The University of the State of New York

The State Education Department
State Review Officer
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No. 19-091

Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Elmira City School District

Appearances:
Kenney Shelton Liptak Nowak, LLP, attorneys for petitioner, by Patrick M. McNelis, Esq.

The Law Firm of Frank W. Miller, attorneys for respondent, by Charles C. Spagnoli, 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 parent) appeals from a decision of an impartial hearing officer (IHO) which determined that the respondent (the district) was not responsible for the lack of implementation of the program and services recommended for her daughter by the Committee on Special Education (CSE) for the 2018-19 school year. The appeal must be sustained in part.

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's history is significant for global developmental delay of unknown etiology (Joint Ex. 11 at p. 1). She has been diagnosed as having multiple medical conditions, including epilepsy, cortical vision impairment (CVI), hypotonic cerebral palsy, and ineffective airway clearance, among other things (Joint Ex. 7 at p. 1; Dist. Ex. 3 at pp. 1-2; see Dist Ex. 7 at pp. 2-4). The student requires pulmonary clearance, which consists of vesting, cupping, nebulizer treatments, cough assist, postural drainage, and suctioning (Dist. Ex. 3 at p. 3). She has a gastrostomy and jejunostomy (a G-tube and a J-tube) through which she receives nutrition and medications (id. at pp. 4-5). The student has been diagnosed as having autism, is nonverbal, and unable to walk (Joint Ex. 11 at p. 2; Dist. Ex. 3 at p. 2; see Joint Ex. 4 at p. 3).

For the 2017-18 school year, the student attended an inclusion class at a district universal prekindergarten program (UPK) for three half-days per week with a 1:1 nurse, who also served as the student's aide, and the student received special education itinerant teacher (SEIT) services, as well as related services of occupational therapy (OT), physical therapy (PT), teacher of the visually impaired (TVI) services, speech-language therapy, and music therapy (Tr. pp. 315, 386; Joint Exs. 1 at p. 1; 5 at p. 1; 7 at p. 2; 11 at p. 1).[1]

For the 2018-19 school year, a district committee report dated June 13, 2018, reflected the CSE's recommendations that the student was eligible for special education as a student with multiple disabilities and that the student attend placements in a 6:1+1 BOCES special class and a 12:1+1 district special class, and receive related services of speech-language therapy, OT, PT, indirect and consultant TVI services, music therapy, and the provision of a 1:1 nurse (Dist. Ex. 1 at p. 3). A subsequent district committee report dated September 14, 2018 reflected a change in the CSE's placement recommendation to a 12:1+(3:1) BOCES special class (compare Dist. Ex. 1 at p. 2, with Dist. Ex. 1 at p. 3).[2]

In or around mid-September 2018, the parent provided the district with a document titled "Physician's Orders and Treatment Plan," which outlined a treatment plan for the student's medical-related needs (Tr. pp. 52, 96; see Dist. Ex. 3), the validity of which became a topic of contention between the parent and the BOCES staff (Tr. pp. 82-84; see Tr. pp. 87-91; Dist. Ex. 3).[3]

By email to the district CSE chairperson, dated September 19, 2018, the parent requested a "program review" for the student, noting that a previous review on September 14, 2018 had been "cut short," and set forth items and questions that she wanted to address (Dist. Ex. 4 at pp. 1-4).

[1] The parent reported that the student's 1:1 nurse was a private duty nurse paid for by Medicaid and that she was not available five days per week (Tr. p. 386). The student's April 2018 independent functional vision and learning media assessment indicated that, at that time, the student had not had a nurse available to her to attend school so she received services at home (Joint Ex. 7 at p. 2). Testimony by the student's mother indicated that she was a licensed practical nurse (LPN) who needed to renew her license and that she provided medical/nursing services to the student when she was in preschool when a nurse was absent and when she took the student to school for therapies (Tr. pp. 20, 22). Her testimony indicated she provided diaper changes, care, transfers, some suctioning, as well as helping with the student's education, i.e., helping her to clap her hands (Tr. pp. 21-22).

[2] The IEPs that correspond with the June 13, 2018 and September 21, 2018 committee reports were not entered into the hearing record as evidence.

[3] During the impartial hearing, the attorney for the district noted that his copy of district exhibit 3, did not include page "6," was missing page "7," and had two copies of page "8" (Tr. pp. 85-86). After an "off the record" discussion, the attorney for the district manually added page "6" to district exhibit 3 before the first copy of page "8" (Tr. p. 87). There is no mention of adding page "7" in the hearing record. It is unclear if this was an oversight or if the document was paginated this way. In any case, as page "7" of district exhibit 3 was not before the IHO and both parties were aware of the missing page, it is also not part of the hearing record filed with the Office of State Review and a request was not made for the parties to add it to the hearing record (see 8 NYCRR 279.10[b] [a State Review Officer "may seek additional oral testimony or documentary evidence if the State Review Officer determines that such additional evidence is necessary"]).

In an email dated September 21, 2018, the BOCES director of special education (BOCES director) advised the district that it was "entirely possible" that BOCES was not going to be able "to meet [the student's] needs to the point of acceptance for her mother" (Dist. Ex. 9). The BOCES director indicated that the student's therapists, aides, teachers, and nurses were putting in "so much extra time" on communication and programming for the student but that the parent remained unsatisfied and presented the staff with "daily requests and expectations" and engaged in "invasive behavior" (id.). The BOCES director further indicated that there was a "real chance" that the licensed practical nurse (LPN) assigned to the student would quit, and if that happened, there would be no nursing option for the student (id.).

The student attended the BOCES program for one day on September 25, 2018 (Tr. pp. 285, 290). On or around September 26, 2018 the district CSE chairperson, the BOCES director and principal, the BOCES LPN and registered nurse (RN), the parent, and the parent's SKIP care coordinator met to discuss the student's medical orders and care plan (Tr. pp. 79-83, 117, 286).[4, 5]

In an email dated September 28, 2018, the BOCES principal thanked the district's CSE chairperson and BOCES personnel for "meeting this morning" and advised that the student would not be attending school at BOCES because the nurses needed "clarification orders" from the student's doctor before they could treat the student (Dist. Ex. 8 at p. 1). The BOCES principal also set forth notes from the meeting that included 16 separate issues that the nurses felt required clarification or correction regarding the student's medical care plan (id. at pp. 1-2).

In a letter addressed "To Whom It May Concern," dated October 18, 2018 and faxed to an unidentified recipient on October 23, 2018, the student's pulmonologist from Boston Children's Hospital outlined a "Sick Plan" for the student (Dist. Ex. 2 at pp. 7-9; see Tr. p. 51).[6] Additionally, on or around November 8, 2018, the parent provided the district with physician's orders for administration of medication to the student in school (Tr. pp. 46-51; see Dist. Ex. 2 at pp. 2-6).[7] By cover letter accompanying these documents, signed and dated December 3, 2018, the BOCES RN indicated that documents attached set forth the "PRN (as needed) medication orders," as well as "the respiratory order" with her notes, and that she still needed daily medication orders, a medical care plan for at school, and orthopedic orders, and that concerns regarding the student's respiratory order needed to be addressed (Dist. Ex. 2 at p. 1; see Tr. p. 81).[8]

[4] The individual who, in most instances throughout the hearing record, is referred to as the BOCES principal (see Tr. pp. 53, 79-80, 107, 112, 117, 277), is elsewhere referred to as the BOCES supervisor of special education (Dist. Ex. 8 at p. 2). For purposes of this decision, this individual shall be referred to as the BOCES principal.

[5] The hearing record indicates that Sick Kids need Involved People, or SKIP, is a non-profit organization that assists children that have medical and developmental disabilities (Tr. pp. 5, 343).

[6] On October 24, 2018, the parent filed the original due process complaint notice underlying the present proceedings, alleging that the district failed to offer the student a free appropriate public education (FAPE) for the 2017-18 and 2018-19 school years (Oct. 2018 Due Process Compl. Notice).

[7] The physician's orders were signed by the physician on November 1, 2018 and by the parent on November 8, 2018 (Dist. Ex. 2 at pp. 2-6).

[8] The documents included with the BOCES RN's cover letter have additional writing on them in gray that was not

On December 7, 2018 the district physician, CSE chairperson, director of special education, school nurse, the parent, the SKIP care coordinator, and the student's respiratory therapist met to clarify the student's medical orders (Tr. pp. 286-87). The CSE chairperson testified that, during the meeting, the district physician indicated that the RN's nursing certification was sufficient qualification for her to provide emergency suctioning (Tr. pp. 287-88).

On February 4, 2019 the BOCES RN resigned from BOCES (Tr. p. 103).[9] In addition, the LPN designated for the student left BOCES employment shortly thereafter (Tr. pp. 103-04).

According to the hearing record, at some point between the end of January and the beginning of February, the student was discharged from BOCES (Tr. pp. 123, 134-35, 289; Dist. Ex. 13 at p. 1). The district started providing the student's related services at a district elementary school starting on or around February 25, 2019, with the parent providing the student's medical care during the therapies (Tr. pp. 289-91).

On March 8, 2019, the CSE convened for an annual review (Joint Ex. 16 at p. 1). The CSE determined that the student remained eligible for special education as a student with multiple disabilities and recommended five 60-minute sessions per week of "Special Class-Tutoring," as well as a 1:1 nurse and the following related services: one 40-minute session biweekly of individual music therapy; four 30-minute sessions per week of individual OT; five 30-minute sessions per week of individual PT; five 15-minute sessions per week of individual skilled nursing services; five 30-minute sessions per week of individual speech-language therapy; one 30-minute session per week of indirect TVI instruction; and one 30-minute session per week of individual TVI instruction (Joint Ex. 16 at pp. 16-17). The meeting minutes for the March 2019 CSE meeting indicated that the district had been unable to secure an RN for the student, which she required for her transportation as well as her school program, and, as such, her health care needs could not be addressed "in current program" (Joint Ex. 13 at p. 2). The minutes further indicated that the CSE proposed that a residential placement be investigated and that, in the interim, the student's therapies and five hours per week of tutoring be provided with the student's "home aide" supporting her "health needs/emergency response" during their implementation, subject to a "legal waiver" between the district and the family (id.).

