The University of the State of New York

The State Education Department
State Review Officer
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No. 17-012

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Howard Friedman, Special Assistant Corporation Counsel, attorneys for petitioner, Theresa Crotty, Esq., of counsel

Mayerson and Associates, attorneys for respondents, Gary S. Mayerson, Esq., and Jean Marie Brescia, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from a decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son for the 2016-17 school year and ordered it to place the student at the Center for Discovery (CFD). The appeal must be sustained.[1]

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];

[1] In September 2016, Part 279 of the Practice Regulations were amended, effective January 1, 2017, which are applicable to all appeals served upon an opposing party on or after January 1, 2017 (see N.Y. Reg., Sept. 28, 2016, at pp. 37-38; N.Y. Reg., June 29, 2016, at pp. 49-52; N.Y. Reg., Jan. 27, 2016, at pp. 24-26). Although the relevant events at issue in this appeal occurred before the effective date of the amendments, the new provisions of Part 279 apply, as the request for review was served upon the opposing party after January 1, 2017; therefore, the citations in this decision are to the provisions of Part 279 as amended.

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 demonstrates a history of significant delays in all areas of cognitive development (Tr. p. 285; Parent Ex. D at p. 1). As reported by the parent, the student has received diagnoses of autism and intellectual disability (Parent Ex. D at p. 1). The student displays a number of challenging behaviors including self-injury, aggression, and "bolting" away from his caregivers (Tr. pp. 220; Parent Ex. E at pp. 4-5). These behavioral challenges are frequently described in the

hearing record as "severe" and as posing a threat to the student's safety and the safety of others in his environment (Tr. pp. 74-75, 107, 204-11; Parent Ex. E at pp. 4-5).

The student has attended the New England Center for Children (NECC) pursuant to CSE recommendation for a number of years, attending a full-time residential program (Tr. pp. 47-48, 89-94, 206, 281, 286-87; Parent Exs. E. at. pp. 1-3; G at p. 1).[2, 3] Due to the severity of the student's behavioral needs, the student resides in a program at NECC called the "staff intensive unit," which contains additional personnel and resources to address these needs (Tr. pp. 22, 204-05).

On May 13, 2016, a CSE convened to conduct the student's annual review and to develop an IEP for the 2016-17 school year (see Dist. Ex. 1 at pp. 1-18).[4] Finding that the student remained eligible to receive special education and related services as a student with autism, the May 2016 CSE recommended that the student attend a State-approved nonpublic residential school and receive the following: a 12-month school year program in a 1:1 special class placement eight hours per day with a crisis management paraprofessional; five periods per week of adapted physical education; five 20-minute sessions per week of individual occupational therapy (OT); five two-hour sessions per week of individual behavioral specialist services; and one 60-minute session per month of parent counseling and training services in a group (Dist. Ex. 1 at pp. 1, 12).[5] The CSE recommended that the student receive the services of a 1:1 crisis management paraprofessional for 18 hours per day in the school and residence and crisis management paraprofessional services in a group of three for 6 hours daily overnight in the residence (id. at p. 12). As a support for school personnel on behalf of the student, the CSE recommended one 60-minute session per week of speech-language consultation and one 60-minute session per week of OT consultation for staff working with the student on a daily basis (id.). With respect to the student's needs relating to special factors, the CSE recommended a behavioral intervention plan to address behaviors that impeded the student's learning or that of others (id. at p. 5; see Parent Ex. F).

The district engaged in the process to determine if there was a suitable State-approved in-State residential program for the student by sending referrals on May 25, 2016 to several in-State nonpublic residential schools, including CFD (Parent Ex. L). Ultimately, the district concluded that there was no appropriate in-State residential program for the student and assigned the student

[2] The hearing record reflects that NECC is an out-of-State nonpublic school approved by the Commissioner of Education as a school with which districts may contract for the education of students with disabilities (Tr. pp. 48, 174-75, 202-03, 223; see 8 NYCRR 200.1[d]; 200.7).

[3] The hearing record contains a document from NECC that lists the student's date of admission as July 24, 2008, but the exact time of admission to the program is not entirely clear because a witness from NECC stated that she believed the student had entered the program in "about 2005" and the student's mother testified that the student had attended the program for "nine years . . . ten years" and entered the program when he was "about seven or eight" years old (Tr. pp. 206, 281, Parent Ex. G at p. 1).

[4] The IEP indicates on the summary page that the date of the CSE meeting was April 15, 2016, but that date was crossed out on the signed attendance page and the date May 13, 2016 was hand-written (see Parent Ex. K at pp. 17, 20; Dist. Ex. 1 at pp. 15, 18). The parties indicated at the impartial hearing that a CSE meeting was convened on April 15, 2016, but that the CSE reconvened and finalized the IEP on May 13, 2016 (Tr. pp. 31-33).

