The University of the State of New York

The State Education Department
State Review Officer
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No. 16-055

Application of the BOARD OF EDUCATION OF THE NORTH SHORE CENTRAL SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Ingerman Smith, LLP, attorneys for petitioner, Susan M. Gibson, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that the district failed to offer an appropriate educational program to the student and awarded the student compensatory educational services in the form of one year of tuition at Westchester Exceptional Children's School (Westchester). The appeal must be sustained.

II. Overview—Administrative Procedures

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

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student

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

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

III. Facts and Procedural History

The student was the subject of a prior administrative appeal involving another school district (see Application of a Student with a Disability, Appeal No. 15-119). Accordingly, the parties' familiarity with the student's educational history is assumed and will not be repeated here in detail. Briefly, according to the hearing record, a Family Court placed the student in the care and custody of the New York City Administration for Children's Services (ACS) as of June 20, 2012 (Dist. Ex. 3 at pp. 3-5). The hearing record reflects that, after being referred to the CSE of the student's district of residence, two IEPs were developed: (1) an April 2013 IEP providing that the student was eligible to receive special education services as a student with an emotional disturbance and recommending a 12-month school year program in a State-approved nonpublic day school with related services, noting that ACS was trying to place the student in a residential setting (Dist. Ex. 7 at pp. 1, 9-10, 12, 15); and (2) a December 2013 IEP providing that the student was eligible to receive special education services as a student with an other health-impairment and again recommending a 12-month school year program in a State-approved nonpublic school (Dist. Ex. 6 at pp. 1, 8-9, 11). According to the hearing record, the district of residence did not locate a

school placement for the student during this time frame but the student received home instruction from approximately May 2013 through January 2014 (Tr. p. 1360; see Dist. Ex. 15 at p. 2).

Subsequently, ACS placed the student at an SCO Family of Services Children's Residence called the Robert J. McMahon Children's Center (SCO/RJMCC) in January 2014, which is located within the district (Tr. pp. 128-29, 154; Dist. Exs. 1; 4 at p. 1; Parent Ex. J). The hearing record reflects that residents of SCO/RJMCC typically attend the Tyree Learning Center (Tyree), a State-approved school affiliated with SCO/RJMCC (Tr. pp. 128-29; Dist. Ex. 4 at p. 1). According to the hearing record, SCO/RJMCC received the December 2013 IEP from the student's district of residence and could not place the student in Tyree because Tyree did not serve students with disability classifications of other health-impairment (Tr. pp. 155-56; Dist. Ex. 34 at p. 1). Therefore, on February 6, 2014, SCO/RJMCC registered the student in the district (Tr. pp. 138, 154-55; Dist. Exs. 2; 4 at p. 1). Upon his registration, the district began providing the student with ten hours per week of home instruction, four 30-minute sessions per week of speech-language therapy, and two 30-minute sessions per week of counseling (Tr. pp. 157-58, 466, 471-72, Dist. Ex. 4 at pp. 1-2).[1]

On March 6, 2014, the CSE convened to review the student's educational needs, determined that the student was eligible to receive special education services as a student with multiple disabilities, and recommended a Board of Cooperative Educational Services (BOCES) 6:1+1 special class placement, speech-language therapy, and counseling services, with home instruction to be continued pending placement (Dist. Ex. 4 at p. 1-2, 8, 11).[2] The March 2014 CSE determined that it did "not have in-district programs for students as involved as those who reside at SCO," and decided to locate an out-of-district placement for the student (see Tr. pp. 391-92, 526, 1277-79; Dist. Ex. 4 at p. 1).

On or about March 17, 2014, the district submitted an application for the student's immediate placement in a BOCES program (Dist. Ex. 19 at p. 1). In an e-mail dated April 2, 2014, an attorney from ACS contacted the district to obtain an update on the student's placement (Dist. Ex. 33; see Dist. Ex. 34 at p. 1). In response, the district director of special education advised that the BOCES program to which the district submitted an application for the student's attendance did not accept the student but that the district planned to apply to State-approved nonpublic schools (Dist. Ex. 33).[3] Furthermore, he noted that, since the March 2014 CSE changed the student's classification category to multiple disabilities, Tyree might have been an option but the March 2014 CSE did not believe it was authorized to place students at Tyree (id.). He indicated that,

[1] According to the hearing record, as part of the student's district of residence's search for a State-approved nonpublic school placement to implement the April or December 2013 IEP, the school district of residence applied to Westchester (Tr. pp. 190, 405, 985, 1367-68). By letter dated February 7, 2014, Westchester accepted the student to attend for the 2013-14 school year "as soon as his district[']s CSE can convene to approve his placement" (IHO Ex. I at p. 4). Westchester has been approved by the Commissioner of Education as a school with which districts may contract for the instruction of students with disabilities (see 8 NYCRR 200.1[d]; 200.7).

[2] The student's eligibility for special education and related services is not in dispute, although the parent alleges that multiple disabilities is not the most appropriate disability category for the student (see 34 CFR 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

[3] In a letter to the district dated April 15, 2014, the chief psychologist from the BOCES program advised that it did not have a placement available for the student (Dist. Ex. 20 at p. 3).

should "the responsible CSE . . . revert from [the district] back to SCO, then [the student's] admittance at Tyree would be possible, provided that this would be agreeable to Tyree and SCO and the parent would consent" (id.).

On April 9, 2014, the district submitted applications for the student's immediate placement at two State-approved nonpublic schools (Dist. Ex. 19 at pp. 2-3). In a letter to the district dated April 14, 2014, the assistant director from one of the nonpublic schools advised that it did not have an appropriate opening for the student for the 2014-15 school year (Dist. Ex. 20 at p. 4).

In a letter to SCO/RJMCC's director of social services dated April 30, 2014, the district director of special education articulated the CSE's rationale for changing the student's disability classification from other health-impairment to multiple disabilities (Dist. Ex. 23). He explained that the student met the criteria for both an emotional disturbance and an intellectual disability and identified a November 2013 neuropsychological evaluation report and a January 2014 psychiatric assessment as the evaluative information relied on by the March 2014 CSE in making its determination (id.).

In an e-mail dated May 1, 2014, SCO/RJMCC's director of social services asked the district "if the best way to move forward [wa]s for SCO . . . to 'rescind' the registration with [the district] for [the student] and register [the student] with the Tyree CSE" (Dist. Ex. 34 at p. 1). She further indicated that she understood the district could not directly refer the student to Tyree (id.).

In a letter dated May 13, 2014, the district director of special education advised SCO/RJMCC and the parents that BOCES and two State-approved nonpublic schools had rejected the student for placement (Dist. Ex. 21 at p. 1). The district requested reconsideration of the student's placement at Tyree and requested that SCO/RJMCC or Tyree advise it of any procedural requirements needed to effectuate this possibility (id.).

On May 15, 2014, the student was enrolled in Tyree (Dist. Ex. 35 at p. 1; Parent Ex. G). On July 21, 2014, a CSE from Tyree convened to develop the student's IEP for the 2014-15 school year (Dist. Ex. 22).

A. Due Process Complaint Notice

By due process complaint notice dated October 15, 2015, the parent alleged that the March 2014 CSE improperly identified the student as having a developmental disability (IHO Ex. I at p. 2). She also asserted that the student was "placed in a school that does not fit" the two previous IEPs developed by the district of residence in April 2013 and December 2013 (id.). As relief, the parent requested immediate placement of the student at Westchester, that his educational placement at Westchester continue for two years, through age 22, and that Westchester evaluate the student (id.). The parent attached supporting documents to her due process complaint notice, including an acceptance letter from Westchester for the student to attend for the 2013-14 school year (id. at p. 4).

In an e-mail to the IHO, dated November 3, 2015, the parent further detailed her allegations and submitted an updated acceptance letter from Westchester for the 2015-16 school year (IHO

Ex. VII at pp. 1, 3-4).[4] The parent explained her position regarding the student's placement contending that, after the district of residence denied the student an education for two years, he was "whisked to [the district] by ACS and SCO one week after an appropriate school, Westchester Exceptional Children's School, invited [them] for an interview" (id. at p. 1). According to the parent, "[the student] was held in an empty SCO residential building for four months with a cleaning lady without school placement" between approximately January and May 2014 (id.). The parent maintained that the district had "the authority to reenroll [the student] and to place him at [Westchester]" and indicated that the distance between SCO/RJMCC and Westchester was not significant (id.). She further stated that the student was "inappropriately placed in a NYS Special Ed non-district school" (id.). According to the parent, the district "obliged SCO and the Tyree CSE" by changing the student's eligibility classification to the multiple disabilities "to fit the institution" (id.). She further challenged the information before the March 2014 CSE and asserted that there was "ample documentation and testimony to show that [the student] [wa]s not developmentally disabled" (id.).