A March 8, 2019 committee report reflected that the parent was in agreement with the services listed on the document, including tutoring, music therapy, OT, PT, and speech-language therapy, but was not in agreement with the CSE's recommendation for a residential placement (Dist. Ex. 1 at p. 1).[10] A March 11, 2019 prior written notice indicated the district would pursue a residential placement for the student because it could not secure the required staff and providers

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original to the documents (see Dist. Ex. 2 at pp. 2-9; see also Tr. pp. 46-51).

[9] The BOCES RN provided notice of her resignation a month in advance in January 2019 (Tr. pp. 134-35).

[10] The committee report did not include all of the services contained on the student's March 2019 IEP (compare Dist. Ex. 1 at p. 1, with Joint Ex. 16 at p. 16). Specifically, the committee report omitted skilled nursing services and TVI services (compare Dist. Ex. 1 at p. 1 with Joint Ex. 16 at p. 16). The parent testified that she indicated verbally at the March 2019 CSE meeting that she was in agreement with the list of services on the committee report "[f]or the time being. . . . [i]n anticipation of th[e] hearing" (Tr. pp. 44-45).

necessary to provide the student with a special education program in a district public school or a BOCES program, specifically staffing for the direct nursing services (Joint Ex. 15 at pp. 1-2).

A. Due Process Complaint Notice

In an amended due process complaint notice dated March 21, 2019, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2017-18 and 2018-19 school years (IHO Ex. I at p. 2).[11]

Relative to both the 2017-18 and 2018-19 school years, the parent argued that the district "fail[ed] to recommend appropriate instruction and/or services for the [s]tudent" (IHO Ex. I at p. 2). Also relevant to both school years, the parent argued that the district failed to provide vision therapy for the student since November 2017 (id).

Specific to the 2018-19 school year, the parent argued that the district failed "to implement special education, supplementary aids and services, and related services to the [s]tudent" (IHO Ex. I at p. 2). Initially, the parent argued that the district refused to permit the student to attend her recommended program based on its "unilateral interpretation of medical documentation" pertaining to the student and "unilateral determination as to the insufficiency of the [s]tudent's nursing care plan" (id.). The parent further argued that the district was solely responsible for the student's inability to attend school (id.). Next, the parent argued that, during CSE meetings convened to develop or amend the student's IEPs for the 2018-19 school year, the district failed to ensure the attendance of a person "who could interpret the evaluative data relating to the [s]tudent's medical needs," such as a physician or nurse (id.). In addition, the parent argued that the student's nursing care plan was not discussed during the CSE meeting (id.). The parent claimed that the district wrongfully accused the parent of fraudulently providing medical information to the school without any reasonable foundation for such accusation and reported the parent to child protective services (CPS), instead of working collaboratively with her (id. at p. 3). The parent argued that this further demonstrated the district's failure to collect and review reliable evaluative information about the student (id.). Additionally, the parent claimed that the student's then-current service providers were not sufficiently trained or sufficiently familiar with the needs of a student with CVI (id. at p. 2).

Next, the parent alleged that the March 2019 CSE's recommendation of a residential program for the student was inappropriate because it was "overly restrictive" and deprived the parent of her right to maintain her child at home (IHO Ex. I at p. 2). The parent further argued that the CSE's recommendation was based on "administrative convenience" and not on the student's needs (id.). The parent asserted that the district's recommendation "result[ed] from its unwillingness to develop an appropriate educational environment for the [s]tudent . . . and ensure that individuals working with the [s]tudent have proper credentials, . . . training, and experience, to work with the [s]tudent" (id.). The parent further argued that the district failed to include "an

[11] The amended due process complaint notice contains handwritten notations and circles around several allegations, which were presumably made by either the attorney for the district or the IHO (IHO Ex. I at pp. 2-3). The district and/or the IHO is reminded that it is necessary to avoid annotating the documents maintained as the official record of the proceedings as it becomes very difficult during subsequent administrative and judicial review to decipher what notations, if any, should be attributed to the various document authors or to the party offering the exhibit. The notations have been disregarded.

appropriate safety net" on "the recommended IEP" to ensure the student would receive special education if the student had any extended absence due to her medical needs (id. at p. 3).

As relief, the parent requested that the district be required to provide the student with a FAPE and return her to a school-based program for the pendency of the proceedings (IHO Ex. I at p. 3). The parent also requested an appropriate IEP and independent educational evaluations (IEEs) in the areas of OT, PT, speech-language therapy, and vision therapy (id.). Lastly, the parent requested "additional services" to compensate for the district's failure to provide the student with a FAPE (id.). Finally, the parent sought "attorneys' fees and costs associated with this matter" (id.).

B. Impartial Hearing Officer Decision

After multiple prehearing conferences, the parties proceeded to an impartial hearing on May 21, 2019, which concluded the following day on May 22, 2019 (Tr. pp. 1-465).[12] In a decision dated August 16, 2019, the IHO found that the district offered the student a FAPE for the 2017-18 school (IHO Decision at p. 8).[13] Further, the IHO "declined" to find that the district failed to provide the student with a FAPE for the 2018-19 school year (id. at pp. 11, 13).

With respect to the 2017-18 school year, the IHO noted that it was difficult to determine whether the recommended program was "sufficient or appropriate" because the district failed to introduce the student's IEP developed by the Committee on Preschool Special Education (CPSE) into evidence (IHO Decision at pp. 7-8). Notwithstanding this, the IHO found that, based on his review of the hearing record and testimony from the student's prekindergarten teacher, the district "successfully" established that it offered the student a FAPE for the 2017-18 school year and that the student made progress (id. at p. 8). However, with respect to the student's needs related to her CVI, the IHO found that the student was "denied" vision therapy services from November 2017 to June 2018 and directed the district to calculate and arrange for compensatory services for the amount of time the student was deprived of the services (id. at pp. 19-20).

[12] According to the IHO's decision, prehearing conferences took place on January 7, 2019, January 16, 2019, January 17, 2019, February 15, 2019, March 5, 2019, and March 28, 2019 (IHO Decision at p. 3). In addition, it is unclear from the hearing record whether additional prehearing conference(s) took place on March 26, 2019 (described as the "last" such conference during the first day of the impartial hearing on May 21, 2019), and/or on April 5, 2019 (as referenced in a letter from the IHO to the district clerk) (compare IHO Decision at p. 3, with, Tr. p. 7, and Letter from IHO to Dist. Clerk [Apr. 10, 2019]). In any case, there are no transcripts or written summaries of any of the aforementioned prehearing conferences included as part of the hearing record, as required by State regulation (8 NYCRR 200.5[j][3][xi]).

[13] The copy of the IHO's decision included with the hearing record filed with the Office of State Review was missing page "22," and instead included two copies of page "23," which set forth a portion of an exhibit list, implying that the missing page included the beginning of the exhibit list. In response to correspondence from the Office of State Review, the district explained that the copy of the decision filed represents the decision as received by the district. The district subsequently filed what it received from the IHO in response to an inquiry about the missing page, including what appears to be the first page of the IHO exhibit list; however, apparently as a consequence of the format in which the document was transmitted from the IHO to the district, the pagination is different from the copy of the decision originally filed with the Office of State Review.

Relative to the 2018-19 school year, the IHO noted the district's failure to introduce the student's IEP into evidence and the lack of documentary or testimonial evidence about the nature, duration, or frequency of the student's related services (IHO Decision at p. 9). Nevertheless, the IHO found that, regardless of the contents of the student's IEP, it was never fully implemented because the student attended her recommended program for only one day on September 25, 2018 (id.). However, the IHO found that the failure of the student to receive any of her educational program from September 2018 to February 2019 was "directly and solely attributable to the [p]arent's improper conduct in altering [the] [s]tudent's [p]hysician's care plans," as well as the parent's refusal to send the student to her BOCES program until her demands that the student's nurse receive additional training in suctioning were satisfied (id. at p. 11). The IHO noted that, although the parent perceived herself "as a strong advocate for [the] [s]tudent," this did not "entitle her to question the qualifications of [d]istrict or BOCES personnel or to establish demands requiring personnel to seek additional training" (id.).[14] The IHO found that, but for the "[p]arent's intrusive actions," the district was prepared to and capable of providing the student with special education services from September 2018 to February 2019 and, therefore, the IHO found that the district should not be held responsible for the student only attending the BOCES program for one day between September 2018 and February 2019 (id.).

With respect to the time period from February 4, 2019 to May 23, 2019, the IHO "decline[d] to find" that the district failed to provide the student a FAPE (IHO Decision at p. 13). The IHO noted that the district conceded it was unable to provide the student with a special education placement and services after the BOCES program "terminated [the] [s]tudent" in February 2019 because the district was unable to hire a nurse to "attend to [the] [s]tudent" (id. at p. 12). The IHO noted the district's efforts to find a candidate for the position and found that the parent's counsel's contention that the district somehow failed the student by not seeking union approval to make an exception to the compensation caps set forth in its agreement to be without merit (id. at pp. 12-13). The IHO also noted that RNs and LPNs "are in short supply and great demand as available health care services burgeon"; therefore, the IHO found that the district was "in the position where there [i]s an [i]mpossibility of [p]erformance" (id. at p. 13). Thus, the IHO directed the district to continue its efforts to secure the required nurse so that the student could access her educational program (id. at pp. 13, 20). With respect to the student's needs related to her CVI, the IHO found that, while there was no indication that the student received vision therapy, there was also insufficient evidence in the hearing record to determine whether the student required such services as part of her program for the 2018-19 school year (id. at p. 19).

Turning to the March 2019 IEP, which was entered into evidence, the IHO noted that, although the IEP did not indicate that the CSE recommended a residential placement, the March 2019 CSE's ultimate recommendation was that it would pursue a residential placement for the student (IHO Decision at pp. 14-16).[15] The IHO also noted that the parties framed the issues before

[14] The IHO also found that the parent's contention that the district reported the parent to CPS to be unsupported by the evidence because the IHO determined that it was the BOCES RN who made the referral to CPS (IHO Decision at pp. 10-11).