[5] The student's eligibility for special education programs and related services as a student with autism is not in dispute (see 34 CFR 300.8[a]; 8 NYCR 200.1[zz][1]).

to attend NECC for the 2016-17 school year; at the time of the impartial hearing, the student was attending NECC (Tr. pp. 71-77, 82; see Parent Ex. L).

In a letter to a district CSE chairperson and SED, dated June 21, 2016, the parents represented that CFD had "accepted [the student] for placement provided and on condition that" the district or the State "expressly confirm" that the student's program would be fully funded (Dist. Ex. 2 at pp. 1-2).

A. Due Process Complaint Notice

By due process complaint notice dated July 1, 2016, the parents challenged the district's placement of the student at NECC for the 2016-17 school year (Parent Ex. A at pp. 1-3). The parents asserted that, while they agreed with the program recommended in the May 2016 IEP, and that NECC had been "an excellent residential facility" for the student, NECC was no longer the least restrictive environment (LRE) for the student (id. at p. 2). The parents claimed that the student had been accepted at CFD on the condition that the district or the State "expressly confirm that [the student's] intensive needs and stated IEP components w[ould] be fully funded" (id.). Citing State policy to return students placed in out-of-State residential facilities to the State, the parents requested an order directing the district or SED to "fully fund" the student's May 2016 IEP at CFD, to fund the costs of safely transferring the student from NECC to CFD, and to fund "regular family visitation opportunities" (id.).[6]

B. Facts Post-Dating the Due Process Complaint Notice

By letter dated July 8, 2016, SED responded to the parents' June 21, 2016 letter and clarified the payment methodology and procedures applicable to in-State approved residential schools and noted that CFD had not given SED any indication that its "current tuition reimbursement rate [wa]s not sufficient to fully fund the IEP services for the students it serve[d]" (Parent Ex. H at p. 1-2).

On August 11, 2016, CFD responded to the district's referral of the student indicating that it "consider[ed] [the student] an appropriate candidate for [its] residential program" but that, "given [its] current allotted resources, [it was] unable to provide the staffing levels that [we]re on his IEP" and would "not be able to move forward with his placement" (Dist. Ex. 4; see Parent Ex. L at pp. 1-2).

C. Impartial Hearing Officer Decision

After a prehearing conference on July 28, 2016, the parties proceeded to an impartial hearing on September 8, 2016, which concluded on November 16, 2016, after six days of proceedings (see Tr. pp. 1-307; IHO Decision at pp. 1-3).[7] By decision issued January 3, 2017,

[6] A copy of a "Special Education Field Advisory" pertaining to placement of students with disabilities in approved out-of-State residential schools was attached to the parents' due process complaint notice (Parent Ex. A at pp. 4-18; see "Placements of Students with Disabilities in Approved Out-of-State Residential Schools," Office of Special Educ. [Jan. 2016], available at http://www.p12.nysed.gov/specialed/applications/outofstate/documents/OOSFullMemo.pdf).

[7] While not referred to as a prehearing conference, on September 8, 2016, since no witnesses were available to

the IHO ordered the district to place the student at CFD within 30 days and fund the costs of any services required by the student's IEP that were not encompassed by CFD's State-approved tuition rate (IHO Decision at pp. 6-9).[8]

Specifically, the IHO found that there was no dispute that the student required a "state approved residential nonpublic school, as specified on his IEP," but that placing the student at NECC resulted in the student being "much further from" his family's residence in New York State than the placement the parents were seeking (IHO Decision at pp. 6-7). Relatedly, the IHO found that CFD was a less restrictive placement than NECC because it was located within the State and closer to the student's home and would provide the student with more opportunities to engage in outdoor activities than NECC could provide due to its urban setting (id.). The IHO noted the hearing record reflected that, in order for the district to be reimbursed by the State for the cost of IEP services beyond those for which CFD had been approved, CFD would need to apply for a change in its funding rate (id. at p. 7). Nonetheless, the IHO stated that, "[w]hile this is a funding concern for [the district]," State policy favoring placement of students with disabilities in schools within the State, as well as LRE considerations, outweighed the district's concern (id. at pp. 6-8). As to CFD's response to the district's referral of the student to CFD and the district's treatment of that response "as a non-acceptance," the IHO found that this also related to the district's concerns about funding, which the IHO determined to be an inappropriate concern on which to base his holding (id. at p. 8). In summary, the IHO found that, because the hearing record indicated the district could provide the student's education in New York State, it was required to do so, as "a far less restrictive alternative to sending [the student] so far away from the family home" (id.). Accordingly, the IHO ordered the district to arrange for the student's transfer and to fund the student's placement at CFD (id. at p. 9).

