



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 15-109 & 15-113

**Applications of a STUDENT WITH A DISABILITY, by her parent, for review of the determinations of a hearing officer relating to the provision of educational services by the Board of Education of the Gates-Chili Central School District**

### **Appearances:**

Empire Justice Center, attorneys for petitioner, Jonathan Feldman, Esq., of counsel

Harris Beach, PLLC, attorneys for respondent, David W. Oakes, Esq., of counsel

## **DECISION**

### **I. Introduction**

These proceedings arise under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from those portions of the decisions of an impartial hearing officer (IHO) which determined that the educational program respondent's (the district's) Committee on Special Education (CSE) had recommended for her daughter for the 2014-15 school year was appropriate; and which determined that the student's service dog was not required for the student to receive a free appropriate public education (FAPE). The district cross-appeals from those portions of the two IHO decisions which found that the educational program recommended by its CSE for a portion of the 2013-14 school year was not appropriate. The appeals must be dismissed. The cross-appeals must be sustained.

### **II. Overview—Administrative Procedures**

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

mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

### **III. Facts and Procedural History**

The student has received diagnoses of autism, Angelman syndrome, epilepsy, asthma, hypotonia, and a sleep disturbance (Dist. Ex. 107 at p. 1).<sup>1</sup> The student has a history of

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<sup>1</sup> Two issues arose concerning the district's exhibits admitted at both hearings underlying SRO Appeal No. 15-109 (the first hearing) and SRO Appeal No. 15-113 (the second hearing). The first issue is that the district's exhibits are not consecutively paginated as entered into evidence at the impartial hearings. The second issue is

developmental delays and ongoing seizure activity (Tr. pp. 564-67). At or around eight months of age she began receiving services through the Early Intervention Program (Tr. p. 565; Dist. Ex. 137 at p. 2). The student has been determined to be eligible for special education and related services as a student with multiple disabilities since 2011 (*id.* at p. 2; Dist. Ex. 119 at p. 2).<sup>2</sup> The student demonstrates severe cognitive, intellectual, and language and communication delays, is non-verbal, and lacks safety awareness (Tr. pp. 45; Dist. Exs. 151 at p. 2; 153 at p. 2; 158 at p. 2; 160 at p. 2; 163 at p. 1).

Due to ongoing academic, language, social and motor delays the student received preschool special education services in a board of cooperative educational services (BOCES) program (Dist. Ex. 137 at p. 2). When the student was approximately three years old, her family acquired a service dog to help monitor the student's seizures (Tr. pp. 569-70, 575). The hearing record reflects that the student has attended BOCES programs since 2011 and since January 2011 has been accompanied to school by the service dog (Dist. Exs. 107; 108; 109; 110; 137 at p. 2; 201 at p. 3; 206; 207; Parent Ex. M).<sup>3</sup> Although the parent contends that the service dog addresses many of the student's needs, the purpose of the service dog is to alert to an upcoming seizure or seizure activity (Tr. p. 569; Dist. Ex. 119 at p. 2). For the 2011-12 school year, the student attended an integrated classroom at an early education center five days per week for two and one half hours per day (Dist. Ex. 119 at p. 2). According to the acting director of pupil personnel services the student's preschool made an exception to allow the dog at school without the parent providing a handler (Dist. Ex. 168 at p. 2). She also stated that the district never authorized or directed that the exception be made (*id.*).

In September 2012 the student transitioned to kindergarten (Dist. Ex. 119 at p. 1). For the 2012-13 school year, a CSE recommended placement in a BOCES 12:1+1 special class (Tr. pp. 103-04, 196; Parent Ex. M). The hearing record reflects that the student was reevaluated in December 2012 and subsequently transferred to a 12:1+4 special class in January 2013 (Tr. p. 496; Dist. Ex. 206 at p. 7; *see* Tr. pp. 195, 456, 496-98; Dist. Exs. 107 at p. 2; 159 at p. 1; 207 at p. 2).

On June 17, 2013, a Subcommittee on Special Education (CSE subcommittee) convened to develop the student's program for the 2013-14 school year (Dist. Ex. 206 at p. 2). The June 2013 CSE subcommittee recommended 12-month services in a BOCES 12:1+1 special class with the related services of speech-language therapy, occupational therapy (OT), physical therapy (PT),

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that the district's exhibits admitted during the second hearing are also numbered beginning with "1" and are also not consecutively paginated. To distinguish the district's exhibits from each hearing a three-digit numbering system has been implemented. The first numeral (either 1 or 2) represents the first or second hearing. The following two digits indicate the exhibit number assigned during the respective first or second hearing. Page numbers refer to the actual number of pages of the subject exhibit and order of pages as submitted, rather than by internal pagination. For example, the April 2014 IEP was admitted as district exhibit 8 at the first hearing, as such citation to this exhibit will be "Dist. Ex. 108." The district is encouraged, in accordance with standard legal practice, to fully mark its exhibits.

<sup>2</sup> The student's eligibility for special education and related services as a student with multiple disabilities is not in dispute in this proceeding (*see* 34 CFR 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

<sup>3</sup> As discussed below, the student did not attend school for a number of full days and half days beginning on May 19, 2015, when the student's dog handler was ill. The parent declined to send the student to school without the service dog on those days.

music therapy, and autism specialist services (Dist. Ex. 206 at pp. 2-3, 13-14). The June 2013 CSE subcommittee further recommended a full-time 1:1 aide (id.). For the 2013-14 academic school year, the June 2013 CSE subcommittee recommended substantially the same program and services as it had for Summer 2013 (compare Dist. Ex. 207, with Dist. Ex. 206).

The student attended the 12:1+1 BOCES special class recommended by the June 2013 CSE for half of the summer session, but the parent believed the placement was inappropriate for the student and a CSE subcommittee reconvened on July 29, 2013 at the parent's request to discuss the student's program recommendation for 2013-14 academic school year (Dist. Ex. 207 at p. 2). According to the July 2013 CSE meeting minutes, the parent stated that the student was not successful in the 12:1+1 setting during the summer (id.). The meeting minutes indicated that the parent believed that the student needed "a handler with the service dog in order to access her academics" (id. at p. 3). The CSE chairperson stated the district's position that the recommended program was appropriate for the student and that there was no educational need for a dog handler (id.). For the 2013-14 school year, the July 2013 CSE continued to recommend a 12:1+1 BOCES special class in a public school with the related services of individual speech-language therapy and individual PT each for three times per week for 30 minutes, individual OT two times per week for 30 minutes, and individual music therapy once per week for 30 minutes (id. at p. 12). The July 2013 CSE also recommended speech-language therapy and OT in a small group two times per week for 30 minutes, and music therapy in a small group once per week for 30 minutes (id.). The student's July 2013 IEP also included individual and consultant assistive technology services, individual and consultant autism services and individual and consultant audiology services (id. at pp. 12-13). The July 2013 CSE further recommended a full-time 1:1 aide, and an augmentative communication device (id.). At the parent's request, a daily 30-45 minute rest period was included on the July 2013 IEP (id. at pp. 3, 13).

The July 2013 IEP also provided the related service of skilled nursing services for 15 minutes per day and referenced the student's "[s]eizure/[n]ursing [c]are [p]lan," medication and food allergies, need for an air conditioned environment, and an emergency health care plan in place for transportation (Dist. Ex. 207 at pp. 1, 15).

The hearing record reflects that a CSE reconvened on January 31, 2014 at the request of the parent for a review of the student's then-current program and placement (Dist. Ex. 107 at p. 2). The parent reported that the student was not doing well in the BOCES 12:1+1 special class, had lost weight and was not eating meals (id.). The parent stated that the student was biting herself and others, and that the student's stress and refusal to eat was negatively impacting her ability to participate (id.). The parent attributed all of her observations to the student's placement in a 12:1+1 classroom environment (id.). The parent also stated that the student was taking more medication and this had affected her motor skills (id.). The minutes of the January 2014 CSE meeting reflected that the student's then-current classroom teacher did not share the concerns of the parent and she reported that the student did not tantrum in class and had demonstrated growth using a discrete trial instructional approach (id.). The student's then-current classroom teacher also stated that the student was well accepted in class and would parallel-play with students who approached her (id. at pp. 2-3). The student's related service providers participated in the January 2014 CSE meeting and each provider reported modest to good improvement in skills (id. at p. 3).

The January 2014 CSE meeting minutes also reflected that the parent and the other CSE members agreed to further evaluate the student and reconvene upon the completion of an independent psychoeducational evaluation and an augmentative communication evaluation (Dist. Ex. 107 at p. 3). The January 2014 CSE chairperson reviewed the information discussed at the meeting and the CSE recommended that the student's then-current program and services remain unchanged (id.).

A CSE reconvened on April 10, 2014 to consider the results of a March 10, 2014 psychoeducational evaluation and a March 11, 2014 comprehensive communication assessment (Dist. Exs. 108; 137; 140). According to the meeting minutes, the CSE also discussed the student's class placement and the addition of a full time, 1:1 nurse (Tr. pp. 475-76; Dist. Ex. 108 at pp. 2-3).

The April 2014 CSE also agreed to seek variances to allow the student to be transferred to a 6:1+1 special class for students who were medically fragile, which already had six students in attendance and exceeded the grade level range permitted by State regulation (Dist. Exs. 108 at p. 3; 109 at p. 2; 144 at p. 1). The record reflects that the variance requests were granted and the student was transferred to the 6:1+1 classroom on April 30, 2014 (Dist. Ex. 109 at p. 2).

A CSE convened again on June 12, 2014 to formally revise the student's 2013-14 IEP to reflect the classroom change and to hold the student's annual review (Dist. Exs. 109 at p. 2; 110 at pp. 2-3). For summer 2014, the June 2014 CSE recommended a BOCES 6:1+1 special class with the related services of speech-language therapy, PT, OT, music therapy, autism specialist services, assistive technology services and full time individual nursing services (Dist. Ex. 110 at pp. 17-18). The June 2014 CSE also recommended a full time 1:1 aide (id. at p. 16). For the 2014-15 academic school year, the June 2014 CSE recommended a 6:1+1 special class in a district school with virtually the same related services as recommended for summer 2014 (id. at pp. 15-16). The June 2014 CSE recommended that nursing services be increased from six hours per day to seven and one-half hours per day (id. at p. 16). Music therapy was increased, audiology services were decreased to one hour per year, and audiology consultant services were eliminated from the student's IEP (id. at pp. 15-17).

