



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 19-086

### Application of the BOARD OF EDUCATION OF THE PLEASANTVILLE UNION FREE SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

#### Appearances:

Shaw, Perelson, May & Lambert, LLP, attorneys for petitioner, by Garrett L. Silveira, Esq.

The Law Offices of Neal H. Rosenberg, attorneys for respondent, by Michael Mastrangelo, Esq.

### DECISION

#### I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from a decision of an impartial hearing officer (IHO) which found that its Committee on Special Education (CSE) failed to offer an appropriate educational program for respondents' (the parents') daughter and ordered the district to reimburse the parents for their daughter's tuition and transportation costs at the Pinnacle School (Pinnacle) for the 2018-19 school year. The appeal must be sustained.

#### II. Overview—Administrative Procedures

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

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

The student has a history of concerns related to impulsive behavior, inattention and social skills, as well as fine motor skills (Dist. Ex. 3 at p. 3). According to an April 2018 psychological evaluation report, the student had been evaluated in 2009 by the Committee on Preschool Special Education (CPSE), which concluded at that time that the student was not eligible for special education (id. at pp. 1, 3). The student began attending the district's elementary school in kindergarten (id. at p. 3). In second grade, due to concerns expressed about the student's social skills, she was referred to the district's Child Study Team by her classroom teacher and began to

receive group counseling services to develop self-advocacy, play and social skills, which continued for third and fourth grade (*id.* at pp. 3-4). In or about second grade, the student also underwent a private neuropsychological evaluation that included administration of behavior rating scales, which indicated that the student exhibited higher levels of externalizing behaviors including hyperactivity and aggression in the home setting, and she was offered a preliminary diagnosis of Disruptive Mood Disorder, NOS. (*id.* at p. 3). In 2013, the student's developmental pediatrician provided the parents with "documentation indicating a diagnostic impression section of: High Functioning Autism Spectrum Disorder, Obsessive-Compulsive Disorder, Sensory Integration, unstable mood, Oppositional Defiant Disorder, hypothyroidism and encopresis" (*id.* at p. 4). At the recommendation of the developmental pediatrician, the student underwent additional speech-language assessments prior to fourth grade (*id.*).

The student was referred to the CSE in the fall of fourth grade; however, after conducting an evaluation of the student, the CSE determined that the student did not meet the criteria as a student with an emotional disturbance at that time (Dist. Ex. 3 at p. 4). At that time, the district created an accommodation plan for the student pursuant to Section 504 of the Rehabilitation Act of 1973 plan (504 plan), provided academic intervention services (AIS) in math, and continued to provide group counseling services (*id.* at pp. 4-5). In April 2014, the student's pediatric neurologist indicated that "clinical presentation is complicated, and it is unclear what her main diagnosis is" and offered a diagnosis of "Unspecified Mental or Behavioral Problem" (*id.*).<sup>1, 2</sup>

The student transitioned to the district's middle school in fifth grade and continued to receive section 504 plan accommodations, AIS services in math, and counseling/social skills services (Dist. Ex. 3 at p. 5). In spring 2015 (fifth grade), the student was re-referred to the CSE due to concerns about declining academic performance, increased difficulty sustaining attention and completing classwork, and behavioral difficulties, at which time she was found eligible for special education as a student with an emotional disability and was placed in the district's therapeutic support program (TSP) and also received instruction in a TSP study skills class, and counseling services (*id.*). For sixth grade, the CSE recommended that the student attend the district's middle school and continue in the TSP placement, which included consultant teacher services, a daily study skills class, modified math and English language arts (ELA) programming, and counseling services (*id.*). Results of a September 2015 neuropsychological reevaluation yielded diagnoses of an attention deficit hyperactivity disorder (ADHD)-combined type, and an autism spectrum disorder (ASD) (*id.* at pp. 5-6). For seventh grade (2016-17 school year), due to her "medical and emotional diagnoses," the CSE changed the student's disability category to a student with multiple disabilities and continued to recommend the TSP placement that she attended in sixth grade (*id.* at p. 6). Additional services provided to the student during seventh grade

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<sup>1</sup> According to the April 2018 psychological evaluation report, the pediatric neurologist did not indicate in April 2014 that the student met the full criteria for autism (Dist. Ex. 3 at p 5).

<sup>2</sup> The student also had received diagnoses of hypothyroidism, "ventricular prominence," and "an underdevelopment of the deep white matter structures" (Dist. Ex. 3 at p. 2).

included an occupational therapy (OT) consult, 1:1 aide support, and mid-way through the school year, a modified science and social studies program (id.).<sup>3</sup>

In August 2017, a private neuropsychological evaluation was conducted (see Dist. Ex. 18). At the conclusion of her evaluation, the private neuropsychologist confirmed the student's diagnoses of an ASD and ADHD, and offered a diagnosis of other specified anxiety disorder (id. at p. 11). She opined that the student required a specialized school setting to meet her complex needs, which included a small class size with 1:1 support, daily general executive skills/organizational support, daily support to develop coping and social skills, and progress monitoring (id.). Additionally, the private neuropsychologist recommended that the student receive 12-month (extended school year) services to ensure the student maintained the gains in regulation, social and academic skills being addressed (id. at pp. 11-12).<sup>4</sup> Regarding school-based services, the private neuropsychologist recommended that the student receive counseling, speech-language therapy, OT, and resource room support (id. at p. 12).

For eighth grade (2017-18 school year) the CSE recommended that the student continue to receive support through the TSP, participate in the modified program for all academic subjects, with science and social studies instruction provided in an integrated setting (Dist. Ex. 3 at p. 6). The CSE also continued to recommend a 1:1 aide, counseling services (one session each of individual, group, consult through program, and direct/indirect consult to support behavior), availability of a psychiatric consult, and quarterly family training for the parents (id.).

In October 2017, the CSE reconvened to review the results of the August 2017 private neuropsychological evaluation that the parents shared with the district (Dist. Ex. 3 at p. 6; 18 at pp. 1-19; see also Dist. Ex. 22). According to the meeting information summary, the parent requested consideration of an approved private school placement for the student, due to her belief that the student's current program did not address her needs related to her anxiety, ADHD or autism diagnoses (Dist. Ex. 22 at p. 1). Following a discussion about the parents' concerns and potential services, the CSE recommended that triennial testing be moved forward to provide additional information about the student's current levels of performance, and include assistive technology, OT, and speech-language evaluations, a functional behavioral assessment (FBA) and behavior intervention plan (BIP) (id. at pp. 1-3). The CSE recommended a 12:1+(3+1) TSP study skills special class, a 15:1+1 special class in modified math and modified English, and consultant teacher services in social studies, science, physical education, and an elective (id. at p. 17). Additionally, the CSE recommended one 42-minute session per week of small group counseling services, one 42-minute session per week of individual counseling services, and two 60-minute sessions per month of parent training in the school/community (id. at pp. 17-18). Further, the CSE recommended a number of program modifications and accommodations including 1:1 aide services, and deferred the recommendation for 12-month services "pending review" (id. at pp. 18-21).

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<sup>3</sup> The April 2018 psychological evaluation report indicated that a school-based psychiatric consult was offered during seventh grade but declined by the parents (Dist. Ex. 3 at p. 6).

<sup>4</sup> The hearing record refers to extended school year or "ESY" services interchangeably as 12-month services (see e.g. Tr. pp. 130, 607; Dist. Exs. 18 at p. 12; 21 at pp. 6, 25).

Over the course of the school year the student exhibited difficulty arriving to school on time, acted impulsively and in a manner inconsistent with classroom expectations, and asked questions in a perseverative manner (Dist. Ex. 13 at pp. 1-2). In January 2018, the district conducted an FBA to assess these target behaviors and developed a BIP for the student (see Dist. Exs. 13; 14). From January to April 2018, the district also conducted psychological, academic achievement, speech-language, OT, and instructional technology evaluations of the student as well as a classroom observation (see Dist. Exs. 3-8).<sup>5</sup>

In March 2018, a psychiatrist working through the Board of Cooperative Educational Services (BOCES) conducted an initial assessment of the student (see Dist. Ex. 15). The resultant report indicated that the student's parents were concerned that the student "expresses that she visualizes wanting to kill herself" (id. at p. 1). The student reported that she hated and felt miserable at school, had no friends, felt sad and depressed and that her aide was "getting mad at her" (id. at pp. 1-2). The report indicated that the student was struggling with school avoidance and refusal, as well as social issues and academic challenges (id. at p. 3). The BOCES psychiatrist determined that she would "leave it up to the CSE" to decide an appropriate program and placement for the student, and recommended medication management as well as social skills and individual therapy (id. at pp. 3-4). In May 2018, the evaluator who conducted the August 2017 private neuropsychological evaluation completed an addendum to her previous report (Dist. Ex. 18 at pp. 20-24).

The CSE convened on June 14, 2018 for the student's annual review and to develop an IEP for the 2018-19 school year (see Dist. Ex. 21). Following review of the evaluative information available, the CSE recommended placement in 12:1+(3:1) ISP (individual support program) study skills and health/life instruction special classes; 15:1 special classes in modified English, modified science, and modified social studies; one 40-minute period per day of 5:1 resource room services; bimonthly TSP consultant teacher services in physical education, and weekly ISP consultant teacher services in math (see Tr. p. 154; Dist. Ex. 21 at p. 21). Further, the CSE recommended that the student receive one 40-minute session per week of small group counseling services, one 40-minute session per week of individual counseling services, one 30-minute session per week of small group (5:1) speech-language therapy, one 30-minute session per week of 1:15+2 speech language therapy, and twice monthly family training sessions in the school/community (Dist. Ex. 21 at pp. 21-22). Additionally, the CSE recommended numerous program modifications and accommodations including full time 1:1 aide services, assistive technology, behavioral intervention consultations with various staff, and 12-month services for summer 2018 (id. at pp. 22-25).<sup>6</sup>

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<sup>5</sup> The June 2018 IEP refers to an assistive technology evaluation dated March 20, 2018 (Dist. Ex. 21 at p. 7). The hearing record contains an "Instructional Technology Evaluation" report reflecting a report date of March 1, 2018 (Dist. Ex. 8 at p. 1). CSE meeting information summary reflects that the CSE reviewed "the IT evaluation" (Dist. Ex. 21 at p. 3). Although the title of the evaluation and dates within the IEP are different, the CSE recommended that the student have access to a portable word processor and use graphic organizers; the two recommendations from the March 1, 2018 instructional technology evaluation report (compare Dist. Ex. 8 at p. 5, with Dist. Ex. 21 at pp. 22, 24).

