The University of the State of New York

The State Education Department
State Review Officer
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No. 17-031

Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Cuddy Law Firm, PLLC, attorneys for petitioners, Alison Morris, Esq., of counsel

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, Brian Davenport, 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 parent) appeals from the decision of an impartial hearing officer (IHO) which determined that the educational program and residential placement recommended by respondent's (the district's) Committee on Special Education (CSE) for her daughter for the 2015-16 and 2016-17 school years was appropriate. The appeal must be sustained in part.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The student in this case has received diagnoses of an unspecified episodic mood disorder and major depressive disorder (recurrent episode, severe degree), and has a history of self-injurious behavior, suicide attempts, and extensive psychiatric hospitalizations (Parent Exs. O at pp. 1-3; T at p. 2; QQQ at pp. 1-2). The student received school-based counseling services twice per week from third to fifth grade (Parent Ex. O at p. 2).

According to the parent, during the 2013-14 school year when the student was in seventh grade, she began having social problems, was subjected to bullying, and exhibited poor frustration tolerance and self-esteem, self-injurious behavior, irritability, social withdrawal, fear of school, temper tantrums, depression, declining emotional health, and declining grades (Tr. pp. 946-50;

Parent Ex. QQQ at p. 1). The student was evaluated at a psychiatric hospital following self-injurious behavior in school, at which point a physician reportedly suggested that the student attend a different school (Tr. pp. 948-49). Subsequently, the student moved out of state to complete the 2013-14 school year (Tr. pp. 265-67, 948-50; Parent Ex. O at p. 2). The student returned to the district for the 2014-15 school year (8th grade) and attended a regular education class in a district public school (Parent Ex. O at p. 2).

During the 2014-15 school year, the student's defiant behaviors, social, and mood problems worsened and she was repeatedly hospitalized for psychiatric issues including self-injurious behavior and depression, and episodes of running away (Tr. pp. 500-507; Dist. Exs. 13-14; Parent Ex. QQQ; see Parent Exs. XX-BBB). In October 2014, the student began receiving psychotherapy, counseling, medication management, and home-based services under the auspices of a hospital program (Parent Exs. N at p. 1; O at p. 1). During the 2014-15 school year, some of the student's teachers expressed concerned about the student's disruptive, uncooperative, and distractible behaviors, and her ability to keep up with her work due to repeated absences from school (Dist. Ex. 18 at pp. 4-7; Parent Exs. H at p. 1; R at p. 2; V at p. 2; Z at p. 2).

In addition to the communication between the parent and the provider of the student's at-risk counseling services, the student also received what were described in the hearing record as "tier one" interventions designed to help her with academics during the 2014-15 school year, which were comprised of academic intervention services (AIS) and a Saturday academy program, which provided additional support to the student with classwork and Regents preparation, respectively (Tr. pp. 280, 546-47, 555-56, 968).

The student was admitted to a psychiatric hospital on March 28, 2015 after a family altercation, at which time a psychological evaluation was conducted on April 10 and 13, 2015 to assess her intellectual functioning (Parent Ex. N at p. 1).[1] The student reportedly scored in the average range on verbal comprehension scale, and the borderline range on the perceptual reasoning index (id. at p. 2). She obtained a full-scale IQ of 89, which indicated intellectual functioning in the low average range (id. at p. 3). The student reportedly tended to give up easily on tasks that she perceived as too difficult (id.).

By email to the district dated April 21, 2015, the parent requested an initial evaluation for special education services for the student (Parent Ex. MM). The student was admitted to a psychiatric hospital on May 14, 2015, at which time psychodiagnostic and psychoeducational evaluations were conducted (Parent Exs. T; U). The resulting evaluations indicated that the student's "extremely low frustration threshold" may have caused inferior performance on the assessment, and that retesting when the student was less stressed and more clinically stable would likely reflect higher cognitive capabilities (Parent Ex. U at p. 2, see Parent Ex. T at p. 2). The student exhibited guardedness in the areas of personality and perception of self, believed that others perceived her as worthless, and experienced anxiety as a result of any negative comment or social failure (Parent Ex. T at p. 4). The evaluator noted that the results suggested that the student's learning difficulties were a result of limited frustration tolerance, inability to persist in independent tasks, and inability to tolerate the possibility of external criticism (id.). Further, the report indicated

[1] The student was assessed using the Wechsler Abbreviated Intelligence Scale second edition (WASI-II) over the course of two sessions, and according to the evaluation report, was cooperative throughout (Parent Ex. N at p. 2).

that the student may feel vulnerable and engage in maladaptive behaviors when separated from support systems (id.). The student reportedly exhibited significant lapses in reality testing, chronically poor judgement, and unusual perceptual and sensory events which were unsettling to her (id. at p. 5). The evaluator noted that the results suggest that the student was capable of engaging in aggression, recklessness and dangerous risk-taking behavior, as well as exhibiting marked difficulties with interpersonal functioning (id. at pp. 5-6).

The CSE initially convened on June 15, 2015, determined that the student was eligible for special education and related services as a student with an emotional disturbance, developed the present levels of performance section of an IEP, and decided to defer her placement recommendation to the Central Based Support Team (CBST) to locate a residential placement (Tr. pp. 290-92, Answer Ex. 1 at p. 15; Parent Ex. C). The district sent information packets to multiple residential schools, and by letter dated July 27, 2015, the student was subsequently accepted by one residential school (Tr. pp. 611-13; Dist. Ex. 19).

The CSE reconvened on August 7, 2015 to complete the student's IEP and specify the residential school that the student would be attending (Tr. pp. 613; Parent Ex. D at pp. 1, 12). The August 2015 CSE recommended an 8:1+1 special class in a specific State-approved nonpublic residential school, which the student began attending on August 14, 2015 (Dist. Ex. 19 at p. 20; Parent Ex. D at p. 12). On August 31, 2015, the student "ran away" from the residential school and her whereabouts were unknown for three hours (Tr. p. 270; Dist. Ex. 19 at p. 22). The parent removed the student from the residential school and the student was admitted to a psychiatric hospital on September 1, 2015 (Dist. Ex. 19 at pp. 20-22; Parent Ex. CCC at p. 3).

By letter dated September 11, 2015 the student was accepted to the St. Anne Institute (St. Anne) in the "Intensive Management Needs Program" (Dist. Ex. 19 at p. 19). The CSE reconvened on September 16, 2015 to amend the IEP to reflect the CSE's recommendation for 12-month services in a 6:1+1 special class in a residential setting, with related services of one individual counseling session per week, and a number of classroom and testing accommodations (Parent Ex. E at pp. 13-15; see Tr. pp. 325-26). The student began attending St. Anne on September 22, 2015 (Dist. Ex. 21 at p. 1).

The CSE convened on January 20, 2016 for the student's annual review and to develop her IEP for the 2016-17 school year (Parent Ex. F at pp. 9, 14). The January 2016 CSE determined that the student remained eligible for special education services as a student with an emotional disturbance, and continued its recommendation for 12-month services in a 6:1+1 special class in a residential school, counseling, and a behavior plan, extra time to complete assignments, and special seating (compare Parent Ex. E at pp. 13, 18, with Parent Ex. F at pp. 9, 14). The student remained at St. Anne for the remainder of the 2015-16 school year and summer 2016 (see Tr. p. 238; Dist. Exs. 2 at p. 2; 3-6).