IV. Appeal for State-Level Review

The district appeals and asserts that, because the parents did not challenge the May 2016 IEP or claim that the recommended program failed to offer the student a FAPE, the IHO exceeded his jurisdiction by ordering the district to place the student at CFD in a program that did not exist and had not been approved by the Commissioner of Education. The district further asserts that the IHO erred in finding that CFD was a less restrictive placement than NECC.

More specifically, the district asserts that it is outside the authority of the IHO, or an SRO, to direct a district to place a student in a program that has not been approved by the Commissioner of Education and that, although CFD has been approved as a school, it does not currently offer the program required by the student's May 2016 IEP, including intensive 1:1 support, whereas NECC has been approved to provide that level of care. The district asserts that, without completing the regulatory process to request State approval of a program including the services required by the May 2016 IEP, CFD is unable to provide the services on the student's IEP and cannot constitute an appropriate placement for the student.

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testify, the proceedings consisted of discussions regarding scheduling of future hearing dates and requests for extensions of the timeline (see Tr. pp. 9-13).

[8] In an apparent typographical error, the decision was dated January 3, 2016 (IHO Decision at p. 9).

The district also asserts that, as part of the process for placing a student in a residential school, a CSE must first seek appropriate in-State programs prior to placing the student in an out-of-State program, consistent with LRE considerations and the State policy. The district asserts that the hearing record shows that, as part of the process of locating the student's placement for the 2016-17 school year, the district referred the student to CFD and that CFD rejected the student's referral, stating that, given the school's "allotted resources," it would be unable to provide the staffing levels set forth on the May 2016 IEP and could not "move forward" with the student's placement (Request for Review at p. 10). The district claims that placing the student at NECC—an approved out-of-State residential school that could implement all portions of the May 2016 IEP—was appropriate under State guidance and that the IHO's findings to the contrary should be reversed.

With respect to the IHO's finding that NECC was not the student's LRE, the district asserts that, although the distance from a student's home to a school can be part of an LRE analysis, it is not dispositive. The district argues that, given the parents' agreement with the May 2016 IEP and the fact that NECC had been successfully implementing the student's IEPs for a number of years, the parents' concerns were not "paramount" (Request for Review at p. 9). The district asserts that under a "totality of the circumstances" test, NECC was the more appropriate placement (id.).

Based on the foregoing, the district requests that the IHO's order to the district to place the student in CFD be reversed.

In an answer, the parents contend that the IHO properly determined that CFD is the student's LRE and that the IHO's order to the district to place the student at CFD and fund that placement was within the IHO's authority and jurisdiction. Although the parents admit that they agree with the program recommended in the May 2016 IEP, they contend that the district failed to comply with the IDEA's LRE requirement or the State policy to return students to in-State residential schools. The parents assert that NECC is not the student's LRE and that, in contrast, CFD is closer to the student's home and within New York State, and that placing the student at CFD would allow the student's family to make more frequent day-trip visits. The parents also assert that the student would engage in fewer aggressive and self-injurious behaviors at CFD because some of the student's behaviors are less severe when he has access to outdoor recreational activities, and that the student's tendency to "bolt" away from staff could put him in harm's way at NECC, which is located on a busy road.

With respect to the student's potential placement at CFD, the parents assert that CFD reviewed the student's May 2016 IEP and consulted with NECC about the student's needs and determined that the student was a candidate for admission and that, if funding for the additional staff the student required was resolved, the student would be admitted.

The parents also contend that the IHO did not exceed his jurisdiction by ordering the district to place the student at CFD and fund the services on the May 2016 IEP because the IHO has broad remedial authority to fashion an appropriate remedy. The parents assert that the IHO's order does not require the creation of a new program at CFD but, rather, an increase in services to an existing State-approved nonpublic school program that the district had the responsibility to fund. The parents assert that, to the extent the district relies on the State tuition rate approval process as a basis for asserting that the program required by the student was not approved, the hearing record

reflects that the district was not precluded by State law from placing the student at CFD regardless of whether it would receive reimbursement from the State for such placement.

Lastly, the parents assert that the district's argument that LRE considerations are subject to a "totality of the circumstances" test is incorrect because that standard is only used to weigh LRE concerns with a unilateral placement in a tuition reimbursement case. The parents request that the IHO's decision be affirmed.

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]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720 [2d Cir. Aug. 16, 2010]).

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 LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; 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]).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

The district has primarily cast its appeal in the context of questioning the remedial authority and/or jurisdiction of an IHO. However, before examining the remedy, it is necessary to review whether or not the evidence in the hearing record supports a finding that the district denied the student a FAPE in the LRE; absent such a finding, there would be no violation upon which the remedy could rest.[9] The IHO's decision is vague in this respect in that, while he set forth an analysis of LRE considerations relating to the distance of the schools from the student's home, discussed State guidance, and compared the appropriateness of NECC to CFD, he did not set forth an explicit finding that the district failed to offer the student a FAPE in the LRE for the 2016-17

[9] As the parent observes, the remedial authority of administrative hearing officers in fashioning equitable relief is broad (see Forest Grove, 557 U.S. at 247; Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 15-16 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994] [stating that "[a]ppropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA."]).

school year based on a prospective analysis of the district's recommendations (IHO Decision at pp. 6-7).