<sup>6</sup> The recommended 12-month services included a 12:1+2 special class placement, counseling services, speech-

In a letter dated July 18, 2018, the student's private psychiatrist indicated that he had been treating the student since 2012 (Dist. Ex. 17). The private psychiatrist stated that the student's "complex medical and neuropsychiatric" needs could not "be well managed in a public school setting, or even in a therapeutic support setting due to the excess stimuli of such a large setting," (*id.*). He further opined that such a setting "could be detrimental" to the student's academic and social progress, therefore, the psychiatrist recommended placement in a school that had "a much smaller student to teacher ratio and has a broad spectrum of therapeutic services" (*id.*).

In an undated letter, the parent indicated that she did not agree with the June 2018 CSE's recommendations (*see generally* Dist. Ex. 19).<sup>7</sup> Among other things, the parent, indicated in the letter that the student expressed that "she would just die if she ha[d] to go" to the district's high school (*id.* at p. 8). The CSE reconvened on July 31, 2018 to discuss the private psychiatrist's July 2018 letter and the parents' concerns about the potential for the student to engage in self-harm behavior if she were to attend the district's high school (Dist. Ex. 20 at pp. 9-11). Based on this information, the CSE agreed to conduct a search for an out-of-district day placement (*id.* at p. 11; Parent Ex. 23). The CSE indicated once a placement search is conducted, it would reconvene and a placement would be recommended (Dist. Ex. 20 at p. 11).

The parents executed an enrollment contract with Pinnacle on August 8, 2018 (Parent Ex. H). According to the parents, they received a draft IEP from the district on August 9, 2018 indicating that the student would be placed in an "Approved Private School-Day" (Dist. Ex. 1 at p. 8). In a letter dated August 16, 2018, the parents indicated that they were concerned that they would not have time to visit and consider any proposed school options prior to the start of the school year and that they were therefore unilaterally placing the student at Pinnacle for the 2018-19 school year and intended to seek reimbursement for tuition and associated costs (Dist. Ex. 23). The parents also requested that the district provide transportation for the student to Pinnacle (*id.*). The student began attending Pinnacle in late August 2018 (Parent Ex. G).

According to the parents, they were contacted by Southern Westchester BOCES (SW BOCES), and on August 22, 2018 they attended an intake interview and tour of its TSP-I program at Rye Lake (Rye Lake) (Dist. Exs. 1 at p. 8; 24 at p. 1). The parents also attended tours at another BOCES program and an alternative high school program located in a special act school district (Tr. pp. 441-42, 935; Dist. Ex. 20 at p. 2).

After receiving acceptance responses from two out-of-district placements, on September 5, 2018, the CSE reconvened (Dist. Ex. 20 at pp. 1). For the 2018-19 school year, the CSE recommended that the student be placed in an 8:1+2 special class with one 40-minute session per week of small group counseling services, one 40-minute session per week of individual counseling services, one 30-minute session per week of small group (5:1) speech language therapy, one 30-minute session per week of 1:15+2 speech language therapy, and twice monthly family training (*id.* at pp. 30-32). After discussion during the meeting, the CSE determined that the student's IEP should be implemented at Rye Lake (*id.* at pp. 8-9, 35).

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language therapy and family training (Dist. Ex. 21 at p. 25).

<sup>7</sup> The director of educational services testified that the district received the letter in early July 2018 (Tr. p. 597).

## A. Due Process Complaint Notice

By due process complaint notice dated December 31, 2018, the parents asserted that the programs offered by the district for the 2017-18 and 2018-19 school years were "substantively and procedurally inadequate and inappropriate" (Dist. Ex. 1 at pp. 1, 11). The parents argued that "[d]espite the [s]tudent's regression over the course of the 2017-2018 school year, the CSE recommended placement at [the district's] High School with therapeutic supports" (*id.* at p. 5). According to the parents, the recommendations of the private neuropsychological evaluation indicated that the student required placement in a small, specialized school to address her learning, social, behavioral, and emotional needs and placement in the district's high school would not address these needs or enable the student to make meaningful progress (*id.*). The parents contended that the recommendation of the "large general education public school" setting was contrary to the student's needs which required "a small, nurturing special education school specifically designed to address the learning, emotional and behavioral needs of [s]tudents with ASD" (*id.* at pp. 5-6). The parents indicated that the student required a "school setting that effectively integrated behavioral and emotional support into the daily curriculum to simultaneously address the emotional, behavioral and academic needs of the [s]tudent" and that the CSE's recommended programming failed to provide such a setting (*id.* at p. 6). Further, the parents asserted that the counseling recommendations were "severely inadequate to address the [s]tudent's emotional needs" (*id.*).

The parents argued that the recommendation of Rye Lake in September 2018 was not appropriate as it would not have placed the student with similarly functioning peers as a large population of students required credit recovery (Dist. Ex. 1 at p. 9). Additionally, the parents contended that the September 2018 IEP was "substantively deficient" as the goals were minimal, vague, and failed to address many deficit areas that the student exhibited, failed to outline implementable strategies to achieve those goals, and that the CSE failed to develop goals designed to address the impact of the student's needs associated with her ASD diagnosis or goals designed to address the student's ability to cope with her anxiety and phobias (*id.*). The parents alleged that the district's "recommendation [was] rooted more in bureaucratic and budgetary concerns than in developing an appropriate program designed to address the unique, individualized needs of the [s]tudent" (*id.*).

The parents alleged that their unilateral placement was appropriate for the student and requested that they be reimbursed for the tuition at Pinnacle for the 2018-19 school year (Dist. Ex. 1 at p. 10). Further, the parents contended that the equities favor their claim for reimbursement (*id.*).

Although stating that it had already provided the parents with a prior written notice, the district responded to the due process complaint notice, asserting that the June 2018 IEP had been "superseded" by the September 2018 IEP, which was the operable IEP for the 2018-19 school year (Dist. Ex. 2 at pp. 1-2). The district contended that Rye Lake was an appropriate program for students with learning disabilities and social and emotional deficits like this student, it was not housed in a public high school as the parents alleged, it was the student's least restrictive environment (LRE), and the student could be grouped with sufficiently similar peers (*id.* at p. 2). The district argued that the "IEP provides sufficient and appropriate goals to address [the] student's

needs" and that it was "designed to address [the] student's unique and individualized needs" (id. at p. 3).

## **B. Impartial Hearing Officer Decision**

An impartial hearing convened on April 8, 2019, which concluded on June 10, 2019, after five days of proceedings (see Tr. pp. 16-952).<sup>8</sup> In a decision rendered on August 11, 2019, the IHO found that the program recommended by the district for the 2018-19 school year failed to offer the student a free appropriate public education (FAPE) (IHO Decision at pp. 20, 25). The IHO reviewed the August 2017 private neuropsychological evaluation report and resulting CSE meeting information (id. at pp. 5-7). The IHO also reviewed, among other things, the documentary materials associated with the district's reevaluation of the student that occurred from January through April 2018 as well as the results of the March 2018 initial assessment conducted by the psychiatrist from BOCES (id. at pp. 7-11). The IHO held that it was "undisputed" that the June 2018 IEP "was inappropriate and failed to offer the student a FAPE" (id. at p. 20). Specifically, the IHO noted that although the district asserted that the June 2018 IEP was appropriate at the time, the "record clearly demonstrate[d] that the [d]istrict was aware of the student's social/emotional challenges throughout the 2017-18 school year and failed to plan accordingly" (id.). The IHO reasoned that the "CSE was aware of the student's school avoidance issues throughout the school year and her inability to access her educational program, which was evidenced by the fact the student spent most of her time in the TPS room and not in her special education and general education classes" (id.). The IHO determined that the CSE was also aware, by March 2018, that the student was expressing self-harm and exhibiting aggressive behavior outside of school (id. at pp. 20-21). Based on this evidence, the IHO found that the district's assertion that the student's "needs and program recommendation only changed after" it received the July 2018 letter was without merit (id. at p. 21). Moreover, the IHO held that there was no evidence to support the district's assertion that the student's school avoidance during the 2017-18 school year was related to the parents' decision to explore out-of-district therapeutic schools, but that was "exactly what the [d]istrict should have been doing" (id.). The IHO found that the student's school avoidance preceded her awareness of the possibility that she might not attend the district's high school (id.).

The IHO also concluded that the CSE's September 2018 decision to place the student at Rye Lake did not offer the student a FAPE (IHO Decision at p. 21). Initially, the IHO determined that the district made the recommendation on September 5, 2018, which was "too late for the parents to reasonably plan for the student's program for 2018-2019 school year" (id.). Because the IHO rejected the validity of the district's explanation that the CSE's placement recommendation only changed after receiving the private psychiatrist's July 2018 letter and the IHO determined that the district was aware (or should have been aware) of the student's need for a therapeutic day program when the June 2018 IEP was developed, the IHO reasoned that the district should have made the Rye Lake recommendation in June 2018 rather than in September 2018 (id. at pp. 21-22).

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<sup>8</sup> A pre-hearing conference was also held via telephone on February 15, 2019 (see Tr. pp. 1-15).

