The University of the State of New York

The State Education Department
State Review Officer
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No. 21-158

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

Appearances:
Legal Services of the Hudson Valley, attorneys for petitioner, by Mary Grace Ferone, Esq. and Alexandra Schweitzer, Esq.

Ingerman Smith, LLP, attorneys for respondent, by Alessandra Pellegrino Pulit, 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 the decision of an impartial hearing officer (IHO) which found the district offered the student an appropriate residential program for the student for the 2020-21 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The parties' familiarity with the detailed facts and procedural history of the case and the IHO's decision is presumed, and they will not be recited here. In brief, the CSE convened on September 10, 2020, to identify a State-approved residential placement for the student for the 2020-21 school year (see generally Dist. Ex. 11). The parent disagreed with the particular school site to which the district assigned the student to attend and, in a due process complaint notice dated October 29, 2020, alleged that the district failed to offer the student a free appropriate public education (FAPE) in the least restrictive environment (LRE) for the 2020-21 school year (see Dist. Ex. 1). The parent requested that the student stay in his then-current placement at Shrub Oak during the course of the hearing (id. at pp. 1, 4).

An impartial hearing convened on February 24, 2021 and concluded on April 8, 2021 after five days of proceedings (Tr. pp. 1-442). In a decision dated June 8, 2021, the IHO determined that the district offered the student a FAPE for the 2020-21 school year and, having so found, declined to consider the parent's request that the district be required to maintain the student's attendance at the Shrub Oak residential school for the 2020-21 school year (IHO Decision at pp. 1-18).[1] In addition, the IHO found that equitable considerations did not weigh in favor of an award of relief (id. at p. 17). Based on the last agreed upon IEP, the IHO also found that the student's day placement at Shrub Oak was the student's stay-put placement for the pendency of the proceeding (id. at p. 12).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parent's request for review and the district's answer thereto is also presumed and they will not be recited here. The gravamen of the parent's appeal is whether the IHO erred by failing to consider the appropriateness of the student's placement at Shrub Oak.

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

[1] The IHO decision is not paginated; for the purposes of this decision, the pages will be cited by reference to their consecutive pagination with the cover page as page one (see IHO Decision at pp. 1-18).

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]).[2]

[2] 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

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

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

VI. Discussion

A. Compliance with Practice Regulations and Scope of Review

Before addressing the merits, a determination must be made regarding which claims are properly before me on appeal. State regulations governing practice before the Office of State Review provide that a request for review "shall clearly specify the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and orders 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, State regulation provides that a request for review must set forth "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 further specify 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][2], [4]). Further, an IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]). Generally, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or a determination excluding issues from the scope of review on appeal (8 NYCRR 279.8[a]; see Davis v. Carranza, 2021 WL 964820, at *12 [S.D.N.Y. Mar. 15, 2021] [upholding an SRO's conclusions that several claims had been abandoned by the petitioner]; M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]).

Here, the IHO made several specific findings regarding issues raised by the parent in the due process complaint notice related to the district's offer of a FAPE to the student for the 2020-

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).

21 school year. In particular, the IHO found that the district did not deny the parent the opportunity to participate in the CSE process and that the September 2020 IEP offered the student a FAPE in the LRE; the IHO rejected the parent's arguments that the CSE's recommendation for a 6:1+1 special class in a residential placement was not appropriate and overly restrictive and that the IEP included unclear annual goals and failed to include sufficient 1:1 aide services or a plan to address the student's elopement (see IHO Decision at pp. 12-16). In addition, the IHO found that the district followed an orderly process to locate a State-approved residential placement for the student and "that the Woods School, if not an ideal placement, [wa]s an appropriate one for the [school year] at issue" (id. at p. 16 [internal footnote omitted]). The IHO also noted that there was no allegation that the Woods School could not implement the student's program (id.).