According to the hearing record, the parent filed a State complaint with the New York State Education Department (SED) on February 17, 2015 (Dist. Ex. 101 at pp. 10-11; see 8 NYCRR 200.5[*l*]). By letter dated April 16, 2015, SED rendered an adverse decision as to one allegation (Dist. Ex. 101 at pp. 10-14). The sustained allegation concerned the district's decision to prohibit the student's service dog from entering the school or accompanying the student on the school bus without a third party service dog handler (id.).<sup>4</sup>

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

Following the adverse decision from SED, the district requested an impartial hearing by due process complaint notice dated April 28, 2015 (Dist. Ex. 101). The district contended that it offered the student a FAPE from February 17, 2014 to February 17, 2015, the time period at issue

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<sup>4</sup> The district does not dispute that the student is entitled to be accompanied by a service animal in a public school building (Dist. Ex. 101 at p. 4).

in the State complaint (Dist. Ex. 101; see 8 NYCRR 200.5[l][4]). The district requested that an IHO declare SED's findings to be null and void, that the district offered a FAPE to the student, and that the district had no liability to the parent or student (Dist. Ex. 101 at pp. 8-9).

Prior to the commencement of the impartial hearing, the parent moved to dismiss the district's due process complaint notice on the grounds that the IHO lacked both subject matter jurisdiction to review SED's adverse decision and the authority to grant the requested relief (IHO Exs. 2; 4; 6). The district opposed the parent's motion, citing State regulation authorizing review of issues raised in a State complaint that resulted in an adverse finding by SED (IHO Exs. 3; 5; 7; see 8 NYCRR 200.5[l][4]). The IHO denied the parent's motion by interim decision dated June 18, 2015 (IHO Ex. 8).<sup>5</sup>

On June 19, 2015, the parent also filed a due process complaint notice and requested that the IHO consolidate the two requests for an impartial hearing (Dist. Ex. 201; see 8 NYCRR 200.5[ii][a]). In her due process complaint notice, the parent alleged the student was denied a FAPE from July 2013 through May 2014 due to her inappropriate placement in a 12:1+1 special class (Dist. Ex. 201 at pp. 10-11). The parent next contended that the student's service dog was a necessary component of the student's program and that requiring a third-party handler to accompany the service dog to school resulted in a denial of a FAPE (id. at p. 10). The parent also alleged that the student was denied a FAPE for several days beginning on May 19, 2015, when the student did not attend school because the dog handler was not available to attend with the student due to illness (id. at p. 11). For relief, the parent requested, among other things, compensatory education services for the time period that the student attended a 12:1+1 special class, reimbursement for the cost of the dog handler, and for the student's IEP to include the service dog as a related service and to designate the student as the dog's handler (id. at pp. 11-12). The parent also raised a number of claims that are outside the scope of an SRO's jurisdiction.

## **B. Impartial Hearing Officer Decisions**

A prehearing conference was held July 20, 2015 (IHO Ex. 9 at p. 1). By letter dated July 20, 2015, the IHO declined to consolidate the parent's due process complaint notice with the district's due process complaint notice (id.; see Tr. pp. 5-7). The impartial hearing on the district's due process complaint notice convened on August 7, 2015, and concluded on August 25, 2015, after four hearing dates (Tr. pp. 1-791). The impartial hearing on the parent's due process complaint notice was held on September 17, 2015.<sup>6</sup>

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<sup>5</sup> The district's due process complaint notice was fashioned as an appeal from a sustained State complaint which sought reversal of the State complaint determination, as well as declaratory relief. Neither State statute nor regulation provide for an appeal to an IHO of an adverse decision rendered by SED in a State complaint proceeding. Nevertheless, State regulations permit a school district to request an impartial hearing "upon receipt of an adverse decision . . . to address issues raised in the complaint" (8 NYCRR 200.5[l][4]). As such, the IHO concluded that the purpose of the impartial hearing was to determine whether the district offered the student a FAPE from February 17, 2014 through February 17, 2015 (Oct. 12, 2015 IHO Decision at pp. 1-2; Tr. pp. 12-13).

<sup>6</sup> The transcript of the September 17, 2015 hearing contains 55 pages and begins with "page 1." Citation to this transcript is not necessary for the disposition of this appeal. To the extent that any exhibits admitted into evidence on the September 17, 2015 hearing date are cited herein, they are referenced as described above.

By decision dated October 12, 2015, the IHO determined that the district failed to offer the student a FAPE from February 17, 2014-April 30, 2014. The IHO found that the 12:1+1 special class recommended by the district's January 31, 2014 CSE was not appropriate for the student (Oct. 12, 2015 IHO Decision at p. 5). The IHO stated that the student was isolated and unable to participate with other students (*id.*). The IHO further found that the hearing record reflected that the district should have known that the student would not derive educational benefit from a 12:1+1 special class given that she had previously been placed in a 12:1+4 special class for students who were medically fragile (*id.* at pp. 10-11). The IHO also determined that the district offered the student a FAPE beginning on April 30, 2014, when the student was placed in a 6:1+1 special class for students who were medically fragile (*id.* at pp. 5-6, 10-12).

The IHO also stated that the district had "provided wide coverage for academic teaching as well as health care for the student throughout the relevant period" and found that the student's service dog was "not necessary to the provision of FAPE" (Oct. 12, 2015 IHO Decision at pp. 13, 14-15).

Although the IHO determined that the district failed to offer a FAPE to the student from February 17, 2014 through April 20, 2014, he awarded no relief pending the outcome of his findings and decision on the parent's June 19, 2015 due process complaint notice, which as noted above, he had previously declined to consolidate with the district's April 28, 2015 due process complaint notice (Tr. pp. 5-7; IHO Ex. 9 at p. 1).

By decision dated November 9, 2015, the IHO again found that the 12:1+1 special class was not appropriate (Nov. 9, 2015 IHO Decision at p. 4). The IHO determined that the relevant time period for the parent's due process complaint notice was from September 1, 2013 through April 30, 2014<sup>7</sup> and that he had already found a denial of a FAPE for the period of time from February 17, 2014 through April 30, 2014 in his decision on the district's impartial hearing request (*id.* at p. 3 n.1). Therefore, he found that the district also denied the student a FAPE from September 1, 2013 through February 16, 2014 for the same reasons (*id.* at pp. 3-4). The IHO further determined that the district was not required to include the student's service dog as a related service on the student's IEP, to designate the student as the handler, or provide any supports relative to dog handling (*id.* at p. 4). The IHO also found that the district was not required to reimburse the parent for the cost of a dog handler, nor was the presence of the service dog required to offer the student a FAPE (*id.*). As relief for determining that the 12:1+1 special class placement was not appropriate, the IHO awarded 60 hours of compensatory education services.

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

The parent appeals from both IHO decisions and alleges that the IHO erred by failing to dismiss the district's due process complaint notice for lack of standing and by failing to consolidate both due process complaint notices. The parent also alleges that the IHO erred by failing to find

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<sup>7</sup> The IHO issued a "corrected" version of his November 9, 2015 decision on November 16, 2015, due to a typographical error. A footnote on page three included an incorrect date, which had been deemed "the relevant time period" (Nov. 9, 2015 IHO Decision at p. 3). To avoid confusion, the IHO prepared a corrected version which reflected the relevant time period as September 1, 2013 through April 30, 2014 rather than April 30, 2013. The November 16, 2015 decision is in all other respects identical to the IHO's November 9, 2015 decision.

that the student's service dog was required for the district to offer the student a FAPE. Lastly, the parent alleges that the IHO failed to award any relief after determining that the district denied the student a FAPE from September 1, 2013 through April 30, 2014. The parent also alleges that the student was denied a FAPE for six school days and five half-days when the student did not attend school while the dog handler was ill. The parent also claims that the district has discriminated against the student in violation of section 504 of the Rehabilitation Act of 1973 (section 504) (29 U.S.C. § 794[a]) and the Americans with Disabilities Act (ADA) (42 U.S.C. § 12101 *et seq.*). The parent also requests that an SRO consolidate the appeals from the two impartial hearings.

In answers with cross-appeals, the district responds to the parent's allegations with admissions and denials, and argues to uphold the IHO's determination that the student's service dog was not required for the district to offer the student a FAPE. The district cross-appeals from the IHO's determination that it failed to offer the student a FAPE from September 1, 2013- April 30, 2014. The district contends that the student is unable to serve as a dog handler and that it is not obligated to provide a third-party handler for the student.

## **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. 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; 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. Florida 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 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 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 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).

Except for in circumstances not applicable here, the burden of proof is on the school district during an impartial hearing (Educ. Law § 4404[1][c]).

## **VI. Discussion**

### **A. Preliminary Matters**

#### **1. Motion to Dismiss**

The parent contends that the IHO erred by failing to dismiss the district's due process complaint notice for lack of standing, lack of subject matter jurisdiction and for the first time in this appeal, that the United States Department of Education "disapproves of this type of action" (Pet. ¶¶ 52-54).

The parent argues that the district lacks standing and the IHO lacks subject matter jurisdiction because an IHO does not have the authority to grant the requested relief. Although the district cannot appeal from an adverse decision rendered by NYSED, State regulation provides that a school district may request an impartial hearing "upon receipt of an adverse decision... to address issues raised in the complaint" (8 NYCRR 200.5[l][4]). A review of the district's due process complaint notice indicates that they seek a determination by an IHO that the student was offered a FAPE during the relevant time period.<sup>8</sup>

The parent also alleges for the first time in this appeal that the district's impartial hearing request should be dismissed because on April 15, 2015, the United States Department of Education's Office of Special Education and Rehabilitative Services (OSERS) issued guidance counseling school districts to refrain from requesting an impartial hearing after a parent has filed a State complaint (Dear Colleague Letter, 65 IDELR 151 [OSERS 2015]). This guidance document discourages school districts from filing due process complaints concerning the same issues involved in an ongoing State complaint review (id.). In this case, the district availed itself

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<sup>8</sup> The parent concedes in her petition that the IHO has jurisdiction and the district has standing, if the district is seeking a finding that it offered the student a FAPE through the impartial hearing process, as opposed to appealing the adverse decision in the State complaint proceeding (Pet. ¶ 45). Furthermore, the parent did not argue that the district's due process complaint notice did not meet the sufficiency requirements (see 20 U.S.C. § 1415[b][7][B]; 34 CFR § 300.508[c]; 8 NYCRR 200.5[i][2]).

of its due process rights in accordance with State regulation at the conclusion of the State complaint process. As such, I find the parent's reliance on this guidance to be misplaced.