B. Impartial Hearing Officer Decision

Prior to the start of the impartial hearing, the district made a motion to dismiss the parent's due process complaint notice asserting that the district was not responsible for developing the student's current educational program and the parent's due process complaint notice should have been filed with the chief executive of SCO/RJMCC or Tyree because SCO/RJMCC was a child care institution (IHO Ex. IV). The parent submitted a response to the district's motion asserting that SCO/RJMCC was not a child care institution, that the district improperly changed the student's disability classification to multiple disabilities so that Tyree could accept the student, and that the district never provided the parent with notice that the district did not have an appropriate placement for the student (IHO Ex. V). In a decision, dated January 4, 2016, the IHO denied the district's motion to dismiss finding that factual issues existed as to whether SCO/RJMCC was a child care institution and whether the parent was provided appropriate notice of the district's determination that it did not have an appropriate program (IHO Ex. IX).

After a prehearing conference on January 13, 2016, the parties proceeded to an impartial hearing on March 16, 2016, which concluded on April 6, 2016 after five days of proceedings (Tr. pp. 1-1444).[5] By decision dated July 22, 2016, the IHO concluded that the district failed to offer the student a free appropriate public education (FAPE) for a portion of the 2013-14 school year

[4] The IHO sent an e-mail to the parties on January 3, 2016 in which she determined that the parent's November 3, 2015 e-mail and attached supporting documentation was intended as an amendment to the due process complaint notice (IHO Ex. VIII).

[5] On March 18, 2016, an SRO issued Application of a Student with a Disability, Appeal No. 15-119, which addressed the parent's July 25, 2015 due process complaint notice filed with the student's district of residence (IHO Ex. XIII). The SRO remanded the proceeding for determinations as to the parent's standing to bring the proceeding and the district of residence's responsibilities during the time periods at issue (id.). Additionally, as the SRO was aware of the due process complaint notice filed in this proceeding with the district, the SRO directed that the matter be remanded to the IHO presiding over this proceeding "to determine whether to have a joint hearing or to consolidate [the] matter[s]" (id.). In an interim order dated April 7, 2016, the IHO accepted jurisdiction over both proceedings but declined to consolidate the matters or conduct a joint hearing (IHO Ex. XVI).

and directed it to fund the costs of the student's tuition at Westchester for one year (IHO Decision at pp. 21, 31).[6, 7]

Initially, the IHO found that, although the student was removed from the parent's custody and placed with ACS, the parent retained the right to participate in educational decision making and thus had standing to bring this proceeding (IHO Decision at pp. 7-9). Next, the IHO concluded that the district waived the jurisdictional defenses it had raised in its motion to dismiss because they were not repeated in the district's post-hearing brief (id. at pp. 9). Nevertheless, the IHO addressed and rejected the district's claim that the matter should be dismissed due to the parent's failure to file her due process complaint notice with SCO/RJMCC in accordance with State regulation, having determined that the parent did not follow the procedures for proper service in this matter because the district failed to notify her of those procedures (id. at pp. 9-10).[8]

With respect to the merits, the IHO "[found] no fault in the [D]istrict having placed the student on home instruction upon his enrollment in the [D]istrict" (IHO Decision at p. 12). Next, regarding the student's classification, the IHO did not find any evidence to support the parent's allegation that the March 2014 CSE changed the student's classification to multiple disabilities for the sole purpose of placement at Tyree (id.). Next, the IHO determined that the appropriate disability category for the student was emotional disturbance (id. at p. 17). However, she rejected the district's claim that the student also met the criteria for having an intellectual disability (id. at pp. 14-16). More specifically, she found that conclusions contained in assessments of the student's cognitive functioning were based more upon speculations and impressions, rather than objective standardized testing (id. at p. 16). Therefore, the IHO determined that although "it may well be the case" that the student had cognitive delays, the March 2014 CSE's determination that the student met the criteria for having an intellectual disability was "not based on the type of reliable and objective standardized testing contemplated by the IDEA" (id.). Under the circumstances, the IHO concluded that the district did not establish that multiple disabilities was an appropriate classification for the student (id.).[9]

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[6] The IHO issued an amended/corrected decision on July 27, 2016, which explained that the IHO could not direct SCO/RJMCC to place the student at Westchester because they were not a party to the proceeding and further stated that the compensatory award of funding placement at Westchester was for after the student turned 21 years old (compare July 22, 2016 IHO Decision at pp. 30-31, with July 27, 2016 IHO Decision at pp. 30-31).

[7] The IHO declined to find that the district had any obligation to offer the student a FAPE for the 2014-15 or 2015-16 school years (IHO Decision at p. 23). As neither party appeals this finding, this determination is 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]; see C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *9 [S.D.N.Y. Mar. 28, 2013]; M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6, *10 [S.D.N.Y. Mar. 21, 2013]).

[8] The IHO indicated that she did not need to determine whether or not SCO/RJMCC was a child care institution (IHO Decision at p. 10 n.3). Additionally, the IHO noted that, had the parent made SCO/RJMCC a party to this proceeding, she could have directed it to re-enroll the student in the district and then directed the district to enroll the student at Westchester (id. at p. 30).

[9] The IHO also rejected the parent's contention that the student should be classified as having an OHI, based on her conclusion that the student did not present with an underlying chronic or acute health problem (IHO Decision at pp. 16-17).

The IHO noted that "there [wa]s no dispute about the fact that the [s]tudent require[d] an intense level of special education support and that his needs [could not] be met in any of the programs available within the [d]istrict" (IHO Decision at p. 11). She further noted that the parties did not dispute the March 2014 CSE's recommendation for placement in a 6:1+1 special class (id. at p. 17). Rather, the IHO explained that the parties' dispute centered around the parent's request to place the student at Westchester (id. at pp. 17-18). Although the IHO found that it was understandable for the March 2014 CSE to secure a placement for the student geographically closer to the district, she further found that when it became clear that local placements would not accept the student, the district should have immediately considered Westchester (id. at p. 18). She rejected the district's claims that it did not consider Westchester, based on least restrictive environment (LRE) considerations, namely, its distance from the district (id.). Moreover, the IHO found no evidence to support the district's claim that it rejected placement of the student at Westchester because it did not have a full-time psychiatrist on staff (id. at pp. 18-19). Additionally, the IHO noted that "placing the student at Tyree was not an option for the [d]istrict and should not even have been considered" (id. at pp. 20-21). She found that it was not clear why the district "pursued" the option of sending the student to Tyree, and that the hearing record lacked "information about the actual mechanics and procedures that resulted in" the student's placement there (id.). Rather, she found that there was no documentation or written notice to the parent regarding the change in placement from home instruction to Tyree (id. at p. 21). More specifically, the IHO concluded that the placement at Tyree was not appropriately processed and was effected in violation of the parent's due process rights (id. at p. 22). Based on the foregoing, the IHO concluded that the district failed to offer the student a FAPE for the period from April 2014 through the end of the 2013-14 school year (id. at pp. 21, 27-28).[10]

With respect to relief, the IHO determined that there was insufficient evidence to support a finding that two years of additional services were necessary to compensate for a three-month denial of appropriate services (IHO Decision at pp. 28-29). Conversely, given that the student was a "twelve-month student," the IHO surmised that he would need "a substantial amount of time in a new educational setting in order to adapt to the setting and begin to benefit from instruction;" therefore, she determined that a three-month compensatory education award would not be sufficient (id. at p. 29). She further reasoned that an award of relief for this student would need to provide the necessary time for him to recoup any regression he may have experienced and then receive the necessary instruction to make the educational progress he would have received had the district offered him a FAPE (id. at pp. 29-30). In light of the foregoing, the IHO determined that a one-year compensatory education award was appropriate and she directed the district to fund a one-year placement for the student at Westchester (id. at pp. 30-31).