Further, the IHO also rejected the district's argument that the Rye Lake placement offered the student a FAPE and found that the district failed to "sufficiently explain how the student's social-emotional challenges regarding self-harm and her ASD would be addressed by Rye Lake," finding the Rye Lake principal's testimony unpersuasive (id. at p. 22). Finally, the IHO determined that the placement at Rye Lake would not have been appropriate "because the student would not have been placed with students who had similar needs and abilities as per . . . State [r]egulations" (id.).<sup>9</sup>

The IHO found that the unilateral placement of the student at Pinnacle was appropriate (IHO Decision at p. 23).<sup>10</sup> The IHO reasoned that Pinnacle "utilizes an integrative education model that includes collaborative solutions with a social learning model that was specifically formulated to work with students with high functioning Autism. [Pinnacle] also utilizes ABA and cognitive behavior therapy to address the underlying cause of a student's behaviors and not just their symptoms" (id.).<sup>11</sup> The IHO held that the parents cooperated with the CSE process and provided notice of the unilateral placement at least 10 days prior to enrolling the student; therefore, equitable considerations favored the parents (id. at p. 25). The IHO directed the district to reimburse the parents for "the entire cost of the annual tuition" at Pinnacle for 2018-19 school year and the cost for any related transportation (id.).

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

The district appeals, asserting that the IHO erred by finding the June 2018 IEP failed to offer the student a FAPE for the 2018-19 school year. The district contends that based on the information known to the CSE in June 2018, the June 2018 IEP afforded the student a FAPE. The district contends that four witnesses testified without contradiction that the June 2018 IEP was appropriate for the student and that the sole evidence relied upon by the parents was the August 2017 neuropsychological evaluation report that the parents provided to the district in October 2017. According to the district, a board-certified behavior analyst (BCBA) called by the district as a witness testified with regard to how the CSE's recommendations were consistent with those from the neuropsychological evaluation. The district argues that the IHO failed to cite to any evidence in the record to support his conclusion that the district failed to plan for the student's social/emotional challenges in the June 2018 IEP.

Further, the district argues that the IHO erred by finding the September 2018 IEP failed to offer the student a FAPE for the 2018-19 school year. Initially, the district argues that the IHO improperly found that the September 2018 CSE was held too late for the parents to reasonably

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<sup>9</sup> The IHO noted that this case was not a matter of "maximizing the student's potential, but, rather, developing an IEP that was reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances" (IHO Decision at p. 22).

<sup>10</sup> The IHO noted two of the district's arguments in support of its contention that Pinnacle was not an appropriate placement and found that each argument was without merit (IHO Decision at pp. 23-24). The first was that the note from the Pinnacle school nurse did not support a finding that the student made progress (id.). The second was the district's request for an adverse inference due to the failure to disclose the student's "May Star Assessment" (id. at p. 24).

<sup>11</sup> The term "ABA" refers to applied behavioral analysis (see Dist. Ex. 18 at p. 21).

plan for the 2018-19 school year because the timeliness issue was not raised by the parents in the due process complaint notice. The district also argues that the IHO erred by finding it failed to demonstrate how the recommended placement would address the student's social/emotional needs in the September 2018 IEP. Moreover, the district contends that the student would have been appropriately grouped with sufficiently similar peers at Rye Lake.

In its answer, the parents generally respond with various admissions and denials to the factual allegations made by the district. The parents assert that the IHO correctly found that the district failed to offer the student a FAPE for the 2018-19 school year. The parents contend that the June 2018 IEP was not appropriate to meet the student's needs and that the district was aware of the student's social/emotional needs at least as of March 2018 and that the student's school avoidance issues began before they began looking for a private school placement. The parents assert that the IHO decision should be upheld because the evidence showed that placing the student in a public-school setting without the appropriate level of therapeutic support was wholly inappropriate given her significant emotional and behavioral difficulties and was inconsistent with the recommendations from all of the private evaluations. The parents assert that the district essentially conceded that the June 2018 was inappropriate because the CSE agreed to modify the IEP in July 2018. The parents argue that the district witnesses failed to acknowledge the student's need for a therapeutic special education setting, asserting that the district later admitted the need when it placed the student in Rye Lake. The parents argue that the district opened the door to the issue of whether the September 5, 2018 CSE was held in a timely manner by raising the issue in its opening statement and calling a witness to testify that the district acted "swiftly". The parents assert that the district's recommended placement in the September 2018 IEP was not appropriate and the IHO's findings on the issue were correct.

## **V. Applicable Standards**

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional

advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. \_\_\_, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and

provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).<sup>12</sup>

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

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

## **VI. Discussion**

### **A. June 2018 IEP and 12-Month Services**

I will first address the district's challenges to the IHO's determinations that the June 2018 IEP was inappropriate because it recommended that the student continue to be placed in the public school and failed to recommend an out-of-district therapeutic placement for the student. The June 2018 IEP reflects that it was based upon a number of evaluation and progress reports, an education summary, a classroom observation, a functional behavioral assessment (FBA) and a behavioral intervention program (BIP), and the October 2017 IEP, all of which were reviewed during the meeting (Dist. Ex. 21 at pp. 2-5, 7-8; see Dist. Exs. 3-16; 18; 22). The parties do not dispute the adequacy of the evaluative information before the CSE, but rather the conclusions that the CSE should have drawn from it. Thus, a description of the evaluative information, while not in dispute, provides context for the discussion regarding whether or not the June 2018 IEP addressed the student's needs. I also note that the majority of the information set forth in the June 2018 IEP present levels of performance is reflective of the evaluative information available to the CSE at that time and is also not in dispute (compare Dist. Ex. 21 at pp. 13-18, with Dist. Exs. 3-16; 18; 21 at pp. 7-12).

The August 2017 private neuropsychological evaluation report reflected assessments of the student's cognitive and language skills, visual and motor functioning, attention and executive functioning, learning and memory, academic skills, social/emotional and behavioral functioning,

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<sup>12</sup> The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

and adaptive functioning (see generally Dist. Ex. 18). The evaluator concluded that the student's cognitive and behavioral profile of "relatively intact intellectual functioning but weakness in more complex language and executive skills, including symptoms of ADHD Combined type," remained consistent with an ASD (*id.* at p. 10). Additionally, the evaluator indicated that the student's adaptive skills were "notably impaired for her age" (*id.*). According to the report, the student's behavioral presentation both at home and with peers was "clearly problematic" for the student's wellbeing and disruptive to family relationships; having the "flavor of a disruptive mood dysregulation disorder with her frequent and overly intense outbursts" (*id.*). The evaluator concluded that the student was struggling to express her stress more adaptively, due to weaknesses associated with ASD and comorbid anxiety, as well as impulsivity, behavioral rigidity, occasional inaccurate interpretation of cues/scenarios, difficulty understanding her emotions and the impact of her behavior on others, and weakness in organizing her ideas and communicating effectively (*id.*). The evaluator provided diagnostic impressions including an ASD, ADHD-combined type, other specified anxiety disorder, and rule out intermittent explosive disorder vs. disruptive mood dysregulation disorder, as well as a number of school, home, and treatment recommendations (*id.* at pp. 11-14).

In January 2018, the district conducted an FBA and developed a BIP for the student (Dist. Exs. 13; 14). According to the FBA, the CSE had determined that the student's behaviors to be targeted were impulsive actions, perseverative questions, and school lateness/refusal (Dist. Ex. 13 at pp. 1-2). The FBA provided information about the antecedents, environments/latency, frequency/duration, intensity, consequences, previous interventions and functions of the behaviors, and functional hypotheses as to why the behaviors occur (*id.* at pp. 1-5). The resultant BIP identified the desired replacement behaviors, positive strategies and interventions, reinforcers, and intervention steps for each of the target behaviors (Dist. Ex. 14).

In a March 14, 2018 psychiatric assessment report of the student, the BOCES psychiatrist provided background history including that the student "hate[d] [going] to school" had "no friends and [felt] miserable in her current school" (Dist. Ex. 15 at p. 1). The psychiatrist reported that there was "no prior history of self harm behaviors, suicide attempts or any inpatient psychiatric admissions; however, according to her parents they were "concerned that the student expresses that she visualizes wanting to kill herself" (*id.*). In the summary portion of the assessment, the psychiatrist indicated that the student struggled with school avoidance/refusal, social issues, and academic challenges (*id.* at p. 3). According to the report, the student and her parents felt that changing the current school setting would provide her the life skills and social skills she needed (*id.*). The psychiatrist noted that the student possessed "a number of remarkable strengths; average verbal comprehension and intellect, relatively intact cognition, yearning for peer acceptance and desire to form relationships" (*id.*). The student also exhibited a moderate level of impaired social perception and a pattern of automated impulsive response to distress tolerance or mood dysregulation (*id.*). Although eager to make and keep friends, she was unaware of her social behaviors or impulsivity (*id.*). According to the psychiatrist, with increasing academic demands the student's anxiety was likely exacerbated which in turn contributed to mood dysregulation (*id.*). The psychiatrist reported that "[a]lthough prior records indicated a diagnosis of disruptive mood dysregulation disorder, her untreated attention deficit disorder-combined type along with ongoing generalized anxiety can best explain her current clinical symptoms in the academic setting" (*id.*). Among other things, the psychiatrist recommended that the CSE determine whether an

individualized support program or a therapeutic support program would best address the needs of the student (id. at pp. 3-4).

