.). The parent testified that the student complained of how unhappy school made him, how the noise impacted him at school, and that it was overwhelming and difficult for him (id.). The hearing record indicates that, despite expressing his refusal to go to school, the student was reported to have attended school regularly (Dist. Ex. 4 at p. 1).

At the June 2023 CSE meeting, the parents shared that the student's mental health had been challenged with repetitive thoughts and feelings toward school and suicidal thoughts and negative comments towards himself at home (Dist. Ex. 3 at p. 3). They also indicated that he refused to attend his private therapy sessions consistently, and "did not want to participate in a social-skills group with his outside therapist," and at home, he expressed concerns about the noise of the classroom as it affected his "sensory load negatively" (id.). However, according to the June 2023 IEP, there were "no reports of suicidal ideation observed or documented at school" (id.).

The hearing record includes evidence that the student was experiencing mental health challenges during the 2022-23 school year, but there was a difference from how the student presented at home verses school as noted above (Dist. Exs. 3 at pp. 1, 3; 4 at p. 3). In response to the parents' concerns, the June 2023 CSE added two counseling sessions per week (one individual and one group) along with two counseling annual goals to address the student's social/emotional needs for the 2023-24 school year (compare Dist. Ex. 2 at pp. 6-12, with Dist. Ex. 3 at pp. 8-9, 11). The June 2023 CSE also added the following management needs to further address his social/emotional needs: a daily mental health check-in with school-based clinician; consultation with the student's teachers, parents, school counselor, and private therapists to support his social/emotional functioning at school; small-group instruction in writing and math; and frequent check-ins initiated by teacher to ensure he was on-task and checks for understanding (compare Dist. Ex. 2 at pp. 4-5, with Dist. Ex. 3 at p. 3). Based upon the foregoing evidence in the hearing record, the IHO correctly found "no evidence in the record to contradict the CSE's conclusion that a BIP was not necessary" and that the student's behavior at home was "not a basis for a BIP if the student's behavior at school [wa]s not interfering with his ability or the ability of his classmates to learn" (IHO Decision at p. 24).[9]

[9] Without minimizing the concerns of the parents regarding the student's behavior in the home, my independent review of the evidence indicates that their concerns regarding the student were not manifesting in same way in the school environment, thus a BIP implemented for the student there would be of little use. If the student manifested interfering behaviors in school and they continued to interfere with his instruction or that of others "despite consistently implemented general school-wide or classroom-wide interventions" (8 NYCRR 200.22[b][1][i]), then at that juncture the CSE might need to consider the use of a BIP in school.

C. Integrated Co-Teaching Services

The parent argues that a general education classroom placement with ICT services was proving inappropriate for the student in light of his statements that he might hurt himself or others if required to go to school.[10]

It is well settled that a student's progress under a prior IEP is a relevant area of inquiry for purposes of determining whether an IEP has been appropriately developed, particularly if the parents express concern with respect to the student's rate of progress (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66-67 [2d Cir. 2013]; Adrianne D. v. Lakeland Cent. Sch. Dist., 686 F.Supp.2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, *14-*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ. Mem. [Revised Sept. 2023], available at https://www.nysed.gov/sites/default/files/programs/special-education/guide-to-quality-iep-development-and-implementation.pdf). The fact that a student has not made progress under a particular IEP does not automatically render that IEP inappropriate, nor does the fact that an IEP offered in a subsequent school year which is the same or similar to a prior IEP render it inappropriate, provided it is based upon consideration of the student's current needs at the time the IEP is formulated (see Thompson R2–J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153-54 [10th Cir.2008]; Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 530 [3d Cir. 1995]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *10 [S.D.N.Y. Dec. 8, 2011]; D. D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *12 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80 [2d Cir. 2012]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 650 [S.D.N.Y. 2011]). Conversely, "if a student had failed to make any progress under an IEP in one year, courts have been "hard pressed" to understand how the subsequent year's IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch. Dist., 62 F.3d at 534 [noting, however, that the two IEPs at issue in the case were not identical]; N.G. v. E.L. Haynes Pub. Charter Sch., 2021 WL 3507557, at *9 [D.D.C. July 30, 2021]; James D. v. Bd. of Educ. of Aptakisic-Tripp Cmty. Consol. Sch. Dist. No. 102, 642 F. Supp. 2d 804, 827 [N.D. Ill. 2009]).