Here, the parents have not challenged any aspect of the May 2016 IEP, the ability of NECC to implement the IEP, or NECC's actual implementation of the IEP at the time of the impartial hearing. Rather, the parents' sole dispute with the district has related to their view that placement at CFD represented a less restrictive option for the student than NECC and was therefore required. The IHO agreed with this assessment, and on appeal the district asserts that the IHO erred in reaching that conclusion. A review of the hearing record establishes that the district complied with its obligations under the IDEA in determining an appropriate placement for the student, and that the placement of the student at NECC was the student's LRE based on the information available to the district at the time of the placement and school assignment determinations. The hearing record reflects that the district sent applications to a number of in-State approved residential programs, including CFD, and that none of the in-State programs accepted the student (Tr. pp. 73-79, 91, 94-95, 102-03, 122-23, 133; Dist. Ex. 4; Parent Ex. L). In particular, CFD indicated that it could not "provide the staffing levels" required by the May 2016 IEP and thus could not "move forward" toward accepting the student (Dist. Ex. 4; Parent Ex. L at pp. 1-2; see Tr. pp. 94-96, 108).[10] Accordingly, the IHO's order requiring the district to place the student at CFD must be reversed.

Generally, parents are entitled to participate in determining the educational placement of a student with a disability (34 CFR 300.116[a]; 300.327; 300.501[c]); however, a district's assignment of a student to a particular school site is an administrative decision which must be made in conformance with the CSE's educational placement recommendation (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244-45 [2d Cir. 2015]; R.E., 694 F.3d at 191-92; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419-20 [2d Cir. 2009] [holding that educational placement refers to the "general educational program—such as the classes, individualized attention and additional services a child will receive—rather than the 'bricks and mortar' of the specific school"]; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014] [holding that while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]; White, 343 F.3d at 379-80; A.W., 372 F.3d at 682; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]). A school district "may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement" (Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]). In this instance, the IEP provided that the student would attend a residential nonpublic school, which implicates the district's administrative decision making in conformance with the IDEA and related State law, regulation, and policies—a process that is more involved than a choice between two equally appropriate public schools within the student's district of residence.

[10] The response from CFD was dated August 11, 2016, subsequent to the commencement of the 2016-17 school year and the parents' filing of the due process complaint notice on July 1, 2016 (Dist. Ex. 4; Parent Ex. A).

The IDEA contemplates that districts may not be able to address the needs of every student in public placements and may need to place some students in private placements at public expense in order to provide such students with a FAPE (Burlington, 471 U.S. at 369-70). However, the IDEA does not endow state or local educational agencies with regulatory authority over nonpublic schools, but instead requires state and local educational agencies to ensure that students placed in nonpublic schools by the educational agencies receive a FAPE (Responsibility of SEA, 71 Fed. Reg. 46598-99 [Aug. 14, 2006]; see 34 CFR 300.2[c][1]; 300.146; Z.H. v. New York City Dep't of Educ., 107 F. Supp. 3d 369, 375 [S.D.N.Y. 2015]; Letter to Stockford, 43 IDELR 225 [OSEP 2005]). The IDEA provides that when a district places or refers a student with a disability to a nonpublic school in order to meet its obligation to provide the student with a FAPE, "the State educational agency shall determine whether such schools and facilities meet standards that apply to State educational agencies and local educational agencies and that children so served have all the rights the children would have if served by such agencies" (20 U.S.C. § 1412[a][10][B][ii]).[11]

Considering the State's obligations involving students placed in private facilities by public agencies, districts are only authorized to contract with nonpublic schools which have been approved by the Commissioner of Education (Educ. Law § 4402[2][b][1], [2]; see Antkowiak v. Ambach, 838 F.2d 635, 640-41 [2nd Cir. 1988] [noting that pursuant to the IDEA a district can only place a student in a nonpublic school that meets State educational standards, including the requirement for approval by the Commissioner of Education], abrogated in part by Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]).[12] SED maintains a list of in-State and out-of-State approved nonpublic schools (see 8 NYCRR 200.1[d], 200.7; see "Approved Private, Special Act, State-Operated and State-Supported Schools in New York State," Office of Special Educ., available at http://www.p12.nysed.gov/specialed/privateschools/home.html; see also Soc. Servs. Law § 483-d[2]).

Although a particular nonpublic school may meet the Commissioner's criteria for approval to provide special education programs and services to students with a disability, it is the individualized needs of a student with a disability that will ultimately "determine which of such services shall be rendered" by an approved nonpublic school (Educ. Law § 4402[2][a]).[13] Moreover, it must be ascertained whether a particular nonpublic school will meet the IDEA's

[11] Whether a "State or public agency contracts with a private school to meet IDEA requirements is an issue between the State or public agency and the private school" (Letter to Stockford, 43 IDELR 225 [OSEP 2005]).