Based on the foregoing, I find that the IHO correctly concluded that the district was entitled to an impartial hearing on the issue of whether or not the student was offered a FAPE from February 17, 2014 through February 17, 2015.

## **2. Consolidation of Matters**

State regulations concerning the conduct of impartial hearings provide that when a subsequent due process complaint notice is filed while a due process complaint is pending before an IHO involving the same parties and student with a disability, the IHO with the pending due process complaint notice "shall be appointed" to the subsequent due process complaint notice involving the same parties and student with a disability, unless that IHO is unavailable (see 8 NYCRR 200.5[j][3][ii][a]). The IHO may consolidate the new complaint with the pending complaint or provide that the new complaint proceed separately before the same IHO (8 NYCRR 200.5[j][3][ii][a][2]). When considering whether to consolidate multiple due process complaint notices, the impartial hearing officer is required to consider relevant factors including: (1) the potential negative effects on the child's educational interests or well-being; (2) any adverse financial or other detrimental consequences; and (3) whether consolidation would impede a party's right to participate in the resolution process, prevent a party from receiving a reasonable opportunity to present its case, or prevent the impartial hearing officer from timely rendering a decision (see 8 NYCRR 200.5[j][3][ii][a][4][i-iii]). In declining to consolidate the two matters under consideration herein, the IHO indicated that since the parties had requested impartial hearings which concerned different time periods, it was simpler to maintain separate hearings (Tr. p. 6; IHO Ex. 9). I find that the IHO did not abuse his discretion by denying the parent's request to consolidate the two matters. Nevertheless, upon notice and an opportunity for the parties to be heard, and because both appeals arise from essentially the same set of facts and involve similar underlying issues, the parent's request to consolidate the appeals is granted as a matter of discretion and both matters will be addressed herein.

## **3. Scope of Review**

Next, a determination must be made regarding which claims are properly before me on appeal. Claims that do not involve the identification, evaluation, or educational placement of a student with a disability are outside the scope of my review. The parent alleges discrimination claims arising from violations of federal statutes upon which no relief can be granted pursuant to the IDEA or the Education Law (Application of a Student with a Disability, Appeal No. 15-053; Application of the Bd. of Educ., Appeal No. 14-109). The IHO acknowledged these claims, but noted that he was not appointed for purposes of a hearing process other than that provided for by the IDEA.<sup>9</sup> Likewise, the parent's allegations that the district violated section 504 and the ADA

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<sup>9</sup> Compliance with the IDEA's impartial hearing procedures is one, but not the only, means by which a district may satisfy the hearing requirements for section 504 claims (34 CFR 104.36).

exceed the jurisdiction of an SRO.<sup>10</sup> Thus, I am without jurisdiction to review any of the parent's section 504 claims or claims arising under the ADA.

## **B. FAPE**

### **1. 12:1+1 Special Class Placement**

The IHO determined that the 12:1+1 special class recommended by a district CSE for the 2013-14 school year was not appropriate because the student was isolated and unable to participate with other students. The hearing record does not support the IHO's determination.

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]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at \*6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "academic, developmental, and functional needs" of the student]), 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]).

State regulations provide that a 12:1+1 special class placement is intended for students "whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students" (8 NYCRR 200.6[h][4][i]). Management needs are defined as "the nature of and degree to which environmental modifications and human or material resources are required to enable the student to benefit from instruction" (8 NYCRR 200.1[ww][3][i][d]).

While the adequacy of the evaluative information available to the July 2013 CSE and the student's present levels of performance as described in the resultant IEP are not in dispute, a discussion thereof provides context for the issue to be resolved—namely, whether the 12:1+1 special class placement was appropriate and reasonably calculated to provide the student with educational benefit.

At the time of the July 2013 CSE meeting, the student was attending a 12:1+1 BOCES special class, as recommended by the June 2013 CSE (Dist. Exs. 206 at pp. 2-3; 207 at p. 2). The July 2013 IEP's present levels of performance, which are the same as those originally developed for the June 2013 IEP, indicated that the student had made steady gains in self-regulation and pre-reading skills since transitioning [from a 12:1+1 special class] to a 12:1+4 special class in January 2013 (Dist. Ex. 207 at p. 6). According to the IEP, the student participated in all classroom activities, and only left the room for necessary support services (id.). The IEP noted that the

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<sup>10</sup> State law does not make provision for review of section 504 or ADA claims through the appeal process authorized by the IDEA and the Education Law (see Educ. Law § 4404[2]; A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 n.17 [E.D.N.Y. 2012] ["Under New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"]).

student was able to complete familiar academic work tasks—including sorting, matching and simple assembly—with minimal assistance (*id.*). The IEP further noted that the student could identify her name from a selection of three, identify the numbers one and two consistently and could sign "more" when she wanted an activity to continue (*id.*). In addition, the July 2013 IEP indicated that the student responded to questions posed to her during circle time with minimal to moderate prompting and, at times, she responded spontaneously and appropriately (*id.*). With respect to the student's speech and language abilities, the July 2013 IEP indicated that the student presented with severe deficiencies in receptive, expressive and pragmatic language skills (*id.*). According to the IEP, the student could sustain eye-contact for up to five minutes during highly motivating activities, was nonverbal and communicated one word sign messages to familiar adults (*id.*). However, the IEP also indicated that when strategically placed and programmed according to the expectation of the task, the student used an augmentative communication device (Dynavox) (with adult cueing) to express a need or desire (Dist. Ex. 207 at p. 6).<sup>11</sup> The July 2013 IEP indicated that the student's hearing was judged to be adequate for general communication and educational needs, especially in a placement where multimodal teaching strategies were used, individual support was given, and the student was likely to be in close proximity to the speaker (*id.* at pp. 5, 7). The July 2013 IEP identified the following academic needs of the student: identifying letters and sound-letter correspondence, identifying numbers and 1:1 counting, and developing receptive and expressive abilities to communicate across settings using basic signs and her Dynavox (*id.* at pp. 6-7).

Regarding social development, the July 2013 IEP indicated that the student made an easy adjustment upon entering the 12:1+4 class in January 2013, had shown a marked improvement in self-regulation, and was not disruptive in the classroom (Dist. Ex. 207 at p. 7). The July 2013 IEP noted that the student would initiate playful interactions with adults, yet did not seem "excessively motivated" by her peers, and was more likely to parallel play, rather than engage directly with her peers (*id.*). The July 2013 IEP noted however, that the student had shown an interest in one female student by reaching out purposefully and moving closer to her on occasion, and the student also had chosen this female student frequently during circle time (*id.* at pp. 6-7). The July 2013 IEP identified the following social development needs of the student: demonstrating imaginary play, participating in cooperative play, and interacting with peers spontaneously (*id.* at p. 7).

With respect to the student's medical needs, the student information summary attached to the July 2013 IEP detailed special alerts including the student's allergies, seizure disorder, and lack of danger awareness (Dist. Ex. 207 at p. 1). Regarding the student's fine motor development, the July 2013 IEP indicated that the student demonstrated the ability to attend to table top activities for periods of 15-20 minutes; continued to explore a hand preference, and was developing isolated finger movement and the ability to transfer items from her palm to her fingertips (*id.* at p. 8). According to the IEP, the student had been observed to spontaneously stabilize an object with one hand while manipulating objects with the other hand (*id.*). In addition, the IEP indicated that the student was able to connect dots four to six inches apart, demonstrate circular scribbling, and

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<sup>11</sup> The July 2013 IEP also reflected that the student's Dynavox was recently restructured focusing on vocabulary related to the student's wants and needs as well as vocabulary that allowed her to participate in her school environment (Dist. Ex. 207 at p. 5). The student was described as showing improvement in appropriate and meaningful usage of the Dynavox (*id.* at p. 6).

imitate vertical and horizontal line movements (id.). With respect to donning her coat, the July 2013 IEP noted that the student could be encouraged to be visually attentive to the process of connecting the zipper and would complete pulling the zipper to a close, and further noted that the student was also visually attentive to the process of donning and tying her shoes and would accept hand over hand engagement in the activity (id.). The July 2013 IEP indicated that the student was able to use a child-size fork to stab food and bring it to her mouth to chew, but needed hand over hand assistance to position and stabilize an open cup on the top of her tongue in order to sip (id.). Regarding sensory processing, the IEP described the student as having an under-responsive sensory system which had been demonstrated by the student's unsafe sensory seeking behavior (e.g., tumbling, running, falling, crashing, and inverting herself) (id. at p. 8). The IEP reflected that the student was over-responsive to visual input, particularly avoidant of lights, and would often become emotionally reactive when overstimulated (id.). With respect to gross motor development, the July 2013 IEP indicated that the student continued to demonstrate low muscle tone and strength, especially in her trunk; however, the IEP also noted that the student had made significant gains during the course of the school year and was able to hold her head in place during a variety of movement activities, tolerate being in the prone position and propel a scooter board while sitting using her legs, or prone using her arms (id. at p. 7). The IEP stated that the student had improved her lower extremity strength and balance and that she ran at a speed at least twice as fast as walking (id. at p. 8). Physically, the IEP described the student as needing continued improvement in muscle strength, balance and endurance; continued opportunity for structured exploration of sensation and movement; continued opportunity to engage hands in using tools (e.g., writing, drawing, mealtime utensils); and continued development of oral motor control needed to drink liquids (id. at p. 9). The July 2013 IEP also indicated that the student needed between 30 and 45 minutes of quiet rest time every day (id.).

The July 2013 IEP also detailed the nature and degree to which environmental and human or material resources were needed to address the student's management needs (Dist. Ex. 207 at p. 9). Specifically, the IEP noted that the student required a small, structured, specially designed program that would allow for a high degree of support and individualization; clear, simple expectations with consistent consequences; and adequate wait time without physical prompting to respond to familiar one-step directions (Dist. Ex. 207 at p. 9). In addition, the IEP stated that the student benefitted from a multi-sensory approach, repetition, positive redirection, and free time to explore her surroundings (id.). The IEP noted that the student was motivated by adults, peers, sights and music; and was using a "now/next schedule board" with picture symbols to help her anticipate activities in her day (id.).