According to the April 2018 district psychological evaluation report, measures of the student's cognitive skills yielded "variability on her performance on verbally based tasks, while her overall testing fell within the [a]verage range, she showed consistent patterns of strengths and weaknesses across test administrations" (Dist. Ex. 3 at pp. 9-10, 20). The school psychologist reported that the student's ability to answer fact-based fund of knowledge questions was in the average range, but that her performance dropped significantly below that of other verbal reasoning tasks when she was required to self-generate solutions to novel situations or multiple reasons behind socially guided behaviors (id. at p. 20). Additionally, the school psychologist determined that the student's processing speed was impacted by "directed attention and motivation to continue to work quickly" (id.). Although assessment of the student's executive functioning skills indicated adequately developed abilities in the area of deductive reasoning, her use of questioning that went from general to specific was inconsistent, reflective of her need for reminders to use specific strategies to support learning and recall of information at school (id.). The completion of behavior rating scales by the student's teacher and mother yielded "some variability" in the student's behavior across settings (id.). Specifically, the parent noted high levels on hyperactivity and depression ratings than the teacher, whose ratings were in the average range (id. at p. 12). Both the parent and the teacher endorsed ratings in the at risk or clinically significant range for anxiety, attention problems, withdrawal, and atypicality (id.). The student's teacher also rated the student in the at-risk range for somatization and school problems (id.). Measures of the student's anxiety completed by the student and her mother yielded significant variability (id. at pp. 16-17, 21). The student's responses indicated elevated levels of concern and worry related to social perception and fears of being separated from her parents—consistent with the parent's responses—which also indicated high levels of tense/restless behavior and a high level of behavior associated with obsessions and compulsions (id. at p. 21). Further, measures of the student's adaptive behavior indicated that she continued to present a need to improve her work organization, work completion, and time management, in addition to development of social problem solving and social pragmatic skills (id. at pp. 201-21).<sup>13</sup>

In May 2018, the private neuropsychologist who had conducted the August 2017 neuropsychological evaluation reviewed the reevaluation assessments conducted by the district during the months since her initial report and she appended an update to her previous evaluation report which was submitted by the parents to the CSE at the time of the June 2018 CSE meeting (Tr. p. 224; Dist. Ex. 18 at p. 20-24; see Dist. Ex. 21 at p. 7). Upon reviewing the district's April 2018 psychological evaluation report, the private neuropsychologist noted that the student's behavioral presentation was not consistent with disruptive mood dysregulation in the school setting, thereby ruling out that diagnosis and noted that the student became more dysregulated in other settings, particularly the home (Dist. Ex. 18 at pp. 20-21). On May 18, 2018, the private neuropsychologist conducted "targeted monitoring" of the student to "gauge her progress with her current services and guide ongoing intervention planning" (id. at p. 21). In addition to addressing

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<sup>13</sup> The evaluation report indicated that at home, the student needed to improve her daily living skills, ability to communicate clearly and effectively, and build coping skills related to transitions and adaptability (Dist. Ex. 3 at p. 20).

the student's written expression weaknesses, the "greatest areas of concern" were her social communication, engagement, self-awareness and monitoring skills, emotion regulation, and ongoing adaptive deficits (*id.*). Although the evaluator indicated that the district's efforts to provide the student with a range of supports to ensure the least restrictive environment, given the student's significant needs and ongoing difficulties in these areas, her high level of distractibility, and need for explicit instruction in a range of adaptive, social, organizational and regulation skills, the evaluator concluded that "the next step" was a "therapeutic day program that c[ould] provide an even more intensive focus on her treatment needs, in a setting that serve[d] other adolescents with ASD and their co-occurring behavioral and emotional needs" (*id.* at p. 23).

The June 2018 CSE also reviewed a June 2018 counseling summary prepared by the district's school psychologist who provided the student's school-based counseling during the 2017-18 school year (Dist. Exs. 16; 21 at p. 4). The report detailed the student's IEP social/emotional annual goals to improve self-advocacy skills when presented with an academic or social challenge, and the ability to: 1) generate an example of expected social behavior and its benefits, 2) identify another's thoughts based on nonverbal cues, 3) use information related to a peers' thoughts/feelings to identify the potential benefit of modifying her behavior, and 4) identify a positive course of action when presented with a hypothetical situation (*id.* at p. 1). Interventions provided during the 2017-18 school year included consultation and behavior shaping; counseling services that targeted emotion regulation, social pragmatics, expected/unexpected behavior, increased perspective taking and distress tolerance; curriculum including dialectical behavior and cognitive behavior therapy (*id.*). The school psychologist proposed IEP annual goals for the 2018-19 school year (*id.* at pp. 3-4). Additionally, the June 2018 family training progress summary prepared by the school psychologist indicated that the family had received twice monthly training in the home and school settings to improve her ability to attend school on time, participate in movement activities for self-regulation, demonstrate appropriate self-care skills, maintain clean eating at home, participate in family activities, and accept "no" and limit setting (Dist. Ex. 12). The school psychologist concluded that the student had made progress in the home environment and required strategies and self-monitoring checklists to be successful; indicating that family training should continue to work toward goals of accepting no and completing self-care activities independently (*id.* at p. 3).

Information also available to and reviewed by the June 2018 CSE indicated that an assessment of the student's academic skills yielded composite oral language, basic reading, mathematics, and math fluency scores in the average range (Dist. Exs. 4 at p. 3; 21 at pp. 2, 7). However, the student demonstrated a weakness in written expression skills (Dist. Exs. 18 at p. 22; 21 at p. 7). Although during a speech-language evaluation the student exhibited "periods of distraction and fidgeting" her receptive and expressive language skills "fell grossly within the average to above average range, with the exception of listening comprehension and identifying and interpreting non-literal language skills" (Dist. Exs. 5 at p. 5; 21 at p. 7). The student's fine and gross motor skills were in the average range and "appropriate for school, and she demonstrated the ability to monitor herself while eating at school (Dist. Exs. 6 at pp. 4-5; 11 at p. 2; 21 at p. 7). Review of the student's progress toward her IEP annual goals reflected that by June 2018, she had achieved all of the goals set forth for her (Dist. Exs. 9; 10).

When the CSE convened on June 14, 2018 to consider the reevaluation of the student, conduct the annual review meeting and develop the student's IEP for the 2018-19 school year, the meeting participants included the student's mother, the school psychologist who provided the

student's counseling services, the student's special education teacher, a regular education teacher, the student's occupational therapist, two other special education teachers, the director of educational services (who served as the CSE Chairperson), two other school psychologists, and a guidance counselor (see Tr. pp. 49, 276, 279, 380, 383; Dist. Ex. 21 at p. 1; 28). The resultant meeting information summary reflected that the private neuropsychologist also participated in the CSE by telephone for the first portion of the meeting, whereby she reviewed her May 18, 2018 assessment (Dist. Ex. 21 at p. 2).

The June 2018 meeting information summary reflects that during the meeting, the CSE reviewed and discussed the available evaluative information described above (Dist. Ex. 21 at pp. 2-5, 7-8; see Dist. Exs. 3-16; 18; 22). Specifically, according to the summary, the private neuropsychologist discussed having reviewed the student's most recent IEP and then-current supports and indicated that "significant steps ha[d] been put into place to support the student's emotional needs in her current school environment" (id. at p. 2). However, the private neuropsychologist also spoke about concerns related to the student's heightened anxiety and struggles with adaptive and practical life skills, her misinterpretation of others' intent/emotions, and emotional dysregulation especially at home (id.). She opined that the student was "at risk for increased mood dysregulation" at the high school due to her "social pragmatic deficits, heightened anxiety and daily living skills needs" (id.). Before exiting the meeting, the private neuropsychologist expressed concern about the makeup of the classroom for the upcoming year and indicated that the student should be placed with similar peers (id.).

According to the meeting information summary, the parent also discussed her frustration with the current therapeutic supports, her perception of the student's lack of progress, and her desire for a "therapeutic day program" for the student (Dist. Ex. 21 at pp. 3-4). The CSE engaged in a discussion about the potential programs at the high school, peer grouping, modified classes, the student's need for 1:1 support, supports to ensure the student arrived to school on time, and whether the district's therapeutic support program or the individual support program would be more appropriate for the student (id. at pp. 5-6; see Tr. p. 155).

The IHO determined that the district failed to offer the student a FAPE in part because the "CSE was aware of the student's school avoidance issues," and "her inability to access her educational program, which was evidenced by the fact the student spent most of her time in the T[SP] room and not in her special education and general education classes" (IHO Decision at p. 20). Additionally, the IHO determined that the CSE was aware that the student exhibited "aggressive behaviors outside of school, which were escalating" and yet failed to "plan accordingly" (id. at pp. 20-21). However, review of the hearing record and standard for 12-month services do not support the IHO's finding.

In addition to the substantive requirement described above, namely that a student with a disability be provided with an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances (Endrew F., 137 S. Ct. at 1001), the IDEA requires that a student's recommended program must be provided in the LRE (20 U.S.C. § 1412[a][5] [requiring CSEs to recommend a placement that would be the "least restrictive environment" for a student]; 34 CFR 300.107, 300.114[a][2][i], 300.116[a][2], 300.117; 8 NYCRR 200.1[cc], 200.6[a][1]; see T.M., 752 F.3d at 161-67; Newington, 546 F.3d at 111; Gagliardo, 489 F.3d at 105; Walczak, 142 F.3d at 132; Patskin v. Bd. of Educ. of Webster Cent. Sch. Dist., 583

F. Supp. 2d 422, 428 [W.D.N.Y. 2008]; see also B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 359 [E.D.N.Y. Mar. 31, 2014], citing E.F., 2013 WL 4495676, at \*15 [explaining that "under the law, once [the district] determined that [the public school setting] was the least restrictive environment in which [the student] could be educated, it was not obligated to consider a more restrictive environment, such as [the nonpublic school]"]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at \*8 [S.D.N.Y. Mar. 19, 2013] [finding that "[o]nce the CSE determined that [the public school setting] would be appropriate for the [s]tudent, it had identified the least restrictive environment that could meet the [s]tudent's needs and did not need to inquire into more restrictive options such as nonpublic programs").