The CSE reconvened on August 18, 2016 at the request of the parent to consider a day treatment program closer to home (Tr. pp. 100-01, 327-28; Parent Ex. G). The CSE discussed moving the student to a day program, but ultimately determined the student should remain at St. Anne in a "step-down program" that provided a "lower level of care," which focused more on life skills and providing opportunities for unstructured time (Tr. pp. 101-03, 131, 136, 146-47). The August 2016 IEP continued the residential placement and related service recommendations from

the January 2016 IEP, and added one session per month of parent counseling and training on an individual basis (compare Parent Ex. F at p. 9, with Parent Ex. G at p. 9).

A. Due Process Complaint Notice

By due process complaint notice dated June 23, 2016, the parent alleged that the district failed to provide the student with a free appropriate public education (FAPE) for the 2014-15, 2015-16, and 2016-17 school years (Parent Ex. A). With respect to the 2014-15 school year, the parent contended that the district failed to identify the student as a student with a disability and provide special education services, despite alleged knowledge of the student's academic and emotional difficulties, repeated hospitalizations, and behavioral issues (id. at pp. 6-7).

With respect to the 2015-16 school year, the parent claimed that the district failed to comprehensively evaluate the student, based on a psychoeducational evaluation performed in June 2015 that recommended re-testing the student when the student was less distracted and more stable (Parent Ex. A at p. 4). The parent further asserted that the district failed to conduct a social history evaluation as part of the student's initial referral (id. at pp. 5-6). The parent contended that she requested that the student be reevaluated in February 2016, and that her request was denied in March 2016 (id. at p. 4).[2]

With respect to the 2016-17 school year, the parent alleged that the district failed to recommend an appropriate educational placement for the student, and that a residential placement was too restrictive (Parent Ex. A at pp. 3-4). The parent further asserted that the student's "2016 IEP" contained an inaccurate statement of the student's present levels of performance, contained inappropriate annual and postsecondary goals that were not tailored to the student and were copied from the previous school year's IEP, and the postsecondary goals were vague and made no mention of the student's preferences or interests (id. at pp. 4-5). The parent contended that the district failed to provide an adequate behavioral intervention plan (BIP), because the existing BIP did not include any strategies to allow the student to transition into a day program (id. at p. 5).

As relief, the parent requested an order directing the district to fund an independent neuropsychological evaluation for the student (Parent Ex. A at p. 7). The parent also requested that the CSE reconvene to provide the student with a new educational placement in a day program, with accurate present levels of performance, meaningful and measurable annual and postsecondary goals, and appropriate related services (id. at p. 7). The parent further requested a new functional behavioral assessment (FBA) and a BIP for the student's transition to a day program (id. at p. 8). The parent further requested compensatory educational tutoring services to remedy the district's failure to identify the student and provide services during the 2014-15 school year, as well as reimbursement for travel costs incurred during the 2016-17 school year and attorney's fees (id. at p. 8).

[2] The parent also alleged that she requested an independent neuropsychological evaluation on May 10, 2016 (Parent Ex. A at p. 3).

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing, which convened on September 20, 2016, and concluded on February 8, 2017, after six days of proceedings (see Tr. pp. 1-1196). In a decision dated March 23, 2017, the IHO concluded that the district provided the student with a FAPE for the 2015-16 and 2016-17 school years, but failed to meet its obligation to identify the student as a student with a disability during the 2014-15 school year (IHO Decision at pp. 14, 17-16, 19).

For the 2014-15 school year, the IHO found that, based upon the student's repeated hospitalizations, absences, and behavioral and academic difficulties, the district should have had a "reasonable suspicion" regarding the student's ability to access her educational curriculum early in the 2014-15 school year (IHO Decision at p. 16). Based upon the concerns expressed by school staff regarding the student's ability to perform in school, the IHO found that a "suspicion, if not a concrete realization, should have arisen" regarding the need to refer the student for special education services (id.). Accordingly, because the school did not initiate "the Child Find process" earlier in the 2014-15 school year, the IHO held that the district failed in this obligation under the IDEA (id.).

The IHO went on to analyze what potential harm the student may have suffered because of the district's failure to meet its obligation (IHO Decision at pp. 16-17). The IHO concluded that although the district failed to identify the student, the student had received numerous "outside support and intervention services," which the district was on notice of, including the support of an at-home crisis intervention therapist, a social worker, a child therapist, a medical doctor for medication (id.). The IHO also found that the district supported the student with meetings with the guidance counselor to address social and peer interaction concerns, and "multiple Tier One interventions within the school" (id.). The IHO noted that the district maintained contact with the outside support personal, the student's social worker, and the parent throughout the year (id. at p. 16). Despite this "substantial amount of services and interventions which may have affected her circumstances," the IHO noted that the student's issues were not alleviated (id. at p. 17). The IHO therefore questioned whether "the referral [would] have really succeeded where all other interventions had failed" and concluded that it was "impossible to predict what effect, if any, a referral a few months earlier would have had" upon the student (id.). Upon consideration of the "broad discretion in fashioning remedies," that is provided to hearing officers under the IDEA, the IHO reasoned that reimbursement of the parent for a psychiatric evaluation of the student which had been performed during the course of the hearing would be appropriate relief for the child find violation (id.; see Parent Ex. QQQ; see also Parent Ex. PPP).

The IHO next analyzed the 2015-16 and 2016-17 school years by merging them together, weighing the evidence, and concluding that "eight credible witnesses" testified and none found the student's residential placement to be inappropriate (IHO Decision at p. 17). The IHO noted that all of the witnesses, including the parent, recognized the progress and educational benefit the student received at St. Anne (id.). The IHO found that the parent did not persuasively rebut the district's arguments that the student needed to remain in a stable environment with a trusted therapist and more time to internalize newly acquired adaptive skills, and that moving the student to a less restrictive placement would have been premature and put the student at risk of significant regression and the reemergence of dangerous behaviors (id.).

Regarding the restrictiveness of the student's placement, the IHO noted that the parent had a "2.5 – 3 hour driving distance from her home" to visit (IHO Decision at p. 18). The IHO ultimately determined that the parent's argument that the student should be transferred to a closer day treatment program was unavailing (id.). The IHO concluded that "credible testimony" established that the parent's request was denied after consideration of the student's needs and progress at the residential placement, citing again to the need to internalize newly acquired adaptive skills and the risk of regression to previous at-risk behaviors (id. at p. 19). The IHO went on to conclude that the district's decision to continue the student's residential placement was made in consideration of the student's individual needs and did not deprive the student of educational benefit or deprive the parent of "meaningful participation," and therefore did not constitute a denial of a FAPE (id. at p. 20).