The IHO addressed the parents' allegation that the student had not made progress with ICT services and that, therefore, the same recommendation should not continue for the 2023-24 school year (IHO Decision at p. 25). The IHO noted that the June 2023 IEP reflected the student's overall progress being fully integrated, moving grade to grade, and progressing toward his special education goals (id.). The IHO noted and the hearing record reflects that, during the 2022-23 school year, the student was reading on grade level, and his reading level progressed from level L to level P, which was considered to be over a full year of growth (IHO Decision at p. 8; Dist. Exs. 3 at p. 1; 4 at p. 1). Additionally, "the student's performance on the teachers college writing rubric improved from level one to level two" (IHO Decision at p. 8; Dist. Exs. 3 at p. 1; 4 at p. 1). In math, the IHO concluded from the evidence presented that the student used schema to make

[10] 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]).

connections and understand new concepts and also, the student "scored high average in operations, algebraic thinking, and numbers, and high on measurement/data and geometry" (IHO Decision at p. 8; Dist. Exs. 3 at p. 1; 4 at p. 1).

The June 2023 IEP noted that the student's parents had expressed they were pleased with his "academic gains" but felt that the decline in his mental health was due to a lack of support in his current learning setting (Dist. Ex. 3 at p. 2). The June 2023 CSE considered a program of related services only but rejected that option as not supportive enough, and also considered a State-approved nonpublic school placement but rejected that option as too restrictive given the student's high academic functioning and need to access the curriculum (Dist. Exs. 1 at pp. 17-18; 7 at p. 2).[11]

In her analysis, the IHO found that the student, while exhibiting declining mental health at home, continued to progress academically at school and was achieving his annual goals (IHO Decision at pp. 25-26). Further, the IHO noted that, although the student had displayed school refusal, the evidence in the record shows that it did not progress to absenteeism and the student had regular attendance during the 2022-23 school year (IHO Decision at p. 26; Parent Ex. M ¶¶ 8, 10; Dist. Ex. 4 at p. 1). The IHO, in her discussion found that the district attempted to implement intervention services to support the student in the general education setting rather than remove him to a nonpublic school as evidenced by the district consulting with the parents and the student's private psychologist (IHO Decision at p. 26; Parent Ex. M ¶ 11). The IHO noted that the district, in response, implemented the "calm down corner" to give the student a quiet place to go if he was feeling overwhelmed or dysregulated (IHO Decision at p. 26). By the end of the year, when the issues at home were not improving, the IHO noted that the CSE convened a meeting at the parents' request and in consideration of the parents' concerns added supports to the IEP including counseling and OT services with corresponding annual goals, and management needs which included a collaborative effort between the student's educational team and family to support his mental health (IHO Decision at p. 26; Parent Ex. M ¶ 14; Dist. Ex. 3 at pp. 1, 3-4, 8-10). Despite the parents' argument regarding the class size where ICT services are delivered, the student's sensitivity to noise, and that the ICT services program was a cause for his mental decline, the evidence in the hearing record shows that he continued to show success in the ICT setting during the 2022-23 school year, which supports the IHO's finding that the student's recommended placement in a general education class with the support of ICT and related services was appropriate (IHO Decision at pp. 26-27; Dist. Ex. 3 at pp. 1-3, 4, 7, 11).

Further, the IHO noted in her analysis that although the student's educators did not testify their reasoning and supporting evidence was documented in the June 2023 teacher report, which indicated that the student had "demonstrated growth in all academic subjects" during the 2022-23 school year (IHO Decision at p. 26; Dist. Ex. 4 at p. 2). The teacher report stated that while the student needed the support from two teachers to stay on task and complete work, required the accommodations of "seat choice, noise canceling headphones, graphic organizers and some modified assessments," he was "thriving in the ICT environment" (Dist. Ex. 4 at p. 3).