[12] State law limits the circumstances under which a district may contract with an approved nonpublic school to provide special services or programs to a student with a disability in order to meet its obligations to provide the student with a FAPE (see Educ. Law §§ 4401[2][e]-[h]; 4402[2][a], [b][1], [2]).

[13] State regulation provides that "no contract for the placement of a student with a disability shall be approved for purposes of State reimbursement unless the proposed placement offers the instruction and services recommended on the student's IEP" (8 NYCRR 200.6[j][2]). In the past, the district has been specifically directed by SED not to refer students to approved nonpublic schools that could not provide all of the related services recommended in the students' IEPs (see "Provision of Related Services to Students with Disabilities Placed in Approved Private Schools in New York City," Office of Special Educ. [Sept. 2016], available at http://www.p12.nysed.gov/specialed/dueprocess/NYC-IHO-RSA-912.pdf). As part of the same guidance and corrective action, SED also directed the approved nonpublic schools in question "to hire staff necessary to provide related services and to accept only those students for whom they can provide the special education program and services recommended in students' IEPs" (id.).

mandate that a student's recommended program must be provided in the 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 111; Gagliardo, 489 F.3d at 105; Walczak, 142 F.3d at 132; Patskin, 583 F. Supp. 2d at 428).[14]

The determination that an out-of-State residential placement is the LRE for a student first requires a district to determine whether an appropriate in-state residential facility is available to meet the student's needs (Educ. Law § 4407[1][a]; 8 NYCRR 200.6[j][1][iii][e]). Consistent with LRE principals, State regulations and guidance require that, when a district intends to place a student in an approved residential school, the district first refer the student to in-State approved residential schools that may be appropriate, even if the student is already placed in an out-of-State approved residential school (8 NYCRR 200.6[j][1][iii][e]; "Placements of Students with Disabilities in Approved Out-of-State Residential Schools," Office of Special Educ., at p. 3 [Jan. 2016], available at http://www.p12.nysed.gov/specialed/applications/outofstate/documents/OOSFullMemo.pdf)

SED's Office of Special Education has published guidance with respect to the placement of students at in-State and out-of-State approved residential schools since 2011 and updates that guidance annually (see "Placements of Students with Disabilities in Approved Out-of-State Residential Schools," Office of Special Educ., at p. 1). The process for students placed in out-of-State approved residential schools requires districts to submit an annual reapplication to SED for placement of a student at an approved residential school (id. at p. 4).[15] At each student's annual review, the CSE must consider placing the student in the LRE and annually seek to place the student at appropriate in-State programs prior to placing the student in an out-of-State program, and a proposed plan and timetable for enabling the student to return to a less restrictive environment must be developed (id.). The reapplication must include documentation that there are no appropriate public or nonpublic facilities for instruction available within the State (id.). In

[14] In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. North Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobol, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 CFR 300.114; 300.116). In this case, neither party disputes that the student cannot be educated in regular education classes in a district public school with nondisabled peers; rather, as discussed below, the dispute is whether the student's placement at NECC is "as close as possible" to his home.

[15] Placement of students in children's residential project (CRP) programs, including CFD among other schools located within the State, requires additional procedures (see "Placements of Students with Disabilities in Approved Out-of-State Residential Schools," Office of Special Educ., at pp. 7-8). CRP programs are educational and residential programs approved by SED and the State Office for People with Developmental Disabilities (OPWDD) to provide in-State programs for students who are placed at, or at risk to be placed at, out-of-State schools (id.). The placement of students in such programs is contingent upon approval by SED and OPWDD that the student meets the criteria for CRP eligibility and requires an additional application to OPWDD (id. at p. 8).

those cases where a CSE rejects a placement that has accepted a particular student because the placement is unable to meet the student's IEP needs, the district must provide SED with information supporting that determination (id.). While the concerns of parents must be considered, "a parent's disagreement with a placement or preference for another school is not, in and of itself, justification for the CSE" to not recommend an appropriate approved in-State program that has accepted the student (id.). Regardless of the State's determination with respect to tuition reimbursement, the district is responsible for implementing the CSE's recommendation for placement in an approved nonpublic school; therefore, the district cannot use disapproval of State reimbursement as a reason not to secure a timely placement of a student in an approved nonpublic school (id. at p. 6).