The IHO further found that the parent's judgment and credibility was "somewhat compromised" with regard to her request to move the student, and indicated that the parent's testimony at the hearing demonstrated "a lack of understanding, or perhaps a denial of, the extent and nature of the troubled parent/child dynamic and it's [sic] relation to [the student's] disability and needs" and a "lack of accurate perception" by the parent, "to the possible detriment of" the student (IHO Decision at pp. 19-20). The IHO also noted, however, that the student's therapist "commended [the parent] for her active and meaningful investment in [the student's] experience," and the parent maintained continual contact with the student and staff (id. at p. 20). The IHO further noted the "unfairness of having a parent shoulder the financial burden" for the cost of transportation, and awarded the parent the estimated cost of transportation for visiting the student at St. Anne (id. at pp. 20-21).

With regard to the parent's contention that the district did not adequately evaluate the student by refusing to perform a requested reevaluation, the IHO noted that a school district is not required to evaluate a student more than once a year, unless the parent and district agree (IHO Decision at p. 21). Because the parent's March 2016 request for a reevaluation was made within one year of the prior evaluation in June 2015,[3] the IHO concluded that the district's denial of the parent's request was not unreasonable, and did not constitute a denial of a FAPE (id. at pp. 21-22). Regarding the parent's request for an independent neuropsychological evaluation, the IHO noted that the district responded to the parent's request and provided the parent with an authorization for such an evaluation at public expense (id. at p. 22). The IHO therefore concluded that the district was not "untimely or inappropriate" in its response to the parent's request, and did not address the matter further (id.).

For relief, specifically for the district's failure "to meet its Child Find obligation under the IDEA during the 2014/15 school year," the IHO awarded reimbursement for the cost of an independent psychiatric assessment obtained by the parent, reimbursement for past travel costs in the amount of $314.58, and an order directing the district to fund continuing transportation costs incurred for parental visitation of the student at St Anne upon the parent's submission of receipts (IHO Decision at pp. 22). The IHO concluded that the district offered the student a FAPE for the

[3] The IHO referred to the request as being made in March 2016, but the hearing record elsewhere indicates that the request was made in February 2016.

2015-16 and 2016-17 school years, and consequently denied the remainder of the parent's requested relief (id.).

IV. Appeal for State-Level Review

The parent appeals, and argues that IHO erred in finding that the district met its burden in establishing that the district provided the student a FAPE during the 2015-16 and 2016-17 school years. The parent alleges that the IHO erred in finding that the district placed the student in the least restrictive environment (LRE), misapplied relevant law, mischaracterized witness testimony about the risk of regression, and inappropriately relied on retrospective testimony in determining whether the district provided the student with a FAPE during the 2016-17 school year. The parent contends that the IHO erred in his LRE determination insofar as district failed to consider deferral to the CBST for consideration of a day program. Furthermore, the parent argues that the IHO failed to issue findings regarding the parent's claims that the IEPs developed for the 2016-17 school year lacked an appropriate statement of the student's present levels of performance, and lacked adequate annual goals or postsecondary goals. Additionally, the parent asserts that the IHO erred in finding that the district comprehensively evaluated the student, and erred in failing to find that the parent was entitled to an independent neuropsychological evaluation of the student at the requested rate.[4] For relief, the parent requests an order reversing the IHO's findings with regard to the 2015-16 and 2016-17 school years, an independent neuropsychological evaluation by the parent's chosen provider at his customary rate, compensatory education in the form of 623 hours of tutoring at the Huntington Learning Center, a reconvene of the CSE to create a new IEP with appropriate goals, present levels of performance, and a transition plan, deferral of the student's placement to the CBST for a day program closer to the parent's home, and a new FBA and BIP.

In an answer, the district generally denies the substance of the parent's allegations, and requests that the IHO's decision be upheld in its entirety and the parent's appeal be dismissed. The district further alleges that the IHO properly determined that the district provided the student with a FAPE by continuing her placement in a residential setting in a step-down program. The district alleges that the IHO considered appropriate variables in assessing the LRE for the student, that the record reflects credible testimony that the student's residential placement was appropriate, and that no persuasive counterargument has been presented. The district denies that any procedural defect exists with regard to the student's 2015 evaluations, and alleges in the alternative that if there was a defect, it did not deny the student a FAPE. The district argues that the parent's allegation that the 2015 IEP contained no postsecondary goals was baseless.[5] The district further alleges that the parent's request for an independent neuropsychological evaluation is mooted by the IHO's award of reimbursement for a private psychiatric evaluation, and asserts that the parent has consented to a new psychoeducational evaluation. Regarding the parent's request for compensatory education, the district alleges that such relief is not warranted and asserts that the student has received high

[4] The parent also raises a number of allegations of IHO misconduct, including limiting the number of pages for post hearing briefs, the admittance of evidence that was not timely disclosed, and failure to admit an exhibit from the parent that was timely disclosed, to which the district did not object.

[5] The district appears to be referring to the parent's allegation that the district failed to develop appropriate postsecondary goals, and appears to have taken this as an assertion that the district did not develop any postsecondary goals, rather than an assertion that the postsecondary goals were inappropriate.

grades, passed her science Regents exam, and is scheduled to take her algebra and global studies Regents exams. The district alleges that the evidence regarding the student's need for compensatory tutoring services does not comport with the student's academic performance at her residential placement. The district alleges that the parent's other requested relief—for the CSE to reconvene, to develop a new IEP, to defer the student to the CBST in order to find a therapeutic day program—have all been granted since the hearing close date, and are therefore moot. The district also alleges that the parent's request for a new FBA and BIP should be rejected because a new FBA and BIP should not be completed until the student begins attending her new placement during the 2017-18 school year.

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 least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; 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. 2014-15 School Year

Neither party appeals the IHO's finding that the district denied the student a FAPE during the 2014-15 school year. The district asks that the IHO's decision be upheld in its entirety. Furthermore, the district explicitly disavows an appeal of the IHO's findings with regard to the 2014-15 school year in its memorandum of law (Dist. Mem. of Law at p. 1). Accordingly, the IHO's finding that the district failed in its child find obligations are final and binding on the parties, and will not be considered further (34 CFR 300.514 [a]; 8 NYCRR 200.5 [j][5][v]).

2. Additional Evidence

After the IHO rendered a final decision in this matter in March 2017, it became apparent that due to changing circumstances additional evidence may be needed to render an appropriate decision in this appeal. The district made a request for an extension of time to serve an answer which indicated, among other things, that the CSE held a meeting on May 3, 2017, to develop an IEP for the student for the upcoming 2017-18 school year. Given these new events and that the particular relief requested by the parent would directly implicate the student's educational programming for the upcoming school year, I concluded that it was necessary to seek additional evidence pursuant to 8 NYCRR 279.10(b). Accordingly, by letter to both parties dated June 12, 2017, I directed the district to provide a copy of the IEP developed at the May 2017 CSE meeting with its answer to the parent's request for review, and the parties were permitted to present arguments in their respective responsive pleadings as to whether and to what extent the IEP should be considered and relied upon by the State Review Officer in rendering a decision in this case.