[11] The January 2023 IEP reflected results from a July 2021 psychoeducational evaluation that indicated the student's cognitive functioning was in the extremely high range and his academic functioning was in the average range (Dist. Ex. 2 at pp. 1-2).

Moreover, the IHO found that a nonpublic school such as Quad Prep as recommended by the private psychologist was too restrictive for the student (IHO Decision at p. 25).[12] I agree with the IHO that, while it is natural for parents "to want their child to thrive to maximum extent possible," the IDEA ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132; see IHO Decision at p. 26). Accordingly, the IHO's thorough and well-reasoned findings of fact and conclusions of law in her final decision with respect to finding that the district offered the student a FAPE for the 2023-24 school year are adopted as my own (see IHO Decision at pp. 23-27).

D. Related Services

Also at issue on appeal are the IHO's findings regarding the related services recommended by the June 2023 CSE. With respect to speech-language therapy services, the parent argues that it was incumbent upon the district to explain why the CSE did not recommend speech-language therapy services despite the private psychologist's recommendation for such services. In a letter, the private psychologist recommended speech-language therapy to support the student's social communication and pragmatic language (Parent Ex. E at p. 2). The private psychologist had not conducted a speech-language evaluation and the IHO found that there was no indication that the parents had requested the addition of speech-language services to the student's programming or a reevaluation (IHO Decision at p. 23). The evidence in the hearing record supports the IHO's determination that there was no "procedural error based on the lack of a speech-language or additional evaluations" and the CSE was not required to adopt the recommendations of the private psychologist (id. at pp. 23-24).[13] In addition to the IHO's discussion, I note that the classroom

[12] Notwithstanding the private psychologist's view that the student required a private school (see Parent Ex. E at pp. 1-2), generally, district staff responsible for formulating the student's IEP in compliance with the requirements of the IDEA may be afforded some deference over the views of private experts (see Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 592 F.3d 267, 270 [1st Cir. 2010] [noting that "the underlying judgment" of those having primary responsibility for formulating a student's IEP "is given considerable weight"]; J.E. & C.E. v. Chappaqua Cent. Sch. Dist., 2016 WL 3636677, at *16 [S.D.N.Y. June 28, 2016], aff'd, 2017 WL 2569701 [2d Cir. June 14, 2017], citing E.S. v. Katonah-Lewisboro Sch. Dist., 742 F. Supp. 2d 417, 436 [S.D.N.Y. 2010] ["The mere fact that a separately hired expert has recommended different programming does nothing to change [the] deference to the district and its trained educators"], aff'd, 487 Fed. App'x 619 [2d Cir. July 6, 2012]; Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at *6 [N.D.N.Y. June 19, 2009] [explaining that deference is frequently given to the school district over the opinion of outside experts]). Moreover, in addition to considering what supports and services the student needed in order to receive educational benefits, the district was mandated to consider placing the student with his nondisabled peers in light of the IDEA's LRE requirements, but the private psychologist was not bound to adhere to the same mandates as the district personnel on the CSE in formulating recommendations for the student, and her report reveals little to no consideration of the benefits of access to nondisabled peers in her conclusion that the student required placement in a "small class" in a "small special education program" (Parent Ex. E at p. 2).

[13] A CSE must consider independent educational evaluations whether obtained at public or private expense, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, consideration does not require substantive discussion, or that every member of the CSE read the document, or that the CSE accord the private evaluation any particular weight or adopt their recommendations (Mr. P. v. W. Hartford Bd. of Educ., 885 F.3d 735, 753 [2d Cir. 2018], citing T.S. v. Ridgefield Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [noting that even if a district relies on a privately obtained evaluation to determine a student's levels of functional performance, it need not adopt wholesale the ultimate recommendations made by the private evaluator], aff'd, 142 Fed. App'x 9 [2d Cir. July 25,

observation included in the hearing record described the student's distractibility but also his ability to advocate for himself, ask questions, and understand the expectations of the classroom and noted that, although he worked slower on a given assignment, overall, he kept with the pace of his classroom (see Dist. Ex. 5). The June 2023 IEP indicated that, while the student gravitated toward adults, he had made connections with his peers and had several friends at school with whom he had frequent playdates and got along (Dist. Ex. 3 at p. 2). Thus, as the IHO found, the student's "social deficits were [not] preventing him from accessing the curriculum or making academic progress" and group counseling with a counseling goal for social interactions was added to the student's recommended program which "would have addressed similar issues as the recommended [speech-language therapy] for social skills" (IHO Decision at p. 24). Accordingly, the IHO correctly held that the lack of speech-language services did not deny the student a FAPE (id.).