[15] The IHO presumed that the March 2019 CSE convened to develop an IEP for the student's 2019-20 school year; however, the implementation date on the IEP was March 14, 2019 and, therefore, the recommendations therein related to the remainder of the 2018-19 school year as well (IHO Decision at p. 14; Joint Ex. 16 at pp. 2, 16-19).

him to include whether a residential placement was appropriate for the student (id. at p. 17). The IHO indicated that such a recommendation was not appropriate, highlighting the time the student would have to spend separated from her family and the distance of the three residential facilities named by the district from the student's home, as well as the loss of opportunities for the student to participate in "local activities" and to access her non-disabled peers (id.). Nevertheless, the IHO opined that the district had no other option because it had been unable to secure the services of a nurse and a residential placement would assure the presence of a nurse for the student (id. at pp. 17-18). The IHO again attributed the district's dilemma to the parent's conduct, noting testimony that the parent "consistently questioned and accused staff, nurses and teachers" and finding that the parent's interactions with the BOCES RN resulted in the nurse's resignation (id. at p. 18). Thus, even though the IHO determined that a residential placement was not appropriate for the student, he found that the district "correctly and appropriately determined that, in order to provide [the] [s]tudent with her mandated special education program, its only option [wa]s to place [the] [s]tudent in an appropriate residential facility in which [the] [s]tudent c[ould] be provided her program under the supervision of an appropriately certified nurse" (id.).

Turning to the parent's request for IEEs in the areas of OT, PT, speech-language therapy, and vision therapy, the IHO found there was no evidence that established that the parent would be entitled to such relief and, therefore, denied the parent's request (IHO Decision at p. 20).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred in finding that the district offered the student a FAPE for the 2018-19 school year. The parent argues that the IHO erred in finding that the district provided the student with a FAPE during the 2018-19 school year, notwithstanding the district's "gross and material failure to implement the student's IEP." More specifically, the parent alleges that the district failed to provide the student with "virtually any academic instruction during the 2018-19 school year." The parent also argues that the district denied the student a FAPE by requiring the parent to provide nursing services for the student so that the student could receive related services. The parent also appeals the IHO's finding that she frustrated or impeded the district's ability to implement the student's IEP. In addition, the parent appeals the IHO's finding that the student may be assigned to a residential placement, notwithstanding the fact that the IHO found that it was wholly inappropriate for the student. The parent also argues that a residential program would not represent the student's LRE. The parent appeals the IHO's failure to award compensatory education services in light of the district's failures. Lastly, the parent argues that the district failed to meet its burden of proof, persuasion, and production in that all of the district's witnesses were administrators and not service providers of the student.

As relief, the parent requests specific findings pertaining to the district's alleged failure to implement the student's IEP during the 2018-19 school year and with regard to the appropriateness of a residential placement for the student. The parent also requests compensatory services for the district's failure to provide the student a FAPE.

In its answer, the district generally admits or denies the parent's allegations and argues that the IHO's decision be upheld in its entirety. The district also asserts several defenses, including that the request for review fails to state a claim upon which relief may be granted "because it only makes conclusory statements about the appropriateness of the placement." The district also argues

that the request for review seeks relief beyond the scope of the authority of the SRO. Next, the district argues that the matters complained of are the result of the conduct or nonfeasance of the parent and not any wrongful conduct of the district. In addition, the district argues that the relief requested by the parent is contrary to controlling law and thus barred and impossible as a matter of law and public policy. The district also argues that the relief requested is barred by the doctrine of equitable estoppel. Additionally, the district argues that the parent's request for review was not accompanied by a notice of request for review as required by State regulation and, instead, a notice of request for review was improperly served at a later date. The district requests that a residential placement be declared an appropriate placement for the student and that the parent's request for compensatory services be rejected.

In a reply, the parent responds to the assertions made in the district's answer and reiterates the same relief requested in her request for review. Initially, the parent argues that the request for review provides a clear and concise statement of issues presented and therefore is in conformity with State regulations. The parent also argues that the relief requested is within the scope of authority of the SRO. In addition, the parent argues that, contrary to the district's contentions, the matters complained of in the hearing record are the direct result of wrongful conduct of the district. Next, the parent argues that the requested relief is not contrary to controlling law nor is it impossible as a matter of law and public policy. The parent further argues that the district's defense of equitable estoppel would favor the parent and not the district. With respect to the district's contention that the notice of request for review was improperly served, the parent asserts that the initial omission of the notice of request for review was a clerical oversight, which was immediately corrected, that the request for review was timely served, and that the district suffered no prejudice.

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]).[16]

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

VI. Discussion

A. Preliminary Matters

1. Compliance with Practice Regulations

Initially, the district contends that the parent's request for review must be dismissed because she served the notice of request for review as a separate document on a later date, rather than along with the request for review. The district further asserts that the request for review must be dismissed because it fails to state a claim upon which relief may be granted, in that it contains only conclusory statements about the appropriateness of the recommended placement.

Each request for review filed with the Office of State Review must contain a "Notice of Request for Review," the content of which is set forth in State regulation and generally notifies a responding party of the requirements with respect to preparing, serving, and filing an answer to the request for review (8 NYCRR 279.3).

State regulation further provides that a request for review "shall clearly specify the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and order to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate what relief should be granted by the [SRO] to the petitioner" (8 NYCRR 279.4[a]). Additionally, the request for review "must conform to the form requirements in section 279.8 of this Part" (8 NYCRR 279.4[a]). Section 279.8 of the State regulations requires, in relevant part, that a request for review shall set forth:

> (1) the specific relief sought in the underlying action or proceeding;
>
> (2) a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review; and
>
> (3) citations to the record on appeal, and identification of the relevant page number(s) in the hearing decision, hearing transcript,

[16] 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).

> exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number.

(8 NYCRR 279.8[c][1]-[3]). The regulation further states that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][4]).

In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the dismissal of a petition by an SRO (8 NYCRR 279.8[a]; 279.13; see T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015], quoting Foman v. Davis, 371 U.S. 178 [1962]).

Turning to the district's contentions, there is no dispute that the parent failed to serve a notice of request for review along with her request for review. The parent notes in her reply that the later filing of the notice of request for review resulted from a clerical oversight, which was corrected upon its discovery (Reply ¶ 6).[17] As noted above, the notice of request for review serves the important purpose of providing a respondent with the critical regulatory directives for properly responding to an appeal. However, in this instance it is unclear why the late delivery of the notice would warrant dismissal of the parent's request for review, as the district requests, when the district does not allege how the later delivery of the notice compromised or prejudiced its ability to timely prepare, serve, or file an answer.

Next, the district asserts that the request for review must be dismissed for failure to state a claim upon which relief may be granted because it contains only conclusory statements about the appropriateness of the recommended placement. However, the request for review sufficiently sets forth the reasons why the parent is challenging the IHO's decision and the relief that the parent is seeking upon review, including the reasons why the parent is challenging the CSE's decision to pursue a residential placement for the student.[18] Moreover, the district was able to formulate an

[17] The notice of request for review is dated September 27, 2019; whereas, the request for review is dated and was verified on September 23, 2019. It is unclear on what date the parent served the documents on the district since proof of service was not filed with the Office of State Review as required by State regulation (8 NYCRR 279.4[e]). This is notwithstanding that, by letter dated September 27, 2019, accompanying the parent's filing of the request for review, parent's counsel stated his intent to send the original verification and affidavit of service of the request for review "under separate cover." In any event the district does not allege improper service of the request for review and did serve and file an answer thereto.

[18] This is not to say that the request for review is without flaws. For example, the request for review completely lacks citations to the IHO decision or the hearing record, which are required by State regulation (see 8 NYCRR 279.8[c][3]). The parent—and her counsel—is cautioned that, while a singular failure to comply with the practice requirements of Part 279 may not warrant an SRO exercising his or her discretion to dismiss a request for review (8 NYCRR 279.8[a]; 279.13; see Application of a Student with a Disability, Appeal No. 16-040), an SRO may be more inclined to do so after a party's repeated failure to comply with the practice requirements (see Application of a Student with a Disability, Appeal No. 18-010; Application of a Student with a Disability, Appeal No. 17-101; Application of a Student with a Disability, Appeal No. 16-060; see also Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040).

answer to the issues raised on appeal. In light of the foregoing, the district's argument regarding to sufficiency of the parent's request for review is dismissed.

With regard to the district's remaining arguments, identified as "affirmative defenses" in the answer, the district alleges that the parent seeks relief that is beyond the scope of the authority of the SRO, contrary to controlling law, and barred by the doctrine of equitable estoppel. However, the district offers no explanation, analysis, or legal arguments as to how these defenses apply to the present matter. It is not this SRO's role to research and construct the parties' arguments or guess what they may have intended (see Gross v. Town of Cicero, 619 F.3d 697, 704 [7th Cir. 2010] [appellate review does not include researching and constructing the parties' arguments]; Fera v. Baldwin Borough, 2009 WL 3634098, at *3 [3rd Cir. Nov. 4, 2009] [a party on appeal should at least identify the factual issues in dispute]; Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 841 [10th Cir. 2005] [generalized assertion of error on appeal is not sufficient]; see generally Taylor v. American Chemistry Council, 576 F.3d 16, 32 n.16 [1st Cir. 2009]; L.I. v. Hawaii, 2011 WL 6002623, at *9 [D. Haw. Nov. 30, 2011]; Lance v. Adams, 2011 WL 1813061, at *2 [E.D. Cal. May 6, 2011] [the tribunal need not guess at the parties' intended claims]; Bill Salter Advertising, Inc. v. City of Brewton, 2007 WL 2409819, at *4 n.3 [S.D. Ala. Aug. 23, 2007]). Therefore, the other defenses raised by the district will not be considered on appeal.

2. Scope of Review

As another preliminary matter, there are a number of issues that have not been raised on appeal and are, therefore, outside the scope of my review. For example, several claims related to the 2018-19 school year, which the parent asserted in the amended due process complaint notice but which the IHO did not address, were not pursued on appeal, including claims pertaining to CSE composition, the lack of discussion about the student's nursing care plan at the CSE meeting, and the CSE's failure to plan for any extended absences due to the student's medical needs (see IHO Ex. I at pp. 2-3). To the extent the parent does not raise such claims on appeal, they are deemed abandoned and will not be further addressed (8 NYCRR 279.8[c][2], [4]).