Attached to its answer and memorandum of law, the district included the requested IEP, dated May 3, 2017, as well as a copy of the June 2015 IEP, a consent to reevaluate the student that was signed by the parent and dated May 3, 2017, and an undated referral letter from the CBST that indicates the student was referred to 11 State approved nonpublic day schools on May 16, 2017 (Answer Exs. 1-4). The district indicates that these documents were submitted to inform the SRO of the student's current referral status, and to complete the hearing record because the copy of the June 15, 2015 IEP admitted into evidence was incomplete (compare Parent Ex. C, with Answer Ex. 1). In a reply, dated June 1, 2017, the parent stated that she does not object to consideration of the May 3, 2017 IEP. The parent's reply does not specifically address or object to admission of the other documents submitted by the district, but alleges a clarification that a school site had not yet been identified to implement the May 3, 2017 IEP.

After reviewing the additional evidence submitted by the district, I find that the May 3, 2017 IEP, CBST referral letter, and May 3, 2017 consent to reevaluate the student are necessary with regard to fashioning appropriate relief in this proceeding, and they are admitted into evidence for this purpose. The record reflects that the June 15, 2015 IEP was available at the time of the hearing (see Parent Ex. C; Answer Ex. 1). A comparison of the two documents indicates that the version submitted on appeal is a complete copy of the document, and it contains additional sections, including a statement of the student's annual and postsecondary goals, the student's

recommended special education program and related services, additional accommodations, instructional/functional levels, and the other options considered by the June 2015 CSE (compare Parent Ex. C, with Answer Ex. 1). This document clarifies background matters in this case without widening the scope of the parties' dispute into new areas that should be addressed through the impartial process in the first instance and, therefore, I will accept it into evidence for the purpose of having a complete hearing record.

3. IHO Conduct

The parent alleges that the IHO's conduct of the impartial hearing prejudiced the parent's ability to present her case. The parent objects to the IHO's decision to limit the length of the parties closing briefs and faults the IHO for excluding evidence submitted by the parent that was timely disclosed, and for admitting evidence presented by the district that was not timely disclosed.

Initially, to the extent that the parent asserts that the IHO's decision to limit the length of the parties' closing briefs to 10 pages exceeded her authority, the IHO has discretion to accept memoranda of law from the parties. Specifically, State regulation provides that "[t]he impartial hearing officer may receive memoranda of law from the parties not to exceed 30 pages in length" (8 NYCRR 200.5[j][3][xii][g]). The IHO gave the parties the option of choosing whether to make a closing statement or submit written closing briefs, which the IHO notified the parties would be limited to 10 pages (Tr. pp. 1090-91). Both parties chose to submit written closing briefs and neither party objected to the 10-page limitation at the time of the hearing (Tr. p. 1098). Under these circumstances, the IHO acted within her authority to limiting the parties' closing briefs to 10 pages and there is no adequate reason presented to disturb that discretionary decision.

The parent also asserts that the IHO erred in excluding a document submitted by the parent on the last day of the hearing (see Tr. pp. 1101-04). State regulation provides that the IHO "shall exclude any evidence that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]). Review of the transcript reveals that although the IHO did not specifically use the words "irrelevant, immaterial, unreliable, or unduly repetitious," the IHO, in considering the document in conjunction with the evidence already submitted, determined it had "minimal" value and decided not to admit it (Tr. pp. 1102-03). The IHO's decision was not an abuse of her discretionary authority regarding evidence that falls into the immaterial or unduly repetitious categories.

Lastly, the parent objects to the IHO's acceptance of documents submitted by the district that were not disclosed at least five business days prior to the start of the hearing. During the hearing, the parent specifically objected to page 3 of District Exhibit 14, pages 14 and 16 of District Exhibit 18, and IHO Exhibit 1 (Tr. pp. 469, 475-79, 558, 801-07). Pursuant to State regulation, "[e]ach party shall have the right to prohibit the introduction of any evidence the substance of which has not been disclosed to such party at least five business days before the hearing" (8 NYCRR 200.5[j][3][xii]). Upon review of the documents submitted, the information contained in page 16 of District Exhibit 18 is also contained elsewhere within that same document (compare Dist. Ex. 18 at p. 16, with Dist. Ex. 18 at p. 17), and thus the substance of the evidence was disclosed, if not the exact format and it is not error for the IHO to admit it. Additionally, page 3 of District Exhibit 14 is a summary of the other information contained within District Exhibit 14 (compare Dist. Ex. 14 at p. 3, with Dist. Ex. 14 at pp. 1-2) and again it is not error to admit the

same information in a different format. Page 14 of District Exhibit 18 is a blank form containing no relevant information regarding this proceeding (see Dist. Ex. 18 at p. 14), and any error in admitting it is harmless. Further, while IHO Exhibit 1 contains e-mail messages that should have been disclosed, there is no indication as to how the inclusion of those e-mails prejudiced the parent or the parent's ability to prepare for this proceeding. In particular, the e-mail messages contained within IHO Exhibit 1 are all between the parent and the student's counselor at St. Anne (see IHO Ex. 1). In general, it is questionable whether e-mails to or from a parent can be excluded from evidence in an impartial hearing at the request of the parent under the 5-day rule because the substance of the information is, in essence, already disclosed to the parent upon e-mail transmission. The problem in this case, as noted below, is that both parties proceeded delve into evidence of evolving issues that postdated the due process complaint notice and the IHO to not clarify on the record how matters that post-date the due process complaint notice would be handled.[6] Assuming for the sake of argument that it may have been technically improper for the IHO to include e-mail evidence that was not timely disclosed, the evidence in question was either not relevant, located elsewhere within the hearing record, or available to the parent prior to the hearing. In any event, I do not rely on IHO Exhibit I in reaching my decision in this matter.

Notably, the parent does not allege what impact she believes the IHO's actions had on her rights, or what relief she seeks as a response to any alleged deprivation of those rights, and a review of the hearing record demonstrates that the parent was able to submit a broad variety of documentary evidence and was provided an opportunity to be heard at the impartial hearing, which took place over multiple days and was conducted in a manner consistent with the requirements of due process (Tr. pp. 1, 38-44, 249-50, 462-64, 627-28, 780-81, 1095-96; see, e.g., 20 U.S.C. § 1415[g]; Educ. Law § 4404[2]; 34 CFR 300.514[b][2][i], [ii]; 8 NYCRR 200.5[j]).

B. Claims Relating to the 2015-16 School Year

On appeal, the parent raises a number of challenges regarding the adequacy of the student's educational program and the CSE's efforts to draft appropriate present levels of performance, and annual and postsecondary goals, without consistently identifying which claims are tied to which years or IEPs at issue. The parent's memorandum of law provides clarification, and specifies which claims relate to which school years specifically (Parent Mem. of Law at pp. 2-19). From this document, it appears that the sole issues for review that the parent specifically links to the 2015-16 school year are the allegations that the district failed to appropriately evaluate the student and failed to create appropriate postsecondary goals for the student (id. at pp. 2-5).

1. Sufficiency of Evaluative Information

The parent alleges that the IHO erred in finding that the district comprehensively evaluated the student. The parent faults the district for reliance upon a June 2015 evaluation that called for re-testing, and the district's subsequent refusal to reevaluate the student upon the parent's February 2016 request. The IHO held that the district was not required to reevaluate the student less than

[6] If the issues in this case excluded disputes regarding all events that post-dated the due process complaint notice, there would be more compelling reasons to exclude some or all of the e-mails as both untimely and irrelevant, but the "rolling list of issues" approach used by both parties during the hearing process may have influenced the IHO's decision to include it.

one year after the previous evaluation (IHO Decision at pp. 21-22), and the parent appeals. A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and must conduct one at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). 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]). 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]).