Although the request for review includes a statement that the IHO erred in finding that the student's IEP for the 2020-21 school year offered the student a FAPE (Req. for Rev. at p. 2), the use of broad and conclusory statements or allegations within a pleading does not act to revive any and all violations the parents believe the IHO erroneously addressed or failed to address without the parents specifically identifying which violations meet this criterion (M.C., 2018 WL 4997516, at *23 [finding that "the phrase 'procedural inadequacies,' without more, simply does not meet the state's pleading requirement"]).[3] Beyond this broad allegation regarding the district's offer of a FAPE, the parent does not identify specific findings of the IHO with which she takes issue. Instead, in her request for review, the parent alleges that the IHO failed to consider whether Shrub Oak was an appropriate placement for the student (id. at pp. 2-6). The parent appears to argue that the IHO was obligated to consider Shrub Oak as a unilateral placement, citing legal standards applicable to determining whether a private school selected by a parent is appropriate for a student and setting forth evidence relevant to assessing the appropriateness of Shrub Oak for the student for the 2020-21 school year (id. at pp. 3-6). However, as the IHO found no denial of a FAPE, he was not obligated to proceed to consider the parent's request for relief (see IHO Decision at p. 16; M.C. v Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000] ["If the challenged IEP was adequate, the state has satisfied its obligations under the IDEA and the necessary inquiry is at an end. . . . Only if a court determines that a challenged IEP was inadequate should it proceed to the second question."]). Nor is it clear from the hearing record that Shrub Oak was a unilateral placement per se in that there is no indication in the hearing record that the parent placed the student there at her own financial risk (see Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [noting that "[p]arents who are dissatisfied with their child's education" can obtain private services, including private schooling but do so "at their own financial risk"], cert. denied, 141 S. Ct. 1075 [2021], reh'g denied, 141 S. Ct. 1530 [2021], quoting Burlington, 471 U.S. at 374). Further, while the parent argues that Shrub Oak was an appropriate unilateral placement for the student for the 2020-21 school year, for relief, she does not seek district funding of the costs of the student's tuition or otherwise request that the district be required to place the student at Shrub Oak. Instead, the parent seeks only declaratory relief, including findings that the district denied the student a FAPE for the 2020-21 school year, that the student made "significant progress at [Shrub Oak's] day program," and that the law allows for the district to place student's in out-of-district placements that are not State approved (Req. for Rev. at p. 6).

[3] Contrary to the form requirements governing appeals to the Office of State Review, the parent's request for review is not paginated (see 8 NYCRR 279.8[a][3]; for the purposes of this decision, the pages will be cited by reference to their consecutive pagination with the cover page as page one (see Req. for Rev. at pp. 1-7).

As the parent has not challenged the IHO's findings regarding the parent's ability to participate in the CSE process and the appropriateness of the September 2020 IEP and placement at the Woods School, these determinations have become final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]). While the parent has effectively abandoned these issues on appeal, prior to delving into why Shrub Oak was an appropriate unilateral placement for the student for the 2020-21 school year, she does set forth in her request for review the district's argument during the impartial hearing that the district was unable to place the student at Shrub Oak as the school was not State-approved (Req. for Rev. at p. 3). In conjunction with the parent's request for a finding that it is legally permissible for the district to place the student in a non-approved placement (Req. for Rev. at p. 6), it appears that the parent continues to take exception to the district's position on this narrow issue, albeit without specifying the findings of the IHO with which the parent disagrees in the manner required by State regulation (see 8 NYCRR 279.4[a]). Accordingly, out of an abundance of caution, I will discuss the appropriateness of the district's process and selection of a State-approved out-of-State residential placement over the parent's preferred residential option for the student, Shrub Oak, notwithstanding my finding that the parent has abandoned this issue on appeal.

B. FAPE

Generally, parents are entitled to participate in determining the educational placement of a student with a disability (34 CFR 300.116[a]; 300.327; 300.501[c]); however, a district's assignment of a student to a particular school site is an administrative decision which must be made in conformance with the CSE's educational placement recommendation (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244-45 [2d Cir. 2015]; R.E., 694 F.3d at 191-92; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419-20 [2d Cir. 2009] [holding that educational placement refers to the "general educational program—such as the classes, individualized attention and additional services a child will receive—rather than the 'bricks and mortar' of the specific school"]; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014] [holding that while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]; White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379-80 [5th Cir. 2003]; A.W. v. Fairfax County Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]). A school district "may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement" (Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]). In this instance, the IEP provided that the student would attend a residential nonpublic school, which implicates the district's administrative decision making in conformance with the IDEA and related State law, regulation, and policies—a process that is more involved than a choice between two equally appropriate public schools within the student's district of residence.