The State regulation and guidance embody the LRE requirement that a district must "ensure" that a student attend a placement "as close as possible" to his or her home and "in the school that he or she would attend if nondisabled," "[u]nless the IEP . . . requires some other arrangement" (34 CFR 300.116[b][3], [c]; see 8 NYCRR 200.4[d][4][ii][b]). Numerous courts have held that, while a district remains obligated to consider distance from home as one factor in determining the school in which a student's IEP will be implemented, this provision does not confer an absolute right or impose a presumption that a student's IEP will be implemented in the school closest to his or her home or in his or her neighborhood school (see White v. Ascension Parish Sch. Bd., 343 F.3d 373, 380-82 [5th Cir. 2003]; Lebron v. N. Penn Sch. Dist., 769 F. Supp. 2d 788, 801 [E.D. Pa. 2011] [finding that "though educational agencies should consider implementing a child's IEP at his or her neighborhood school when possible, [the] IDEA does not create a right for a child to be educated there"]; Letter to Trigg, 50 IDELR 48 [OSEP 2007]; see also R.L. v. Miami-Dade Cnty. Sch. Bd., 757 F.3d 1173, 1191 n.10 [11th Cir. 2014]; A.W. v. Fairfax Cnty. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; McLaughlin v. Holt Pub. Sch. Bd. of Educ., 320 F.3d 663, 672 [6th Cir. 2003]; Kevin G. v. Cranston Sch. Comm., 130 F.3d 481, 482 [1st Cir. 1997]; Flour Bluff Ind. Sch. Dist. v. Katherine M., 91 F.3d 689, 693-95 [5th Cir. 1996]; Urban v. Jefferson Cnty. Sch. Dist. R–1, 89 F.3d 720, 727 [10th Cir. 1996]; Poolaw v. Bishop, 67 F.3d 830, 837 [9th Cir. 1995]; Murray v. Montrose Cnty. Sch. Dist. RE-1J, 51 F.3d 921, 929 [10th Cir. 1995]; Schuldt v. Mankato Indep. Sch. Dist. No. 77, 937 F.2d 1357, 1361–63 [8th Cir. 1991]; Barnett v. Fairfax Cnty. Sch. Bd., 927 F.2d 146, 152-53 [4th Cir. 1991] [holding that a district must "take into account, as one factor, the geographical proximity of the placement in making these decisions"]; H.D. v. Cent. Bucks Sch. Dist., 902 F. Supp. 2d 614, 626 [E.D. Pa. 2012]; Straube v. Florida Union Free Sch. Dist., 801 F. Supp. 1164, 1177-79 [S.D.N.Y. 1992] [noting that "[t]here is no requirement though that a child receive a residential placement located in his immediate geographic area" and finding that New York may permissibly restrict nonpublic school placement choices by districts to schools preapproved by the State]).

Taken as a whole, the guidance issued by the State with respect to the procedures for placing students in approved in-State and out-of-State residential programs requires the district to engage in an annual effort to attempt to place the student at an appropriate in-State approved residential school—by actively applying to all potentially appropriate in-State programs—prior to considering placing the student in an out-of-State approved residential program (see "Placements of Students with Disabilities in Approved Out-of-State Residential Schools," Office of Special Educ.). Compliance with the procedures prescribed would, in most cases, ensure that the resulting placement constituted the student's LRE (see 34 CFR 300.116[b][3], [c]; 8 NYCRR 200.4[d][4][ii][b]). Based on a review of the hearing record, the district complied with these procedures. The deputy director of the district's central based support team (CBST) testified about

the procedures followed by the district when seeking to place students in approved residential schools (Tr. pp. 39-85). The CBST deputy director explained that a student is referred to the CBST when a CSE determines that it cannot find an appropriate program for a student in a public school and the student requires placement in a State-approved nonpublic residential or day school (Tr. p. 41). In the case where a student is placed in an out-of-State school, the CBST applies to all appropriate "in-State schools for the following year" (Tr. pp. 51-52). The CBST then receives response letters from the nonpublic schools, sometimes indicating that a particular student has been accepted into the program (Tr. p. 43). If a student attends an approved nonpublic school, the district funds the student's tuition and seeks reimbursement from the State (Tr. pp. 41-42). With respect to a CRP program specifically, the residential portion of the program is funded by OPWDD (Tr. pp. 42-43, 50). The deputy director confirmed that both NECC and CFD are State-approved to provide services for severely autistic students, but that the specific approvals differ in detail (Tr. pp. 48-49).

A district educational administrator who was the student's "case manager" at the CBST for a number of years testified with more specificity with respect to the procedures that were followed to place the student in a program for the 2016-17 school year (Tr. pp. 88-134). The case manager described the process of reviewing information about the student and the student's IEP and identifying which in-State programs could be appropriate for the student (Tr. pp. 91-93). The case manager testified that she would reach out to the parents and inform them of the process for applying to in-State placements before moving on to out-of-State placements, which could include a student's participation in intake interviews at schools interested in accepting that student (Tr. p. 91). The case manager stated that, in the event that one of the in-State programs accepted a student, she would confirm with the parent and the in-State approved nonpublic school that the student could be properly placed there and refer the case back to the CSE so it could develop a recommendation to place the student at the school (Tr. pp. 90-93). In the event that none of the in-State programs accepted the student, she would move forward with applications to out-of-State programs (Tr. p. 92).