The parents also argue that it was incumbent upon the district to explain the CSE's recommendation for one session per week of OT. The IHO addressed the parents' claim that the CSE failed to adopt the recommendations and goals set forth in the private OT evaluation (IHO Decision at p. 24). The IHO noted that the purpose of the June 2023 CSE meeting was discuss the student's mental health issues and not to modify the recommendation made for OT services (id.). The February 2023 private OT report indicated that the student's scores were in the above-average and average ranges on all subtests of the Beery-Buktenica Developmental Test of Visual Motor Integration (Beery VMI), and he demonstrated limited attention span and deficits in upper body strength, handwriting, and sensory self-regulation (Parent Ex. D at pp. 1-4). The OT evaluation report also noted that the student presented with "disruptive movement-seeking behaviors which affect[ed] his ability to follow directions and problems with social skills related to his challenges" (id. at p. 4). While the private OT evaluation recommended that the student receive two sessions of OT per week, the June 2023 CSE recommended that the student receive one 30-minute session per week of individual OT (compare Parent Ex. D at p. 5, with Dist. Ex. 3 at p. 11). On this point, the IHO correctly held that the CSE was not required to adopt the recommendations from the private OT report, "and deference [wa]s owed to the student's teachers who determined, based on the [district's] own OT evaluation (which was still current), that the student had adequate functional, motor, sensory processing, and self-regulation skills and work behaviors to function in the classroom with the accommodations provided (teacher supports for attention and extra time to complete assignments)" (IHO Decision at p. 24).[14] Thus, based on the evidence, the IHO correctly found that there was no evidence in the hearing record that one session of OT per week would "prevent the student from accessing the curriculum or making academic progress" (id.).

2005]; see Michael P. v. Dep't of Educ., State of Hawaii, 656 F.3d 1057, 1066 n.9 [9th Cir. 2011]; K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 805-06 [8th Cir. 2011]; Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir. 1988]; James D. v. Bd. of Educ. of Aptakisic-Tripp Community Consol. Sch. Dist. No. 102, 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]).

[14] According to the January 2023 IEP, an OT evaluation was conducted in November 2022 in which the student was found to demonstrate "functional gross motor skills to access and safely negotiate his community and educational environment" (Dist. Ex. 2 at p. 4). It was also noted that the student's fine motor skills were adequate, and he had "appropriate visual perceptual and visual motor coordination," but he struggled with handwriting (id.). As a result, the January 2023 IEP noted that the student required "additional teacher support and extended time to complete assignments" (id.). Furthermore, the January 2023 IEP noted that based upon the evaluation, OT was "deemed too restrictive" and the student's "written expression needs [could] be supported in the ICT setting with targeted accommodations addressed in his management needs" (id. at p. 18).

VII. Conclusion

I am sympathetic to the parents' concerns about their son and their experiences in the home regarding his mental health; however, the evidence in this proceeding shows that the district carried out the requirements of the IDEA related to the disputed issues at the time the June 2023 IEP was formulated. The district staff on the CSE was responsive and appropriately added services to the student's programming in an attempt to lessen the parents' concerns, even if those concerns (especially those in the home) could not be eliminated altogether. Having determined that the evidence in the hearing record supports the IHO's determination that the district offered the student a FAPE for the 2023-24 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether Quad Prep was an appropriate unilateral placement or whether equitable considerations weighed in favor of the parents' request for relief.

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

THE APPEAL IS DISMISSED.

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

JUSTYN P. BATES
STATE REVIEW OFFICER