The IDEA contemplates that districts may not be able to address the needs of every student in public placements and may need to place some students in private placements at public expense in order to provide such students with a FAPE (Burlington, 471 U.S. at 369-70). However, the IDEA does not endow state or local educational agencies with regulatory authority over nonpublic schools, but instead requires state and local educational agencies to ensure that students placed in

nonpublic schools by the educational agencies receive a FAPE (Responsibility of SEA, 71 Fed. Reg. 46598-99 [Aug. 14, 2006]; see 34 CFR 300.2[c][1]; 300.146; Z.H. v. New York City Dep't of Educ., 107 F. Supp. 3d 369, 375 [S.D.N.Y. 2015]; Letter to Stockford, 43 IDELR 225 [OSEP 2005]). The IDEA provides that when a district places or refers a student with a disability to a nonpublic school in order to meet its obligation to provide the student with a FAPE, "the State educational agency shall determine whether such schools and facilities meet standards that apply to State educational agencies and local educational agencies and that children so served have all the rights the children would have if served by such agencies" (20 U.S.C. § 1412[a][10][B][ii]).[4]

Considering the State's obligations involving students placed in private facilities by public agencies, districts are only authorized to contract with nonpublic schools which have been approved by the Commissioner of Education (Educ. Law § 4402[2][b][1], [2]; see Antkowiak v. Ambach, 838 F.2d 635, 640-41 [2nd Cir. 1988] [noting that pursuant to the IDEA a district can only place a student in a nonpublic school that meets State educational standards, including the requirement for approval by the Commissioner of Education], abrogated in part by Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]).[5] The State Education Department maintains a list of in-State and out-of-State approved nonpublic schools (see 8 NYCRR 200.1[d], 200.7; see "Approved Private, Special Act, State-Operated and State-Supported Schools in New York State," Office of Special Educ., available at http://www.p12.nysed.gov/specialed/privateschools/home.html; see also Soc. Servs. Law § 483-d[2]).

Although a particular nonpublic school may meet the Commissioner's criteria for approval to provide special education programs and services to students with a disability, it is the individualized needs of a student with a disability that will ultimately "determine which of such services shall be rendered" by an approved nonpublic school (Educ. Law § 4402[2][a]).[6] Moreover, it must be ascertained whether a particular nonpublic school will meet the IDEA's mandate that a student's recommended program must be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i]; 300.116[a][2]; 8 NYCRR 200.1[cc]; 200.6[a][1]; see Newington, 546 F.3d at 111; Gagliardo, 489 F.3d at 105; Walczak, 142 F.3d at 132; Patskin v. Bd. of Educ. of Webster Cent. Sch. Dist., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).[7] The

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

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

[6] State regulation provides that "no contract for the placement of a student with a disability shall be approved for purposes of State reimbursement unless the proposed placement offers the instruction and services recommended on the student's IEP" (8 NYCRR 200.6[j][2]).

[7] In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i]; 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. No. Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin,

determination that an out-of-State residential placement is the LRE for a student first requires a district to determine whether an appropriate in-state residential facility is available to meet the student's needs (Educ. Law § 4407[1][a]; 8 NYCRR 200.6[j][1][iii][e]). Consistent with LRE principals, State regulations and guidance require that, when a district intends to place a student in an approved residential school, the district first refer the student to in-State approved residential schools that may be appropriate, even if the student is already placed in an out-of-State approved residential school (8 NYCRR 200.6[j][1][iii][e]; "Placements of Students with Disabilities in Approved Out-of-State Residential Schools," Office of Special Educ., at p. 4 [Mar. 2020], available at http://www.p12.nysed.gov/specialed/applications/documents/memo-out-of-state-placement-application-2020-21.pdf).