Based on the student's needs, the July 2013 CSE continued to recommend that the student be placed in a 12:1+1 BOCES special class for the 2013-14 school year (Dist. Ex. 207 at p. 12). To support the student within the 12:1+1 special class, the July 2013 CSE recommended numerous supports and services for the student including the provision of a full-time 1:1 aide, allowance for a rest period of 30-45 minutes daily, strategic seating to meet the student's listening needs and minimize exposure to extraneous sensory information, customizable communication software, and the accommodation of having tests administered in a location with minimal distractions (id. at pp. 12-14). The July 2013 CSE also recommended the student receive audiological consultation services as needed to discuss her auditory profile, monthly team meetings, and monthly speech-language consultation (id. at p. 13).

To further address the student's identified needs and deficits the July 2013 CSE recommended annual goals in the areas of reading, mathematics, speech-language therapy, fine and gross motor skills, career/vocational/transition skills, activities of daily living, and music therapy (Dist. Ex. 207 at pp. 10-12). For example, the July 2013 IEP included academic annual goals to increase the student's recognition of letters and their sounds, sight word vocabulary, and her ability to identify the numbers one through ten (compare Dist. Ex. 207 at p. 10, with Dist. Ex. 207 at p. 6-7). To improve the student's strength and balance, the July 2013 IEP included annual goals involving forward jumping and balancing on one foot (compare Dist. Ex. 207 at p. 11, with Dist. Ex. 207 at p. 9). To address the student's weaknesses in peer awareness, peer interaction and cooperative play, the July 2013 IEP also included an annual goal that targeted the student's ability to engage in interactive play with a variety of peers by initiating and maintaining interaction with others (compare Dist. Ex. 207 at pp. 10-11, with Dist. Ex. 207 at p. 7).

Furthermore, to address the student's academic, communication, motor and sensory deficits, the July 2013 CSE recommended that the student receive related services of two 30-minute sessions per week of small group speech-language therapy, three 30-minute sessions per week of individual speech-language therapy, two 30-minute sessions per week of small group OT, two 30-minute sessions per week of individual OT, three 30-minute sessions per week of individual PT, one 30-minute session per week of small group music therapy, one 30-minute session per week of individual music therapy, 20 hours per year of assistive technology consultation services, 60 hours per year of autism services, 10 hours per year of audiology consultation services, and 15 minutes per day of skilled nursing services for the administration of medication (Dist. Exs. 207 at pp. 2, 12; 151 at p. 5).

Despite the above, the IHO found that the record was "replete" with evidence that the 12:1+1 special class placement was not appropriate for the student and determined that the 12:1+1 special class was less effective in providing advancement than the other placements attempted (Nov. 9, 2015 IHO Decision at pp. 8-9). In support of his determinations the IHO pointed to descriptions of the student's transition into the 12:1+4 special class, such as, "[the student] has made steady gains since this transition in both self-regulation and pre-reading skills" and "[the student] entered the 12:1+4 class in January 2013. She has made an easy adjustment" (id. at p. 9; see Dist. Exs. 114 at p. 3; 206 at pp. 6, 7). Although these statements portray the student's transition into the 12:1+4 special class placement in a positive light, they do not inform the relevant standard of whether or not the recommended program was reasonably calculated to provide the student with educational benefit (see Dist. Exs. 114 at pp. 1-8; 206 at pp. 6, 7).

At the July 2013 CSE meeting, the parent stated that the student had "lost a lot of skills over the past three weeks" and attributed this regression to the student's placement with peers who were not at her developmental level, as well as the student's placement in the 12:1+1 special class (Dist. Ex. 207 at p. 2). The parent also shared her concern regarding the student's placement in a 12:1+1 special class for the fall 2013 (id.). The student's special education teacher for summer 2013 reported that "changes" had been stressful for the student, but did not specify what changes she meant and further stated that the student cried often for up to half an hour (id.). However the special education teacher also noted that with "modifications" the student was doing well and that the other students were beginning to interact with her (id.). According to the affidavit of the student's special education teacher for summer 2013, the student participated in group activities as well as individual instruction (Dist. Ex. 252 at p. 4). The special education teacher averred that

the student had some issues with respect to regulation, however, the student was able to maintain the skills she had at the beginning of the 2013 summer session (id. at pp. 4-5).

The hearing record shows that the July 2013 CSE considered numerous special class student-to-staff ratios for the student for the 2013-14 school year (Dist. Ex. 207 at pp. 2-3). A BOCES administrator, who participated in the student's July 2013 CSE meeting, explained that BOCES was unable to provide the option of a 12:1+4 special class ratio and stated that a 6:1+1 special class for students who were medically fragile was outside of the student's grade level (id. at p. 2). According to the CSE meeting minutes, the BOCES administrator also stated that a 12:1+1 special class with the modifications and interventions that the student needed would be the only option that BOCES would be able to provide and that BOCES would be responsive to the student's needs and would accommodate her as appropriate (id. at pp. 2-3). In addition to a BOCES placement, the July 2013 CSE also considered a 7:1+4 special class placement in a nonpublic day treatment program, but the parent requested that the student remain in a district-based program (id. at p. 3). Consequently, for the 2013-14 academic school year the July 2013 CSE recommended for the student a 12:1+1 special class placement with the supports and related services detailed above (Tr. p. 456; Dist. Ex. 207 at p. 1-16). The district's acting director of pupil personnel services—who served as the CSE chairperson at the July 2013 meeting—stated that the July 2013 CSE deemed the 12:1+1 special class placement with the recommended level of support and related services to be appropriate for the student (Tr. p. 456).

In January 2014, the CSE reconvened at the request of the parent, who was again concerned that the student was not doing well in her 12:1+1 BOCES special class placement (Dist. Ex. 107 at p. 2). According to CSE meeting minutes, the student's mother stated that the student had lost weight since the summer and stopped eating her meals, which she believed was due to the student's classroom environment (id.). The parent further stated that the student had been biting herself and things that used to regulate the student did not consistently work anymore (id.). In addition, the parent reported that the student was taking "a lot" of medication and that there was a dramatic difference in her motor skills and a decline in her adaptive skills (id.). According to the January 2014 CSE meeting minutes, the parent believed that the student was isolated and wanted her in a classroom with students who were similar to her (id.). In addition, the parent stated that the student needed a new approach to communication and that the student's Dynavox was inconvenient and heavy (id.). In contrast, the student's special education teacher stated that the student described by the parent was not the student she saw in school (id.). She reported that the student did not tantrum in school, that the use of discrete trials had resulted in growth for the student and that the student was well accepted in class (id. at p. 3). The student's related service providers reported that the student had been able to use the Dynavox to make some choices, was fairly consistent with her use of the word "no" and was making approximations of some signs (speech therapist); was attentive for longer periods in the motor room, was able to maintain more of a tripod grasp on a writing utensil and was cutting better with scissors (occupational therapist); and had mastered riding a tricycle, could complete the balance beam and was signing and using eye contact more consistently (physical therapist) (id.).

The January 2014 CSE updated the student's IEP to reflect her instruction and performance in the 12:1+1 BOCES special class (Dist. Ex. 107 at pp. 6-7). The IEP noted that with the guidance of the autism specialist, BOCES began discrete trial therapy (DTT) with the student in November 2013 (id. at p. 6). The IEP explained that the student was working on ten DTT programs for a total

of 55 minutes per day and that the student had made steady gains in most of her DTT programs (id.).<sup>12</sup> With respect to the student's speech and language abilities, the IEP noted that the student was using her Dynavox to request highly motivating toys and objects, as well as snacks (id. at p. 7). However, the student had difficulty imitating signs due to motor limitations (id.). According to the IEP the student showed strength in visual skills by matching identical pictures. In addition, the IEP indicated that the student had shown an increased awareness and response to others (id.).

Regarding social development, the January 2014 CSE updated the student's IEP to reflect her then-current functioning. According to the January 2014 IEP, the student followed the routine of the classroom with the support of her 1:1 aide and individual picture schedule (Dist. Ex. 107 at p. 8). The January 2014 IEP also noted that the student used a picture choice board to choose activities at play time and used her Dynavox to indicate feelings on occasion and could request specific needs and wants (id.). The student's then-current special education teacher reported that the student participated in small and large group activities with peers; and participated in large motor activities with peers such as playground, bean bags, and scooters with adult support, but noted that the student appeared to be minimally aware of her peers and would play next to them (id.).

Regarding the student's medical needs, the student information summary attached to the January 2014 IEP again detailed special alerts including the student's allergies, seizure disorder, and lack of danger awareness (Dist. Ex. 107 at p. 1). The January 2014 IEP included updated reports from the physical therapist who stated that the student was working at improving her core strength, coordination, locomotion and balance (id. at pp. 9-10). The IEP indicated that the student could ride a tricycle about the building with independent steering and pedaling and that she was able to walk a tapeline or low balance beam with one-hand assistance and one to two steps off of the beam (id. at p. 10). The IEP reported that the student enjoyed sensory exploration activities, sensory brushing/massaging, and that a weighted blanket or gentle swinging sometimes helped to comfort and calm the student (id.). According to the January 2014 IEP, the student had shown right hand dominance and was able to maintain a tripod or quadruped grasp of a crayon or marker (id.). With respect to self-care skills, the January 2014 IEP indicated that the student used a more mature radial grasp of a fork and used a fork to spear cut-up food, pointed to picture symbols on a board to indicate food or drink choices, held and drank from an open cup and poured drink from a larger cup given hand over hand assistance, and could button four buttons on a practice vest with verbal cues and moderate assistance (id.). According to the January 2014 IEP, the student wore a diaper to school and continued to work on toileting skills (id. at p. 7). The January 2014 IEP also reflected that the student was on a very restricted diet and only consumed food and beverages provided by the parent (id. at p.6).

With respect to the nature and degree to which environmental and human or material resources were necessary to address the student's management needs, the January 2014 IEP described the student as able to participate in the classroom program with the support of her 1:1 aide (Dist. Ex. 107 at p. 11). The IEP noted that the student enjoyed hands-on/sensory activities

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<sup>12</sup> The student's DTT programs included non-verbal imitation, following directions, writing, identification of body parts, object identification, math sets, matching numbers, identification of name and letters, identification of familiar people, and responding to her name by looking (Dist. Ex. 107 at p. 6).

and benefitted from frequent breaks, various sensory activities, and a structured environment with the use of visual structure (id.). The January 2014 IEP also noted that the student had times of distress and required time away in order to regroup and that the student needed between 30 and 45 minutes of quiet rest time every day (id.).