IV. Appeal for State-Level Review

The district appeals and requests that the IHO decision be reversed in its entirety. Initially, the district argues that dismissal of the matter is warranted because the parent failed to properly file the complaint with SCO/RJMCC in accordance with State regulation. Next, the district alleges that the IHO erred in concluding that the hearing record did not support a finding that the student met the criteria for classification as a student with multiple disabilities. The district further

[10] The IHO found that the student's FAPE deprivation began in early April 2014, when the district learned that out-of-district placements did not accept the student (IHO Decision at p. 28).

contends that even if the parent properly initiated the proceeding, the IHO erred in finding that its failure to provide the parent with notice prior to the student's placement at Tyree resulted in a failure to offer the student a FAPE as both parents were aware of the placement decision and the issue was not raised in the parent's due process complaint notice. Additionally, the district argues that the IHO improperly awarded compensatory education because there was not a gross violation of a FAPE as the alleged denial of FAPE did not occur over an extended period of time. The district further alleges that it "exhausted all placement options" before the student was placed at Tyree and that the district appropriately rejected Westchester as being too far from SCO/RJMCC and requiring too much travel time. The district also alleges that the IHO improperly issued an award of compensatory education in the form of a one-year placement at Westchester without first considering its appropriateness, namely, whether it was the student's LRE or whether it had accepted the student. The district further contends that the award of one year of compensatory education was excessive in comparison to the amount of time that the alleged violation of a FAPE occurred.

In an answer, the parent refutes the district's claims, and requests that the decision be upheld in its entirety. More specifically, she alleges that the student was inappropriately classified as a student with multiple disabilities and that her concerns "were merely listed, and were never seriously considered or addressed." The parent alleges that the district did not offer the student a FAPE for a portion of the 2013-14 school year, based on its failure to "follow proper placement and notification procedures." The parent also submitted additional evidence with her answer which is discussed in further detail below.

As a remedy, the parent requests an order directing that the student be re-enrolled in the district, and then placed in Westchester. She further requests an order granting leave to amend the due process complaint notice to join SCO/RJMCC as a necessary party, and that the matter be remanded to the IHO.

In a reply, the district objects to the parent's submission of additional evidence. The district argues that the SRO does not have the authority to amend the parent's due process complaint notice or direct the district to re-enroll the student. Additionally, the district argues it is inappropriate to remand this matter to the IHO, because "such remand would not assist in expeditiously resolving the dispute between the parent and the [d]istrict."

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v.

Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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

VI. Discussion

A. Preliminary Matters

1. Additional Evidence

The parent submits additional evidence with her answer and memorandum of law. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). Most of the additional evidence submitted by the parent was available at the time of the hearing and is unnecessary to render a determination (Answer Exs. A-G; Parent Mem. of Law Exs. A; C-F). Accordingly, I decline to accept this evidence.

However, Exhibit H to the parent's Answer is an IHO's decision after an SRO's remand in Application of a Student with a Disability, Appeal No. 15-119, pertaining to the administrative proceeding against the student's district of residence (Answer Ex. H). The IHO's decision in that matter is dated September 19, 2016, after the conclusion of the impartial hearing in the present case, and is necessary in order for a fully informed decision in this matter to be rendered (id. at p. 17). In addition, Exhibit B to the parent's Memorandum of Law is a response from the State Education Department to the parent's request for records pursuant to the Freedom of Information Law (FOIL), dated June 30, 2016, after the last hearing date but before the IHO's decision (Parent Mem. of Law Ex. B). I find that this evidence was not available during the impartial hearing and is necessary to render a determination regarding the classification of SCO/RJMCC.

2. Classification of SCO/RJMCC

Before addressing the merits of the procedural claims related to the March 2014 CSE and the parent's challenge to the actions of the district, it is necessary to examine the classification of SCO/RJMCC. This preliminary question impacts the analysis of the district's responsibility to educate the student, as well as the procedural requirements relative to the initiation of the proceedings. The IHO indicated that she did not make a specific finding as to whether or not SCO/RJMCC was a child care institution (IHO Decision at p. 10 n.3); however, many of her subsequent determinations rested on her treatment of the facility or its affiliated school as a child care institution, including her findings relating to the termination of the district's obligation to offer the student a FAPE (see id. at p. 23).[11] Neither party has appealed the IHO's treatment of SCO/RJMCC as a child care institution or her determination that the district's obligation to develop an IEP for the student ceased as of a July 2014 Tyree CSE meeting.[12] Therefore, these determinations are final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *9 [S.D.N.Y. Mar. 28, 2013]; M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6, *10 [S.D.N.Y. Mar. 21, 2013]). However, a discussion of the classification of SCO/RJMCC is warranted in order to frame the remaining issues on appeal.

A person over five and under twenty-one years of age who has not received a high school diploma is entitled to attend the public schools maintained in the district in which such person resides without the payment of tuition (Educ. Law § 3202[1]). However, State laws and regulations also include a number of special provisions that address, among other things, the educational rights of children who are in a variety of institutional settings, or have been placed in a residential setting by a social services district, State agency, or family court (see Educ. Law § 3202[4]-[8]).[13] In these special cases, the programmatic and fiscal responsibilities of school districts are statutorily defined.[14]

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[11] As examined in more detail below, if SCO/RJMCC or Tyree was not a child care institution, the district's obligations to the student would not have ceased as of the date the Tyree CSE convened as the IHO found.

[12] The parent does not appeal the IHO's treatment of SCO/RJMCC as a child care institution but also indicates that it would be appropriately categorized as an agency operated boarding home (Parent Mem. of Law at p. 10). The parent has gone above and beyond to research and attempt to obtain a concrete answer as to the classification of SCO/RJMCC and Tyree. It is unacceptable that the parent should have to go to such lengths to obtain this information, particularly when the character of the facility defines the legal rights and responsibilities of students, parents, and districts.

[13] This sort of placement is distinct from a CSE's placement of a student in a residential school in order to meet the student's special education needs (Educ. Law § 4402[2][b]).

[14] In 1996, the State Office of Special Education issued a guidance regarding the responsibilities for the education of school-age children in residential care, which was reprinted in 2000 ("Education Responsibilities for School-Age Children in Residential Care," Office for Special Educ. Servs. [Feb. 1996, reprinted Jan. 2000], available at http://www.p12.nysed.gov/specialed/publications/EducResponsSchoolAgeResidence.pdf). Excerpts from the guidance are included in the hearing record (Dist. Exs. 27; 28). The guidance offers charts to identify programmatic and fiscal responsibilities of facilities, districts of location, and districts of residence and/or origin, varying based on the State agency which licensed or certified the facility in which the student was residentially placed ("Education Responsibilities for School-Age Children in Residential Care"). However, due to the passage of time, many of such State agencies have merged or been renamed and many of the laws or regulations cited

Residential foster care supervised by OCFS includes "care provided a child in a foster family free home or boarding home, group home, agency boarding home, child-care institution, health-care facility or any combination thereof" (18 NYCRR 441.2[k]; see 18 NYCRR 441.1). A foster family free home means care provided to a child by a family member other than "the child's parent, stepparent, grandparents, brother, sister, uncle, aunt or legal guardian" (18 NYCRR 441.2[j]). A "foster family boarding home," an "agency boarding home" and a "group home" are defined as a person's or family's "residence" or "a family-type home," with the two former authorized to care for not more than six children and the lattermost authorized to care for between seven and twelve children (with exceptions to these maximum numbers of children in the case of siblings) (18 NYCRR 441.2[h]-[i]; 443.1[j]; see Soc. Servs. Law § 371[16]-[17]).[15] Children placed in a foster family, agency boarding home, or group home must be admitted to the public school district in which the family, agency boarding, or group home is geographically located (Educ. Law § 3202[4]; McMahon v. Amityville Union Free Sch. Dist., 48 A.D.2d 106 [2d Dep't 1975]; Education Responsibilities for School-Age Children in Residential Care," at pp. 27-28).

Both child welfare agencies and the Family Court may place children in child care institutions, which are residential facilities serving 13 or more children licensed by the Office of Children and Family Services (OCFS) (Educ. Law § 4001[2]; 18 NYCRR 441.2[f]; see Soc. Servs. Law §§ 398, 460).[16] In keeping with the IDEA, Article 81 of the Education Law guarantees a FAPE to all disabled children ages five through twenty-one placed in child care institutions (Educ. Law § 4002[1]; see 8 NYCRR 200.11[b]). A child care institution may maintain its own schools, in which case it must appoint a CSE that performs the requisite CSE duties (Educ. Law § 4002[3]; 8 NYCRR 116.6[a]).

The evidence in the hearing record includes references to SCO/RJMCC as a child care institution, but it also includes contradictory and confusing references to the character of SCO/RJMCC and/or Tyree in documents, some of which were generated by the facility and/or the school. The district director of special education testified that SCO/RJMCC was a child care institution (Tr. pp. 128-29, 135; see Tr. p. 121). Additionally, the parent offered documentation in opposition to the district's motion to dismiss obtained from a website dedicated to assisting the public access health and human services information, which referred to Tyree as an Article 81 (child care institution) residential school (IHO Ex. V at p. 31). The parent also pointed to progress reports generated by Tyree that referred to Tyree as the facility and "SCO-The Theresa Paplin School" as a district (id. at pp. 89-91). Further, the hearing record also includes a DSS-2999 form

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have been amended or repealed. For example, since the guidance was originally published in 1997, the State Department of Social Services was renamed the Department of Family Assistance and divided into the Office of Temporary and Disability Assistance and OCFS (Chap. 436 of the Laws of 1997 § 122). In addition, as part of the same reorganization, OCFS assumed all of the functions of the Division for Youth (id. § 123). Accordingly, while it is a useful resource, the information contained therein should be viewed in light of more recent developments in the law.