Here, a review of the hearing record establishes that the district complied with its obligations under the IDEA in determining an appropriate placement for the student, and that the placement of the student at the Woods School, a State-approved residential school was consistent with the IDEA and State law, regulation, and guidance, and was the student's LRE based on the information available to the district at the time of the placement and school assignment determinations.

The student attended Shrub Oak as a day student beginning in October 2019 (see Tr. pp. 47-49).[8] The school psychologist testified that sometime toward the end of November 2019 the parent sent an email requesting that the student attend Shrub Oak as a boarding student (Tr. p. 49). She recalled that the district responded by telling the parent that it could not just place the student in a residential program, that the county needed to be involved, and also that the district did not have data to support a residential placement (Tr. p. 51). In her testimony, the parent confirmed that in November 2019 she requested a residential placement for the student because his behavior was severe and Shrub Oak had the clinical staff and supports the student needed (Tr. pp. 286-87). The parent testified that she felt it would be best for the student to be at Shrub Oak for a 24-hour placement (Tr. p. 287). She explained that it was very traumatic for the student to transition between home and school and back and doing so heightened the student's behaviors (Tr. p. 287). The parent reported that the CSE told her that a program review would need to take place before any changes could be made (Tr. p. 288).

According to both the school psychologist and the parent, the CSE held a program review in January 2020 and the district staff reiterated that it did not have the appropriate data to recommend a residential placement and that the county had to be involved and the district needed to "exhaust[] all those options first" (Tr. pp. 52-53, 288, 314). However, the CSE recommended that the student receive ten hours per week of ABA support at home and that parent counseling

583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobol, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 CFR 300.114; 300.116). In this case, neither party disputes that the student cannot be educated in regular education classes in a district public school with nondisabled peers.

[8] According to the hearing record, the district placed the student in the day program at Shrub Oak for the 2019-20 school year notwithstanding that the school was not State-approved (see Tr. pp. 47-49, 177-78).

and training be provided to the parent by Shrub Oak (Tr. pp. 54, 57, 288). The parent testified that, at the January 2020 CSE meeting, the director of special and alternative education told her that she had placed Shrub Oak on the list of schools for the student to attend (Tr. p. 288).

The hearing record reflects that, on April 1, 2020, the CSE determined that the student required a residential placement and by April 21, 2020 had advised the parent that the search for a residential placement needed to begin with placements that had been approved by New York State (Dist. Ex. 10 at pp. 1, 2).

The school psychologist recalled that when the CSE reconvened on April 1, 2020 committee members reviewed behavior data from Shrub Oak and anecdotal data from the parent (Tr. pp. 58-61; see Dist. Exs. 9; 15). She reported that the general consensus between the parent and her representatives was that the student required a residential placement due to concerns regarding his behavior (Tr. p. 63). The school psychologist reported that, in addition, at the time of the meeting the county representative felt that the family had exhausted the services and supports that were available through the county and that a residential placement was necessary for the student (Tr. pp. 63-64). The school psychologist testified that based on the information the CSE had it recommended a residential placement for the student (Tr. p. 64). She reported that, as the CSE chairperson of that meeting, she recommended that the student attend Shrub Oak as a residential student with a 1:1 aide during academic instruction (Tr. p. 65; see Dist. Ex. 15 at p. 1). Consistent with this, the parent indicated that, at the April 1, 2020 CSE meeting, the CSE chairperson stated that the student would be entering the residential program at Shrub Oak on May 6, 2020 (Tr. p. 290). However, the school psychologist testified that following the April 1, 2020 CSE meeting she became aware that when the district recommended a residential placement for a student it had to explore State-approved programs whether they were in-State or out-of-State (Tr. p. 66). She indicated that once she learned this requirement, she scheduled the CSE to reconvene, which it did on April 21, 2020 (Tr. p. 66).[9]