A student's progress under a prior IEP may be a relevant area of inquiry for purposes of determining whether a subsequent IEP is appropriate, particularly if the parent expresses concern with respect to the student's rate of progress under the prior IEP (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66 [2d Cir. June 24, 2013]).

While at least one court has 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. v. Scott P., 62 F.3d 520, 534 [3d Cir. 1995]); that is not the case herein. The district clearly disputes the parent's contention that the student failed to make progress in the 12:1+1 special class placement during the 2013-14 school year.

According to the affidavit of the student's 12:1+1 special education teacher, from September 2013 through April 29, 2014, the student demonstrated modest improvement as was consistent with the expectations for a student with her number of, range of, and level of disabilities (Dist. Ex. 151 at pp. 1, 4). The special education teacher acknowledged that the student had many needs and functioned at a low level, but explained that the student was making some progress (id. at p. 6). According to the January 2014 IEP, the special education teacher reported that the student had made steady gains in most of her DTT programs (Dist. Ex. 107 at p. 6). The special education teacher also reported that the student had made some improvement in self-help/daily living skills by January 2014, but still needed considerable support with virtually all daily living skills including dressing and undressing, toileting and eating (Dist. Ex. 151 at p. 8). The special education teacher averred that she, along with the various service providers and the 1:1 aide, worked with the student on all of the annual goals listed on her IEP (id. at p. 9).

According to the affidavit of the student's autism specialist, the student began the 2013-14 school year having modestly improved in basic skills and continued to show some modest improvement throughout the 2013-14 school year (Dist. Ex. 152 at p. 4). The student's occupational therapist reported that the student had shown improvement with increased tolerance and attention span for movement activities; was better able to wait her turn; and attended to and followed an obstacle course about a story book with verbal cues, modeling and occasional minimal assistance (Dist. Ex. 107 at p. 10). The occupational therapist also stated at the January 2014 CSE meeting that she had seen the student progress in the areas of attention and fine motor skills (id. at p. 3). The occupational therapist added that the student seemed relaxed in the cafeteria (id.). The physical therapist reported to the January 2014 CSE that the student was building strength, was now capable of completing the balance beam as she was more focused, was communicating more, was signing more consistently, and was using more eye contact (id.). The physical therapist noted that the student's "greatest accomplishment" to date in physical therapy had been her ability to follow a picture schedule board with assistance and to transition from activity to activity with direction (id. at p. 9). The student's speech therapist—who worked with the student during the relevant time period—stated that the student had been able to use her Dynavox to make choices, had been making approximations of some signs, and that the staff was working on ways to have the student express herself effectively and efficiently (id. at p. 3).

The student's second quarter (January 2014) report card stated that the student had made steady growth in several areas using an applied behavioral analysis (ABA)/DTT approach, had increased her eye contact and interactions with adults, was using her Dynavox more to indicate her wants with less assistance, and was making growth in functional skills including toileting and eating (Dist. Ex. 132 at p. 2). The student's January 2014 progress report indicated that the student was making satisfactory progress toward four of her annual goals and progressing gradually toward three of her annual goals (Dist. Ex. 147 at pp. 1-11). A review of the reports available to the January 2014 CSE reveals a student who was engaged and making progress in her 12:1+1 special class placement from September 2013 through January 2014.

Regarding the functional levels of the students in the 12:1+1 special class during the 2013-14 school year, the IHO found that the students in the 12:1+1 special class were "considerably more advanced in capabilities" than the student and that she lacked the opportunity to develop peer relationships (Oct. 12, 2015 IHO Decision at p. 10). A comparative review of the 2013-14 school year's 12:1+1 special class profiles with the abilities, needs, and annual goals of the student does not support the IHO's findings.

The special education teacher's affidavit provided a description of the 12:1+1 special class profile, which included a range of students with varying abilities and strengths and weaknesses; including some who were nonverbal, some whose abilities were higher than the student and some whose abilities were similar to the student (Dist. Ex. 151 at p. 3). The special education teacher also averred that she individualized education as appropriate to the needs of each student, and that instruction included large and small group activities and individual instruction and activities as well (*id.*). The 2013-14 school year class profiles document indicated that many of the other students in the student's 12:1+1 special class were working on identifying letter names and sounds, numbers one through ten, and pre-academic skills such as identifying colors and shapes (*see* Dist. Ex. 150 at pp. 1-8). The student's 12:1+1 special class included another nonverbal student, and two students with severe speech-language delays (Tr. pp. 46, 237, 619; Dist. Ex. 150 at pp. 1, 6). A number of the students were described as functioning in the two year old to three year old range cognitively or in social, communication or reading skills (Dist. Ex. 150 at pp. 3, 5, 6). The class profiles further revealed that some of the students in the class engaged in parallel play, some were developing peer awareness or struggled with peer interactions, and others were working toward maintaining eye contact (*id.* at pp. 1-4, 7). In addition, a number of the students were identified as having needs in one or more of the following areas; safety awareness, behavior issues, self-care skills, and toileting (*id.* at pp. 1-8).

The parent further contends that the student was isolated and as a result unable to receive educational benefit. The hearing record does not support this contention. According to the affidavit of the student's special education teacher, the student's providers met with the parent in November 2013, and decided that the student's program should include an ABA approach which included DTT (Dist. Ex. 151 at p. 7). Both of the 1:1 aides who worked with the student during the 2013-14 school year noted that the student did not have a lot of time in the classroom for group activities because of her related services schedule, ABA training, and sensory breaks (Tr. p. 238; Parent Ex. N). The special education teacher also acknowledged that there were times the student showed some unhappiness or distress and was provided with appropriate away time, but the special education teacher also stated that the student was in the classroom participating most of the time (Dist. Ex. 151 at p. 8). Moreover, the special education teacher reported that the student was well

accepted in the class, that other students approached her, and that she played alongside them (Dist. Ex. 107 at pp. 2-3). The special education teacher reported at the January 2014 CSE meeting that the student participated in small and large group activities with peers and would play next to her peers using the same materials, though she noted that the student appeared to be minimally aware of her peers (id. at p. 8). The special education teacher also reported that the student participated with her peers in large motor activities with adult support, such as playground, bean bags, and scooters (id.). Additionally, the student's IEP recommended speech-language therapy in a small group twice weekly, OT in a small group twice weekly, and music therapy in a small group one time weekly (id. at p. 14). The hearing record demonstrates that although the student's program called for individual instruction and therapies, the student was also provided with opportunities to interact with peers and to develop communication and social skills.

The parent also made available to the January 2014 CSE a number of reports and letters from the student's medical and outside providers (Tr. pp. 476-81; see Dist. Exs. 124-128). In a letter, the student's dietician stated that the student would often skip lunch due to the stress of her environment and as a result had poor seizure control and experienced weight loss (Dist. Ex. 126). The dietician further stated that the student's regression during the 2013-14 school year was notable and so significant that the team monitoring her diet had been unable to wean the student from her seizure medication as scheduled (id.). In a letter dated January 2014, the student's Medicaid attendant stated that the student was no longer able to navigate the steps on the bus or in the house, often asked to be held or carried, and looked "drugged" (Dist. Ex. 127 at p. 1). In a third letter, the dog handler felt that the student's 12:1+1 special class was very overwhelming and that a doubling of her medication dose, adding a new medication to control emotional dysregulation and increased seizure activity had left the student groggy and depressed (Dist. Ex. 128 at p. 1). In a report dated December 27, 2013, a nurse practitioner from a developmental services center stated that the student required careful educational planning and that she would learn best in a classroom with a very predictable and calming environment and a low level of sensory stimulation (Dist. Ex. 124 at p. 1). The nurse practitioner further discussed the student's sleep and daytime behavior, and recommended medication changes (id. at pp. 1-2).

The autism specialist acknowledged the parent's concerns and her request that the CSE consider a change of class, however, the autism specialist stated that she had no knowledge or indication that the student was not doing well in the 12:1+1 special class or that the parent's assertions could be attributed to attendance in the 12:1+1 special class (Dist. Ex. 152 at pp. 4-5). The acting director of pupil services stated that in reviewing the report from the nurse practitioner, it was noteworthy to her that there was a lengthy discussion of the student's sleep and day time behavior and perhaps the connection with the medication (Tr. p. 477). The acting director of pupil services stated that she thought the student's medical team was looking into adjusting the student's medications at that time (id.). The January 2014 IEP indicated that at the CSE meeting the BOCES administrator requested more communication between the school and the student's medical providers (Dist. Ex. 107 at pp. 2-3). The parent was provided with consent forms to share information with the student's medical and outside providers, which she did not sign at the time of the meeting (id. at p. 3).

Moreover, in response to the parent's request, the January 2014 CSE arranged for an independent educational evaluation (IEE) to be conducted by a psychologist chosen by the parent (Dist. Ex. 107 at p. 3; see Dist. Ex. 140 1-3). The January 2014 CSE also arranged for an

augmentative communication evaluation and a follow-up CSE meeting to be held once the two evaluations were completed (Dist. Ex. 107 at p. 3; see Dist. Ex. 137).

The acting director of pupil personnel services (acting director) stated that she understood that the parent wanted the January 2014 CSE to consider changing the student's class placement, but she thought it was important to have the results of the other evaluations first to see if there were any further recommendations that the CSE would want to consider (Tr. pp. 475-76). The acting director testified that the result of the meeting was to continue to support the student in her current 12:1+1 special class placement with the related services and move forward with an augmentative communication evaluation and an IEE (Tr. p. 489). Similarly, the January 2014 meeting minutes stated that the CSE would reconvene upon completion of these evaluations (Dist. Ex. 107 at p. 3). The acting director testified that the student was being provided an appropriate education in her then-current 12:1+1 special class placement with related services (Tr. p. 475).

The January 2014 CSE meeting minutes also reflected that the parent and the other CSE members agreed to further evaluate the student and reconvene upon the completion of an independent psychoeducational evaluation and an augmentative communication evaluation (Dist. Ex. 207 at p. 3). A BOCES administrator in attendance at the January 2014 CSE meeting requested "more communication between the school and with [the student's] medical providers (id.). The parent consented to the additional evaluations and did not consent to the request "to share information with [the student's] medical and outside providers" (id.). The January 2014 CSE chairperson reviewed the information discussed at the meeting and the CSE recommended that the student's then-current program and services remain unchanged (id.).

Consistent with the minutes of the January 2014 CSE meeting, a district CSE reconvened on April 10, 2014 to review the independent psychoeducational evaluation, the augmentative communication evaluation, the student's class placement, as well as a recent change in the student's nursing services (Tr. pp. 475-76; Dist. Exs. 107 at p. 3; 108 at pp. 2-3; see Dist. Exs. 137; 40).