In this case, the parent's main concern with the evaluative material used by the CSE to develop the student's educational program appears to stem from the evaluations which were conducted in June of 2015, a psychodiagnostic evaluation and a psychoeducational evaluation, which noted the student's challenges in participating in the evaluation process (see Parent Exs. T at p. 3; U at p. 2). The language noting the "marked difficulty" that the student had in participating in the evaluation and that the "current results need to be viewed with caution" was included in each of the 2015-16 IEPs (Answer Ex. 1 at p. 1; Parent Exs. D at p. 1, E at p. 1; see Parent Exs. T at p. 3; U at p. 2). However, the IEPs and the evaluation reports themselves noted that the results, while perhaps an underestimation of the student's cognitive potential, were likely an accurate reflection of the student's capacity to respond to learning situations, highlighted her need for greater supports, and noted her reduced frustration tolerance (id.). Despite the parent's concerns regarding the statements in the evaluation reports calling for caution when interpreting the results and making a note of the usefulness of retesting under different circumstances, these statements do not inherently undermine the useful information which was obtained by these evaluations, the contents of which are discussed in greater detail below (see Parent Exs. T; U).

The student was admitted to a psychiatric hospital on May 14, 2015, and, as noted above, was referred for psychological testing to assist in differential diagnosis and treatment planning (Parent Ex. U at p. 1). The psychoeducational evaluation report stated that the student's "extremely low frustration threshold" may have caused inferior performance on the assessment, and a retest was recommended for when she was more "clinically stable" (id. at p. 2). As reflected in the student's September 2015 IEP, the student exhibited her strongest functioning and performed in the "upper portion of the low average range" on tasks measuring verbal comprehension and reasoning skills (compare Parent Ex. E at p. 2 with Parent Ex. U at p. 2). The student demonstrated

low average nonverbal abilities, and test scores related to fluid reasoning and visual spatial functioning were in the borderline range (id.). The student exhibited a disparity between her average functioning on processing speed tasks and her borderline functioning on measures of auditory and visual working memory (compare Parent Ex. E at pp. 2-3, with Parent Ex. U at p. 2). The student's full-scale IQ of 80 fell in the low average range, yet her academic functioning in "basic skills areas" was "above the level that would be anticipated given current cognitive functioning levels" (compare Parent Ex. E at p. 3, with Parent Ex. U at pp. 2, 4). Measures of the student's language skills yielded "a fairly consistent pattern of low average to lower average range functioning (Parent Ex. U at p. 2).

The June 2015 psychodiagnostic evaluation report noted and the September 2015 IEP reflected that in the areas of personality and perception of self, the student exhibited guardedness, believed that others perceived her as worthless, and experienced anxiety as a result of any negative comment or social failure (compare Parent Ex. E at p. 5 with Parent Ex. T at p. 4). The evaluator also noted that the results suggest that the student's difficulty in learning situations was due to limited frustration tolerance, inability to persist in independent tasks, and inability to tolerate the possibility of external criticism (Parent Ex. T at p. 4). Further, the report and the IEP indicated that the student may feel vulnerable and engage in maladaptive behaviors when separated from support systems (compare Parent Ex. E at p. 5, with Parent Ex. T at p. 4). The student reportedly exhibited significant lapses in reality testing, chronically poor judgement, and unusual perceptual and sensory events which were unsettling to her (compare Parent Ex. E at p. 5, with Parent Ex. T at p. 5). The evaluator noted that the results suggested that the student was capable of engaging in aggression, recklessness and dangerous risk-taking behavior, as well as exhibited marked difficulties with interpersonal functioning (compare Parent Ex. E at pp. 5-6, with Parent Ex. T at p. 6).

Furthermore, these two evaluation reports were not the only evaluative information the CSE had available to it in making a program recommendation. In addition to the June 2015 psychodiagnostic and psychoeducational evaluation reports, the June 2015 CSE had available the student's grades from the first two marking periods of the 2014-15 school year, a May 4, 2015 social history, a May 5, 2015 classroom observation, a May 18, 2015 social studies progress report, a May 19, 2015 counseling progress report, a June 4, 2015 science progress report; a June 9, 2015 behavior chart, a June 10, 2015 FBA, and a June 11, 2015 math progress report (Dist. Ex. 17; Parent Exs. O-P; R-X; Z; PP at p. 2).

A May 4, 2015 social history report indicated that the student had a previous diagnosis of major depressive disorder with psychotic features, had a current diagnosis of unspecified episodic mood disorder and major depressive disorder (recurrent episode, severe degree), was currently prescribed daily medication, and reportedly had tried to commit suicide last year (Parent Ex. O at p. 1). The parent reported her concerns that the student's emotional difficulties were affecting her academic performance and that the student exhibited escalating defiant and disrespectful behaviors in the home (id. at p. 2). The parent also reported that the student had difficulty expressing her feelings and taking responsibility for her actions, that she blamed the parent for everything, and that she "shuts down or cries" when she becomes anxious in social situations (id.).

The May 5, 2015 classroom observation stated that according to the student's math teacher, the student was "usually able to do the work," she sometimes tried hard, but at other times "shut

down" and refused to work (Parent Ex. P). In a May 2015 progress report the counselor, who provided in-school "at-risk counseling" on an as needed basis, reported that the student wanted to do well in school and responded well to praise and encouragement, but her emotional struggles caused difficulties (Parent Ex. S at pp. 1-2). The May 2015 progress report indicated that the student felt her peers were being "mean" to her and "singling her out," that she had trouble navigating social situations and interactions with peers, causing her anxiety; and she benefitted from adult assistance when this occurred (id. at p. 2). Finally, the counselor recommended that the student would benefit highly from a therapeutic environment and school setting where trained staff could support her academic and emotional needs (id.).

A June 4, 2015 science class progress report stated that at the start of the 2014-15 school year, the student completed her classwork and stayed on task on "most days" (Parent Ex. V at p. 1). However, the student had "more extreme" moods since her hospital stay, and completion of her work depended on her mood (id.). In addition, the report stated that at times, the student would completely "shut down," put her head down, and refuse to do her work (id. at p. 2). The June 2015 report also stated that the student needed a lot of support, including structured organizers, extra time, one-to-one instruction, modified work, modified tests and quizzes, teachers who could accommodate her absences and moodiness, emotional support, peers who could understand and accept her, and an academic environment she could trust (id.).

According to behavioral data, taken on June 9, 2015 during classroom instruction, and a resultant June 10, 2015 FBA, the student displayed behaviors such as putting her head down to avoid work, off-task behaviors, ignoring teacher directives, engaging in negative interactions with peers, leaving the classroom without permission, talking out of turn, refusing to do her work, and "shutting down" (Parent Exs. W; X at pp. 1, 4). The June 2015 FBA indicated that interventions such as counseling, preferential seating, breaks, and opportunities to make up missed work had not been consistently effective (Parent Ex. X at p. 4).