The school psychologist reported that the purpose of the April 21, 2020 meeting was to talk about the exploration of the residential program (Tr. p. 68). The regular education teacher recalled that, according to the parent, the student's behavior at home was getting worse (Tr. pp. 236-37). She stated that staff from Shrub Oak indicated that the student was a "high-management" student who required supervision and support (Tr. p. 237). At the April 21, 2020 CSE meeting, the parent, along with her representatives, expressed concern that the student could potentially be placed in a residential placement other than Shrub Oak following a program search (Dist. Ex. 10 at p. 2). A family representative reported that the parent had looked into approved residential schools and did not feel that they were appropriate for the student and that he would not make progress in them (id. at p. 1). The April 21, 2020 meeting information summary stated that the student had achieved significant progress at Shrub Oak and had made connections with the school staff (id.). According to the meeting summary, the parent provided historical information regarding the student's placements prior to Shrub Oak and indicated that if something happened to the student the district "w[ould] have many more problems" (id.). The family representative commented that he did not feel the district was transparent about the process of reviewing "inferior

[9] The parent reported that she received an email from the district on April 14, 2020, which indicated that the district's attorney had advised the district that it would have to look at State-approved residential programs before it could place the student at the Shrub Oak residential program (Tr. p. 290).

schools" and that they had expected the student to be placed at Shrub Oak after a six-week process involving the county (id.). The meeting information summary indicated that the CSE intended to send "packets" to other residential programs "within the next few days" and noted that the student would not be able to start at a school until the national health crisis "shelter in place" order was lifted (id.). The meeting information summary indicated that the parent was not making phone calls to her own list of State-approved schools, but she had made calls to the list of schools provided to her by the school psychologist (id.). However, the summary indicated that the parent was not doing a search of State-approved schools because her school of choice was Shrub Oak (id.; see Tr. pp. 69, 234-36). District members of the CSE advised the parent that based on regulations the district had to explore New York State approved programs (Tr. pp. 69, 233, 290-91; see Dist. Ex. 10 at p. 1). The parent wanted to know if the regulation requiring the district to explore State-approved schools was new (Dist. Ex. 10 at p. 1). According to the meeting summary, the parent reported that the director of clinical services at Shrub Oak indicated that other programs did not have what the student needed and "that it [wa]s all a matter of money" (id. at p. 2; see Tr. p. 67). The family representative indicated that they were determined to get what the student needed "by any means necessary" (Dist. Ex. 10 at p. 2). The parent expressed that the right thing for the CSE to do would be to place the student at Shrub Oak as soon as possible (id.).

According to the testimony of district staff, the result of the April 21, 2020 meeting was that the district recommended and began a search for a residential program for the student (Tr. pp. 70, 238). According to the parent, this meant that she was expected to do intakes with State-approved programs, something that was difficult to do in the middle of a pandemic when most of the schools were closed down (Tr. p. 291).

The CSE reconvened on June 17, 2020 for the student's annual review (see Dist. Ex. 11 at p. 2).[10] At the time of the CSE meeting, the student had been accepted to two out-of-State schools (Dist. Ex. 11 at p. 3). According to the meeting summary, the student would continue to attend Shrub Oak as a day student until a New York State-approved residential program was identified (id.).

With regard to the process of identifying a State-approved residential school, the school psychologist could not recall the number of packets the district sent out in its initial canvass but indicated that the student was not accepted to any of the programs to which the district applied (Tr. p. 70). The school psychologist reported that "it was quite a difficulty" to find a program for the student (id.). She testified that the district was directed by the State to the "hard to place" unit (Tr. pp. 71, 73). The hard to place unit provided the district with the names of additional schools and the district sent out 23 referrals in its second attempt to locate a program (Tr. pp. 71, 73). The school psychologist reported that the parent was copied on all 23 referrals (Tr. pp. 73-74). The school psychologist reported that when she sent out a "packet" she usually gave a school two weeks to reply and after that she would follow up with the school and parent on a weekly basis to make sure the school was appropriate, that the parties had been in touch, and that an intake had been scheduled (Tr. p. 75). The school psychologist reported that, if a school wanted to schedule an intake, she let the school contact the parent directly and then asked the parties to let her know when the intake was scheduled (id.).