The case manager stated that, for the 2016-17 school year, she sent applications to a number of in-State approved residential programs, including CFD (Tr. p. 94; see Parent Ex. L). According to a nonpublic school "tracking document" maintained by the district for the student, on May 25, 2016, the district referred the student to a total of 16 in-State residential programs seeking a placement for the student for the 2016-17 school year (Parent Ex. L). According to this document, the schools were asked to respond within ten days of receipt of the referral (id. at p. 1). Of the 16 schools, 14 responded to the district's referral of the student prior to the beginning of the 2016-17 school year on July 1; the remaining 2 (one of which was CFD) responded in August 2016 (id. at pp. 1-3; see Tr. p. 124).[16] None of the in-State programs accepted the student, citing a variety of reasons, including that the student's needs were too intensive for the program, or that the programs lacked the staff required to address the student's behavioral needs (Parent Ex. L; see Tr. pp. 73-79, 102-03). Two schools responded that the student was an appropriate candidate, but that the school did not have a vacancy (Tr. pp. 73, 91, 122-23, 133; Parent Ex. L at pp. 2-3).

[16] In New York, the school year is defined as the "period commencing on the first day of July in each year and ending on the thirtieth day of June next following" (Educ. Law § 2[15]).

Specifically with respect to CFD, the case manager received a "response form" from CFD, dated August 11, 2016, stating that, while CFD considered the student "an appropriate candidate for [its] residential program," given its "current allotted resources," the school could not "provide the staffing levels that [we]re on his IEP" and thus could not "move forward" with accepting the student; the case manager indicated that she understood the letter to state that the school could not meet the student's IEP mandates (Tr. pp. 94-96, 108; Parent Ex. L at pp. 1-2; Dist. Ex. 4).[17] The case manager further testified that she took this letter to be a rejection of the application for the student's attendance at CFD and made no further inquiry to determine what the school may have meant by the phrase "current allotted resources" (Tr. pp. 94-97, 113). Consistent with the case manager's impression, the vice president for admissions at CFD testified that at time of CFD's response, CFD could not accept the student without a "matched IEP" (Tr. p. 253). The CBST case manager testified that, had CFD accepted the student and been deemed able to meet the student's needs, she would have acted to place the student there pursuant to the State guidelines described above (Tr. pp. 92-93, 102, 114-16).

A supervisor of SED's Office of Special Education, Special Education Quality Assurance Nondistrict Unit (the nondistrict supervisor) testified regarding SED's role in the process of placing students in approved in-State and out-of-State residential schools, including the tuition rate approval process for such schools (Tr. pp. 143-99). When questioned regarding CFD's application response letter to the CBST, the nondistrict supervisor responded that "we would expect acceptances to be made without condition" (Tr. p. 190). In the context of placing the student at CFD and having the district fund additional services, the nondistrict supervisor went on to state that the "expectation is that all the services specified on an IEP, that they're provided," and that, if a program accepted a student, it would be able to provide all of the services on that student's IEP "within their tuition rate" (Tr. pp. 191, 197-99).

Taking all of the foregoing into account, the parents' assertion that the student was accepted for enrollment at CFD for the 2016-17 school year is not supported by the hearing record; rather, district personnel reasonably viewed the response from CFD as a rejection of the student's application for admission or, at the least, a representation that it did not have the capacity to implement the staffing ratios on the student's IEP (cf. M.O., 793 F.3d at 245 [finding that a claim regarding an assigned school's ability to implement an IEP may stand when the allegations consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP"). Moreover, CFD did not communicate any response to the district until after the beginning of the 2016-17 school year, after the student's enrollment at NECC for that school year, and after the parents filed their due process complaint notice. Thus, for a prospective analysis, CFD's communication to the district regarding its acceptance or rejection of the student for the 2016-17 school year would not even be an appropriate consideration in examining the appropriateness of the May 2016 IEP and subsequent assignment of the student to attend NECC since it was not communicated to the district until after the district assigned the student to attend

[17] The response form included a number of boxes that the school could check to indicate that it: agreed to accept the student; agreed to observe the student; rejected the student (because it did not have an appropriate opening or because the parent would not agree to an interview or missed appointments); rejected the student but could accept the student if specified "services/modifications were available," or had no available seats in an otherwise appropriate program (Dist. Ex. 4). CFD did not check any of these boxes but instead checked the box "other" (id.).