[15] A residential health care facility "means a nursing home or a facility providing health-related service" (18 NYCRR 360-1.4[m]). No party claims that SCO/RJMCC could be deemed a residential health care facility.

[16] The child care institutions licensed by the Office of Mental Health (OMH) are known as residential treatment facilities (Educ. Law § 4001[2]; Soc. Serv. Law § 2[32]; Mental Hyg. Law § 1.03[33]).

completed by a social worker from SCO/RJMCC titled "School District Notification of Foster Child Placed in a Foster, Family, Agency Boarding, or Group Home" (Dist. Ex. 2).[17]

Despite these confusing characterizations of SCO/RJMCC and Tyree, the hearing record also includes an OCFS operating certificate, dated January 25, 2013, which authorized SCO Family of Services to operate as an "Institution" with 74 "Hard-to-Place Beds" for males and females, ages 5-21 (Parent Ex. E).[18, 19] To the extent that the operating certificate identifies OCFS as the licensing State agency, identifies the facility to be an "institution,"[20] and authorizes SCO to serve more than 13 children at the address of SCO/RJMCC, the operating certificate includes information consistent with the definition of a child care institution in State law and regulation (see Educ. Law § 4001[2]; 18 NYCRR 441.2[f]).[21] The evidence in the hearing record also indicates that Tyree is a State-approved nonpublic residential school affiliated with and located on the same grounds as SCO/RJMCC (Tr. p. 129; Parent Mem. of Law Ex. B at pp. 3-4; compare Dist. Ex. 16 at p. 1, with Dist. Ex. 22 at p. 1).[22, 23] Finally, it is undisputed that Tyree had a CSE

[17] This form is used to notify school districts whenever a child in foster care is newly enrolled in a school district, thus permitting those districts to apportion tuition costs for the student's schooling (18 NYCRR 445.1[a]; see Educ. Law § 3202[4][a], [d], [f][i]; see also "Education Responsibilities for School-Age Children in Residential Care," at pp. 27-28). If SCO/RJMCC was a child care institution, the appropriate form should have been DSS-3424, for "School District Notification of Financial Responsibility for Educationally Handicapped Foster Child Placed in a Child Care Institution" (see "Education Responsibilities for School-Age Children in Residential Care," at pp. 24-25).

[18] The applicable State regulation promulgated by OCFS provides that "[a]n operating certificate shall state the name of the facility, its location, the name and address of the authorized agency, corporation, association, organization, proprietary operator or public agency, who or which operates such facility, the type of facility, and the maximum resident capacity" (18 NYCRR 476.2[a]).

[19] The response to the parent's FOIL request also includes an OCFS operating certificate, dated March 8, 2005, for SCO Family of Services to operate as a 73-bed institution (including 36 regular beds and 37 hard-to-place beds) (Parent Mem. of Law Ex. B at p. 2).

[20] While the operating certificate identifies the facility as an "institution" and not a "child care institution," a comparison of the definition of a "child care institution" in the Education Law with the definition of an "institution" in the regulation promulgated by OCFS reveals that they are effectively the same (compare Educ. Law § 4001[2], with 18 NYCRR 441.2[f]).

[21] In contrast, the other community-based foster care programs supervised by OCFS are considered family-type settings and exclude institution-type settings such as SCO/RJMCC (see Appeal of Constantine, 43 Ed. Dep't Rep., Decision No. 15,044 [2004], available at http://www.counsel.nysed.gov/Decisions/volume43/d15044).

[22] Tyree appeared on a list of nonpublic schools approved by the Commission of Education as schools with which districts may contract for the instruction of students with disabilities (IHO Ex. V at pp. 39-40; see 8 NYCRR 200.1[d]; 200.7). Further, according to the State Education Department's response to the parent's FOIL request, "any [CSE] in New York State c[ould] refer a school-age student with a disability to the Tyree Learning Center" (Parent Mem. of Law Ex. B at p. 1).

[23] An administrative directive published by the State Department of Social Services shortly after the passage of the Institution Schools Act (Chap. 563 of the Laws of 1980)—which, among other things, enacted Article 81 of the Education Law relating to the education of children residing in child care institutions—describes a school maintained by a child care institution as an "on-campus private school" ("Educational Services to Children in Child Care Institutions and Community Based Foster Care," Dep't of Spec. Ed. Admin. Directive [July 1982], available at http://ocfs.ny.gov/main/policies/external/1982/ADMs/1982%20ADM-36%20part%201%20Educational%20Services%20for%20Children%20in%20Child%20Care%20Institutions%2

dedicated to developing IEPs for students enrolled in Tyree (see Dist. Ex. 22).

While the operating certificate may have been sufficient to sustain the IHO's treatment of SCO/RJMCC or Tyree as a child care institution if the classification of the facility was at issue on appeal, the sustained lack of clarity on this point is disconcerting. The character of the facility should not be a matter so disputed. It was incumbent upon the district, as the party carrying the burden of proof at the impartial hearing (Educ. Law § 4404[1][c]; see 8 NYCRR 200.11[c][1]), to offer evidence as to the classification of SCO/RJMCC. Not only did the parent obtain and produce the majority of the evidence relating to the character of the facility, the district did not even offer a witness at the impartial hearing from SCO/RJMCC to help clarify what should be a preliminary and undisputed fact. The district should take greater care in the future to: (a) be sure of the character of the residential facility located within its geographic boundaries; (b) be able to definitively establish that character at an impartial hearing or other proceeding, particularly when the district relies on the classification of the facility as a defense to a parent's claims as it did in the present case; and (c) ensure transparency about the classification of a facility located within its geographic boundaries so that students, parents, and districts can understand the legal rights and responsibilities that are attached thereto.

3. Initiation of the Proceedings

The district has raised an issue about the parent's initiation of the impartial hearing in this matter. The district maintains that, even if programmatically responsible for the student once he was enrolled in the district, the parent's recourse was still to pursue an impartial hearing against SCO/RJMCC or Tyree, the school affiliated with SCO/RJMCC.

Parents of students in child care institutions may exercise due process rights and request impartial hearings (Educ. Law § 4005[2][b]; 8 NYCRR 200.5[j]; 200.11[c]). For students residing in child care institutions, State regulation sets forth particular procedures for review of a determination by a board of education of a school district of location (8 NYCRR 200.11[c]). In the case of a parent who wishes to challenge the determination of the board of education in such circumstances, State regulation requires that the parent inform the chief administrator of the facility or the child care institution in writing (8 NYCRR 200.11[c][1]). The chief administrator of the facility or the child care institution must, in turn, provide notice to the parent and to the board of education whose decision is sought to be reviewed (8 NYCRR 200.11[c][1]-[2]). The board of education is a necessary party to the hearing and bears the burden of proof with respect to the unavailability of an appropriate program for the student in the school district or at a BOCES or another school district (8 NYCRR 200.11[c][1]). The chief administrator of the facility or child care institution is responsible for facilitating the procedures of the impartial hearing and ensuring due process (8 NYCRR 116.6[a]; see 8 NYCRR 200.5[h]-[j]).

In the instant case, assuming that the parent's failure to provide the chief administrator of SCO/RJMCC with notice of the impartial hearing conflicted with State regulation, it would not invalidate the present proceedings. Initially, as discussed below, neither the district nor the

0and%20Community%20Based%20Foster%20Care.pdf). As with the guidance document prepared by the State Education Department regarding education responsibilities for school-age children in residential care, this directive must be considered in light of more recent developments in law and regulation, particularly the reauthorization and amendment of the IDEA in 2004.

SCO/RJMCC strictly complied with the procedures attendant to placement of students residing in child care institutions. Additionally, as the IHO generally observed, it would seem inequitable to dismiss the parent's claims based on her procedural missteps since they may have been prevented had the SCO/RJMCC and the district complied with their procedural responsibilities. Further, had the parent provided SCO/RJMCC with notice of the impartial hearing, SCO/RJMCC would have been required to join the district as a necessary party to this action and the district would have borne the burden of proof (see 8 NYCRR 200.11[b][c][1]). Under these circumstances, there is no indication in the hearing record that the district suffered any prejudice as a result of the parent's failure to initiate the impartial hearing pursuant to State regulation and the IHO's determination to allow the impartial hearing to proceed is supported by the hearing record.