[10] The hearing record does not include a copy of the June 2020 IEP.

The school psychologist reported that some schools did schedule intakes for the student (Tr. p. 76). She noted specifically that the student attended a virtual intake for the Devereux New York residential program but that the parent declined to participate in a second intake with the school (id.). The school psychologist also noted that the Center for Discovery had requested a virtual intake and the parent had declined (id.). The school psychologist indicated that she was aware that the parent allowed the student to do an intake with the Woods School (Tr. pp. 99-100). According to the school psychologist she followed up with the parent three times between July and early August 2020 regarding the virtual intakes and the parent told her that she had been advised that she did not need to make the student available for the intakes (id.). The parent asked her not to contact her again regarding the intakes and indicated that she was going to consider it harassment or coercion if the school psychologist did (id.). The school psychologist recalled that she sent the parent's emails to her supervisor and also notified the State Education Department that the parent was not participating in the intake process and would not allow the two intakes to move forward (Tr. p. 77). The school psychologist testified that subsequently the Woods School accepted the student as did Foundations in Behavioral Health (id.). The school psychologist reported that the program search was still going on at the time of the June 2020 CSE meeting and continued through the summer (Tr. pp. 78-80). According to the school psychologist, after receiving the acceptances, the district looked at the student's profile again to determine if the schools were appropriate (Tr. p. 81). She reported that the CSE reconvened on September 10, 2020 to discuss the student's placement (Tr. p. 81; Dist. Ex. 11).

The parent indicated that she participated in some intakes, including the virtual intake for the Woods School (Tr. pp. 291-92). The parent reported that the student became anxious in response to the virtual intake (Tr. p. 292). The parent indicated that after the April 21, 2020 CSE meeting, she wrote to State officials for help (Tr. p. 324). The parent testified that she asked State representatives for a reprieve from the regulation requiring the district to explore State-approved options but was told that she had to look at a State-approved school because of the pandemic (id.). The parent indicated that she was not required to participate in an intake for the second program that accepted the student (Tr. pp. 326-27). She testified that the student participated in two intakes (Tr. pp. 329, 334). She recalled telling the out-of-district coordinator that if she contacted her again about intake meetings it would be harassment (Tr. p. 329).[11] She reported that the coordinator contacted her three times (Tr. p. 330).

The September 10, 2020 CSE meeting information summary indicated that the student was referred to five programs in May 2020 and 12 in-State and 11 out-of-State programs in June 2020 (Dist. Ex. 11 at p. 1). Twelve referrals indicated that the student was not appropriate for their programs, five referrals indicated that their programs were full, one program was closed due to COVID-19, and eight referrals did not respond despite attempted follow ups (id. at p. 2). The student was accepted at two programs and two programs indicated that the parent did not make the student available to complete the intake process (id.). The district recommended the Woods

[11] The parent testified that the out-of-district coordinator emailed her on July 6th, August 3rd, and August 5th asking her to do virtual intakes (Tr. pp. 329-30). She recalled that she explained to the coordinator that the student would not be doing virtual intakes and asked her to give the schools her number so they could call and ask her questions about the student (Tr. p. 330).

School as the particular nonpublic school to which the student would be assigned (id.). The meeting summary indicated that the parent disagreed with the CSE's recommendation (id.).

The school psychologist recalled that a representative from the Woods School participated in the September 2020 meeting and the CSE discussed how the school could meet the student's needs (Tr. pp. 82-83; see Dist. Ex. 11 at p. 1). The parent was represented by an advocate and an attorney at the meeting (Tr. p. 240; see Dist. Ex. 11 at p. 1). The CSE discussed transportation because the parent was concerned about the distance of the program from her home and staff from the Woods School offered possibilities for transporting the student to and from home and the parent to the school for visits (Tr. pp. 83-85, 240-41). In addition, the CSE discussed the parent's other concerns with the program recommendations and the placement of the student at the Woods School (Tr. pp. 84, 87-93, 102, 241-44).