According to a math progress report dated June 11, 2015, the student had completed "very little" work in class, frequently came to class unprepared, needed a great deal of teacher guidance, and often put her head down on the desk if the work was challenging (Parent Ex. Z at pp. 1-2). In addition, the student reportedly had missed so much class time, it was unclear whether she was unwilling or unable to complete the work, her frequent absences made it difficult to keep up with the work, and her emotional problems deterred her from functioning in the classroom environment (id.). The CSE also used the student's second marking period report card, and social studies grades and teacher comments from a May 2015 progress report in developing the student's IEP (compare Parent Ex. E at pp. 2-3, 5, with Dist. Ex. 17 and Parent Ex. R).

An independent review of the record indicated that the student's September 2015 IEP was reflective of the evaluative information available to the CSE at the time, as generally summarized above (compare Parent Ex. E at pp. 1-8; with Dist. Ex. 17; Parent Exs. O-P; R--X; Z). Accordingly, the hearing record provides no basis for a finding that the district did not adequately evaluate the student at the time the 2015-16 IEP was developed. Regarding the parent's specific evaluative information claim, although the June 2015 psychodiagnostic and psychoeducational evaluation reports contain language indicating that the student should undergo a reevaluation of her cognitive abilities when she was more clinically stable, the reports also explain that the results accurately reflected the student's then-current ability to respond in learning situations, and also the presence

of average academic abilities, suggesting that her "acquisition of basic skills has proceeded in an age appropriate fashion" (Parent Exs. T at pp. 3-4, 6; U at pp. 2, 4). The hearing record also supports the IHO's position that at the time the parent requested that the student be reevaluated in February 2016, the student was exhibiting successful academic and social/emotional performance, such that the district's determination not to conduct a reevaluation of her cognitive skills at that time did not deny the student a FAPE for the remainder of the 2015-16 school year (IHO Decision at p. 21; Parent Exs. BB; JJ; SS). To the extent the parent believes the CSE required additional or clarifying information in order to create an appropriate IEP for the student, and seeks an independent neuropsychological evaluation, that matter is addressed below.

2. Postsecondary Goals

The parent alleges that the district failed to provide adequate postsecondary goals for the 2015-16 school year, and appeals the IHO's failure to make a finding addressing that claim. The IDEA requires that, for students with IEPs in effect when the student turns sixteen years old, the district is obligated to provide "appropriate measurable postsecondary goals and related services, based upon age appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills" (20 U.S.C. § 1414[d][1][A][VIII]; 34 C.F.R. § 300.320[b]. Under State regulations, districts are held to a similar standard in drafting IEPs for students who turn fifteen (8 NYCRR § 200.4[d][2][ix]). The parent cites to this regulation as the basis to challenge the adequacy of the postsecondary goals and transition plan made for the student during the 2015-16 school year, first drafted in the June 2015 IEP (see Answer Ex. 1). However, the student did not turn 15 until the 2016-17 school year and all three IEPs that relate to the 2015-16 school year indicated annual review dates prior to the student's fifteenth birth date (Parent Exs. D at p. 1; E at p. 1 [both preceding exhibits listing the projected annual review date as August 5, 2016]; Answer Ex. 1 at p. 1 [listing the projected annual review date as June 13, 2016]).[7] Accordingly, the district was not obligated to create postsecondary goals for the student on those IEPs (8 NYCRR § 200.4[d][2][ix]). Additionally, to the extent that the district did include postsecondary goals on those IEPs, the student's postsecondary goals remained the same from the June 2015 IEP through the January 2016 IEP (compare Answer Ex. 1 at pp. 7-8, with Parent Exs. D at p. 8; E at p. 9; F at p. 5). Accordingly, the parent's claims with regard to the district's provision of postsecondary goals during the 2015-16 school year are dismissed; however, the substance of the student's postsecondary goals is discussed below as part of the analysis of the January 2016 IEP.

C. Claims Relating to the 2016-17 School Year

The parent claims that the district failed to provide an appropriate educational placement for the student during the 2016-17 school year because a residential placement was too restrictive, and seeks, as relief, to have the district place the student in a therapeutic day program closer to her home. The parent also challenges the adequacy of various portions of the January 2016 and August

[7] In New York, the school year is defined as the "period commencing on the first day of July in each year and ending on the thirtieth day of June next following" (Educ. Law § 2[15]). The student's 2015-16 school year, with a 12-month program, would therefore begin in July 2015, and conclude in June of 2016.

2016 IEPs, including the statement of the student's present levels of performance, annual goals, postsecondary goals, and transition plan.[8]

1. Present Levels of Performance

The parent alleges that January and August 2016 IEPs were substantively deficient, in part, because the district failed to provide an accurate statement of the student's present levels of performance. The parent appeals the IHO's failure to address this issue.

Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

In addition to the documents available to the CSE for the 2015-16 school year, the January 2016 CSE had before it the student's report card, her current IEP, behavioral report, and progress notes from her teachers (Tr. pp. 112-13; see Parent Exs. E; F; AA at pp. 9-10). The January 2016 IEP indicated that the student had a positive response to the highly structured, therapeutic learning environment, individual attention, and clinical support at the residential program (Parent Ex. F at p. 3). The January 2016 IEP indicated that the student was performing in the average range in all academic areas and made the honor roll, and documented the student's grades for the first quarter: English 9 (96), global 9 (95), algebra (92), living environment (91; lab 80), physical education (88), art (95), and health (96) (id. at p. 2). The January 2016 IEP also noted that the student needed to work on initiating her schoolwork independently, and checking it for accuracy (id.). In addition, although the student was able to read independently and had good comprehension, she needed to develop her ability to ask for help when needed and not rush through tests (id.).

[8] In this case, the parent challenges matters that postdate the events set forth in the June 2016 due process complaint notice, for example, the adequacy of the August 2016 IEP, which leads to the question whether such disputes may be permissibly addressed in this proceeding. The IHO did not provide any explanation regarding why she went beyond the matters identified in the due process complaint. It appears that the parent's challenges to the adequacy of the August 2016 IEP began to arise during the course of the impartial hearing (78-79). Rather than assert challenges the inclusion issues relating to the August 2016 IEP in these proceedings, the district opted to present evidence defending the recommendations of August 2016 CSE, and the matter was fully addressed by the parties at the hearing (Tr. pp. 100-04, 127-37, 141-50, 165-73, 180-90, 193-94, 328, 330-33, 360-72, 392, 449, 654, 897-99, 980-992, 1178-80, 1183-86, 1189-90). The IHO made findings regarding the August 2016 CSE meeting. On appeal, the parent continues to press her specific challenges to the adequacy of the August 2016 IEP, described above, alleging that the IHO erred. In their answer, the district continues to defend the August 2016's CSE's decision to reject the parent's request to relocate the student to a day program, in favor of moving the student to a step-down program (Answer at pp. 6, 8). At this point, it cannot be said that the district did not open the door the August 2016 CSE meeting and IEP issues that postdate the due process complaint and I find that the parent's challenge to the August 2016 IEP is within the permissible scope of review (M.H. v. N.Y. City Dep't of Educ., 685 F.3d 217, 250 [2d Cir. 2012]).