B. District's Responsibility / CSE Process

The district's responsibilities to plan for and provide the student with special education will next be examined.

As noted above, students placed in foster family homes, agency boarding homes, or group homes must be admitted to the public school district in which the family, agency boarding, or group home is located (Educ. Law § 3202[4][a]-[b]; McMahon, 48 A.D.2d 106; see also "Education Responsibilities for School-Age Children in Residential Care," at pp. 27-28). If the student requires special education, the CSE of the district of location must convene a CSE to recommend an appropriate placement for the student pursuant to the IDEA and Article 89 of the Education Law.

The State Education Law and regulations are more specific with respect to the educational planning for students in child care institutions. Students residing in child care institutions shall be "identified, evaluated and provided with suitable special education services" (Educ. Law § 4002[3]; 8 NYCRR 200.11[b]; see also Letter to Covall, 48 IDELR 106 [OSEP 2006]).[24] Child care institutions that operate their own schools each have a CSE, which must perform the requisite CSE duties (Educ. Law § 4002[3]; 8 NYCRR 116.6[b]).[25] The child care institution CSE is required to follow the procedures governing the CSE process "including the involvement of the parents or guardians of the child" (Educ. Law § 4005[2][a]). The child care institution CSE must place the student in an appropriate program in the LRE for that student, taking into account the "recommendations made by the [CSE] of the school district of residence" (Educ. Law §

[24] Before placing any child thought to have a disability in a child care institution, the family court or child welfare agency is required to ask the CSE of the child's school district of residence to evaluate the child and issue a written recommendation and report within forty-two days of the request (Educ. Law § 4005[1]; 8 NYCRR 200.4[h][1]). The court or agency must then consider the information gathered from the CSE in determining the "most appropriate placement for the child" (Educ. Law § 4005[1]). State regulation also requires residential homes or facilities to produce an educational evaluation of children within 10 days of admission (8 NYCRR 116.2). "[I]nformation obtained from the student's previous school district or other comparable sources may be used to supplement or in lieu of conducting the assessments required" (8 NYCRR 116.2[g][2]; see Educ. Law § 4005[2][a][i]).

[25] According to the administrative directive published by the State Department of Social Services, the CSE of the school maintained by the child care institution has the educational planning responsibility for students placed there by a child welfare agencies or the Family Court but not for students placed there by the CSE of a school district ("Educational Services to Children in Child Care Institutions and Community Based Foster Care," at p. 14).

4005[2][a][ii]). State law specifies that the "day programs" in which the child care institution CSE may place a student may be provided by, among others, a public school, a BOCES, a special act school district, a State-approved nonpublic school operated by the institution, or a State-approved non-residential school (Educ. Law §§ 4002[2]; 4005[2][a][iii]).

If the child care institution CSE determines that a student will be able to benefit from instruction in a public school program, it "shall recommend to the school district in which the facility is located" that the student be admitted to the schools of such district (8 NYCRR 200.11[b][1]; see Educ. Law § 4005[3]). Upon admission, the CSE of the school district of location must review the recommendation of the child care institution's CSE, along with "relevant supporting information and data, to determine whether the school district has an educational program appropriate to the needs of [the] student " and report its findings to the board of education of such school district (8 NYCRR 200.11[b][2]). If the board of education of the school district of location determines that there is no program appropriate to the needs of a student in the schools of the district, at a BOCES or at another school district, "the board of education shall give notice of such determination to the parent, . . . and to the chief administrator of the facility or child care institution in which the student resides" (8 NYCRR 200.11[c]).

In the present case, the procedures relevant to the placement of a student in a child care institution were not followed in all instances. Upon ACS's placement of the student at SCO/RJMCC in January 2014, the hearing record shows that SCO/RJMCC conducted a psychiatric assessment of the student (Parent Ex. A at pp. 7-8).[26] However, the hearing record does not indicate that a CSE from SCO/RJMCC or Tyree convened to determine an appropriate placement for the student. Instead, the hearing record reflects that, because the CSE of the student's district of residence had found the student eligible for special education as a student with an other health-impairment (Dist. Ex. 6 at p. 1) and because Tyree did not enroll students that had been assigned such a disability classification, SCO/RJMCC caused the student to be registered in the district on February 6, 2014 (Tr. pp. 137-38, 154-56; Dist. Exs. 2; 4 at p. 1). While the child care institution CSE would be required to take into account the recommendations made by the student's school district of residence (Educ. Law § 4005[2][a][ii]), it does not appear that there was any impediment to the SCO/RJMCC or Tyree CSE undertaking a review of the disability classification or recommending an educational placement for the student other than Tyree, such as a day program in a State-approved nonpublic school (Educ. Law §§ 4002[2]; 4005[2][a][iii]). Further, there is no indication in the hearing record that the CSE from SCO/RJMCC or Tyree made a determination that the student would benefit from instruction in a public school program, which appears to be a condition precedent to a child care institution's recommendation that a student be admitted to a district of location (8 NYCRR 200.11[b][1]; see Educ. Law § 4005[3]).[27]

Upon the student's registration, the district convened a CSE to develop the student's IEP (Dist. Ex. 4). The March 2014 CSE determined that the district "d[id] not have in-district programs for students as involved as those who reside at SCO" and, therefore, recommended the student's placement in an out-of-district BOCES (see Tr. p. 190; Dist. Ex. 4 at pp. 1-2, 11). The district

[26] Pages 7 and 8 of Parent Exhibit A are from the same document as District Exhibit 16; however, District Exhibit 16 is missing a page (compare Parent Ex. A at pp. 7-8, with Dist. Ex. 16).

[27] The meeting minutes of the district's March 2014 CSE indicate that SCO/RJMCC enrolls students in the district "[w]hen, for whatever reason, [they] cannot be placed at Tyree Learning Center" (Dist. Ex. 4 at p. 1).

submitted an application with a BOCES placement for the student's attendance (Dist. Ex. 19 at p. 1). At some point in or around early April 2014, the BOCES informed the district that it did not accept the student (Dist. Ex. 20 at p. 3; see Dist. Ex. 33).

It appears that, at this point, the district concluded that it did not have a program for the student "in the schools of the district, at a BOCES or at another school district," but there is no indication in the hearing record that it informed its board of education of this determination in the manner contemplated by State regulation (8 NYCRR 200.11[b][2]; [c]). Additionally, the parent was also not provided the notice required by State regulation (8 NYCRR 200.11[c]). Instead, the district undertook to seek a nonpublic school for the student (see Dist. Ex. 19 at pp. 2-3). Although the district applied to nonpublic schools placement for the student, none accepted the student and, at that point, the district requested that Tyree reconsider accepting the student in light of the student's change in disability classification to multiple disabilities (Tr. pp. 460-61, 526; Dist. Ex. 21).

As a result of the district's stated inability to locate an appropriate placement for the student—as well as apparent consensus among SCO, district, and ACS representatives that the student should attend Tyree—SCO/RJMCC opted to rescind the student's registration with the district in May 2014 (Dist. Exs. 32-33; 34 at p. 1). The hearing record shows that the parent participated in the July 2014 CSE meeting to formalize the student's placement at Tyree (Dist. Ex. 22 at pp. 20-21).

The foregoing description of events establishes that the district did not strictly adhere to the procedures required for students residing in child care institutions, including the requirement of notice to the parent regarding the district's inability to locate an appropriate placement for the student. To some extent, it appears that the district found itself in a procedural quandary since it seems that the SCO/RJMCC did not need to enroll the student in the district in the first place. In any event, the hearing record does not support a finding that the district's failure to strictly follow the processes outlined above (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]).

SCO/RJMCC and the parent were ultimately notified about the determination that the district could not locate an appropriate placement for the student (Dist. Ex. 21; see Tr. pp. 1380-81; Dist Ex. 22). The hearing record also shows that the parent participated in the district's March 2014 CSE meeting, as well as the Tyree CSE's July 2014 CSE meeting (see generally Dist. Exs. 4; 22). Further, as described below, despite that the student did not attend a school placement during the time that he was enrolled in the district, the district provided him with home instruction and related services (Tr. 157-58, 404-05, 466-67, 471-72, 1379-80; Dist. Ex. 4 at pp. 1-2).

As a final note, if SCO/RJMCC was not a child care institution, the more involved processes outlined above would not be applicable. The district would still be required to comply with the procedural requirements set forth in the IDEA and develop an IEP reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E., 694 F.3d at 189-90). However, there is no allegation and the IHO did not make a finding regarding the district's compliance with the processes mandated by the IDEA.