The regular education teacher for the district indicated that at the September 2020 CSE meeting the chairperson had a placement at the Woods School for the student and the CSE was going to make the recommendation for placement there based on its belief that the program would meet the student's needs (Tr. pp. 239-40; Dist. Ex. 11 at p. 1). The regular education teacher confirmed that there were two State-approved schools that accepted the student (Tr. p. 246). She indicated that there was a discussion in reference to both schools at the CSE meeting and based on the information provided, the Woods School was a more appropriate program (Tr. p. 247). The regular education teacher did not know why a representative from the other program was not present at the CSE meeting (id.). She indicated that the CSE determined that the Woods School was appropriate at the end of the CSE meeting (Tr. p. 248). The regular education teacher testified that the CSE members decided what the recommended placement was going to be at the end of the CSE meeting; she noted that the CSE reviewed the programming, and the out-of-district case manager reviewed her list of programs that were part of the search (Tr. pp. 248-49). The regular education teacher reported that she was individually polled as to whether the program was appropriate when the CSE chairperson asked if anyone had any objections to the placement (Tr. p. 249). She could not recall if a vote was taken (Tr. p. 249). The regular education teacher opined that it would be difficult for any student to leave their home and go away to school and acknowledged that it might be more difficult for the student in question (Tr. pp. 249-50). She opined that it was important for the student to have consistency and the support of his family and community (Tr. p. 250).

The parent testified that she learned the district was recommending the student for the Woods School on September 10, 2020 at the CSE meeting (Tr. pp. 292-93). The parent opined that the Woods School placement was inappropriate largely based on its distance from the student's home and community (Tr. pp. 294-96). In comparison, the parent indicated that the student would not be removed from his community if he attended Shrub Oak (Tr. pp. 331-32). She indicated that it would take two hours to get to Shrub Oak using public transportation (train) (Tr. p. 333).[12]

The school psychologist testified that Shrub Oak was not a State-approved school and she did not know the penalty for a district placing a student in a non-approved school (Tr. p. 94). The director of special and alternative education also testified that Shrub Oak was not State approved

[12] In contrast, the parent testified that, by public transportation, it would take her four hours and forty-seven minutes to reach the Woods School (Tr. p. 294).

and indicated it was important for a school to be approved because it "provides almost a guarantee to the District that the program will be implemented with fidelity, that the staff are certified and the clinicians or service providers are licensed" (Tr. pp. 176-77).

Overall, the evidence in the hearing record shows that the district's pursuit and identification of a State-approved nonpublic school for the student, rather than placing the student at Shrub Oak, which was not a State-approved nonpublic school, was consistent with the district's obligations under the IDEA and related State law, regulation, and policies. In addition, the district made reasonable attempts to place the student at an appropriate in-State residential facility but was unable to do so as a result of a lack of available in-State residential programs that were able to address the student's needs. The parent's frustration with the process is understandable, particularly given the district's initial agreement with the plan of placing the student at the parent's preferred placement, Shrub Oak. However, as the district's recommendations were consistent with federal and State requirements, there is no basis for finding that it committed a procedural or substantive violation of the IDEA as a result of its insistence that the student's residential placement be State approved.

In light of the above, there is no basis in the hearing record to disturb the IHO's determination that the district's decision to place the student at the Woods School provided the student with a FAPE in the LRE.

VII. Conclusion

As noted above, on the issue of the district's offer of a FAPE to the student for the 2020-21 school year, the parent has not set forth a clear and concise statement of the issues presented for review and has thus abandoned any appeal of the IHO's findings underlying his determination that the district offered the student a FAPE. However, out of an abundance of caution, I have reviewed the issue of the district's requirement for and identification of a State-approved residential placement for the student to attend, and the evidence in the hearing record supports the IHO's determination that the district offered the student a FAPE in the LRE for the 2020-21 school year.

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

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
August 18, 2021

SARAH L. HARRINGTON
STATE REVIEW OFFICER