Furthermore, the parent does not appeal a number of the IHO's findings, including the IHO's finding that, based on his review of the hearing record, the district established that it offered the student a FAPE for the 2017-18 school year (see IHO Decision at p. 8).[19] The parent also does not appeal the IHO's determination that there was insufficient evidence in the record to determine whether the student required vision therapy as part of her program for the 2018-19 school year or the IHO's denial of the parent's request for IEEs in the areas of OT, PT, speech-language, and vision therapy (see id. at pp. 19-20). Moreover, the district has not interposed a cross-appeal in this matter and has, therefore, not challenged the IHO's finding that was adverse to the district; to wit, that the student was denied vision therapy services from November 2017 to June 2018 and, therefore, the district was required to calculate and provide compensatory services for the student

[19] While not set forth in the parent's request for review, the parent argues that the district failed to provide the student with a FAPE for the 2017-18 school year in her memorandum of law (Parent Mem. of Law at pp. 7-8); however, it has long been held that a memorandum of law is not a substitute for a pleading (see 8 NYCRR 279.4, 279.6; see, e.g., Application of a Student with a Disability, Appeal No. 19-021; Application of the Bd. of Educ., Appeal No. 16-080). Accordingly, the parent's claim in this regard will not be further discussed.

(see id.). Therefore, these determinations have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

B. Implementation—2018-19 School Year

The IDEA requires that, once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if there was more than a de minimis failure to implement all elements of the IEP, and instead, the school district failed to implement substantial or significant provisions of the IEP (Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]; see also Fisher v. Stafford Township Bd. of Educ., 289 Fed. App'x 520, 524 [3d Cir. Aug. 14, 2008]; Couture v. Bd. of Educ. of Albuquerque Pub. Schs., 535 F.3d 1243, 1251 [10th Cir. 2008]; Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 [8th Cir. 2003]). Accordingly, in reviewing failure to implement claims under the IDEA, courts have held that it must be ascertained whether the aspects of the IEP that were not followed were substantial or "material" (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007] [holding that a material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled student and the services required by the student's IEP]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73, 75-76 [D.D.C. 2007] [holding that where a student missed a 'handful' of speech-language therapy sessions as a result of the therapist's absence or due to the student's fatigue, nevertheless, the student received consistent speech-language therapy in accordance with his IEP, and the district's failure to follow the IEP was excusable under the circumstances and did not amount to a failure to implement the student's program]).

As noted above, although there are no IEPs in evidence for the majority of the 2018-19 school year, the evidence in the hearing record reflects that the CSE recommended that the student attend a 12:1+(3:1) special class at a BOCES program with the support of a full-time 1:1 nurse, along with related services consisting of five 30-minute sessions of individual speech-language therapy per week, four 30-minute sessions of individual OT per week, five 30-minute sessions of individual PT per week, one 30-minute session of individual services from a teacher of the visually impaired per week, and one 40-minute session of music therapy on a biweekly basis, as well as one 30-minute session per week of indirect services and a monthly consult from a teacher of the visually impaired (Dist. Ex. 1 at pp. 2-3). It is undisputed that the student's IEP was not fully implemented during the 2018-19 school year. However, the parties differ in their arguments as to which party is responsible for the lack of implementation: the parent or the district.

To be sure it is a district's obligation to implement the IEP, not a parent's; however, to the extent a parent thwarts the district's ability to implement an IEP, this would tend to weigh against a parent's position on equitable grounds and would be relevant to an analysis of any relief due as a consequence of a district's failure to implement a student's IEP (see J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 643-44 [S.D.N.Y. Mar. 31, 2011] [in examining a request for compensatory education, noting that "IDEA relief depends on 'equitable considerations'," and denying parents' request for relief due to the parents' "inaction" despite the district's "prompt and professional" responses to the parents' requests]; Wenger v. Canastota, 979 F. Supp. 147, 151 [N.D.N.Y. 1997]). Here, since the parties' primary dispute is equitable in nature (i.e., which party

was at fault for the implementation failures), the facts and circumstances relevant to the equitable arguments shall be examined along with an analysis of the district's implementation or lack thereof, rather than separately examining the equitable questions.

The changing factual circumstances surrounding the implementation of the student's IEP tend to fall within three separate time frames. The first consists of the beginning of the 2018-19 school year (in September 2018) to December 2018. The second consists of December 2018 to February 2019, after which time the BOCES RN was no longer employed at the school. The third time period consists of February 5, 2019 through the end of the 2018-19 school year in June 2019. Accordingly, the foregoing discussion will address these timeframes in turn.

1. September 2018-December 2018

In the instant matter, the IHO found that the failure of the student to receive any of her educational program from September 2018 to February 2019 was directly and solely attributable to the parent's improper conduct in altering the student's physician's care plan (IHO Decision at p. 11). On appeal, the parent asserts that the IHO erred in this regard and alleges that the district refused to allow the student to attend the BOCES program until it received updated information but, in the meantime, did not reach out to any of the student's treating physicians.

A child who is medically fragile and needs school health services or school nurse services to receive a FAPE must be provided such services as indicated in the student's IEP (see School Health Services and School Nurse Services, 71 Fed. Reg. 46,574 [Aug. 14, 2006]; see also 34 CFR 300.34[a], [c][13]; 8 NYCRR 200.1[qq], [ss]; Cedar Rapids Community Sch. Dist. v. Garret, 526 U.S. 66, 79 [1999] [school districts must fund related services such as continuous one-on-one nursing services during the school day "in order to help guarantee that students . . . are integrated into the public schools"]). With regard to skilled nursing services on a student's IEP, State guidance provides that "[d]ue to the frequency of changes to orders for nursing treatment and/or medications, the specific nursing service and/or medication to be provided should not be detailed in the IEP" ("Guidelines for Determining a Student with a Disability's Need for a One-to-One Nurse," at p. 4, Office of Special Educ. Mem. [Jan. 2019], available at http://www.p12.nysed.gov/specialed/publications/documents/guidelines-for-determining-a-student-with-a-disability-need-for-a-1-1-nurse.pdf).[20] Instead, the guidance document provides that "[t]he nursing treatment and/or medication orders [should be] documented on an Individualized Health Plan (IHP), which is a nursing care plan developed by an RN [and] maintained in the student's cumulative health record . . . and . . . updated as necessary" ("Guidelines for Determining a Student with a Disability's Need for a One-to-One Nurse," at p. 4).[21] For administration of medication in school, provider orders must be obtained, and, according

[20] Although several guidance documents were entered into evidence during the impartial hearing (see Dist. Exs. 11-16, 21), they are also publicly available and, therefore, are cited directly.

[21] In another State guidance document, it is acknowledged that an IHP is not required by law but "is strongly recommended for all students with special health needs-particularly those with nurse services as a related service on their individualized education plan (IEP)" ("Provision of Nursing Services in School Settings - Including One-to-One Nursing Services to Students with Special Needs," at p. 9, Office of Student Support Servs. [Jan. 2019], available at http://www.p12.nysed.gov/sss/documents/OnetoOneNSGQAFINAL1.7.19.pdf).

to State guidance, "[i]f a school has concerns or questions regarding a provider's order, the school's medical director or school nurse school call the provider to resolve concerns and/or clarify the order" ("Guidelines for Medication Management in Schools," at p. 14, Office of Student Support Servs. [Dec. 2017], available at http://www.p12.nysed.gov/sss/documents/MedicationManagement-DEC2017.pdf).[22]

Here, there is no IHP in the hearing record. However, in or around mid-September 2018, the parent provided the district with a document titled "Physician's Orders and Treatment Plan," which bore a physician's signature and was dated July 12, 2018 (Tr. pp. 52, 96; see Dist. Ex. 3). The physician's orders and treatment plan detailed the student's medical diagnoses, identified her medications including dosage and route of administration, and identified the skilled nursing tasks/treatments required by the student (Dist. Ex. 3).

Between September 2018 and December 2018, the student attended her BOCES placement for one day, September 25, 2018 (Tr. pp. 285-86, 290-91).[23] That same week, a meeting took place attended by the BOCES director, the BOCES principal, the BOCES LPN and RN, the parent, her SKIP care coordinator, and the district CSE chairperson, during which questions were raised by the BOCES RN regarding "doctoring" of the student's care plan by the parent (Tr. pp. 79, 84-92, 117; see Dist. Ex. 8 at pp. 1-2).[24] The BOCES director testified that, during the meeting, the BOCES RN indicated that there were several discrepancies that were of concern regarding the student's prescription orders and the student's care plan (Tr. pp. 82-84; see Tr. pp. 87-90; Dist. Exs. 2; 3). The BOCES director also testified that the BOCES RN raised concerns regarding portions of the student's care plan being copied and pasted from previous documents that she had seen (Tr. pp. 90-91). Although the BOCES director testified that the parent admitted to doctoring the document as well as signing the doctor's name to the plan, beyond such testimony, the hearing record is devoid of any other evidence that the care plan was altered (Tr. pp. 91-92). The parent testified that she specified to the BOCES principal that the care plan provided was for use by a private duty nurse at home (Tr. pp. 52-53). The parent was not asked during the impartial hearing whether or not she altered the plan in any way.

As it is, regardless of whether or not the medical orders were doctored, as of September 26, 2018, BOCES determined that the physician's orders were inadequate and needed to be corrected and that it would not allow the student to attend school until the corrected orders were

[22] "Parent/guardian consent to speak with the private provider is not required for the purpose of clarifying orders per the Health Insurance and Accountability and Portability Act (HIPAA)" (see "Guidelines for Medication Management in Schools, at p. 15; see also "Joint Guidance on the Application of the Family Educational Rights and Privacy Act (FERPA) And the Health Insurance Portability and Accountability Act of 1996 (HIPAA) To Student Health Records," at p. 6, U.S. HHS & DOE, available at https://www2.ed.gov/policy/gen/guid/fpco/doc/ferpa-hipaa-guidance.pdf).

[23] There is some indication in the hearing record that, early in the 2018-19 school year, the student received some related services with the parent attending to the student's medical needs (see Tr. pp. 97, 125-27).