Relative to nursing, the April 2014 IEP reflected an increase in the individual nursing services listed in the January 2014 IEP, from 15 minutes to seven hours daily (compare Dist. Ex. 108 p. 14, with Dist. Ex. 107 at p. 14). The 12:1+1 special education teacher explained that when doctor's orders were changed indicating that there could be a situation in which the occurrence of a seizure would require the administration of medication within three minutes, the nursing services were expanded on or about February 24, 2014 so that a full-time 1:1 nurse was assigned to the student throughout the school day and on the bus ride to and from school (Dist. Ex. 151 at p. 5; see Tr. p. 303). The BOCES administrator reported at the April 2014 CSE meeting that the student was currently being provided with 1:1 nursing through staff in the building and that the district agreed to have BOCES hire a nurse to be put into place "after the break" (Dist. Ex. 108 at p. 2).<sup>13</sup>

The evaluators who conducted the comprehensive communication assessment reported that the student was an emerging communicator, and noted a specific limitation in that the student unpredictably altered mode and style of communication when interacting with different people

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<sup>13</sup> The April 2014 IEP indicated that the student's individual nursing services would be increased starting April 21, 2014 (Dist. Ex. 108 at pp. 2, 14).

(Dist. Ex. 108 at p. 3). The evaluators stated that the student needed a universal, reciprocal system that the student could use to both communicate and learn language function (*id.*). The April 2014 CSE meeting minutes indicated that planning for a program to address the student's communication needs using a language acquisition through motor planning (LAMP) program would begin and noted that the April 2014 CSE was recommending an additional ten hours of assistive technology (AT), a change in the student's speech-language consult from four hours monthly to two 30-minute sessions per week, and parent training for AT as part of the AT hours (Dist. Ex. 108 at p. 3).<sup>14</sup>

According to CSE meeting minutes, the independent psychologist who observed the student as part of an IEE reported that the student may be "less stressed" in a smaller classroom environment with fewer peers (Dist. Ex. 108 at p. 3, *see* Dist. Ex. 140). The student's 12:1+1 special education teacher acknowledged that the student experienced an "up and down" year due to medical issues and distress (Dist. Ex. 108 at p. 2). The parent stated that she wanted the April 2014 CSE to look at recommendations to keep the student "from being stressed" (*id.*). In response, the April 2014 CSE discussed the option for a smaller classroom setting for the student (*id.* at p. 3).

As described above, the April 2014 CSE considered a number of possible special class placements for the student (Dist. Ex. 108 at p. 3). The April 2014 IEP noted that BOCES was in the process of looking at a 6:1+1 special class for students who were medically fragile for first to third grade students beginning in the summer (Dist. Ex. 108 at p. 3). The April 2014 CSE recommended applying for a variance for the student to enter the 6:1+1 special class for grades four to six (*id.*). Although the April 2014 IEP continued the student's placement in a 12:1+1 special class, the district transferred to student to the 6:1+1 special as of April 30, 2014 (*id.* at p. 2).<sup>15</sup>

The BOCES administrator and the district psychologist, both of whom participated in the January 2014 and the April 2014 CSE meetings agreed that the 12:1+1 special class was appropriate for the student but, in light of the parent's preference, also agreed that the 6:1+1 special class could also be appropriate; the CSE agreed (Dist. Ex. 161 at p. 7).

The evidence in the hearing record as detailed above demonstrates that the July 2013, January 2014, and April 2014 IEPs and their recommendation for a 12:1+1 special class placement were reasonably calculated to provide the student with educational benefit. Accordingly, the IHO's determination that the district failed to offer the student a FAPE from September 1, 2013 through April 30, 2014 is reversed.

The IHO awarded 60 hours of compensatory education services upon determining that the student had been inappropriately placed in a 12:1+1 special class placement. As I have found the 12:1+1 special class placement to be appropriate, the IHO's award of compensatory education services is also reversed.

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<sup>14</sup> The April 2014 and June 2014 IEPs do not reflect the change in speech-language consultation services (*see* Dist. Exs. 108 at p. 15; 109 at p. 15).

<sup>15</sup> The transfer was reflected in the student's June 2014 IEP (Dist. Ex. 109 at p. 2).

## 2. Medical Needs and Seizure Alert Assistance Dog

The Second Circuit and other jurisdictions have considered whether or not the exhaustion requirement of the IDEA applies to alleged violations of federal rights relative to use of a service animal. The determinative factors are whether or not the service animal has been claimed to be educationally necessary (see Cave v. East Meadow Union Free Sch. Dist., 514 F.3d 240, 248 [2d Cir. 2008] [plaintiffs required to exhaust administrative remedies, because use of service dog as an independent life tool was not outside the bounds of the IDEA]; Riley v. Sch. Admin. Unit #23, 2015 WL 9806795, at \*6 [D.N.H. Dec. 22, 2015] [IDEA's exhaustion requirement does not apply because plaintiffs did not challenge the student's IEP or education]; Alboniga v. Sch. Bd. of Broward County Fla., 87 F. Supp.3d 1319, 1329-30 [S.D. Fla. 2015] [exhaustion not required when plaintiff does not claim the service animal is educationally necessary]; Sullivan v. Vallejo City Unified Sch. Dist., 731 F. Supp., 947, 951 [E.D. Cal. 1990] [exhaustion of administrative remedies does not apply when service animal is not alleged to be educationally necessary]); or when the alleged injury can be remedied through IDEA procedures (see Fry v. Napoleon Cmty Schools, 788 F.3d 622, 625 [6th Cir. 2015] [exhaustion requirement applied to plaintiffs' claims concerning service dog, because they sought relief available under the IDEA]).

In the cases noted above, the respective court was determining whether or not IDEA's exhaustion requirement applied to the plaintiffs' case and if it did not, the court addressed the plaintiffs' ADA and civil rights claims. None of the above cases addressed the substantive issue of whether or not the plaintiff's service animal was educationally necessary under the IDEA and the case herein is factually distinguishable from those cases as well. In this case, the district has not prohibited the student's service dog from entering the school. As indicated above, the district agrees that the student is entitled to the use of a service dog in a public building. The underlying dispute arises from the district's requirement that the parent provide a third-party handler while the service dog is in use during transportation and in the public school building.

The parent has alleged that the student's service dog provides a number of supports to the student; however, the service dog is trained as a seizure alert assistance dog (Dist. Ex. 119 at p. 2). The issue before me therefore is whether or not the student's recommended program is appropriate to address her needs without the use of a seizure alert assistance dog.

The IHO determined that the student's service dog was not necessary for the delivery of educational, safety or medical care services. The hearing record fully supports the IHO's findings on this issue.

The student was reported to have had a complicated medical history and had received diagnoses of Angelman syndrome, autism spectrum disorder, epilepsy, hypotonia, and asthma (Dist. Ex. 118 at p. 1). The parent testified that the student began having seizures at approximately two years of age (Tr. p. 566). The parent described two seizures in excess of 20 minutes, both of which required significant medical intervention and hospitalization (*id.*). The parent also described attempts to better manage the student's seizure activity through many different prescribed medications, most of which proved unsuccessful (Tr. p. 567). The parent testified that the student had a good response to a modified diet initiated in December 2012 (Tr. pp. 567-568; see Dist. Ex. 118 at p. 1). The parent also testified that the student's seizures were somewhat

unpredictable, but typical causes were exposure to an environmental "trigger," extreme temperatures or when the student was emotionally dysregulated (Tr. p. 568).

The parent testified that she first learned about seizure alert dogs from a doctor at the student's sleep clinic (Tr. p. 569). She stated that the student's service dog arrived in January 2011 (Tr. p. 569-70, 575). The parent explained that in preschool the student was permitted to bring her service dog to school on her own and that her 1:1 aide and teachers assisted her with some tasks related to using the dog such as tethering and untethering and issuing the dog an occasional command (Parent Ex. F at p. 1). Before the student entered kindergarten in September 2012, the parent was informed that the staff at the student's school would be instructed not to provide any assistance to the student in using the service dog and that if the parent wanted the student to bring the dog to school, she would have to hire her own private dog handler to accompany the service dog to school (*id.*). The parent hired a dog handler to assist the student beginning in September 2012 (*id.*).

The parent alleges that the presence of the student's service dog is required to address the student's seizure-related medical needs. The parent further alleges that the service dog is uniquely able to alert of an upcoming seizure and to identify seizure activity that appears innocuous. As explained by the student's medical specialist, the student had a very difficult to control seizure disorder which placed her at medical risk (Parent Ex. I). The medical specialist stated that the student's service dog had proven to be an effective intervention to promote physical safety and to alert adults to provide acute medical monitoring for her life threatening seizures (*id.*). According to testimony from a parent witness and documentary evidence provided by the parent, there are a number of instances in which the service dog had been credited with alerting adults to an impending seizure. The dog handler testified that from February 2014 through February 2015, the service dog alerted to seizures at least 20 times and had alerted to seizures on the bus at least five times from February 2014 until the end of April 2014 (Tr. pp. 661-663). The student's speech language therapist during the first half of the 2014-15 school year recalled one occasion when the student had a seizure at school that went unnoticed by three adults, yet was immediately recognized by the service dog, who alerted the dog handler by placing a paw on the dog handler's lap (Parent Ex. L at pp. 1, 3).

Notwithstanding the parent's evidence, there are significantly more instances in the hearing record which reveal that the service dog's ability to alert to an upcoming seizure or seizure activity was unreliable.

The 2013-14 school year nurse supervisor—who also served as the student's 1:1 nurse from February 2014 through April 2014—stated that she never witnessed an incident in which the service dog indicated an upcoming seizure or even a seizure when it occurred (Dist. Ex. 167 at p. 5). She stated that there were a number of days when the professional dog handler stated that the service dog was alerting to an upcoming seizure, but then no seizure occurred (*id.* at pp. 5-6). In addition, the nurse supervisor stated that there were times that she witnessed, and other occasions which were reported to her, when the student had a seizure and the dog did not alert in any way (*id.* at p. 6).

The 2014-15 school year nurse supervisor averred that when the student had seizures in school, there was no evidence that the service dog had alerted to the seizure, but on one or more

occasions the dog handler had informed her that she thought the dog may be alerting (Dist. Ex. 166 at p. 2). In addition, the nurse supervisor testified that the dog often alerted and nothing occurred during the school day or that the student had a seizure and the dog failed to alert (Tr. p. 449). According to the affidavit of the student's special education teacher during the 2014-15 school year, she never observed the service dog indicate or interrupt a seizure (Dist. Ex. 164 at p. 11).