C. March 2014 IEP

1. Eligibility Classification

The district next alleges that the March 2014 CSE properly classified the student as eligible for special education as a student with multiple disabilities, because he met both the criteria for classification as a student with an intellectual disability and as a student with an emotional disturbance. More specifically, the district argues that the IHO ignored extensive evaluative information and expert opinions that the student presented with an intellectual disability.

As an initial matter, the IDEA provides that a student's special education programming, services, and placement must be based upon a student's unique special education needs and not upon the student's disability classification (20 U.S.C. § 1412[a][3] ["Nothing in this chapter requires that children be classified by their disability so long as each child . . . is regarded as a child with a disability under this subchapter"]; 34 CFR 300.111; M.R. v S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *9 [S.D.N.Y. Dec. 16, 2011] [finding that once a student's eligibility is established "it is not the classification per se that drives IDEA decision making; rather, it is whether the placement and services provide the child with a FAPE" (emphasis in original)]; see also Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011] [finding that "the particular disability diagnosis" in an IEP "will, in many cases, be substantively immaterial because the IEP will be tailored to the child's specific needs"]). In other words, a district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]), and an evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

Here, it appears that the eligibility classification of other health-impairment included on the student's December 2013 IEP from the student's district of residence did impact the student's educational program, in that it was the apparent impetus for SCO/RJMCC's decision to register the student with the district (see Tr. pp. 155-56; Dist. Exs. 6 at p. 1; 34 at p. 1). However, the IHO did not find and the parent does not argue on appeal that other health-impairment was the more appropriate classification for the student. Any programmatic impact of the March 2014 CSE's decision to change to the student's eligibility classification to multiple disabilities instead of emotional disturbance is less apparent (see I.B. v New York City Dep't of Educ., 2016 WL 1069679, at *13 [S.D.N.Y. Mar. 17, 2016] [finding that, while the record indicated that the eligibility classification included on the IEP "may not have captured the full extent of [the student's] challenges and individual needs," there was no denial of FAPE]).[28] Further, a review of the evidence in the hearing record supports a finding that the March 2014 CSE's decision to change the student's eligibility classification from other health-impairment to multiple disabilities was supported by the evaluative information available to the CSE.

[28] According to the hearing record, the student could have been considered for placement at Tyree or Westchester with a classification of emotional disturbance, intellectual disability, or multiple disabilities (see Tr. pp. 155-56.985-88, 1379, Dist. Exs. 33; 34).

State regulation describes an intellectual disability as "significantly subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior and manifested during the developmental period, that adversely affects a student's educational performance" (8 NYCRR 200.1[zz][7]). In this case, to determine the student's intellectual functioning, the March 2014 CSE reviewed the following evaluation reports: a January 2014 psychiatric evaluation, a November 2013 neuropsychological evaluation, an October 2013 social history update, and a July 2013 psychological/psychiatric evaluation (Tr. pp. 161-63, 499; Dist. Ex. 4 at p. 3; see Parent Ex. A at pp. 7-8, Dist. Exs. 13; 14; 15; 16). As explained more fully below, the weight of the evidence supports a finding that the student's adaptive skills and intellectual abilities were significantly below average at the time of the March 2014 CSE meeting.

According to a July 2013 psychological/psychiatric evaluation conducted by an adult and child psychiatrist and a licensed psychologist, the student was determined to have a severe to profound intellectual disability with a severe adaptive deficit requiring substantial support (Dist. Ex. 13 at pp. 12, 13). The July 2013 report referenced previous evaluation attempts in July 2012 and January 2013 in which evaluators characterized the student as nonresponsive, internally preoccupied, and unable to focus (id. at pp. 5-6). During the July 2013 evaluation, the evaluators found that the student exhibited a flat affect, displayed inappropriate eye contact, touched himself inappropriately, placed inedible things in his mouth, and performed certain compulsory movements of his trunk and legs when walking and trying to move objects (see id. at pp. 9-11). The student did not use language in a spontaneous way and his speech was limited to a few words or responding with the second of two choices presented in an echolalic manner (see id.). The evaluator selected a nonverbal test, the Leiter International Performance Scale, to avoid any language bias in assessing the student's cognitive skills (id. at pp. 6-7). According to the July 2013 report, the student could match easy shapes "but seemed sincerely unable to discriminate more complex shapes" and "appeared to be unable to complete any of the subtests at even the two-year level," at which point testing was suspended (id. at p. 7).[29] The evaluators noted that the testing situation appeared to cause the student anxiety, as evidenced by his psychomotor agitation, increased breathing rate, and various forms of tensing his muscles and pressing his arms against his seat to provide a sense of deep pressure (id.). Although the evaluators surmised that the student may once have had the skills to perform such tasks, the student's level of cognitive disorganization combined with his limited language and social skills resulted in him no longer being able to perform these cognitive skills (id.). According to the evaluators, the student's diagnosis was "consistent with profound intellectual disability" (id.).

To assess the student's adaptive skills, the evaluators administered the Vineland Adaptive Behavior Scales-second edition (Vineland-II) via interview with the child protective specialist who accompanied the student to the evaluation (Dist. Ex. 13 at pp. 2, 7). The evaluator noted that, if the child protective specialist was not able to answer any questions regarding the student's skill levels, the child care worker who worked with the student on a daily basis provided the information (id. at p. 7). Results of the Vineland-II indicated that the student's general adaptive functioning was low, scoring below the first percentile compared to same-age peers (id. at pp. 7-8). All of the Vineland-II domain scores (communication, daily living skills, and socialization) were

[29] The July 2013 evaluation report did not provide a standardized score for the student's performance on the Leiter International Performance Scale (see Dist. Ex. 13).

approximately the same (with all domain scores below the first percentile), suggesting that the student did not exhibit any relative strengths or weaknesses (see id. at pp. 8-9).

In October 2013, a social worker obtained a social history update of the student (Dist. Ex. 15). The student's home instructor described him as a "sweet person," who laughed and smiled (id. at p. 2). The student's instructor further reported that the student was cooperative and had not demonstrated aggressive behavior (id.). Additionally, his instructor noted that the student demonstrated "good skills with puzzles" (id.). According to the report, the student could write some letters and label some pictures but had difficulty writing three letters or a three-letter word (id.). The report also noted that the student's communication was limited to one or two words (id.). Although the parent indicated that the student was able to answer questions when provided with choices, his instructor indicated that the student was not responding at the time of the interview (id.). When provided with open ended questions, the student could express his needs and wants with "yes" and "no" responses (id.).

In November 2013, two psychologists conducted a neuropsychological evaluation of the student to determine his level of cognitive functioning and provided a diagnosis of severe mental retardation (Dist. Ex. 14 at pp. 1, 8). The evaluators reported that the student established fleeting eye contact and never smiled and that there was no difference between his eye contact and affective response to familiar adults and to the examiners he had just met (id. at p. 4). They further described the student's language skills as significantly delayed and also found that his spontaneous speech output was restricted (id.). Although the evaluators did not observe any behaviors that would suggest homicidal, suicidal, or paranoid ideations, they described the student's mood as "anxious" and further characterized his affect as "flat" (id.). According to the report, the student exhibited significant difficulty comprehending task instructions and his attention wandered frequently, making it necessary to repeat instructions (id. at p. 5). The evaluators noted that, although the student was able to be redirected, he required extra time to complete tasks (id.). In addition, the evaluators found that, while the student exhibited habitual behaviors, he was polite and cooperative throughout the testing and, once focused, completed tasks to the best of his ability (id.). Administration of the Stanford Binet Intelligence Scales-Fifth Edition (SB-5) yielded scores within the severely delayed range of intellectual functioning with no significant difference between the student's perceptual reasoning and verbal comprehension scores (all scores were below the first percentile) (id. at pp. 5-6). In summary, the evaluators found that at the time of the evaluation the student "present[ed] as an individual with delayed cognitive and adaptive function, poor insight and judgement, difficulty perceiving social situations accurately, low frustration tolerance, attention and concentration difficulties, pragmatic and conversational skill deficits, repetitive language, poor eye contact, difficulty with changes and transitions and significant levels of anxiety that can be very difficult for him to control" (id. at p. 7).