[24] It is unclear from the hearing record if multiple meetings took place during the week the student attended school or if the testimony referencing a meeting on September 26, 2018 and the email referencing a meeting on the morning of September 28, 2018 were describing the same meeting (see Tr. pp. 79, 84-92, 117, 285-86; see Dist. Ex. 8 at pp. 1-2).

provided (Tr. pp. 100, 252-53, 286; see Dist. Ex. 8 at p. 1). The parent agreed to get the corrected care plan and prescriptions that matched, moving forward (Tr. pp. 92-93). According to the BOCES director, although the BOCES RN repeatedly asked to be allowed to contact the student's doctors to straighten out the medical care plan, the parent wanted to be the one to communicate with the doctor directly and BOCES honored her request (Tr. pp. 101, 122).[25] The BOCES director explained that "at this point we were working with the mother expecting her to help" (Tr. p. 101). The BOCES director testified that the parent offered to facilitate a conversation with the student's health care providers as long as the parent could also participate (Tr. p. 122). The BOCES director indicated that she did not know if BOCES followed up on that, but believed it had (Tr. p. 122).

The hearing record shows that the parent and her SKIP care coordinator made efforts to provide the district with the documentation necessary to care for the student's medical needs at school. Testimony by the CSE chairperson indicated that the district communicated weekly with the parent and her care coordinator with regard to getting the scripts and care plan (Tr. p. 305). The BOCES director testified that the BOCES RN and the parent had a back and forth dialogue about what was missing and "what needed to be in place directly from a doctor" (Tr. p. 122). The parent provided the district with a respiratory plan from Boston Children's Hospital dated October 18, 2018 and with physician's orders for PRN (as needed) medications from the student's pediatrician's office dated (by the physician) November 1, 2018 (Tr. pp. 46-51; Dist. Ex. 2 at pp. 2-6, 8-9; see Tr. pp. 348-350).[26] A note dated December 3, 2018, written by the BOCES RN and attached to these documents indicated that the medication orders were for PRN (as needed) medications only and that BOCES still needed daily medication orders, a medical care plan for at school from the physician, and orthopedic orders, and that concerns related to the respiratory order still needed to be addressed (Dist. Ex. 2 at p. 1). Testimony by the SKIP care coordinator indicated that she placed phone calls to the student's primary care physician, neurologist, orthopedist, and endocrinologist, had district forms sent to them, and received back the completed forms from each doctor via fax (Tr. pp. 367-68). She then reviewed the forms, and at the next meeting with the district, she provided the completed forms to the district (Tr. p. 368).[27] The care coordinator testified that the forms were reviewed at a meeting, with meeting participants making sure that the parameters were included, such as the times that medication was needed and what would take place if the student needed to be suctioned or hooked up to oxygen (Tr. p. 369).

According to the CSE chairperson, at the beginning of December 2018, all but one of the orders were correct and current (Tr. p. 255). She testified that the orders were completed on or around December 11, 2018 and that BOCES and the BOCES RN were comfortable with the

[25] The BOCES director testified that a nurse can reach out directly to a doctor without the parent's permission (Tr. p. 101; see Dist. Ex. 2 at p. 9). This is consistent with guidance documents cited above detailing the application of the HIPAA for schools (see "Guidelines for Medication Management in Schools, at p. 15; see also "Joint Guidance on the Application of the Family Educational Rights and Privacy Act (FERPA) And the Health Insurance Portability and Accountability Act of 1996 (HIPAA) To Student Health Records," at p. 6).

[26] The respiratory plan was dated October 18, 2018 and faxed on October 23, 2018 (Dist. Ex. 2 at pp. 7-9). It is unclear when the parent provided this document to the district, or if it was faxed directly to the district on October 23, 2018, as the document does not indicate to whom it was faxed (id. at p. 7).

[27] The care coordinator did not remember when the next meeting with the district took place (Tr. p. 368). In addition, the completed forms are not included in the hearing record.

medical plan and willing to resume providing some level of service to the student (Tr. pp. 255, 286-87, 306).

While it was reasonable for the BOCES nurses to not provide services to the student until they received a corrected plan, the district should have taken measures to obtain a corrected plan instead of relying on the parent and her care coordinator and waiting almost two months for the corrected paperwork. In this instance, the allegation of the student's fraudulent care plan, at a minimum, required the district to contact the student's doctor in a reasonable timeframe. Moreover, considering the substance of the allegation, the district should have taken measures to either clarify, correct or, at least, contact the student's doctor in lieu of waiting for the parent to correct the care plan herself. As a result, the student was denied access to special education instruction for two months, which is far too long a delay and amounts to a material deviation from the student's IEP as to constitute a denial of a FAPE. As the hearing record indicates that the district was not proactive in addressing this issue, the district is responsible for the student not being in school receiving educational services during this time period.

2. December 2018-February 2019

As noted above, the CSE chairperson testified that, as of December 11, 2018, "the care plan and care orders were all submitted and agreed upon" and BOCES and the BOCES RN were comfortable with the care plan (Tr. pp. 255, 286, 306). While there was some more equivocal testimony about the BOCES staff's agreement that the care plan was satisfactory (see Tr. pp. 101, 132, 216, 136), in the verified request for review, the parent states that "[t]he District did not agree to permit [the student] to return to school until December 2018" (Req. for Rev. ¶ 13). Therefore, the parties appear to agree that, from December 2018 to February 2019, BOCES was willing and able to resume providing services to the student (see Tr. p. 306; Req. for Rev. ¶ 13).[28] However, during this time period, the parent continued to be uncomfortable with sending the student to school because the nursing staff had not completed the suctioning training requested by the parent (Tr. pp. 254-56, 306; see Tr. pp. 99-100, 124, 135-36, 254, 402).[29] In the memorandum of law accompanying her request for review, the parent elaborates on her view that the nurses assigned to the student were insufficiently trained to perform the suctioning required by the student, pointing to the student's need for "deep suctioning in order to clear her airway and allow her to breath" and the BOCES RN's "failure to demonstrate the ability to properly suction [the student]" (Parent Mem. of Law at pp. 4-5).

[28] As noted above, the CSE chairperson testified that the BOCES RN and BOCES were comfortable with the medical plan and were willing to resume providing services to the student in December 2018 (Tr. pp. 255, 286-87, 306). According to the CSE chairperson, the December 7, 2018 meeting where it was determined that BOCES was comfortable with the student's medical care plan and willing to resume providing services to her, was attended by the district's CSE chairperson, physician, nurse practitioner, district director of special education, the parent, her care coordinator, and a respiratory therapist, but no one from BOCES (Tr. p. 287). However, there was inconsistent testimony by the BOCES director that indicated she did not believe the care plan and care order issues were ever fully worked out to the nurse's satisfaction (Tr. pp. 101, 136).

[29] Although the parent expressed her desire that staff receive suctioning training as early as September 2018, given that the student could not attend the BOCES program up until December 2018 due to the district's or BOCES's issues with the care plan, a discussion of the parent's desire that suctioning training take place was not dispositive to the time period of September 2018 through December 2018, discussed above.

Because the parent chose not to send the student to the BOCES program based on her view that the BOCES nurses did not have appropriate training, the facts are more akin to a line of cases that discuss the situation where a student never attends the public school assigned by the district and the parent challenges the assigned pubic school site's capacity to implement the student's IEP. In other words, rather than stating the allegation retrospectively (i.e., the district failed to implement the IEP), the allegation is prospective (i.e., if the parent sent the student to the BOCES program, the district could not have implemented the IEP). The Second Circuit has held that parents may pursue claims regarding an assigned school's ability to implement an IEP when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (M.O., 793 F.3d at 245; see Y.F. v. New York City Dep't of Educ., 659 Fed. App'x 3, 5-6 [2d Cir. Aug. 24, 2016]; J.C., 643 Fed. App'x at 33; B.P. v. New York City Dep't of Educ., 634 Fed. App'x 845, 847-49 [2d Cir. 2015]). In order for such challenges to be based on more than speculation, a parent must allege that the school is "factually incapable" of implementing the IEP (see M.E. v. New York City Dep't of Educ., 2018 WL 582601, at *12 [S.D.N.Y. Jan. 26, 2018]; Z.C. v. New York City Dep't of Educ., 222 F. Supp. 3d 326, 338 [S.D.N.Y. 2016]; L.B. v. New York City Dep't of Educ., 2016 WL 5404654, at *25 [S.D.N.Y. Sept. 27, 2016]; G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at *15 [S.D.N.Y. Sept. 19, 2016]; M.T. v. New York City Dep't of Educ., 2016 WL 1267794, at *14 [S.D.N.Y. Mar. 29, 2016]). Such challenges must be based on something more than the parent's speculative "personal belief" that the assigned public school site was not appropriate (K.F. v. New York City Dep't of Educ., 2016 WL 3981370, at *13 [S.D.N.Y. Mar. 31, 2016]; Q.W.H. v. New York City Dep't of Educ., 2016 WL 916422, at *9 [S.D.N.Y. Mar. 7, 2016]; N.K. v. New York City Dep't of Educ., 2016 WL 590234, at *7 [S.D.N.Y. Feb. 11, 2016]).

Here, the parent reported that the BOCES RN attempted to suction the student in her presence and she was not satisfied with the RN's ability on that attempt (Tr. p. 391). She explained that the BOCES RN "put the catheter that you use for suctioning" into the student's nostril "about two inches," which she opined defeated the purpose of suctioning because it did not go down far enough (Tr. pp. 39-40, 392). The parent reported that the only information she had about the BOCES RN was that she had worked on a respiratory unit and used to work in the family's pediatrician's office (Tr. p. 40). The parent opined that, although the BOCES RN previously worked on a respiratory unit, nurses there did not get nasotracheal or oropharyngeal suctioning experience unless they were in an intensive care unit and therefore, she believed the BOCES RN needed suctioning training (Tr. pp. 39-40).

The BOCES director testified that she was not present on the day in September 2018 when the student attended instruction but that she was told there were questions about the suctioning aspects of the student's medical needs (Tr. p. 98). The BOCES RN and BOCES principal told her that the parent had a concern about the ability of the BOCES RN to suction the student and "desired that further training would happen" (id.). The BOCES director testified that she was not fully familiar with the BOCES RN's background as a nurse but that the RN stated several times that she had experience in the hospital, although the BOCES director did not know which unit (Tr. p. 99). According to the BOCES director, the BOCES RN indicated that she had the ability to provide suctioning and "was repeatedly adamant that she felt very qualified to provide that act" (id.). The BOCES director stated that, after the student attended "that one day" in September, "there was enough concern by [the parent] about the suctioning that we all understood that [the student] would

not be returning until a certain training happened," that being suctioning training (Tr. pp. 99-100). According to the BOCES director, it was the parent who was insisting on the training (Tr. p. 100).