A recent district court case determined that a student was denied a FAPE because the IEP inadequately described the student's medical needs (G.B. v. New York City Dep't of Educ., 2015 WL 7351582, at \*15 [S.D.N.Y. Nov. 5, 2015]). The district court found the student's IEP deficient for describing the student's seizure disorder as if in the past, for failing to include the student's need for a climate controlled environment, and for failing to include any medical alerts (id.).

In this case, however, the hearing record shows that the district appropriately planned for and responded to the student's medical needs. The July 2013 IEP included medical alerts and specific instructions for the school staff (see Dist. Ex. 207 pp. 1, 15).<sup>16</sup> On the cover page, under the title "special alerts", the student information summary attached to the July 2013 IEP stated that the student had a seizure/nursing care plan and that she had a number of medical alerts including; Angelman's syndrome, autism, epilepsy, asthma, hypotonia, sleep disturbance, and that she had no danger awareness (id. at p. 1). The July 2013 IEP noted the student's allergies to cow's milk and to medicines including Abuterol and Ibuprofen; her sensitivity to latex, gluten, soy, and casein; and the IEP included the notation "supplemental feeding as needed" (id.). The July 2013 IEP also indicated that the student was prone to seizures in settings of extreme temperatures and that she should be in an air-conditioned classroom when extremes of temperature were expected (id.). The July 2013 IEP and a 2012 social history indicated that the student had a seizure protocol in her student file and an emergency health care plan for transportation (Dist. Exs. 119 at p. 2; 207 at p. 1).<sup>17</sup> The transportation health care plan included nurse-provided training for the bus monitor and driver, and reiterated that the student had a seizure disorder and was prone to seizures in settings of extreme temperatures (Dist. Ex. 207 at p. 1). The transportation health care plan instructed the 1:1 nurse to sit with the student during the bus ride, ensure that the service dog had a visual of the student throughout the bus ride, and keep the student awake since the student was most vulnerable to seizures at the onset of sleep (Parent Ex. B). The transportation health care plan included warning signs the student may display prior to a seizure such as abnormal body movements (e.g., stiffening or jerking movements of legs or arms), not responding to voices, eyes rolling or staring, as well as the service dog alerting by attempting to run in circles and/or letting out short repetitive barks and then sitting down next to the student (id.). The special transportation needs section of the July 2013 IEP noted that the student needed special transportation to include; adult supervision (bus with an individual attendant), door to door transportation, special seat, and an air-conditioned

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<sup>16</sup> The July 2013 IEP contains the same special alerts, medical alerts and special transportation needs instructions included in the January 2014, May 2014 and both June 2014 IEPs (compare Dist. Ex. 207 at pp. 1, 15, with Dist. Exs. 107 at pp. 1, 17; 108 at pp. 1, 17-18; 109 at pp. 1, 17-18; 110 at pp. 1, 19).

<sup>17</sup> The emergency health care plan for transportation included in the record is dated September 23, 2014 and includes the role of the 1:1 nurse (Parent Ex. B). The student began receiving 1:1 nurse services on the bus ride on or about February 2014 (Dist. Ex. 151 at p. 5).

bus (Dist. Ex. 207 at p. 15).<sup>18</sup> The 2014-15 school year nurse supervisor testified that she saw no medical reason for the service dog to be a part of the student's health care plan (Tr. p. 450). The nurse supervisor explained that she did not seek to remove the service dog from the student's health care plan because the service dog had already been a part of the plan and that the parent wanted it included (Tr. pp. 450-51). The nurse supervisor stated, "it's a care plan, so it's something we work with together" (Tr. p. 451).

The 2013-14 school year nurse supervisor averred that she made sure that the building nurse had all the relevant medical and health information and care plans with respect to the student (Dist. Ex. 167 at p. 2). The nurse supervisor also reported that the student's care plan and medical information were carried with the student in her medication bag and copies were also kept in the building nurse's office (*id.* at p. 2). The nurse supervisor recalled that during the 2013-14 school year, the student had approximately three seizures, which typically lasted for about 80 seconds and that none of the seizures required the administration of any medication (*id.* at p. 3). The nurse supervisor stated that it was her opinion that with the full-time building nurse the student was under proper medical, nursing, and health care (*id.*). The student's 12:1+1 class special education teacher averred that there was never an incident when appropriate medical attention was not provided (Dist. Ex. 151 at p. 5).

According to the affidavit of the student's special education teacher, when doctor's orders were changed indicating that there could be a situation in which the occurrence of a seizure would require the administration of medication within three minutes, the nursing services were expanded on or about February 24, 2014 and a full-time 1:1 nurse was assigned to the student throughout the school day and on the bus ride to and from school (Dist. Ex. 151 at p. 5; *see* Tr. p. 303). The special education teacher averred that it was her understanding that the 1:1 nurse was added as a "conservative measure" to ensure that immediate medical assistance was always available in light of the change in doctor's orders (Dist. Ex. 151 at p. 6). The 2013-14 school year nurse supervisor reported that she gave to the nurses all the medical and health care plan information concerning the student before they began their work (Dist. Ex. 167 at p. 5).

The 1:1 nurse assigned to the student from May 2014 through the end of the school year stated that the nurse supervisor informed her of the student's life threatening seizure disorder and that she emphasized it was the 1:1 nurse's responsibility to dispense medications as directed in the doctor's orders (Parent Ex. J at p. 1). The 1:1 nurse stated that the student had a number of medications and was following a special medical diet (*id.*). The 1:1 nurse further explained that the student was prescribed two different kinds of emergency medications for her seizures; one was available when the student was having short bursts of seizure activity, and the other was available for life threatening seizures that extended beyond three minutes and/or caused oxygen deprivation (*id.* at p. 2).

The 2014-15 school year nurse supervisor stated that as part of her responsibilities she made sure that the building nurse had all the medical information, care plans, and medications for

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<sup>18</sup> The June 2014 IEP (2014-15 school year) did not include the special transportation service of adult supervision (bus with an individual attendant), but included an increase in nursing services to seven and one half hours a day to include the bus ride to and from school (Dist. Ex. 110 at pp. 3, 19).

the student and also that the 1:1 nurse assigned to the student always was fully informed of and had all the information concerning the student's care and care plans (Dist. Ex. 166 at p. 2). The nurse supervisor stated that she checked in on the student's class about two times per week and that she recalled that during the 2014-15 school year the student had two or three seizures in the fall and two or three in the spring (*id.*). She also reported that the student's seizures were mild and of short duration, never required the administration of the special medication the doctor prescribed should there be a seizure exceeding three minutes, and never required the calling of emergency medical services (*id.*). The nurse supervisor stated that the student always had with her a bag or pack with all of her supplies, medications, and medical and care information and that the nurses were always informed and aware of this and that the 1:1 nurses carried this with them at all times (*id.* at p. 3).

Regarding the need for the service dog, the 2013-14 school year nurse supervisor testified that in her opinion the student was perfectly safe and properly provided for medically, health-wise and care-wise without there being any use or reference to the service dog and that it was irrelevant in terms of the student's care, safety, and health whether or not there was a service dog with the student (Dist. Ex. 167 at pp. 6-7). The 2014-15 school year nurse supervisor testified that the dog was not necessary for the medical safety of the student because the 1:1 nurse was always with the student (Tr. p. 449). The 2014-15 school year nurse supervisor explained that if the student had a seizure the nurse would give the medications, make the proper phone calls and decide the course of action (Tr. p. 449). A review of the hearing record reveals that independent of the presence of the service dog, the district appropriately described, planned for and responded to the student's medical needs. I therefore find that the IHO correctly determined that the student's service dog was not educationally necessary and that the student's program appropriately addressed the student's medical needs without including the service dog on the student's IEPs.

### **3. Other Needs and Seizure Alert Assistance Dog**

The parent argues that the student's service dog helped to ensure the student's safety by preventing her from falling and promoted the student's independence by enabling the student to walk and function independently. The hearing record does not support the parent's argument. By all accounts from the staff who worked with the student during the 2013-14 and 2014-15 school years, the student could ambulate independently and was fully capable of walking and running without assistance (Dist. Exs. 151 at p. 8; 164 at p. 4; 166 at p. 3; 167 at p. 5). According to a November 2012 PT re-evaluation, the student was independent in ascending and descending stairs with or without a rail (Dist. Ex. 121 at p. 1).

Although the 2012 PT re-evaluation also noted that the student required "guarding" in unfamiliar settings due to safety awareness, the hearing record reflects that the responsibility of keeping the student safe in this and other situations at school was that of the assigned 1:1 aide and other adults and not that of the service dog (Dist. Ex. 121 at p. 1). The student's 1:1 aide—assigned to the student from December 2013 through June 2015—testified that her duties included assisting the student with paying attention and focusing, transitioning from activity to activity, moving from one area of the building to another, as well as daily living skills such as dressing and toileting (Dist. Ex. 155 at pp. 1-2). The 1:1 aide further explained that the student had little to no danger awareness and that it was her responsibility to keep the student safe in all situations (*id.* at p. 3). Within the 2012 psychological evaluation, the examiner noted that the student was not learning

the appropriate response to a fire alarm and her service dog was startled by the alarm; as a result, the student and her service dog were escorted from the building before a drill began (Dist. Ex. 118 at p. 4). The student's 2014-15 special education teacher stated that she observed the service dog pull the student in the wrong direction on at least one or two occasions, when the student was walking with the class outside of the building (Dist. Ex. 164 at p. 10). The special education teacher explained that the student seemed unaware that she was going in the wrong direction and that she took no action to change her direction or that of the dog, and that the dog handler redirected the dog (*id.*). In addition, the student's Medicaid attendant described a time when the student was no longer able to navigate the stairs on the bus or in the house and would often ask to be held or carried and that the assistant would have to get the student off the bus (Dist. Ex. 127 at p. 1). In these cases the hearing record reveals that human resources, not the service dog, provided for the student's safety; that the student was dependent on the support of school staff; and that the service dog did not enhance or promote the student's independence.

The parent also claims that the service dog prevented the student from eloping. Although the hearing record indicates that the student did not attempt to run when tethered to the service dog, the student's providers implemented different methods to address this behavior.