The relevant aspects of the June 2018 IEP to be reviewed in this proceeding are those applicable to the appropriateness of the 12-month services for summer 2018 that the CSE had recommended prior to agreeing to change the student's placement on July 31, 2018 while locating the out-of-district placement identified by the CSE in September 2018.<sup>14</sup> Unlike the previous IEP, in the June 2018 IEP, the CSE recommended that during the summer, the student attend a "full day" 12:1+2 special class placement at the district's high school with full time 1:1 aide services, and receive one 40 minute session per week of individual counseling, one 30-minute session per week of speech-language therapy in a small group, and one hour every two weeks of individual family training (compare Dist. Ex. 22 at p. 21, with Dist. Ex. 21 at pp. 6, 23, 25).<sup>15</sup> The June 2018 IEP included goals to improve the student's ability to arrive to school on time, accept a limit placed or the word "no" from the parent, identify others' potential thoughts/feelings based on nonverbal cues, identify and practice two strategies to combat heightened emotions related to an identified trigger, use an emotional rating scale and practice use of a coping strategy, and initiate peer interactions in less structured settings (id. at pp. 19-21). The IEP indicated that the family training sessions, which were to be provided in the school and community, addressed "generalization of skills across environments," and included "skills for building greater independence with functional skills and behavior across settings" (id. at pp. 21, 25). According to the meeting information summary, the CSE added "ESY" or 12-month services to the student's IEP "to help prevent the potential for substantial regression (including difficulty coming back to school/getting back to the routine after breaks)" (id. at p. 6). The meeting information summary indicated that the 12-month services would "be used both to prevent academic/behavioral regression and to support [the

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<sup>14</sup> State regulations require that students "shall be considered for 12-month special services and/or programs in accordance with their need to prevent substantial regression" (8 NYCRR 200.6[k][1]; see 8 NYCRR 200.1[eee]). "Substantial regression" is defined as "a student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa]). State guidance indicates that "an inordinate period of review" is considered to be a period of eight weeks or more ("Questions and Answers Extended School Year 2017," Office of Special Educ. [Feb. 2017], available at <http://www.p12.nysed.gov/specialed/applications/ESY/esy-2017/documents/questions-and-answers-extended-school-year-2017.pdf>). District courts in New York have followed the eight-week standard set forth in guidance when determining whether substantial regression has occurred (D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at \*15-\*16 [E.D.N.Y. Sept. 2, 2011]; see F.L. v. Bd. of Educ. of Great Neck Union Free Sch. Dist., 274 F. Supp. 2d 94, 125 [E.D.N.Y. 2017]).

<sup>15</sup> The school psychologist testified that at the conclusion of the June 2018 CSE meeting, she "believed everyone was in agreement," with the recommendations, and that although she was aware the student would be "away" for the first week or two of the "summer program," she was scheduled to attend it (Tr. pp. 128-30).

student's] readiness for [high school]" (*id.*). The IHO did not provide an explanation of why, at the time of the June meeting, he believed removal of the student from the district to an out-of-district placement was required as opposed to the route that the CSE attempted—keeping the student in district and adding the ESY services in response to the student's increased school avoidance and anxiety. Therefore, contrary to the IHO's finding, the CSE provided the student with a special class setting and supports such as a 1:1 aide, counseling and family training specifically to prevent regression of skills surrounding her ability to attend school and address her "social/emotional challenges" in a variety of settings.

Next, the IHO also determined that "by at least March 2018" the district was aware "that the student was expressing self-harm and was exhibiting aggressive behaviors outside of school, which were escalating" such that by the time of the June 2018 CSE meeting "the [d]istrict had sufficient evidence that the student required a therapeutic day program" (IHO Decision at pp. 20-22). The hearing record reflects that the student had a history of exhibiting "aggressive" or externalizing behaviors (i.e. tantrums and cursing at and/or hitting family members) at home, which the district was aware of at the time of the June 2018 CSE meeting (*see* Tr. p. 107; Dist. Exs. 3 at p. 2-3; 18 at pp. 2-3, 10, 22; 21 at p. 2; 22 at p. 3). However, the information available to the June 2018 CSE did not indicate that the student exhibited those behaviors in the school setting (Dist. Exs. 3 at pp. 12, 23; 7; 18 at pp. 2-3; 21 at pp. 2-5; *see* Tr. pp. 190, 920-21), and the meeting information summary indicated that the CSE discussed the results of the April 2018 administration of the Behavior Assessment System for Children to the student's mother and special education teacher, which did not reflect "elevated concerns . . . with regard to aggression or conduct problems on the scale in either setting" (Dist. Ex. 21 at p. 2; *see* Dist. Ex. 3 at p. 12). Additionally, the June 2018 IEP provided support to the student and family by including annual goals to improve her identification and use of strategies to combat heightened emotions, practice the use of coping strategies, and accept a limit placed or the word "no" from the parent, as well as continuation of the twice monthly family training sessions (Dist. Ex. 21 at pp. 20, 21).

The evidence shows that the June 2018 CSE discussed the March 2018 BOCES psychiatrist's report, during which the parent had reported to the psychiatrist that the student had "expressed feelings of wanting to hurt herself," which the meeting information summary indicated the district was "not aware of this until this report" (Dist. Ex. 21 at p. 3; *see* Dist. Ex. 15 at p. 1).<sup>16</sup> The school psychologist stated that the CSE discussed that portion of the BOCES psychiatrist's report at the June 2018 CSE meeting, but the "bulk" of the conversation about the report surrounded the parent's concerns about errors in the report, and "not that [the student] was at risk of killing herself if she were to attend the high school program" (Tr. pp. 151-54). The director of educational services testified that at the meeting the parent did not express concern that the student was "at risk or wanting to hurt herself" and that the BOCES psychiatrist indicated in her report that she "there were no concerns from any of the school staff members that [the student] was wanting to hurt herself," nor had the student "expressed in school about wanting to hurt herself" (Tr. pp. 601-03, 605, 649-51; *see* Dist. Ex. 21 at p. 1). In the March 2018 report, the BOCES psychiatrist indicated that she had posed "safety assessment questions," but did not indicate a need

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<sup>16</sup> The June 2018 meeting information summary also detailed the parent's disagreements with and concerns about the March 2018 psychiatric assessment report; concluding that the psychiatrist "could not make diagnoses and medication recommendations based on a 2 hour evaluation" (Dist. Ex. 21 at p. 3).

for further safety evaluation monitoring in her report (see Tr. pp. 151-53, 651-52; Dist. Ex. 15). Additionally, the school psychologist testified that during the time she had counseling sessions, conversations, and daily contact with the student, the student "talked about things like wishing she was home schooled, she talked about stressors;" however, stated that she was "not a student who ever in the time I worked with her ever made a statement she was going to hurt herself" (Tr. pp. 133, 151).

While I note that the IHO discussed the private neuropsychological evaluation at length, and that the CSE reviewed her evaluation, including her May 2018 addendum, but the IHO did not grapple with the witness testimony described above in which the director of educational services and the school psychologist noted that the student herself had not expressed suicidal ideation to anyone in the district up through the June 2018 CSE meeting, and that the BOCES psychiatrist had conducted a further safety assessment based upon the parent's report during the evaluation and did not identify a safety concern that required additional mitigation at that time. Although she reportedly reviewed the March 2018 BOCES psychiatrist's report, there are no concerns regarding the likelihood that the student would engage in self harm expressed in the private neuropsychologist's May 2018 addendum or in the notes regarding her participation during the June 2018 CSE meeting. Additionally, when asked during the impartial hearing about the June 2018 CSE meeting, the parent's testimony did not focus on the self harm concern but continued with their previous advocacy for an out-of-district placement, indicating that "we still explained that [the student] needed a special education setting, a small setting, small classroom requirements to and that could meet her complex needs. We continually expressed that" (Tr. pp. 931; see also Tr. p. 595-96),<sup>17</sup> and that it was not until July—after the June 2018 IEP had been developed—that the parent told the district in a letter to the district and during the July 31, 2018 CSE meeting that the student had "finally came to a breaking point and told me that she would just die if she had to go to" the district's high school (Tr. pp. 597, 931-32; see Dist. Ex. 19 at p. 8). Thus, I disagree with the IHO's cursory ruling that "it is undisputed that the IEP dated June 14, 2018 was inappropriate and failed to offer the student FAPE" (IHO Decision at p. 20). The IHO also did not grapple with how the CSE modified the programming in the June 2018 IEP to add ESY services in a small special class during the summer, and while he acknowledged that an FBA had been conducted and a BIP put in place (IHO Decision at p. 13), he did not thereafter articulate any specific criticism of the evaluator's assessment or the strategies recommended. The evidence described above shows that the student's dysregulation tended to occur in the home and other non-school environments, so it is not clear why the IHO believed, based upon the information available to the June 2018 CSE, that moving the student from a therapeutic in-district day program to a therapeutic out-of-district program would further improve student's behaviors outside of school, because it was not until July 2018, that the trigger for the student's behavior was specifically tied to the district's building. Although the IHO rejected the district's arguments in conclusory fashion, the IHO did not grapple with testimonial evidence showing that it was after obtaining the further information regarding concerns about the student's social/emotional state, which was directly tied to the possibility of her attending the district's high school in July 2018 that the district members of the CSE believed the student's needs had changed and determined that an out-of-district placement was warranted (Tr. pp. 132-33, 324-25, 435-36, 595-96, 599-600, 605-06, 652-60).

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<sup>17</sup> The evidence shows that the parents had been raising the request for an out-of-district placement with the CSE since at least October 2017 (Dist. Ex. 22 at pp. 1-3).

Therefore, when viewed under the prospective analysis of an IEP required by R.E., I find that there was insufficient evidence that the June 2018 IEP was inappropriate for the student or that the evidence showed that in order to offer the student a FAPE the district was required to place her in an out-of-district therapeutic day program due to concerns regarding aggression and/or the potential for self-harm behavior.

### **B. Development of the September 2018 IEP and SW BOCES TSP-I at Rye Lake**

As described above, the hearing record shows that district received additional information regarding the student's social/emotional status in July 2018. The director of educational services testified that the district received the letter in early July 2018 (Tr. p. 597; see Dist Ex. 19).