NECC (cf. R.E., 694 F.3d at 186; see C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013]).[18] Further, while the State-approved tuition rate may have formed the basis for CFD's nonacceptance of the student (see Tr. p. 250; Parent Ex. K), there is no evidence in the hearing record that the district took funding-related factors into consideration when choosing the particular residential school to assign the student to attend for the 2016-17 school year. Accordingly, the IHO's speculation about the district's underlying motivations is unsupported by the hearing record (IHO Decision at pp. 6-8). Based on the foregoing, the evidence in the hearing record does not support a finding that the district was obligated to pursue placement of the student at CFD based on the information that was available to it.

The evidence in the hearing record shows that the district made reasonable attempts to place the student at an appropriate in-State residential facility but was unable to do so as a result of a lack of available in-State residential programs that were able to address the student's needs. Additionally, the location of the school in relation to the student's home did not violate the IDEA's LRE requirement or render the recommended residential placement inappropriate to offer the student a FAPE. The May 2016 IEP required the "other arrangement" of educating the student at NECC, an out-of-State school, rather than at CFD, an in-State school (34 CFR 300.116[b][3]; [c]; 8 NYCRR 200.4[d][4][ii][b]; R.L., 757 F.3d at 1191 n.10; White, 343 F.3d at 380; Lebron, 769 F. Supp. 2d at 801; see also Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006] [noting that districts need not place students in the closest school to the student's home if "the services identified in the child's IEP require a different location"]; Letter to Trigg, 50 IDELR 48). The distance from the student's home to NECC does not outweigh the district's obligation to ensure the provision of appropriate services to address the student's educational needs.

In light of the above, I find that the district complied with the required procedures and engaged in an appropriate effort to place the student at an approved in-State residential program prior to considering placing the student at NECC, an approved out-of-State program, and that therefore the district's ultimate decision to place the student at NECC provided the student with a FAPE and satisfied the district's obligation to place the student in the LRE. Having found that the district provided the student with a FAPE in the LRE for the 2016-17 school year, the IHO's order that the district place the student at CFD must be reversed.

Finally, the parents assert that LRE concerns are implicated by the fact the CFD would provide greater and safer access to outdoor activity than NECC, and that access to walks and other physical activity were set out as needs on the student's IEP (see Dist. Ex. 1 at pp. 2-3). Even assuming that this allegation was raised in the parents' due process complaint notice—which does

[18] This is not to say that CFD and the parents did not engage in steps to evaluate whether or not CFD could accommodate the student. The student's mother testified that she engaged in the intake process at CFD and that the parents visited the campus (Tr. pp. 287-88). CFD's executive vice-president for admissions testified that the parents had toured the facility as part of the application process and the school's "interdisciplinary team" had met with the student and reached out to NECC to discuss the staffing that would be required to address the student's behavioral needs (Tr. pp. 226-27, 229-34). Additionally, there is some indication that CFD had discussions with the CBST regarding its ability to implement the student's IEP given its staffing and/or funding (Tr. pp. 256-270-71). Moreover, as noted above, the parents sent correspondence to the district and SED seeking some guarantees that, if CFD accepted the student, the student's program would be funded (Dist. Ex. 2 at pp. 1-2). Nevertheless, the documentary evidence shows that CFD did not communicate to the district that it accepted the student prior to the commencement of the 2016-17 school year (Dist. Ex. 4; Parent Ex. L).

appear to be the case (Parent Ex. A at pp. 1-3)[19]—the evidence in the hearing record shows that staff at NECC were aware of these needs and took steps to meet them (Tr. pp. 211-14, 286-89, 296-97, 299-302). Moreover, as noted above, the parent has not asserted that NECC failed to implement the student's IEP.

I am cognizant of the parents' concern for their child and sympathize with their efforts to find the best possible school for him. It may be that CFD has or could have aspects of a program that could meet the student's needs better than NECC, and it is undisputed that CFD is located within the State and closer to the student's home. However, under the factual circumstances described above, the district committed no violation of the IDEA upon which relief could be granted. Moreover, even if a violation were found, a more appropriate course of action going forward would be for the CSE to consider CFD for the student consistent with the statutory process, pursuant to which the CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing a student's needs (see Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008] [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]). The parties are encouraged to discuss the student's potential placement at CFD at the student's next annual CSE meeting or at such earlier CSE meeting that the parents may request.

VII. Conclusion

Based on the foregoing, I find that the district offered the student a FAPE in the LRE during the 2016-17 school year and that the IHO erred in ordering the district to place the student at CFD.

THE APPEAL IS SUSTAINED.

IT IS ORDERED the IHO's decision, dated January 3, 2016, is reversed to the extent that the district was ordered to arrange for the transfer of the student from NECC to CFD and fund the student's placement at CFD.

Dated: Albany, New York
March 16, 2017

SARAH L. HARRINGTON
STATE REVIEW OFFICER

[19] Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]; see, e.g., N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584 [S.D.N.Y 2013]; see B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 2014 WL 2748756, at *1-*2 [2d Cir. June 18, 2014]). Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]).