The BOCES director testified that the student was not coming to school while the BOCES RN was in place because the parent was concerned about the ability of BOCES staff to suction the student as needed and that suctioning training was not happening to her satisfaction (Tr. p. 124). The BOCES director did not know when the training was offered and noted that BOCES was not expected to set it up (Tr. p. 125). The BOCES director testified that there was specific suctioning training that the parent wanted the BOCES staff to have and that it was her understanding that the parent was not willing to have the student attend instruction or therapies if the BOCES nurses did not get it (Tr. p. 135). The BOCES director indicated that the BOCES nurses did not receive the training before they resigned (Tr. p. 136). She opined that, had the care plan and physician's orders been in place, the position of the parent would have been that the student could not attend school because suctioning training had still not occurred (Tr. p. 136).

In order to appease the parent, the CSE chairperson worked with the district's nurse practitioner to contact a local college to provide training, as well as a respiratory therapist, and a pulmonary facility, without success (Tr. pp. 305-06; see Tr. pp. 211, 303-04). In addition, according to the district director of special education, she had spoken with the district's physician for suggestions he may have for training sources and had asked at the CSE Advisory if anyone had knowledge of training in their regions (Tr. pp. 320-21).[30] The district also asked the parent's care coordinator from SKIP if she was aware of any help available through her agency (Tr. p. 321).

Testimony by the district nurse practitioner indicated that initially the local college was concerned with assuming liability for the outcome of suctioning done on the student and also concerned that practicing on a robotic patient or dummy was not the same as practicing on a student as it did not provide the opportunity to gauge the patient's response and readjust technique accordingly (Tr. pp. 211-12). According to the nurse practitioner, the district and the college reached a point where the college was more comfortable with providing a "refresher training and not being responsible for teaching the entire skill" (Tr. p. 212). However, the nurse practitioner did not follow through with the training (Tr. p. 212).

The parent acknowledged that she told the district that staff required proper training to suction the student and opined that BOCES staff needed to be able to do all forms of suctioning that the doctors had the family do with the student (Tr. pp. 163-64). The parent testified that she felt she was in a position to talk about the student's suctioning needs and reported that she "spent . . . more than three hours calling different programs trying to get them to see [if] somehow we could join forces to get the nurse proper suctioning training" (Tr. p. 164). The parent testified that, in terms of her request for suctioning training, she wanted just the nurses trained and would never expect a therapist to "intervene in that way with [her] child" (Tr. pp. 401-02). The parent indicated that she would not feel safe leaving the student with staff who did not have suctioning training and confirmed that she conveyed this to the district (Tr. p. 402). The parent indicated that she relayed

[30] The CSE Advisory is made up of the CSE chairs or directors of special education of the 21 school districts in the region (Tr. p. 321).

this to the school physician in December, as well as the BOCES nursing supervisor when she (the parent) initially asked for suctioning training (id.).

With respect to the suctioning training she was envisioning, the parent indicated that there were "a couple different options" (Tr. p. 390). As described by the parent, the options included using a dummy or fake patient to practice on or viewing a webinar that went into detail about suctioning (Tr. pp. 390-91). The parent indicated that as part of the webinar the nurses could set up the equipment and "play with it as like an experience so they get used to how it works" (Tr. p. 391). The parent explained that her concerns regarding suctioning were prompted by her own experience where providers at the hospital would not allow her to take her daughter home if she did not know how to suction; she felt she could not leave the student with someone who did not know how to care for her properly (Tr. p. 391).

The CSE chairperson testified that, at a December 7, 2018 meeting regarding the student's care plan, the school physician indicated that the RN's nursing certification was sufficient for providing emergency suctioning (Tr. pp. 287-88).

State guidance indicates that RNs or LPNs under the direction of an RN may perform oropharyngeal or tracheostomy suctioning in school ("Provision of Nursing Services in School-Settings – Including One-to-One Nursing Services to Students with Special Needs," at p. 14, Attachment A, Office of Student Support Servs. [Jan. 2019], available at http://www.p12.nysed.gov/sss/documents/OnetoOneNSGQAFINAL1.7.19.pdf). On the other hand, the guidance document acknowledges that "[l]icensed health professionals may not have the same work experience or education and may not be familiar with all types of nursing activities/tasks" ("Provision of Nursing Services in School-Settings – Including One-to-One Nursing Services to Students with Special Needs," at p. 11). In such instances, the guidance provides that the professional "who is not knowledgeable in a particular nursing activity/task is responsible for informing school administration of the need for appropriate training to safely meet the student's needs" and that "schools must seek out necessary training for staff to meet students' needs" (id.).

Here, although the BOCES RN did not testify at the impartial hearing, as summarized above, the hearing record includes some general testimony about the RN's qualifications and the BOCES director conveyed the content of her conversations with the RN, during which the RN stated her adamance that she was qualified to perform the suctioning (Tr. p. 99). This, in conjunction with the district physician's recommendation that additional training was not necessary (Tr. pp. 287-88), sufficiently establishes that the district considered the parent's concerns but made a professional determination that the RN could deliver the services to the student without additional training. While the parent's preference for the additional training is understandable, this is not sufficient to rebut the district's evidence that the RN had sufficient training to perform the required suctioning. The parent testified about what she observed with regard to the BOCES nurse's suctioning; however, the parent's opinion was based on one occasion. Overall, although the parent's opinion on matters regarding her child are not taken lightly, a one-time observation is not a sufficient indication that the parent's challenge was based on more than her speculative "personal belief" that the BOCES program did not have the capacity to implement the student's IEP without the provision of additional training to the nursing staff (see K.F., 2016 WL 3981370, at *13; Q.W.H., 2016 WL 916422, at *9; N.K., 2016 WL 590234, at *7). This is particularly so

to the extent the parent's concern with her observation of the RN's performance of suctioning on the student could be characterized as a dispute between professionals. For example, while the parent noted that the BOCES RN only went "two inches" into the student's nose while suctioning (Tr. p. 40), the parent also testified that when demonstrating nasotracheal suctioning on the student to the nurses at BOCES, the nurses indicated that they did not believe they should be doing that type of suctioning in school and that it was only warranted for hospital care (Tr. pp. 36-37).

While the parent no doubt has a level of expertise about her daughter's medical needs that, in many ways, could not be matched by the most qualified of witnesses, her more generalized concern in this instance is insufficient to overcome the evidence that the district was capable of implementing the student's IEP. This is by no means intended to diminish the parent's concern or her desire that staff receive additional training. However, the evidence in the hearing record supports a finding that, notwithstanding the parent's view that the nurses required additional training, the district had the capacity to implement the student's IEP between December 2018 and February 2019.

3. February 2019-June 2019

The BOCES director testified that the BOCES RN resigned from her position on February 4, 2019 and that the BOCES LPN also left her position, shortly thereafter (Tr. pp. 102-04). Following the resignation of the RN and LPN, BOCES was unwilling to provide instruction or "therapies" to the student because it did not have the necessary medical professional for the student and, moreover, did not even have a medical professional in the building (Tr. pp. 104-05). Once, the BOCES program became unavailable, it fell on the district to locate an appropriate placement for the student to replace the BOCES program. In March 2019, the CSE did recommend an interim program for the student to consist of five 60-minute sessions per week of "Special Class - Tutoring," along with related services (Joint Ex. 16 at pp. 16-19; see Joint Ex. 13 at p. 2 [characterizing the tutoring and related services as an "interim proposal while residential opportunities are pursued]); however, the evidence in the hearing record indicates that this program also remained unimplemented (see Tr. p. 290). Due to the district's inability to provide the student with 1:1 nursing services, between February 5, 2019 and June 2019, the student was unable to attend school and receive special education instruction. Accordingly, with the district's admitted inability to implement the student's IEP, the analysis shifts back to a traditional retrospective view of implementation, along with the equitable factors that arose in this case on which the IHO rested his determination.[31]

[31] To the extent that the evidence shows that the parent provided some coverage for the 1:1 nurse during the student's related services (see Tr. pp. 289-90), this would not overcome a finding that the district failed to implement the student's IEP—first, because material components of the IEP remained unimplemented (i.e., the special class or tutoring) and, second, because the district may not be absolved of its obligation to implement all components of the student's IEP by relying on family members, even here where the parent has training as a nurse (see In re: Student with a Disability, 71 IDELR 47 [SEA SD 2017] [finding that a district's decision to have family members come to school to assist a student with G-tube feedings and its failure to have a nurse or personal assistant with the student throughout the day violated the IDEA]; see also "Provision of Nursing Services in School Settings - Including One-to-One Nursing," at p. 11 ["In New York State under Section 6908 of Education Law, family members may provide home nursing care to other family members"; however, "[t]his exemption under Section 6908 does not empower families to extend that right to individuals employed in educational

In particular, the IHO found that the parent's actions forced the BOCES RN to quit (see IHO Decision at p. 18). In addition, the IHO found that the district was not responsible for providing 1:1 services for the student where there was an "impossibility of performance," since the district could not find a qualified nurse to fill the position of the student's 1:1 nurse (see id. at pp. 12-13). On appeal, the parent argues that the IHO erred in finding that she frustrated or impeded the district's ability to implement the student's IEP. In particular, in her memorandum of law, the parent argues that, no one informed the parent that her behavior was perceived as overbearing. The parent further notes that the doctrine of "impossibility of performance" is "an element of contract law [with] no bearing on a school district's obligations under the IDEA" (Parent Mem. of Law at p. 8). However, even if the doctrine applied, the parent argues that the district's ability to fill the position for the student's 1:1 nurse was not objectively impossible and could have been foreseen.