The special education teacher testified that when the student failed to attend the 2018 summer program, she reached out to the parent, who informed her that the student's private psychiatrist felt it would be "detrimental" to the student to attend the summer program as well as the high school (Tr. p. 324).<sup>18</sup> The parent indicated that she was following the advice of the student's private psychiatrist, who had recommended that she not attend the district's summer program (Tr. p. 130). Also at that time, the parents communicated to the director of educational services that they disagreed with the June 2018 IEP (*id.*).

The evidence shows that on July 31, 2018 the CSE reconvened to discuss the 2018-19 IEP (Dist. Ex. 20 at p. 9). During the CSE meeting the parent presented, and the school psychologist read aloud a letter dated July 18, 2018, in which a private psychiatrist indicated that the student had been under his medical and psychiatric care since 2012 (Dist. Exs. 17; 20 at p. 9). The letter stated that the student had received diagnoses of ASD, ADHD, severe anxiety, and impulse control syndrome and was administered a variety of psychiatric medications (Dist. Ex. 17). The private psychiatrist further indicated that the complex medical and neuropsychiatric needs of the student could not "be well managed in a public school setting, or even in a therapeutic support setting due to the excess stimuli of such a large setting" (*id.*). He opined that in fact, such a setting "could be detrimental to the [student's] academic and social progress," indicating that she "must be in a school that has a much smaller student to teacher ratio," and offered "a broad spectrum of therapeutic services" (*id.*).

The hearing record shows that during the July 2018 CSE meeting, the parents reported that following the appointment with the private psychiatrist, the student stated "that if she ha[d] to attend the [district's high school] she would kill herself" (Tr. pp. 130-33, 324, 397, 434-35, 464, 606-08; Dist. Ex. 20 at pp. 9-10).<sup>19</sup> According to the CSE meeting information summary, during the meeting the parent reported that the student had "been saying this since mid-year," and asked the CSE if it was "willing to take that risk that [the student] may hurt herself" if she attended the high school (Dist. Ex. 20 at p. 10). The parents further stated that the middle school did not give

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<sup>18</sup> It is unclear exactly when the special education teacher reached out to the parent. The education director testified that the parents had informed the district that they would not initially access the ESY programing due to a scheduled family vacation, but the family had returned by the July 31, 2018 CSE meeting (Tr. pp. 595, 607).

<sup>19</sup> The parent had also conveyed this information in the undated letter addressed to the school superintendent and board of education (see Dist. Ex 19).

the student anything but "a hatred for school," and that she had "regressed severely" (*id.*). After further discussion about an appropriate placement, the hearing record shows that the CSE agreed to conduct a search for an out of district placement and reconvene to recommend a placement at a later date (Tr. pp. 133-34, 325, 608-13; Dist. Exs. 20 at pp. 10-11; 26).

The student attended intake interviews and tours with her parents, and in a letter dated August 28, 2018, the student was accepted to a day program at Clark Academy (Dist. Exs. 20 at p. 1; 25). By letter dated August 31, 2018, the director of special services of the SW BOCES informed the district's director of educational services that based upon a review of the student's IEP, supporting documentation, and an intake and observation, the TSP-I program at Rye Lake was a "suitable and appropriate" special education program for the student (Dist. Ex. 24).

The CSE convened on September 5, 2018 (*see* Dist. Ex. 20). Participants included the student's father, the school psychologist, the special education teacher, the occupational therapist, the director of educational services, a second district school psychologist, a speech-language pathologist, an administrator from SW BOCES, who was also the principal of the Rye Lake TSP-I program, an SW BOCES psychologist, and a coordinator from Clark Academy (Tr. pp. 509-10, Dist. Ex. 20 at p. 1). Following discussion about both the Clark Academy and the SW BOCES programs, the CSE recommended that the student be placed in an 8:1+2 special class and attend the TSP-I Rye Lake placement for the remainder of the 2018-19 school year, starting September 6, 2018 (Dist. Ex. 20 at pp. 1-9, 30, 35).

The facts occurring after the June 2018 CSE meeting that led to the CSE's change in position during the July 2018 meeting, its search for an out-of-district placement, and the process by which it arrived at the selection of the Rye Lake site in September 2018 are not materially disputed by the parties; however, at this juncture before reviewing the substantive adequacy of the revised IEP, I will pause and turn to an issue that appears to manifest between the parties on appeal from the IHO's decision, namely whether the district denied the student a FAPE because the meeting at which Rye Lake was selected by the CSE was not held until September 5, 2018, due to a statement by the IHO that it was "too late for the parents to reasonably plan for the student's program" (IHO Decision at p. 21).

Although the district argues that the IHO was impermissibly raising an issue that was not in the parents' due process complaint notice and the parents argue that the district opened the door to a new issue that was beyond the complaint by eliciting testimony on the issue, both parties misread the IHO's determination. The IHO was merely providing an explanation of his view that the district denied the student a FAPE and his criticism of the CSE's decision not to place the student in an out-of-district program in the June 2018 IEP before ESY programming began in July, when making the statement that the CSE's decision selecting Rye Lake in September was "too late for the parents to reasonably plan for the student's program for the 2018-19 school year" (IHO Decision at p. 21). The IDEA requires a CSE to review and, if necessary, revise a student's IEP at least annually (*see* 20 U.S.C. § 1414[d][4][A]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]). Additionally, the IDEA requires districts to have an IEP in effect at the beginning of each school year for every student with a disability in the district's jurisdiction (20 U.S.C. § 1414[d][2][A]; 34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; *Cerra*, 427 F.3d at 194; *K.L. v. New York City Dep't of Educ.*, 2012 WL 4017822, at \*13 [S.D.N.Y. Aug. 23, 2012], *aff'd*, 530 Fed. App'x 81; *B.P. v. New York City Dep't of Educ.*, 841 F. Supp. 2d 605, 614 [E.D.N.Y. 2012]). The IHO neither ruled that the CSE violated

the requirements for conducting a CSE meeting in accordance with the annual review procedure, nor held that the district failed to have an IEP in effect at the beginning of the school year for ESY purposes in July or for the 10-month school year in September. Instead, the IHO held that the June 2018 IEP in place was inappropriate because it failed to offer an out-of-district placement by that time, and that offering an out-of-district placement in September did not rectify the situation because it was too late. The IHO's ruling is understandable when read in the context of the parents' post-hearing arguments that "based on the information the Parents had available to them at the time the IEP was finalized at the September 5, 2018 CSE meeting and the program recommendation at Rye Lake[] were inadequate and not reasonably calculated to enable the Student to make appropriate progress in light of her unique circumstances," which is an argument that the student was denied a FAPE on substantive grounds by the time the district had agreed to place the student out-of-district. The parents did not raise any claims prior to or during the hearing that the CSE failed to have an IEP in effect at the beginning of the school year or that the CSE conducted the annual review process in an untimely manner. The evidence also shows that the parents visited the Rye Lake site on August 22, 2018 (Dist. Exs. 1 at p. 8; 24 at p. 1)—and that the district finalized the revisions to the IEP two weeks later on September 5, 2018—prior to the first day of school (Tr. p. 560; see Dist. Ex. 20).<sup>20</sup> Therefore, I find that when interpreted appropriately, the IHO's determination was merely that it was too late to remediate the alleged deficiencies in the student's ESY programming when the CSE finished revising the portion of the IEP that addressed the 10-month school year, but assuming for the sake of argument that the IHO's ruling was intended as a determination that there were procedural infirmities in scheduling the IEP meetings, the evidence in the hearing record would not support a finding that the timing of the CSE meetings were conducted in a manner inconsistent with the IDEA and that the parents had two weeks to consider their misgivings about Rye Lake.

Turning next to the parties arguments over the September 2018 IEP and Rye Lake, the district appeals from the IHO's finding that it denied the student a FAPE for the 2018-19 school year, in part because the evidence the district presented did not "sufficiently explain how the student's social-emotional challenges" related to self-harm and her diagnosis of an ASD would be addressed at Rye Lake.<sup>21</sup> Specifically, the IHO determined that the Rye Lake principal failed to explain what therapeutic strategies would have been used at the program to address the student's self-harm issues, how the program would provide the student with "explicit instruction in a range of adaptive, social, organizational and regulation skills," and whether there were opportunities for the student to develop social cognitive skills as recommended by the private neuropsychologist. A review of the hearing record shows that these IHO's findings in this regard must be reversed.

The September 2018 IEP meeting information summary reflects that during the meeting, the CSE conducted a lengthy discussion about the student's placement options for the 10-month

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<sup>20</sup> The hearing record shows that the district received acceptance for the student from two potential placements on August 28, and August 31, 2018 (Dist. Exs. 20 at p. 1; 24; 25).

<sup>21</sup> I note that the district did not appeal the IHO's findings that the student's unilateral placement at the Pinnacle School was appropriate and that equitable considerations favor tuition reimbursement (IHO Decision at pp. 23, 25). Therefore, these determinations have become final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*6-\*7, \*10 [S.D.N.Y. Mar. 21, 2013]).

2018-19 school year (Dist. Ex. 20 at pp. 1-9). Specific to the SW BOCES therapeutic support program-intensive (TSP-I) placement at Rye Lake, information about the program provided during the meeting indicated that it offered 12-month, 8:1+2 special class placements for 40 high school students who were provided instruction by dually certified teachers and certified teaching assistants, all of whom were trained in therapeutic approaches, including therapeutic crisis intervention, and had experience working with students with executive functioning challenges (id. at pp. 3-5; see Tr. p. 513).

Specific to the student population, the September 2018 IEP meeting information summary indicated that out of the 40 high school students in the Rye Lake program, approximately 35 percent were female, there were 7 female students within the student's age group, and the majority of classes were "within grade with equally aged peers" (Dist. Ex. 20 at pp. 3-4, 7). Additionally, the IEP indicated that potential students were "[s]creen[ed] against physical aggression and substance abuse," in that students with "histories of aggressive behaviors" and/or who were engaged in "maladaptive substance use" were not accepted into the program (id. at pp. 3, 6). The meeting information summary noted that students with symptoms associated with anxiety, depression and school refusal were common, and the program also had students with an ASD (id. at pp. 6-7). According to the meeting information summary, for students who needed it, Rye Lake also offered an online credit recovery program that was "tied to a certified teacher—in a separate location—in a 1:1 or 3:1 session" (id. at p. 7).