Regarding the student's social/emotional present levels of performance, the January 2016 IEP noted that the student's emotional difficulties had minimal impact on her performance in social studies, ELA, and art, and no impact in health (Parent Ex. F at pp. 2-3). According to the IEP, social, emotional, and behavioral difficulties had a "significant impact" on her participation and progress in algebra; due to low self-esteem she required constant reassuring that she was correct, slowing her ability to work (id. at p. 2). Teacher comments included that the student can become frustrated and agitated when a concern was not addressed immediately, she can become frustrated by peers when she feels "instigated" by them, and that she often lost focus and needed prompts to remain on task (id. at pp. 2-3). The student had reportedly improved in her ability to use effective coping strategies, benefitted from taking a break when needed and ignoring the negative behavior of peers when it did not involve her, and needed to increase her patience and ability to follow instructions (id. at p. 3). The IEP indicated that while the student continued to struggle at times, she had the support she needed to cope effectively and appropriately, and that her needs were being met in a residential academic setting (id. at pp. 3-4).

The CSE convened again on August 18, 2016 at the request of the parent (Tr. pp. 327-28; Parent Ex. G). The August 2016 CSE had before it a June 2016 goal progress report, which updated the student's progress on 4 out of 11 goals (compare Parent Ex. E at pp. 10, 12, with Parent Ex. FF). A comparison between the present levels of performance in the January 2016 IEP and the August 2016 IEP shows that no changes were made (compare Parent Ex. F at pp. 1-4, with Parent Ex. G at pp. 1-4).

The parent's main concern with the January and August 2016 IEPs' statement of the student's present levels of performance was based on the inclusion of language from the June 2015 psychodiagnostic and psychoeducational evaluations reports, which noted the student's challenges in participating in the evaluation process (Parent Ex. A at p. 5; see Parent Exs. T at p. 3; U at p. 2). As previously discussed, the language in those evaluations calling for caution in interpreting the cognitive test results did not undermine the volume of useful information obtained by those evaluations (see Parent Exs. T; U). Including information in both the January and August 2016 IEPs about the student's cognitive potential as measured in a testing environment in June 2015, alongside then-current measures of the student's actual functioning and academic success in a classroom setting when she is receiving adequate support, did not result in inaccurate information. Rather, the January and August 2016 IEPs described the academic, developmental, and functional needs of the student over time, in a manner that aligned with information available at the time of the CSE meetings (see 34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). Accordingly, the parent's claim that the January and August 2016 IEPs failed to appropriately state the student's present levels of performance is contrary to the information contained within the hearing record and must be rejected.

2. Academic and Postsecondary Goals

The parent alleges that January and August 2016 IEPs were substantively deficient, in part, because the district failed to provide adequate annual and postsecondary goals for the student. Specifically, the parent alleges that the goals were copied without any changes from the September 2015 IEP, and were vague and insufficiently specific. The parent appeals the IHO's failure to address these issues.

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

Although the adequacy of the annual goals contained in the September 2015 IEP is not at issue, the nature of the parent's challenge to the inclusion of the same goals in the January and August 2016 IEPs necessitates some discussion of the goals as contemplated in preceding IEP. The September 2015 IEP featured ten measurable annual goals to address the student's needs in the areas of writing, reading, mathematics, and counseling (Parent Ex. E at pp. 9-12). Specifically, to address the student's written language difficulties, the IEP included two annual goals designed to improve her ability to develop multi-paragraph essays with supporting evidence and using supporting details, given grade level text (id. at p. 10). In the area of reading, the annual goal was for the student to complete a graphic organizer to support an analysis of grade level text (id. at p. 10). In mathematics, the IEP annual goals addressed the student's need to use specific language and vocabulary for multistep mathematical questions, and construct simple equations to solve real world mathematical problems (id. at p. 11). The September 2015 IEP included five counseling annual goals to address the student's primary area of need of emotional functioning (id. at pp. 11-12). These goals included improving the student's ability to comply with adult requests, use positive self-talk and coping strategies when anxious or frustrated, and demonstrate problem solving when given scenarios involving social conflict (id. at pp. 11-12).

The student's therapist at St. Anne stated that when she began working with her, the student was unable to utilize coping skills (Tr. pp. 202, 226-27). A December 15, 2015 quarterly treatment review report indicated that, less than three months after the student was admitted to the program, she had adjusted well to the structured routine, complied with expectations, had developed positive relationships with staff and peers, and had earned the privilege of going on outings in the community (Parent Ex. AA at p. 3). However, the student often forgot to use coping strategies when angry, and continued to "shut down" when frustrated and stressed (id. at pp. 5-6). The student's first quarter academic grades were in the 90 range, and report card comments reflected good participation and that the student was a pleasure to have in class (Parent Ex. II at p. 1).

Turning next to the annual goals contained in the January 2016 IEP, which the parent asserts were inappropriately copied from the previous school year, comparison of the September 2015 IEP and the January 2016 IEP shows that the annual goals are the same (compare Parent Ex. E at pp. 9-12, with Parent Ex. F at pp. 5-8).[9]

[9] The January 2016 IEP included an annual goal to improve the student's use of positive self-talk to be achieved at a criteria of 90 percent (Parent Ex. F at p. 5). This is similar to annual goals on both the September 2015 IEP and elsewhere in the January 2016 IEP that address the student's need to use positive self-talk at 85 percent criteria (Parent Exs. E at p. 12; F at p. 8).

The January 2016 CSE discussed the student's academic and behavior goals, and an IEP annual goal progress report provided information about the student's progress toward four of her goals (Tr. p. 122; see Parent Ex. BB). Specifically, as of January 2016, the student successfully used graphic organizers to support an analysis of a short story written for her grade level, and was expected to achieve the goal by the end of June 2016 (compare Parent Ex. F at p. 6, with Parent Ex. BB at p. 2). In the area of writing, the student was also expected to achieve one of her written language goals; summarizing grade level text with three supporting details (compare Parent Ex. F at p. 6, with Parent Ex. BB at p. 2). The student was expected to achieve one of her math goals by the end of June 2016, as the progress report stated that she was able to explain or support a multistep equation 70 percent of the time, but was not currently working on her second math goal as it was deemed not appropriate at that time (compare Parent Ex. F at p. 7, with Parent Ex. BB at pp. 2-3). Although the January 2016 IEP annual goal progress report and the December 15, 2015 service plan review indicated that the student continued to exhibit difficulty using coping strategies when she was frustrated, she was expected to achieve the IEP annual goal by the end of June 2016 (compare Parent Ex. F at p. 8, with Parent Ex. AA at p. 5, and Parent Ex. BB at p. 3). The January 2016 CSE discussed that while the student had made progress on her academic and behavioral goals during the 2015-16 school year, she had not yet achieved them; and therefore, the goals would remain the same (Tr. pp. 122, 349-50).[10]

The March 2016 St. Anne quarterly treatment review report indicated that the student reportedly worked on staying in classes even when frustrated, continued to struggle with her emotions, but had gained some insight about her "triggers" and was working hard to use her coping skills independently (Parent Ex. CC at pp. 3-4). In addition, the student had made improvements in independent living skills, and was working on building trust and communication skills with her parent (id. at p. 4). The student had two incidents of "at-risk" behavior since the previous meeting in December 2015; specifically failing to follow staff directives, and threatening a peer, although overall the report indicated that the student was doing well in the program (id. at pp. 10-11). The June 2016 St. Anne child care report indicated that the student had continued to comply with unit routines both independently or with basic prompts, consistently participated in assigned groups, and had shown improvement in interpersonal relationships with peers (Dist. Ex. 3). In addition, the June 2016 quarterly treatment review report indicated that the student continued to make progress in consistently attending classes, using her coping skills in a variety of settings, and improving independent living skills, and communication with her parent (Dist. Ex. 2 at pp. 3-5).