In January 2014, when he transferred to SCO/RJMCC, a psychiatrist conducted an assessment of the student (Parent Ex. A at p. 8). In obtaining the student's history, the psychiatrist reported that although the student was always meek and orderly, his early development was reportedly normal (id.; see Parent Ex. A at p. 22). She further noted that the student was disruptive in preschool, had difficulty adjusting in school and reportedly never learned to read or write (Parent Ex. A at p. 8). The psychiatrist found that the student's attitude was pleasant, and she described his behavior as good, but she was unable to assess the student's thought processes, memory functioning, or orientation (id. at pp. 8-9). She also reported that the student was "able to say a few words" and characterized his intellectual functioning as severely deficient (id.). According to

the psychiatrist, the student's strengths were his "good physical health," and his ability to adjust; however, his liability was his "history of behavioral difficulties" (id. at p. 9). The psychiatrist concluded that the student had the following diagnoses: pervasive developmental disorder NOS and severe mental retardation based on the student's long history of impaired development and poor social interactions (id. at p. 8). The psychiatrist recommended "minor adjustment to [the] program," special education, routine medical follow-up and the continuation of the student's medications (id.).

Assuming, without deciding, that the student's early development was not delayed as the parent reports, district witnesses testified that they reviewed and considered information regarding the student's history, but found the information regarding the student's early development inconsistent and unreliable and, consequently, gave more weight to current evaluations (Tr. pp. 165, 490-91, 503-04, 516-18, 568, 735-36, 863-65, 897-99). Although the parent's expert witness disagreed with the student's psychiatric diagnoses, he indicated that the student "could be referred to descriptively as having autistic-like behavior" and "at the current time he was evaluated his adaptation was low" (Tr. pp. 1118, 1129).[30] In addition, he stated that the student "was not somebody who could really be evaluated by any cognitive form, because the cognitive—you need a standard form of communication to be able to use the standard testing" (Tr. p. 1142). Similarly, based on observations during a school visit in February 2014, the social worker from Westchester characterized the student as appearing "to be severely psychiatrically involved" and opined that he "was not developmentally normal" (Tr. pp. 1021-25).

The IHO questioned the reliability and validity of the July 2013 adaptive behavior assessment upon which the March 2014 CSE relied and opined that it would have been better practice to rely exclusively on the responses of someone who had a substantial amount of daily contact with the student (such as the child care worker), rather than responses made by the child protective specialist (IHO Decision at p. 16). However, there is no evidence in the hearing record to suggest that the child protective specialist lacked knowledge about the student's adaptive skills, and furthermore, the evaluation report indicated that the child care worker provided responses to any questions the child protective specialist was not able to answer (see Dist. Ex. 13 at p. 7). In addition, results of the adaptive behavior assessment which reflected low adaptive skills were consistent with the behavioral descriptions of the student in the then-current evaluation reports (compare Dist. Ex. 13 at pp. 7-9, with Dist. Exs. 13 at pp. 4-7, 9-11; 14 at pp. 4-5; 15 at pp. 2-3; see also Parent Ex. A at pp. 8-9). Furthermore, contrary to the IHO's finding that the conclusions contained in the reports were based more upon speculations and impressions rather than objective standardized testing contemplated by the IDEA when making a determination whether or not a student meets the criteria for having an intellectual impairment, three evaluations were conducted during the 2013-14 school year by certified and licensed professionals who utilized a variety of assessment techniques (i.e., record review, standardized testing, informal assessment, observation, and interviews) and, based on the totality of the assessment data and clinical judgment, the evaluators concluded that "it is clear that (the student) ha[d] significant impairment in adaptive functioning and cognitive functioning prior to the age of 18," and the student presented "as an individual with delayed cognitive and adaptive function" (Dist. Exs. 13 at pp. 2, 5-12; 14 at pp. 1,

[30] Although the parent's expert generally disagreed with the diagnostic impressions reported in the November 2013 neuropsychological evaluation, he testified that he agreed with the axis V "general level of functioning" score of 35 (Tr. p. 1129).

4, 7; Parent Ex. A at pp. 2-3). Based on the foregoing, the hearing record supports a finding that the March 2014 CSE considered the evaluative information before it and based on the evaluative information it was reasonable for the CSE to determine that the student met the criteria for an intellectual disability classification.

Turning next to the parties' dispute regarding the appropriateness of the district's determination to classify the student as a student with multiple disabilities, according to State regulation, "multiple disabilities means concomitant impairments (such as intellectual disability-blindness, intellectual disability-orthopedic impairment, etc.), the combination of which cause such severe educational needs that they cannot be accommodated in a special education program solely for one of the impairments. The term does not include deaf-blindness (8 NYCRR 200.1[zz][8]).

District representatives indicated that, based on a review of current evaluations, the student met the concomitant criteria for classification as a student with an intellectual disability and as a student with an emotional disturbance and that the March 2014 CSE concluded the most appropriate classification for the student was multiple disabilities, as the student required a program that could address both significant intellectual and emotional deficits (Tr. pp. 183-88, 499-501, 504-08, 513-15, 721-34, 749-53, 808). According to the school psychologist, there were "multiple documents" before the March 2014 CSE that indicated disability concerns "above and beyond [a classification of other health-impairment], meaning there were issues tied to emotional disability, issues tied to intellectual" (Tr. p. 721). He further testified that there were other issues tied to speech in addition to reports of autism, "so there had been multiple diagnoses made which would speak to a much more pressing issue in terms of education, than [other health-impairment]," which he characterized as "relatively a minor disability" (id.). Although the parent disagreed with the disability category of multiple disabilities and her expert witness disagreed with the student's psychiatric diagnoses, the parent's expert witness testified that, at that time, "descriptively" the student "ha[d] an intellectual disability" and, when asked if the student was emotionally disturbed when the CSE convened in March 2014, the witness responded, "as a descriptive term, yes" (Tr. pp. 183, 1115-18, 1144, 1146-47; Dist. Ex. 4 at p. 2).

Based on a review of the hearing record, the March 2014 CSE's determination that a classification of multiple disabilities was appropriate was supported by the evaluative information available to the CSE. Moreover, the IHO did not find and the parent does not argue that the recommendations in the March 2014 IEP were driven by the disability classification.[31] Accordingly, even if classification as a student with an emotional disturbance was more appropriate for the student, as the IHO found, the hearing record does not support a finding in this instance that the student was denied a FAPE as a result of the disability classification alone (see I.B., 2016 WL 1069679, at *13).

[31] The IHO rejected the parent's original claim that the March 2014 CSE changed the student's eligibility classification as a pretext to place the student at Tyree (IHO Decision at p. 12). Neither party has appealed this portion of the IHO's decision and, therefore, it is final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

2. Placement

The next issue pertains to the March 2014 IEP and the district's attempts to locate a school placement for the student to attend.

Turning to the March 2014 IEP, as the IHO observed, the parent did not object to the recommended 6:1+1 special class placement with related services; rather, the dispute between the parties has related to the district's pursuit of school placements other than Westchester, the State-approved nonpublic school preferred by the parent (IHO Decision at pp. 17-18). The hearing record reflects that the parent requested placement of the student at Westchester and the district refused to "make this recommendation" in light of its distance from the student's residence (Tr. pp. 188-89, 760-61; Dist. Ex. 4 at p. 2). Rather, the March 2014 CSE recommended locating an out-of-district BOCES placement within a reasonable distance from SCO/RJMCC (see Tr. p. 190; Dist. Ex. 4 at p. 2). As a result, the district, albeit unsuccessfully, attempted to find a BOCES and, subsequently, a State-approved nonpublic school placement for the student (see Tr. p. 764; Dist. Exs. 19; 20; 21; 34).

Contrary to the IHO's finding that LRE requirements did not constitute a valid basis for the March 2014 CSE's decision (IHO Decision at p. 18), 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 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 CFR 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Evidence in the hearing record shows that the social worker from Westchester agreed with the March 2014 CSE that the school was "very far away," and that "it would probably be better for [the student]" if the district could obtain a placement closer to home for him (Tr. p. 537; see also Tr. p. 984). The school psychologist further testified that the March 2014 CSE had concerns about the student's safety transitioning that distance, and determined that it was necessary to explore a program closer to the student's home (Tr. pp. 547-48). Moreover, according to the school psychologist, when locating placements for students, especially disabled students, the district tried to obtain placements closest to their homes, "because otherwise . . . they're facing the prospect of [a] lengthy bus ride to and from school, which may further exacerbate their learning and social issues" (Tr. pp. 761-62). The social worker from Westchester testified that, during the March 2014 CSE, he questioned the student's tolerance for the bus trip to Westchester each day and could not testify during the impartial hearing that a 120-mile trip each day would be appropriate for the student (Tr. pp. 1018-20). Accordingly, while not the sole relevant consideration, the distance of Westchester from SCO/RJMCC was both a legally and factually appropriate consideration.