The hearing record shows that the Rye Lake program was housed in two wings within one building, and the students were monitored and supervised at all times (Tr. pp. 519-20; Dist. Ex. 20 at p. 4).<sup>22</sup> According to the meeting information summary, Rye Lake offered a Regents curriculum, "CDOS," internships and vocational studies opportunities, differentiated learning, a multimodal, tailored teaching approach, project-based learning opportunities, and access to a laptop throughout the day (Dist. Ex. 20 at pp. 3-6).<sup>23</sup> Related services provided included OT, physical therapy (PT), speech-language therapy, and nursing services to assist students with individual activities of daily living needs (id. at p. 4). The program was characterized as "highly structured, consistent, predictable, supportive and warm," with an emphasis on "community," curriculum, and social components (id. at pp. 3-6).

To address students' social/emotional needs, the September 2018 IEP meeting information summary indicated that Rye Lake offered at least one individual and one group counseling session per week, and crisis intervention as needed (see Tr. pp. 513-14; Dist. Ex. 20 at p. 3). Counseling services utilized cognitive behavior therapy (CBT), dialectical behavior therapy (DBT), and evidence based social skills approaches—such as social stories—and were "eclectic to meet the needs of the individual student" (see Tr. p. 76; Dist. Ex. 20 at pp. 3-6;). Rye Lake also provided positive behavioral interventions and supports (PBIS), and other behavioral approaches such as a digital token economy system and access to a BCBA for consultation and for an FBA/BIP as

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<sup>22</sup> The Rye Lake principal testified that the building housed the high school and the middle school "which is upstairs", but the two schools did not "intermingle," nor did the TSP-I high school program integrate with other programs on the campus (Tr. pp. 520-21).

<sup>23</sup> The term "CDOS" refers to the Career Development and Occupational Studies commencement credential (8 NYCRR §100.5[d][11]).

needed (see Tr. p. 533; Dist. Ex. 20 at p. 4). Additionally, the meeting summary indicated that Rye Lake used social contracts, described as "very explicit" short-term expectations for instilling positive behaviors (Dist. Ex. 20 at p. 7).

In addition to the information about the Rye Lake program reflected in the September 2018 IEP meeting information summary, participants at the September 2018 CSE meeting including the school psychologist, the high school psychologist, the director of educational services, and the Rye Lake principal testified, at length, during the impartial hearing about those features of the Rye Lake program (see e.g. Tr. pp. 134-41, 444-49, 452-54, 456-60, 509-10, 513-14, 516-18, 524-28, 531-32, 617-19, 623-25; see Dist. Ex. 20 at pp. 3-7).

Turning to the IHO's finding that the hearing record lacked evidence regarding how Rye Lake would address the student's social/emotional challenges related to the risk of self-harm, I initially note that the director of educational services testified, and the hearing record reflects that the parents' concern regarding the student's potential to harm herself was very strongly and specifically linked her impending attendance at the district's high school and not "any other high school" (Tr. pp. 668-69; see Dist. Exs. 19 at p. 8; 20 at pp. 9, 10). Although the hearing record lacks evidence suggesting that the student would have been at elevated risk of engaging in self-harm behaviors if she were to attend Rye Lake, the evidence nevertheless supports that the September 2018 IEP and the Rye Lake program were designed to address her social/emotional needs in this area.

First, at the September 2018 CSE meeting, Rye Lake representatives stated that the program would have implemented the student's IEP including her related service mandates, annual goals, and program modifications/accommodations, which are not in dispute on appeal (Tr. pp. 456-58; see Tr. p. 537; Dist. Ex. 20 at pp. 4, 27-34).<sup>24</sup> The school psychologist testified that the September 2018 CSE specifically added a social/emotional annual goal to the IEP to identify areas of personal strength to improve her self-confidence, which was in addition to the already-present IEP annual goals to improve the student's coping skills and identify/use strategies to "combat heightened emotions" related to identified triggers (Tr. pp. 141-43; Dist. Ex. 20 at p. 29). For Rye Lake students who "enter[] a state of crisis," the school employs between five to seven "response team members" that were trained in therapeutic crisis intervention systems (TCIS) for schools, although all staff were trained to some degree about how to de-escalate students who were emotionally agitated or becoming aggressive (Tr. pp. 575-76). Students considered to be in crisis included those who had "escalated to a point where they become a danger to themselves or somebody else" (Tr. pp. 575-76). The Rye Lake principal testified that the TSP-I program had a psychologist, social worker, registered nurse and school counselor on staff for the students that attend the high school (Tr. p. 513). He described the Rye Lake PBIS five-point value system, of which two components included being safe at all times and having respect for yourself (Tr. pp. 564-65). After each period, teachers award the students points based upon the values demonstrated and reflect with students if they did not demonstrate those values (*id.*). The points go into a "bank account" from which students use the points to purchase desired items from the school store or participate in an outing (Tr. pp. 565-67). Although elaborated on further in testimony, the supports

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<sup>24</sup> Additionally, the Rye Lake principal testified that following his review of the student's records, the 8:1+2 special class size was appropriate for the student because the class ratio could provide her with opportunities to work outside the classroom and receive 1:1 attention (Tr. pp. 531-32).

described above at Rye Lake were also referenced in the September 2018 IEP itself (Dist. Ex. 20 at pp. 3-4), thus the IHO's criticisms of the lack of information regarding Rye Lake were not well supported.

To further address the student's social/emotional needs, the high school psychologist testified that Rye Lake was appropriate because it provided "immense wrap-around therapeutic support," including DBT, CBT and social skills groups that were "informed" by those therapeutic methods, points also referenced in the proposed IEP (Tr. pp. 459-60; see also Dist. Ex. 20 at p. 3). She indicated that these particular methodologies were important to this student specifically, in part because the school psychologist had used them with the student, and because the private neuropsychologist had recommended those methods due to the student's need to develop emotional regulation, executive functioning, focusing, distress tolerance, and interpersonal skills (Tr. pp. 474-76). Additionally, she stated that CBT focused on symptoms of anxiety and depression (Tr. p. 476).

Although the IHO determined that the district failed to present evidence of how Rye Lake would address the student's social/emotional challenges related to her diagnosis of an ASD, review of the evidence in the hearing record shows that conclusion is also unfounded. The school psychologist testified that the student's weaknesses related to her autism diagnosis included social pragmatic deficits, and her need for information to be presented visually, to be "prepped" for transitions, have directions clarified and broken down, use graphic organizers, have tasks broken down, and to improve self-monitoring skills, all of which were incorporated into and addressed by the September 2018 IEP (Tr. pp. 176-77; Dist. Ex. 20 at pp. 24, 27, 29-33).

Specific to how Rye Lake would meet these needs, the school psychologist testified that the Rye Lake psychologist "had been aligned with an autism specific program for over ten years" and according to the Rye Lake principal, staff had "experience with students on the autism spectrum []" through previously working with students with an ASD in other assignments and by attending the "robust professional opportunities" Rye Lake offered (Tr. pp. 148, 532-34). The Rye Lake principal testified that it was "very commonplace" for students "on the spectrum" who attended the program to exhibit "atypical behavior" that may be "off-putting to a general population," but that staff "work[ed] with students through that atypical behavior and tr[ie]d to teach them more typically and socially acceptable behavior" (Tr. pp. 527-28, 571-73). Additionally, the Rye Lake principal stated that there were other students with an ASD diagnosis attending the program and that they were "exploring the grouping of those kids together so we could build a small clinical group to work with and help develop targeted social skills" (Tr. pp. 555-59).

The district's school psychologist, who participated in the Rye Lake intake process with the student and parents, and who worked at the district's high school (high school psychologist) testified that the student required support to improve her executive functioning skills, peer interactions, and ability to get to school on time (Tr. pp. 233, 430, 436-41, 449, 472-73; see Dist. Exs. 20 at pp. 23-27; 26).<sup>25</sup> She stated that the Rye Lake program addressed the student's needs

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<sup>25</sup> The high school psychologist testified that her knowledge of the Rye Lake program came from the Rye Lake psychologist and principal obtained during her two-hour visit to the school, and during the September 2018 CSE meeting (Tr. pp. 469-70, 473).

because it was a "highly structured, highly therapeutic, very consistent and predictable" environment that would have provided the student with an individualized, differentiated curriculum, a high level of support from the certified teachers and teaching assistants, and a "robust" PBIS that focused on teaching organization, responsibility, and how to use appropriate social and coping skills; components of the September 2018 IEP (Tr. pp. 445-48, 453-54; see Dist. Ex. 20 at pp. 27-30). To further address the student's executive functioning needs, the high school psychologist stated that Rye Lake provided features such as "Google classroom" and Chromebooks that enabled students to complete their work and track it, wiggle seats, and preferred seating arrangements (Tr. pp. 453-54; see Dist. Ex. 20 at pp. 4, 30, 32). Specific to the parent's concern at the September 2018 CSE meeting about Rye Lake's ability to address the student's executive functioning needs, the high school psychologist indicated that the program had BCBAs on staff to consult for FBAs and BIPs as well as a school nurse who could address the student's daily living skill needs (Tr. p. 456; see Dist. Ex. 20 at pp. 22-27, 29).