With respect to the IHO's determination that the parent was to blame for the lack of nursing services, there is minimal evidence in the hearing record regarding the parent's interactions with the BOCES nurse to support a finding that she caused the nurse to quit. The BOCES director testified that the BOCES RN stated she quit because, she had been "repeatedly questioned" and "harassed" by the parent (Tr. p. 103). In terms of documentation of the parent's alleged behavior, in an email dated September 21, 2018, the BOCES director advised the CSE chairperson and others that the parent made the BOCES staff "cry" and that they went to the union because they were consistently made to feel inadequate based on the parent's daily requests and expectations (Dist. Ex. 9; see Tr. pp. 109-11, 113). In her email, the BOCES director referenced the parent's "invasive behavior," which she later testified referred to the parent's "consistent questioning and accusations" that staff members did not know how to do their job (Tr. p. 114; Dist. Ex. 9). She noted that staff felt that they were not being treated as professionals (Tr. p. 114). The parent was not included on the BOCES director's email, so the hearing record does not include the parent's reaction to the BOCES director's description of the staff's concerns. Beyond this hearsay characterization of the parent's behavior, there is no further evidence in the hearing record regarding the parent's interactions with the BOCES RN and no direct evidence of the RN's concerns.

Beyond the parent's request for suctioning training for the BOCES nurses, discussed above, there is no evidence that the parent placed unreasonable demands on the BOCES RN or the staff in general. An example of the parent's requests is shown in an email the parent sent to the CSE chairperson on September 19, 2018, requesting a program review for the student (Dist. Ex. 4 at p. 1). In her email the parent indicated that she needed information a week ahead of time from teachers and therapists regarding goals they were thinking of working on with the student and supporting evidence for those suggestions, so that she could review it; and she listed items that needed to be added to the student's IEP that had been discussed at a previous meeting related to CVI modification, team trainings, curriculum, CVI schedule/routines, CVI ranges, and CVI spaces including modifications to the student's environment (Tr. pp. 57-58; Dist. Ex. 4 at p. 2). The parent identified additional items for discussion, including: compensatory services for the dates the student had not received services; parent training on ways staff was working with the student so that the parent could carry over; use of a particular seat and toddler bed at school; district provision of a second set of lesson materials that the parent could use to provide follow through at home; a

settings."]). On the other hand, the student's receipt of some related services may be taken into account in crafting an award of compensatory education.

method of tracking the student's progress on goals that had been utilized in her preschool class; potential ways to provide the student with socialization; and a backup plan in case the student's nurse was absent (Tr. pp. 55-61; Dist. Ex. 4 at p. 2). The parent also listed, in some detail, additional topics/questions that could be answered before a program review took place, including: questions related to the nursing staff, such as whether the parent would get a copy of the medication administration record (Tr. p. 63); how she would know if PRNs were given to the student; and when training would take place with the parent related to equipment/suctioning and an in-service for bus aids (Dist. Ex. 4 at p. 3). The parent also requested the student's daily schedule and copies of the TVI consultant's reports so she knew what the consultant was doing and could learn more about CVI from the consultant's recommendations and thereby assist the student in working toward her goals (Dist. Ex. 4 at p. 4; see Tr. pp. 63-64).[32]

A review of the parent's questions and requests shows that, while they were admittedly detailed, they were not inappropriate coming from a concerned parent of a student with multiple disabilities. Other than the emails cited above, there is no evidence in the hearing record that indicates that the parent's actions forced the BOCES RN to quit. Additionally, as the parent notes, there is no information in the hearing record that she was made aware that her alleged behavior was upsetting BOCES staff (see Tr. pp. 131-32).

Additionally, although the IHO found that the district was not responsible for providing 1:1 services for the student because there was an "impossibility of performance," this defense relates to contract law and does not excuse the district's responsibility to implement the student's IEP under the IDEA (see Brown v. Dist. of Columbia, 2019 WL 3423208, at *16 [D.D.C. July 8, 2019] [finding no authority for the proposition that "impossibility of performance relieves a state, state educational agency, or local educational agency of its duties under the IDEA"]). The district's inability to hire a nurse, regardless of the reasons for such inability, has resulted in its failure to implement the student's IEP (cf. J.L. v New York City Dep't of Educ., 324 F Supp 3d 455, 466-67 [S.D.N.Y. 2018] [finding that parents sufficiently stated a cause of action under the IDEA to survive a motion to dismiss when they alleged that a district's policies pertaining to nursing assignments and transportation requirements resulted in a lack of IEP implementation and the disabled students being unable to attend their placements]). The consequences for this failure should not fall on the student, who is entitled to the protections of the IDEA

Accordingly, as the district was unable to provide the student with instruction and/or services from February 5, 2019 to June 2019, due to its inability to secure a nurse, this resulted in a material deviation from the student's IEP as to constitute a denial of a FAPE.

C. Residential Placement

The parent appeals the IHO's finding that the student may be assigned to a residential placement, notwithstanding the fact that the IHO found that the recommendation was wholly inappropriate for the student. The parent further argues that the district's recommendation of a residential program is not the student's LRE.

[32] The parent testified that the consults had previously taken place in her home so she had been learning about CVI at the same time the therapists were learning about it (Tr. pp. 63-64).

In the instant matter, the March 2019 CSE ultimately indicated that the district would seek out a residential placement for the student; however, the recommendation was not indicated on the student's March 2019 IEP (Dist. Ex. 1 at p. 1; see Tr. pp. 43-44, 274-75, 293-94). Moreover, as set forth above, it has already been determined that the district failed to offer the student a FAPE from February through June 2019 due to its failure to implement the student's program and services, and a finding as to the appropriateness of a residential placement would not alter this determination. In any case, while the challenge to a residential placement recommendation may be in some respects premature, the parties are in agreement that the issue should be addressed. Accordingly, a limited discussion of the issue is set forth, notwithstanding that the district had yet to locate and officially recommend a residential placement for the student on the student's IEP.

The Second Circuit has stated that "[w]hile some children's disabilities may indeed be so acute as to require that they be educated in residential facilities, it is appropriate to proceed cautiously whenever considering such highly restrictive placements. . . . The norm in American public education is for children to be educated in day programs while they reside at home and receive the support of their families" (Walczak, 142 F.3d at 132). A residential placement is not appropriate unless it is required for a student to benefit from his or her educational program (M.H., 296 Fed Appx at 128; Walczak, 142 F.3d at 122; Mrs. B., 103 F.3d at 1121-22; see Educ. L. § 4402[2][b][2]; 8 NYCRR 200.6[j][iii][d]).

As one of the most restrictive placements, a recommendation for a CSE's decision to pursue a residential placement for a student with a disability implicates LRE considerations. The IDEA requires that a student's recommended program must be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 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]). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling, or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ. of Borough of Clementon Sch. Dist., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. N. Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobol, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]).

The hearing record shows that the March 2019 CSE considered several placement options for the student. According to a March 11, 2019 prior written notice the CSE considered maintaining the student in the then-current program provided by BOCES but rejected this option because BOCES notified the district that it was unable to continue the program (Joint Ex. 15 at p. 2). In addition, the CSE considered providing the student's school program and related services locally but rejected this option as the district was unable to secure staffing for the required direct nursing services (id.). The CSE also discussed the possibility of the parent homeschooling the student while the district provided her with related services in her home school (Tr. pp. 259-60; Joint Ex. 13 at p. 2; see Tr. pp. 297-98). However, the CSE chairperson testified [the parent] was

not comfortable with delivering curriculum to [the student] at the time" as "she was not fully equipped" to do so (Tr. p. 258). Therefore, the parent rejected the homeschooling option (Tr. p. 297; see Joint Ex. 13 at p. 2).[33] The CSE chairperson reported that the ultimate recommendation of the March 2019 CSE was for the student to attend a residential placement (Tr. p. 260). She explained that there was not enough data collected at the time to determine if the student's then-current program was effective and the student needed continuity within her program "to meet her educational as well as medical needs and we were unable to secure the necessary medical personnel at the time," meaning a 1:1 RN (Tr. pp. 260-61).

The district director of special education testified that the district had identified three possible options for residential placements for the student that had current openings and that fit the student's age and disability profile (Tr. p. 323). She testified that the two that she was familiar with were both on the SED approved list of residential placements for students with disabilities (Tr. p. 324; see Tr. pp. 325-26; Dist. Ex. 21 at pp. 2, 7). According to the district director of special education, both programs had either ongoing enrollment or an open bed and could provide an RN to meet the student's medical needs (Tr. p. 326). The director of special education testified that, if either program was unable to provide for the student's CVI services or consultation, the district would discuss contracting with an outside agency to provide the services and ascertain whether the residential program was willing to participate in that arrangement (Tr. pp. 327-28).[34]

The CSE chairperson confirmed that if a nurse was available the student would have been able to remain in the BOCES program (Tr. p. 301). She further confirmed that "a portion" of the reason that the student was recommended for a residential program was because a nurse was not available (id.). However, she stated that the CSE also looked at continuity and consistency for the student and with nurses quitting "that would [sic] have been best for her educational career" (Tr. pp. 301-02). The CSE chairperson agreed that a residential program could encounter the same issue of nurses quitting or resigning (Tr. p. 302). She opined that it would not be more consistent for the student to stay at home (and receive homeschooling) because the district was looking at the educational impact of staying home on the student and the fact that the parent was not comfortable teaching the student the curriculum (id.). The CSE chairperson stated that she "could not speak" to the opportunities that the student would have to interact with non-disabled students at the

[33] The CSE chairperson clarified that homeschooling was not a recommendation, but rather was an option that was presented, and the fact that the district was open to a homeschooling arrangement did not suggest that the student did not need a residential placement (Tr. p. 298). The CSE chairperson explained that the homeschooling option meant visual and auditory stimuli could be limited and visual stimuli presented on a black background, within the home (Tr. pp. 298-99; see Tr. pp. 29-30, 149, 163, 267-68, 270; Joint. Ex. 16 at p. 5). She seemed to acknowledge that the same services could be provided in the school in an isolated, separate location, but stated that "would essentially be a residential program" (Tr. p. 299). The CSE chairperson agreed that if the student was provided with services in a separate environment within the school she could still go home at the end of the day (id.). However, she opined that this would be untenable and not conductive to learning (id.). The district director of special education opined that a residential placement would be less restrictive than a space constructed within a kindergarten classroom (Tr. p. 323).

[34] The hearing record shows that the district had contracted with an outside agency to provide the student with vision services during the 2018-19 school year (Tr. pp. 37-18; Dist. Ex. 20).

residential school "because she had not been to that particular one" (Tr. p. 303).[35] The CSE chairperson did not know what activities the student participated in outside of school nor did she know what outside activities would be available at the closest residential school being considered (id.).