According to the district director of special education, the March 2014 CSE applied to schools with the expectation of obtaining an acceptance and followed the steps to obtain that placement (Tr. p. 208). As described above, the district was ultimately unsuccessful in securing an out-of-district placement for the student and, at that point, requested that Tyree reconsider accepting the student in light of the student's change in disability classification to multiple disabilities (Tr. pp. 460-61; Dist. Ex. 21). The IHO found that placing the student at Tyree was not an option for the district and should not even have been considered (IHO Decision at p. 21).

This returns the analysis to issues relating to the classification of SCO/RJMCC as a child care institution. As described above, a child care institution CSE is constrained by the more limited placement continuum dictated by State law for students in child care institutions—which excludes recommendation for residential placements (Educ. Law §§ 4002[2]; 4005[2][a][iii]). It would seem that a district of location would be similarly constrained to this continuum or further limited to consider only the schools of the district, at a BOCES or at another school district, as noted above (see 8 NYCRR 200.11[c]). Under these circumstances it is arguable that the district was not authorized to recommend any State-approved nonpublic school for the student, including Westchester. However, even were such constraints not applicable, the hearing record supports a finding that the district responded reasonably by investigating and exploring the possibility of the student's attendance at Tyree after the student was rejected by the BOCES placement, as well as two nonpublic school. Once again, the procedural routes taken to achieve this placement for the student were unnecessarily circuitous and resulted in a delay in the student's attendance at a school placement. However, under particular circumstances of this case, the delay resulted primarily as a result of factors outside of the district's control. Further, under the particular circumstances of this case, the delay did not result in a denial of a FAPE to the student.

In particular, despite the delay in locating a school placement for the student, the hearing record shows that the district provided the student with home instruction and related services throughout the time that the student was registered with the district until he began attending Tyree. The hearing record includes the student's December 2013 IEP from the student's district of residence, which recommended that the student be placed in a State-approved nonpublic school and receive speech-language therapy and counseling services (Dist. Ex. 6 at p. 8). The IEP also indicated that the student would receive home instruction pending a school placement (id. at p. 12). Consistent with the IEP of the district of residence, the evidence in the hearing record shows that, as soon as the student was registered in the district (and on an continuing basis after the March 2014 CSE took place while a school placement was sought), the district provided the student with 10 hours per week of home instruction as well as related services including four 30-minute sessions of speech-language therapy per week and two 30-minute sessions of counseling per week (Tr. 157-58, 404-05, 466-67, 471-72, 1379-80; Dist. Ex. 4 at pp. 1-2).[32, 33] The mother's concern that 10 hours of instruction per week and three hours of related services left a substantial portion of time during the week where the student was at his residential placement without educational services is

[32] Prior to the student's residential placement at SCO/RJMCC in January 2014, the parent had requested home instruction from the New York City Department of Education and the student received home instruction for the eight months prior to January 2014 (Tr. pp. 1359-60).

[33] When a student with an IEP from a district transfers into a new district in the same school year, the new district must initially provide FAPE to the child, including the provision of services comparable to those described in the student's IEP from the previous district until the new district either adopts the student's IEP from the previous district or develops and implements a new IEP (20 U.S.C. § 1414[d][2][C][i][I]; 34 CFR 300.323[e]; 8 NYCRR 200.4[e][8][i]). Those comparable services must be provided until the new public agency either adopts the IEP from the previous public agency or develops, adopts and implements a new IEP (34 CFR § 300.323[e][1], [2]; 8 NYCRR 200.4[e][8][i]). "Comparable services" means services that are similar or equivalent to those services that were described in the student's IEP from the previous district (IEPs for Children Who Transfer Public Agencies in the Same State, 71 Fed. Reg. 46681 [Aug. 14, 2006]). Further, if a student with a disability moves to a new school district within the same state and implementation of the old IEP is not possible, the new district must provide services that approximate the old IEP as closely as possible (Letter to Campbell, 213 IDELR 265 [OSEP 1989]; see Ms. S. v. Vashon Island School District, 337 F. 3d 1115, 1133-34 [9th Cir. 2003]).

understandable. Additionally, the parent's belief that the student appeared isolated during the day may very well have been exacerbated due to the other students residentially placed at SCO/RJMCC attending Tyree during school hours (see Tr. pp. 131-32).[34] However, home instruction is an educational service and is defined as "special education provided on an individual basis for a student with a disability confined to the home, hospital or other institution because of a disability" (8 NYCRR 200.1[w]). Home instruction must be provided for a minimum of five hours per week at the elementary level, preferably one hour daily, and 10 hour per week at the secondary level, preferably two hours daily (8 NYCRR 200.6[i]). Under the circumstances of this case, while it would have been preferable for the district (or SCO/RJMCC) to have located a school so that the student would have been less isolated, the provision of home instruction on a temporary basis (from February 2014 to May 2014) while the district took steps to place the student was appropriate.

D. Other Matters

The parent has valid concerns about the student's educational placement and is understandably frustrated by the lack of clarity and information provided by the various districts and agencies involved. However, much of the parent's concerns pertain to the decisions and/or actions of the Family Court, ACS, the student's school district of residence, and SCO/RJMCC and Tyree. The decisions and actions of these entities are outside of my jurisdiction, which is limited to the review matters relating to the identification, evaluation, or educational placement of a student with a disability, or the provision of a FAPE to such a student (see Educ. Law § 4404[2]). This is further limited to a review of the responsibilities and actions of the district who is a party to the present proceeding.

Further, even if the parent's claims discussed above had supported a finding that the district failed to offer the student a FAPE, the IHO's award of compensatory relief was and/or is no longer appropriate. Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Within the Second Circuit, compensatory education relief in the form of supplemental special education or related services has been awarded to such students if there has been a denial of a FAPE (see 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]"]). Likewise, SROs have awarded compensatory "additional 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. 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]).

First, as the district argues, the IHO's award of compensatory education was not aligned with the underlying basis for her finding that the district failed to offer the student a FAPE. The IHO found that the district denied the student a FAPE for an approximate two month period of time from April to June 2014 (IHO Decision at p. 28). An entire year of compensatory education is out of proportion to the timeframe underlying the FAPE determination and also fails to take into

[34] For example, the parent asserted that the student "was held in an empty SCO residential building for four months with a cleaning lady without school placement" (IHO Ex. VII at p. 1).

account any educational benefit the student received from the home instruction and related services provided by the district during this time. Also, the IHO's compensatory award of one year of tuition at Westchester was conditional on the school's acceptance of the student (id. at pp. 30-31). According to the parent's closing brief submitted during the impartial hearing, Westchester notified the parent on May 6, 2016 that Westchester no longer had an opening for the student's age group (IHO Ex. XIX at p. 1 n.1). The IHO acknowledged the possible unavailability of Westchester in her decision in the related proceeding involving the student's district of residence (Answer Ex. H at p. 15). As a result, for relief in that proceeding, the IHO ordered the student's district of residence to fund a one year placement at a State-approved nonpublic residential or day program to remedy a denial of a FAPE to the student for from February 2013 through February 2014 (id. at p. 16).[35]

It would be counterproductive to the student's future educational and transitional post-secondary undertakings to order compensatory education in this matter. Given that the foster care status of the student will soon likely change based on the student's age, his eligibility for special education under the IDEA will end at the conclusion of the 2016-17 school year also by reason of his age, and an award of compensatory education from the student's district of residence remains to be implemented, the ability to craft a compensatory award from which the student could benefit is significantly speculative at this juncture and could just as likely conflict and interfere with the attempts of courts and agencies to move the student forward.

Finally, the parent requested that this matter be remanded to the IHO and that SCO/RJMCC and Tyree should be made parties to the proceeding. As previously observed, given the number of districts and agencies involved, the administrative proceedings in this matter have been relatively complex and the parent is not faulted for pursuing this matter against the district of location rather than SCO/RJMCC. However, it would not serve the interests of judicial economy or finality for both parties to prolong these proceedings.[36, 37]

VII. Conclusion

Having found that the district offered the student a FAPE for the period of February 2014 through June 2014, the necessary inquiry is at an end.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

[35] The Office of State Review has not received notice of an appeal from this decision and the time period for service of a petition for review has expired (see 8 NYCRR 279.2).

[36] This is particularly the case given that the matter of SCO/RJMCC's participation in the impartial hearing was indirectly addressed by the parties in the context of the district's motion to dismiss.

[37] This decision shall be without prejudice for the parent to pursue any proceedings against SCO/RJMCC permitted by law.

IT IS ORDERED that the IHO's decision, dated July 27, 2016, is modified by reversing those portions which determined that the district failed to offer the student a FAPE for a portion of the 2013-14 school year and ordered the district to fund a one-year placement for the student at Westchester.

Dated: **Albany, New York**
November 21, 2016

SARAH L. HARRINGTON
STATE REVIEW OFFICER