To address the student's need to improve peer interaction skills, the September 2018 IEP provided annual goals for the student to review social interactions/situations occurring in less structured environments and identify a peer's potential thought or reaction based on nonverbal cues, and to initiate peer interactions during less structured opportunities (Dist. Ex. 20 at pp. 28-29). The IEP also provided one 40-minute session per week each of individual and small group counseling services (id. at p. 30). Testimony reflected that at Rye Lake there were "semi-structure[d]" opportunities for students to engage in social interactions in the hallways and a focus of the PBIS was using appropriate social skills and interacting with peers in an appropriate way (Tr. pp. 139, 447). As previously stated, Rye Lake also provided students with social skills group counseling services in which the clinicians grouped students they felt were appropriate to "intermingle together" (Tr. pp. 459-60, 475-76, 554). Further, according to the principal, "a lot of time we will try to socially engineer some social groups for students because we totally acknowledge that students need interaction to develop those social skills" (Tr. pp. 554).

Finally, the high school psychologist testified that during the September 2018 CSE meeting, the Rye Lake school psychologist described how he successfully addressed the needs of a student who had exhibited school avoidance/phobia, and that should the student exhibit school avoidance at Rye Lake, the program would maintain ongoing contact with the family either in person or by telephone to provide training, coaching, interventions and strategies (Tr. pp. 449-52; see Dist. Ex. 20 at p. 27). The Rye Lake principal testified that staff had "pretty significant experience" with students who exhibited school refusal and that they "tailor our approach to meet that student where they are" (Tr. pp. 534-35). Specifically, Rye Lake uses strategies such as incentives for walking into the school building, creating a flexible schedule to take off some of the academic pressures, and conducting therapy sessions in the parking lot (Tr. pp. 535-36).

Therefore, contrary to the IHO's conclusions, the evidence in described reflects that the September 2018 IEP provided an out-of-district setting with a small student to staff ratio in a supervised environment that addressed the student's needs in great detail and that Rye Lake was capable of implementing that IEP with a highly trained staff having experience in, among other things, crisis intervention and numerous therapeutic approaches. The IHO's determinations to the contrary must be reversed.

### C. Functional Grouping—Rye Lake

In addition to rejecting the IEP and criticizing the lack of therapeutic support at Rye Lake, the IHO also found that Rye Lake was not appropriate because the student would not be grouped appropriately (IHO Decision at p. 22). The district argues that the hearing record demonstrates the student would have been appropriately grouped with similarly situated peers at Rye Lake (Req. for Rev. at p. 10). The parents argue that the record fails to show how the student would be grouped appropriately with sufficiently similar peers (Answer at pp. 9-10).

One of the problems with an improper grouping claim in this case is that grouping is not a CSE determination and thus the claim is impermissibly speculative.<sup>26</sup> As discussed in much greater length in the undersigned's decision in Application of the Board of Educ., Appeal No. 18-033, the Board of Regents modified how the grouping of special education students is conducted in certain special education placements when it modified the policies regarding the process in which IEPs are created beginning in the 1991-92 school year. While the Regents' policy changes left intact the requirements in Section 200.6 that school districts must group students together by similarity of needs when they entered the public program (8 NYCRR 200.6 [a][3], [f]), the automatic right that parents once enjoyed to review that placement in a second mandated CSE meeting known as "phase II" that provided the opportunity for parents to examine the actual grouping of the student with his or her peers after a student begins attending the public program was explicitly discontinued under State regulation. Since that time, the State has never re-promulgated a policy to allow parents to challenge grouping when the child did not attend a public program either prospectively or retrospectively.

The State's approach to grouping is also distinct from any federal requirement. Neither the IDEA nor federal regulations require students who attend a special class setting to be grouped in any particular manner. The United States Department of Education has opined that a student must be assigned to a class based upon his or her "educational needs as described in his or her IEP" and not on "a categorical placement," such as one based on the student's disability category (Letter to Fascell, 18 IDELR 218 [OSEP 1991]). While unaddressed by federal law and regulations, State regulations set forth some requirements that school districts must follow for grouping students with disabilities. State regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii]; 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [approving an IEP that placed a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]). It is in State regulation that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to: levels of academic or educational achievement and learning characteristics; levels of social development; levels of physical development; and the management needs of the students in the classroom (8 NYCRR 200.6[h][2]; see 8 NYCRR 200.1[ww][3][i][a]-[d]). The social and physical levels of development of the individual students must be considered to ensure beneficial growth for each student, although neither may be a sole basis for determining placement (8 NYCRR 200.6[a][3][ii], [iii]). Further, the management needs of students may vary, so long as

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<sup>26</sup> The district's attorney raised the speculative nature of the grouping claim during the impartial hearing (Tr. pp. 561-62).

the modifications, adaptations, and other resources provided to students do not "consistently detract from the opportunities of other students" in the class to benefit from instruction (8 NYCRR 200.6[a][3][iv]). SROs have often referred to grouping in the areas of academic or educational achievement, social development, physical development, and management needs collectively as "functional grouping" to distinguish that set of requirements from grouping in accordance with age ranges (see, e.g., Application of a Student with a Disability, Appeal No. 17-026).

Here, the student never actually attended Rye Lake as she was unilaterally placed at Pinnacle for the 2018-19 school year (Tr. p. 941; see Dist. Ex. 23). Therefore, with the record before me, any alleged grouping claim is impermissibly speculative.

The Second Circuit has held that "our precedent bars us from considering such retrospective evidence" ... (J.C. v New York City Dep't of Educ., 643 Fed.Appx. 31, 33 [2d Cir. March 16, 2016]; [finding that "grouping evidence is not the kind of non-speculative retrospective evidence that is permissible under M.O." where the school possessed the capacity to provide an appropriate grouping for the student, and plaintiffs' challenge is best understood as "[s]peculation that the school district [would] not [have] adequately adhere[d] to the IEP" (quoting R.E., 694 F.3d at 195)]. Various district courts have followed this precedent post M.O. (G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at \*15 [S.D.N.Y. Sept. 19, 2016] same; L.C. v. New York City Dep't of Educ., 2016 WL 4690411, at \*4 [S.D.N.Y. Sept. 6, 2016]"Any speculation about which students [the student] would have been grouped with had he attended [the proposed placement] is just that—speculation. And speculation is not a sufficient basis for a prospective challenge to a proposed school placement" (citing M.O., 793 F.3d at 245)].

Although the student was not placed in Rye Lake due to her unilateral placement at Pinnacle and I find that the parents' argument regarding functional grouping is impermissibly speculative, I will review evidence in the hearing record regarding functional grouping for the sake of thoroughness. In this case, the evidence shows in any event that Rye Lake was at least capable of appropriately grouping the student.

Initially, the district's school psychologist testified the student would have been placed with similarly functioning peers at Rye Lake (Tr. pp. 144-46). The Rye Lake principal testified that the student would have been appropriately grouped as the program is designed for students with learning disabilities and social/emotional deficits (Tr. pp. 521, 529-32, 553-57). The principal testified that prior to admission, they look at whether a student would have a natural peer group and they considered the student's behaviors; they knew that they "had students that would be able to socialize with [the student] that we c[ould] grow together" (Tr. p. 522).<sup>27</sup> Specifically, the principal testified that when Rye Lake performs an intake and determines acceptance of a student, one of the variables they look at is whether "the student [will] have a natural peer group or peer group that [they] could socially engineer" (id.). After they accept a student, Rye Lake attempts to craft a class schedule to enable the student to obtain the proper credits for graduation and then they

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<sup>27</sup> The principal testified that there were students who were seeking credit recovery at Rye Lake (Tr. pp. 523-24). He testified that there are not a lot of these students and that the credit recovery students are in a separate location (Tr. pp. 524-25).

will engineer social groups for social skills, which is done by a counselor (Tr. pp. 553-54).<sup>28</sup> The principal explained that they accepted the student because they believed they had a group of students appropriate for the student to learn alongside and that they knew that the school had other students that would be able to socialize with the student (Tr. pp. 522, 554-55).<sup>29</sup> Although the principal acknowledged that they do not necessarily group students based on similar cognitive or academic ability or disability classification, he testified that the "CSE was searching for a state-assessed program" and that Rye Lake was "a state-assessed program" (Tr. pp. 523, 554). Finally, the principal testified that he did not believe the school ever created a schedule for the student because the parents did not accept the offer to place the student at Rye Lake (Tr. pp. 561-62).<sup>30</sup> Based on the evidence regarding the Rye Lake program, the record demonstrates that had the student attended the program, Rye Lake was capable of grouping the student in compliance with the state's grouping requirements.

## **VII. Conclusion**

In accordance with the foregoing, I find that the district offered the student a FAPE for the 2018-19 school year as the educational programs recommended by the June 2018 and September 2018 CSEs were appropriate and that the IHO erred in determining that the student would not have been appropriately grouped at Rye Lake. The district did not challenge the IHO's determinations with respect to Pinnacle and equitable considerations, thus review of those aspects of the case is unnecessary.

### **THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the decision of the IHO dated August 11, 2019 is modified by reversing those portions that determined that the district denied the student a FAPE and directed the district to reimburse the parents for Pinnacle and associated transportation costs.

**Dated: Albany, New York  
November 12, 2019**

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**JUSTYN P. BATES  
STATE REVIEW OFFICER**

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<sup>28</sup> It is noted that during the principal's testimony he used the terms counselor and clinician interchangeably. The principal testified several times that the school clinicians would have decided the student's grouping had she come to the school (Tr. pp. 554, 556-57, 559). It was explained that the counselor groups students "they feel are appropriate to intermingle together" for group counseling sessions (Tr. p. 554). Further, that they "will try to socially engineer some social groups for students because we totally acknowledge that student need interaction to develop those social skills. So we spend a lot of time and a lot of deliberate focus making sure that we bring students that can socially jive together" (*id.*).

<sup>29</sup> The parents testified that during her tour, Rye Lake did not indicate it understood the student's needs related to her autism diagnosis (Tr. p. 937). However, the principal testified that they had other students on the spectrum and were exploring grouping those students together in order to "build a small clinical group to work with and help develop targeted social skills" (Tr. p. 555).

<sup>30</sup> This supports the previous finding that the parent's grouping argument is impermissibly speculative.