In contrast to district witnesses, the parent and the SKIP case coordinator testified that a residential placement was not appropriate for the student. The student's SKIP care coordinator testified that she did not agree with the March 2019 CSE's recommendation for residential placement (Tr. p. 356; see Tr. p. 380).[36] The SKIP care coordinator reported that the student thrived on consistency and repetition and that the "countless hours of therapy and/or play" that the student had with her parents and siblings were a "huge part" of who the student was (Tr. p. 357). She opined that the student would not get the one-on-one love and attention from her family and continue to thrive and grow as she had, in a residential setting (id.). In addition, the SKIP care coordinator testified that the student was involved in community-based activities, including a baseball league for students with special needs, and her family was scheduled to go to a camp for children with special needs for a weekend (Tr. pp. 357-58).

The parent also testified that she did not agree with the March 2019 CSE's recommendation for a residential placement for the student (Tr. p. 397). She explained that a residential placement "would limit the relationship we have with her" (id.). She indicated that, due to the student's visual impairments, she would be unable to see her family on a screen and because she was "not vocal in the sense of words" the family would not know how life at the residential placement was for the student (id.). The parent noted that in a residential placement there was the possibility of a nursing change at the change of shift and there would be someone different from shift to shift watching the student for seizures or infection (id.). The parent opined that the student did not need to be in a residential placement as she enjoyed life "outside of here" and that with the little bit of therapies the student received through the district and outpatient she was able to thrive and grow and meet IEP goals (Tr. p. 398).

In addition, weighing against the need for placement in a residential facility, there is some evidence that the student benefited from placement in the district's UPK program during the 2017-18 school year. The SKIP care coordinator reported that she observed the student in her classroom during the 2017-18 school year and noted that the student participated, with her SEIT, in music during circle time (Tr. pp. 346-47; see Joint Ex. 1 at p. 1). In addition, the parent reported that, during the 2017-18 school year, the student enjoyed school and laughed and smiled while interacting with the other students and, when other students said hi to her and came up and talked to her, she kicked and squealed with happiness (Tr. pp. 386-87). Moreover, testimony by the student's preschool teacher indicated that the student had positive interactions with her peers in her general education class and that she enjoyed the socialization with her peers (Tr. pp. 153, 155; see Tr. pp. 152, 155-56). The teacher indicated that the whole class enjoyed having the student there and that the other children were very welcoming to her (Tr. pp. 152, 157). According to the preschool teacher, the student was able to participate in circle time and one of the classroom jobs

[35] The transcript does not identify the "particular" residential placement the CSE chairperson is referring to.

[36] The SKIP care coordinator explained that it was a goal of her agency to keep students out of hospitals and residential placements (Tr. pp. 356, 372-73).

was to be the student's helper, which included tasks such as sitting by her, helping push her wheelchair to a "special," and helping the student go to the board and answer a question (Tr. pp. 151, 152-53).

The preschool teacher testified that the student gained meaningful benefit from her attendance in the pre-K class and from being part of the group (Tr. p. 156). She indicated that the student seemed happy while she was in class and did especially well when they had music time and sang songs (Tr. p. 156). The teacher also indicated that the student made progress during the 2017-18 school year "[a]s far as socialization and smiling and laughing more" as well as in "being able to sit up" (Tr. p. 155). The preschool teacher testified that the student had previously cried and made noises a lot and that during the year she stopped these behaviors and seemed happier, unless she did not feel well (Tr. pp. 153, 155).

Based on the foregoing, it appears that the district largely focuses on its inability to retain an RN to implement 1:1 nursing services to justify its decision to pursue a residential placement for the student. As discussed above, the student should not bear the consequences of the district's inability to retain a nurse by either missing her services and placement or by being assigned to attend a residential placement if her needs do not require such a restrictive placement. As the hearing record establishes that the district's intention to seek a residential placement for the student arose less from a view of the student's needs and more on the district's inability to provide nursing services for the student, the justification, were it brought to fruition by the district's recommendation for a residential placement in an IEP, would be lacking. I remind the district that placement decisions must be based on a student's unique needs, rather than on the basis of services available in the district (34 CFR 300.116[b][2]; 8 NYCRR 200.6[a][2]; see Adams v. State, 195 F.3d 1141, 1150-51 [9th Cir. 1999]; Reusch v. Fountain, 872 F. Supp. 1421, 1425-26 [D. Md. 1994]; [Placements, 71 Fed. Reg. 46,588 [Aug. 14, 2006] ["placement decisions must be individually determined on the basis of each child's abilities and needs and each child's IEP, and not solely on factors such as . . . availability of special education and related services, configuration of the service delivery system, availability of space, or administrative convenience"]).

With that said, it is not altogether impermissible for the district to consider a residential placement for the student if the student's needs so dictate. However, the hearing record does not, at this juncture, present evidence indicating that the student needs a residential placement in order to receive a FAPE (see M.H., 296 Fed Appx at 128; Walczak, 142 F.3d at 122; Mrs. B., 103 F.3d at 1121-22; see Educ. L. § 4402[2][b][2]; 8 NYCRR 200.6[j][iii][d]). For example, the evidence summarized above shows that the student benefited from her preschool program during the 2017-18 school year, as well as from the benefits of the day program (i.e., being home in the evenings and on the weekends).

Further, there is no indication in the hearing record that the CSE based its recommendation for a residential placement on a belief that the student's inclusion in a less restrictive placement would have any negative effect on the other students in the class. Although the student presents with significant medically-related needs—and such needs may support a more restrictive placement in many instances (see Taylor v. Bd. of Educ. of Copake-Taconic Hills Cent. Sch. Dist., 649 F. Supp. 1253, 1258 [N.D.N.Y. 1986] [finding that, "in some instances, a special facility will constitute the [LRE] for a particular handicapped child"]; K.I. v. Montgomery Pub. Schools, 805 F. Supp. 2d 1283, 1297 [M.D. Ala. 2011] [finding that suctioning performed multiple times per

day has the potential to disrupt the classroom and impact on the education of the other students in the classroom]; but see Dep't of Educ., State of Hawaii v. Katherine D., 727 F.2d 809, 815 [9th Cir 1983] [finding that student with medical needs related to breathing and feeding was nonetheless capable of participating in regular classes with nondisabled student with services by a school nurse or other qualified person])—testimony during the impartial hearing revealed that, with respect to suctioning (apparently the most medically-intensive need with which the student presented), the student's last emergency-related suctioning took place in April 2017 and the last suctioning in general took place on September 25, 2018 (Tr. pp. 35, 396; see Tr. pp. 285, 290-91).

In any event, as the district has not, as of yet, developed an IEP for the student with the recommendation for a residential placement, the foregoing discussion is for further consideration by the parties in their future efforts to develop an educational plan for the student.

D. Remand—Compensatory Educational Services

Given the conclusion that the district failed to offer the student a FAPE based upon its failure to implement the student's IEP during portions of the 2018-19 school year, the next inquiry focuses on the amount of compensatory educational services the student should be awarded as a remedy for a denial of a FAPE for the time periods of September 2018 to December 2018 and then from February 5, 2019 to June 2019. Since the hearing record is insufficient to determine an appropriate award, the matter is remanded to the IHO to make a determination consistent with this decision.

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger, 979 F. Supp. at 151). Compensatory education may be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). Compensatory education relief may be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014] [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; see also E. Lyme, 790 F.3d at 456; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Likewise, SROs have awarded compensatory services to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. of City Sch. Dist. of Buffalo v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]). Accordingly, an

award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

In the instant case, the hearing record established that the district failed to offer the student a FAPE for portions of the 2018-19 school year. However, with regard to establishing an appropriate amount of compensatory education the student should receive for the denial of FAPE, the hearing record falls markedly short. Accordingly, the matter must be remanded back to the IHO. Upon remand, the parent should articulate for the IHO how much and what form of compensatory education she seeks. Further, the district should, pursuant to the due process procedures set forth in New York State law (Educ. Law § 4404[1][c]), address its burden by describing its views, based on a fact-specific inquiry set forth in an evidentiary record, as to what form of a compensatory education remedy would most reasonably and efficiently place the student in the position that she would have been but for the denial of a FAPE (E. Lyme, 790 F.3d at 457; Reid, 401 F.3d at 524).

Moreover, to ensure a complete development of the hearing record, the IHO may wish to request that the district present certain evidence. In particular, the student's IEP(s) for the 2018-19 school year may be required in order to get clarification as to what services the student should have received for much of the 2018-19 school year, prior to the CSE's development of the March 2019 IEP. Further, services-delivery records may be useful to demonstrate what services the student received. Although the record is clear that the student received one day of instruction during the 2018-19 school year, additional fact development on what related services were delivered to the student would assist in determining an appropriate award.

Overall, the hearing record is not as developed as necessarily required when determining how much the student should receive as an award for compensatory education. Therefore, on remand, the IHO is directed to more fully develop the record as to what services the student should have received, what services the student received, and, if necessary, what compensatory education services should be provided. The hearing record in this case is such that it may require a monthly accounting of each service and period of instruction to accomplish this.

VII. Conclusion

Based on the above, the district failed to offer the student a FAPE for the time periods of September 2018 to December 2018 and then from February 5, 2019 to June 2019. However, this matter is remanded to the IHO for further development of the hearing record and a determination

with respect to an appropriate award of compensatory education services for the student for these time frames.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated August 16, 2019, is modified by reversing that portion which found that the district provided or was not responsible for a failure to provide the student with a FAPE for those portions of the 2018-19 school year from September 2018 to December 2018 and from February 5, 2019 to June 2019;

IT IS FURTHER ORDERED that the IHO's decision, dated August 16, 2019, is modified by reversing that portion which denied the parent's request for compensatory education services;

IT IS FURTHER ORDERED that the matter is remanded back to the IHO who issued the August 16, 2019 decision for a determination regarding compensatory education to remedy the district's failure to provide the student with a FAPE for the time periods of September 2018 to December 2018 and February 5, 2019 to June 2019; and

IT IS FURTHER ORDERED that, in the event the IHO who issued the August 16, 2019 decision is not available, another IHO shall be appointed in accordance with the district's rotational selection procedures and State regulations.

Dated: **Albany, New York**
October 30, 2019

STEVEN KROLAK
STATE REVIEW OFFICER