The student's speech-language provider from September 2014 through January 2015 reported that the student continued to attempt to run off when she was not tethered, and that the dog prevented this from occurring (Parent Ex. L at p. 3). The student's special education teacher during the 2014-15 school year stated that the student could not leave the classroom when she was tethered to her service dog and the 12:1+4 special education teacher also stated that the student never tried to run away when she was tethered to the service dog because the dog "grounded" her (Tr. pp. 272, 421).

However, by all accounts the student's running behavior was more likely a game of chase rather than an attempt to escape by the student. The student's 12:1+4 special education teacher explained that it was not her perception that the student would run away; rather, she explained that the student would try to run out of the room because she wanted the teacher to chase her and that if the teacher did not, the student would come back and grab the teacher's hand so that she would run after the student (Tr. p. 272). The autism specialist stated that the student "loved to play chase" and that the student would run, but then she would stop because she knew that was the point where she needed to stop or the teacher would tell her to stop. (Tr. p. 71).

Moreover, recent reports reveal that the student's running behavior had improved. The autism specialist stated that the student had made progress in this area and that although earlier in the 2013-14 school year the student would sometimes "try to go to the playground" when going to physical education class, by May she no longer attempted that behavior (Tr. p. 71; Dist. Exs. 115 at p. 1; 152 at p. 3; 155 at p. 2). The student's 1:1 aide testified that the 6:1+1 special class for the 2014-15 school year had an open floor plan with "no doors" and the student would attempt to leave; however, the staff had worked with the student and her eloping behavior had improved (Tr. p. 254). The 1:1 aide also explained that at one point, the student needed her support and direction to stay in the appropriate part of a classroom, but that the student had improved and learned to remain in the appropriate space (Dist. Ex. 155 at pp. 1, 2). The 2014-15 school year special education teacher stated that there was a brief period at the beginning of the year in which the student seemed to indicate that she might want to leave or wander out of the classroom, and that

the staff addressed this behavior early on and that it was no longer an issue (Dist. Ex. 164 at p. 4). The special education teacher testified that the student's running behavior did not completely stop, but that it "definitely improved greatly as the year went on" (Tr. p. 423). The special education teacher further testified that not running was a safety skill she wanted the student to learn (Tr. p. 434).

The parent also alleges that the service dog helped the student with emotional regulation, reducing her anxiety, and enabling her to focus in class. There is evidence that the student shared a bond with the service dog, and the service dog was able to calm the student when she was stressed; however, the hearing record reflects that the student was more likely to seek comfort and support from adults (compare Parent Exs. J at p. 3, and L at p. 3, with Tr. pp. 211-12, Dist. Exs. 112 at p. 1, 128 at p. 2, 151 at p. 8, and Parent Ex. J at pp. 2-3).

The parent further contends that the service dog supported the student's efforts to achieve OT and PT goals by building hand strength from holding the tether, and improving her coordination skills by learning to tether and untether from the dog. The student's IEPs included OT and PT annual goals involving letter formation; jumping forward; balancing on one foot; non-seated movement activities; tasks involving assembly, matching, fine motor skills, and sorting; and feeding tasks such as using a spoon while stabilizing a bowl, and drinking from an open cup (Dist. Exs. 107 at p. 12-13; 108 at pp. 12-13; 109 at pp. 12-13; 110 at pp. 13-15; 207 at pp. 10-12). The annual goals do not include the service dog as a necessary element in attaining these annual goals (see Dist. Exs. 107; 108; 109; 110; 207). While activities such as learning to tether and untether the service dog and holding the service dog's tether may benefit the student, the hearing record does not reflect that this was the only way the student could develop skills in the areas of OT and PT. The 12:1+1 special education teacher stated that neither the student's service dog nor the handler was any part of the instruction or services provided for the student and that she never saw a need for the service dog or the handler to be a part of the program or services for the student (Dist. Ex. 151 at p. 12). Further, the student's occupational therapist and physical therapists during the 2013-14 and 2014-15 school years stated that although the service dog and the handler were always present at therapy sessions, they were not any part of the therapy or services and that they did not use the service dog or handler in any way in the provision of services to the student (Dist. Exs. 154 at p. 3; 156 at p. 6; 163 at p. 3).

The parent also argues that the service dog helped to improve the student's functional communication and speech-language skills by enabling her to learn to give commands. According to the student's service providers, however, this was not the case. The speech-language provider—who provided the student services from September 2013 through April 2014—stated that she never observed the student giving any command or direction to the service dog, that the student did not have the cognitive, functional or communication/language abilities to direct the service dog, and that the dog was not engaged in any part of the speech-language services or any part of the program that the district or BOCES provided to the student (Tr. p. 83; Dist. Ex. 153 at p. 10). The speech-language provider also stated that most commonly the service dog lay on the floor, and that it made no difference to her whether the dog and the handler did or did not come to school with the student (id.). A second speech-language provider, who worked with the student from February 2015 through June 2015, stated that he never saw the student commanding or directing the service dog and that the service dog did not positively or negatively impact the speech-language therapy sessions or services provided to the student (Tr. p. 338-39; Dist. Ex. 160 at p. 5). The assistive

technology consultant stated that she paid no attention to the service dog because it did not impact the student's communication needs (Tr. p. 186). Within the July 2013 speech-language related service summary, the student's provider stated that the student was nonverbal and her communication skills were severely deficient such that she relied on familiar adults to interpret her communication intentions (Dist. Ex. 112 at p. 1). The speech provider also stated that when the student was dysregulated, frustrated, hungry and/or not physically well, her first mode of communication was to cry and typically at that point familiar adults responded to her needs (*id.*). Neither the November 2012 speech-language re-evaluation report nor the July 2013 speech-language related service summary report included the use of the service dog in any of their recommendations (*see* Dist. Exs. 112 at p. 3; 122 at p. 5). Further, the March 2014 comprehensive communication assessment contained a large number of recommendations including assistive technology and training needs for the student, staff, and family, but did not include the need for a service dog (Dist. Ex. 137 at pp. 14-17).

To address her needs, the student's IEPs included speech-language annual goals involving initiating and maintaining interactions with others by indicating "all done," "more," or "no" through a sign or communication device; sharing interactions to regulate the behavior of others by requesting desired food or objects; responding by clapping or vocalizing to various questions for the purpose of drawing attention to the speaker; and labeling items in the classroom verbally, by signing, or by use of a communication device (Dist. Exs. 107 at pp. 12-13; 108 at pp. 12-13; 109 at pp. 12-13; 110 at pp. 13-14; 207 at pp. 10-11). The student's IEPs provided for two 30-minute sessions per week of small group speech-language therapy and three 30-minute sessions per week of individual speech-language therapy (Dist. Exs 107 at p. 14; 108 at p. 14; 109 at p. 14; 110 at p. 15; 207 at p. 12). In addition, the student's IEPs provided for strategic seating to meet the student's listening needs and minimize exposure to extraneous sensory information, customizable communication software (Dynavox V) as needed daily across all settings, audiological consultation services as needed to discuss the student's auditory profile, and monthly speech-language consultation (Dist. Exs. 107 at p. 15; 108 at p. 15; 109 at p. 15; 110 at p. 15; 207 at p. 13). I find that between September 2013 and June 2015 the student's OT, PT, communication, and speech-language needs were adequately addressed by the student's IEPs and that the service dog was not necessary for the student to receive a FAPE.

According to her affidavit, the acting director of pupil personnel services (acting director) would not have recommended any change to the student's IEPs had the parent decided to stop sending the dog to school with the student, and that in her view, the IEPs appropriately addressed the student's needs (Dist. Ex. 168 at pp. 3, 8, 9). She concluded that the dog and services for the dog are not required for the provision of a FAPE (*id.* at p. 8). The acting director averred that in all her considerations of the student's programs, she found that the instruction, services, accommodations and supports proposed by the district offered the student a FAPE without the inclusion of a service dog or any service dog handler services (*id.* at p. 3). She also stated that the incorporation of the service dog or handling for the service dog was not necessary for the provision of a FAPE for the 2013-14 school year or the 2014-15 school year (*id.* at p. 9). Further, even if the service dog's presence was potentially beneficial to the student, 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). Thus, while I can understand that the parent believes the student's seizure alert dog was a desirable service for the student, it does not follow that the district

must facilitate that service in order to provide the student with a FAPE. 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, quoting Tucker, 873 F.2d at 567 [citations omitted]). Accordingly, while the parent may have preferred that the student's IEP include a recommendation for the service dog; given the provision of the 1:1 aide, 1:1 nurse, and all of the other supports in the IEP, the district did not deny the student a FAPE on this basis (see Rowley, 458 U.S. at 208 [finding that, notwithstanding the parent's preference, a district was not required to recommend a sign language interpreter for a hearing impaired student given supports in the IEP]; see also M.M. v. Sch. Bd., 437 F.3d 1085, 1102 [11th Cir. 2006] [finding that the parents of a hearing impaired student could not compel the district to use a particular method of communication with the student]). Though the service dog may provide some benefit to the student, the hearing record supports the IHO's determination that, taking into account the broad range of the student's particular and extensive needs, the student's IEPs appropriately addressed those needs and the presence of a seizure alert dog was not required for the student to receive educational benefit. Moreover, as indicated previously, the district agrees that the student is entitled to the use of a service dog in a public building, and she may continue to utilize her service dog, as she has been doing, with the assistance of a third-party handler provided by the parent.

The parent also contends that the student was denied a FAPE for six full school days and five half-days during the period of time when the dog handler was ill and the student did not attend school. As I have determined that the student's seizure alert assistance dog is not educationally necessary for the student to receive a FAPE, I find the parent's claim to be without merit.

## **VII. Conclusion**

In summary, I find that the district offered the student a FAPE for the 2013-14 school year and that the student's service dog is not educationally necessary to provide the student with a FAPE. I have considered the parties' remaining contentions and find them to be without merit.

**THE APPEALS ARE DISMISSED.**

**THE CROSS-APPEALS ARE SUSTAINED.**

**IT IS ORDERED** that the IHO's decisions, dated October 12, 2015, and November 9, 2015 are modified by reversing those portions which concluded that the district failed to offer the student a FAPE for the time period of September 1, 2013 through April 30, 2014; and

**IT IS FURTHER ORDERED** that the IHO's decision, dated November 9, 2015, is modified by reversing that portion which awarded the parent 60 hours of compensatory education services.

**Dated:** Albany, New York  
February 12, 2016

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