At the time of the August 2016 CSE meeting, St. Anne had prepared a July 2016 IEP annual goal progress report that indicated the student had achieved her reading goal to complete a graphic organizer given grade level text (Dist. Ex. 4 at p. 2). The student had reportedly made steady progress on her writing goals, which again were conditioned upon the use of grade level text (id. at pp. 2-3). The progress report noted that the student was "on track" to achieve one of her math goals, but did not indicate if the student achieved the goal by June 2016 (id. at p. 3). In the area of behavior, the report indicated that the student's behavior was inconsistent, and she exhibited difficulty when expected to comply with teacher directives and use coping strategies in frustrating situations, and had not achieved these goals (id. at pp. 3-4). Review of testimony about the August

[10] The January 2016 IEP reflected an implementation date of July 1, 2016, and a projected date of annual review of January 18, 2017 (Parent Ex. F at p. 1).

2016 CSE meeting provides conflicting information regarding the CSE's discussion or lack thereof about the student's annual goals (compare Tr. pp. 134-135, with Tr. pp. 168-69, 180, 188-89). Regardless of whether or not there was discussion, a comparison between the annual goals included in the January 2016 and August 2016 IEPs shows they are the same (compare Parent Ex. F at pp. 5-8, with Parent Ex. G at pp. 5-8).

While the parent is correct that the 2016-17 IEPs contained the same academic annual goals as the September 2015 IEP, the student had not achieved the goals by the time of the January 2016 CSE meeting, and the student's instructional level between the January 2016 IEP and the August 2016 IEP changed over time (Tr. pp. 323, 349-50; compare Parent Ex. F at p. 14, with Parent Ex. G at p. 14). Therefore, while the September 2015 and January 2016 IEPs indicated that the student's functional level was at sixth grade, her August 2016 IEP indicated her instructional level was at ninth grade (id.). Consequently, by modifying the student's instructional level, the August 2016 IEP academic annual goals contemplate achievement based upon higher grade-level material (compare Parent Ex. F at pp. 6-7, 14, with Parent Ex. G at pp. 6-7, 14). The district did not submit information regarding the student's progress toward her IEP social/emotional annual goals (see Parent Exs. BB, EE, FF). However, other sources of information about the student's social/emotional status compiled during the course of the 2015-16 school year—while reflecting progress—did not indicate that the student had achieved goals pertaining to attending all her classes, improving positive coping and emotional regulation skills, identifying triggers to her anxiety, impulsivity, and anger, improving independent living skills, and family/peer relationship skills, goals similar to those included in her IEPs (compare Dist. Ex. 2 at pp. 3-6, with Parent Ex. F at pp. 7-8 and Parent Ex. G at pp. 7-8). Therefore, the continuation of IEP annual goals to address these needs, while carried over from the previous school year, did not, by virtue of the fact that that they were carried over, result in a denial of a FAPE.

Upon an independent review of the student's relative areas of need, the evidence in the hearing record shows that the annual goals included in the January and August 2016 IEPs, broadly aligned with and targeted the student's needs identified in the present levels of performance, appropriately addressed the student's needs, and were sufficiently specific and measurable to guide instruction and to evaluate the student's progress over the course of the 2016-17 school year (see D.A.B. v. New York City Dep't of Educ., 973 F. Supp. 2d 344, 359-61 [S.D.N.Y. 2013]; E.F. v. New York City Dept. of Educ., 2013 WL 4495676, at *18-*19 [E.D.N.Y. Aug. 19, 2013]; D.B., 966 F. Supp. 2d at 334-35; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *8 [S.D.N.Y. Dec. 8, 2011]; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 288-89 [S.D.N.Y. 2010]; Tarlowe, 2008 WL 2736027, at *9; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *11 [S.D.N.Y. Sept. 29, 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 146-47 [S.D.N.Y. 2006]; Application of the Dep't of Educ., Appeal No. 12-108 [finding annual goals appropriate where the goals addressed the student's areas of need reflected in the present levels of performance]).

While not a denial of FAPE, the parents concern regarding the goals was not unjustified. The procedure for developing the goals was an example of poor process, even if the substance of the goals passed muster. The district's apparent carelessness in copying goals from a previous IEP, which is generally ill advised, particularly when those goals include a completion date which predates the August 2016 CSE meeting itself (see Parent Ex. G at pp. 6-8). Given the testimony of the CSE chairperson, the district appears to have prevailed on this issue largely by accident, as

she justified the continuation of the student's goals onto the January 2016 IEP on the partial basis that the CSE could reconvene to discuss the student's goals at a later date if the student met her goals before the student's next annual review (Tr. p. 123); however, she also testified that the August 2016 did not discuss the student's goals (Tr. p. 134), and a progress report indicated that one of the reading goals had already been met by that time (compare Parent Ex. G at p. 6, with Parent Ex. FF at p. 2). Additionally, all but one of the annual goals indicates that the student is to complete the goal by June 2016, the month prior to the date the IEP is scheduled to be implemented (Parent Exs. F at pp. 1, 5-8; G at pp. 1, 5-8). Notwithstanding these process problems the goals were phrased in such a way as to largely allow the student to continue to work in persistent areas of need, on work that is appropriate to her current grade level, as discussed above (see Parent Exs. F at pp. 5-8; G at pp. 5-8). Accordingly, I caution the district to take greater care in the future in monitoring the student's progress toward her goals to ensure the ongoing appropriateness of the student's goals at the time of each CSE meeting so that the program remains appropriately ambitious in light of her circumstances (see Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988, 1000 [2017]).

I now turn to the parent's challenge to the adequacy of the postsecondary goals. The parent asserts that the postsecondary goals on the January 2016 and August 2016 IEPs are vague and are the same as those on the student's IEP for the 2015-16 school year. She also alleges that the IEPs do not mention the student's preferences and interests. The parent appeals the IHO's failure to address this issue. Under the IDEA, to the extent appropriate for each individual student, an IEP must focus on providing instruction and experiences that enable the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34]; see Educ. Law § 4401[9]; 34 CFR 300.43; 8 NYCRR 200.1[fff]). Accordingly, an IEP for a student who is at least 16 years of age (15 under State regulations), or younger if determined appropriate by the CSE, must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills (20 U.S.C. § 1414[d][1][A][i][VIII]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]). An IEP must also include the transition services needed to assist the student in reaching those goals (id.). Transition services must be "based on the individual child's needs, taking into account the child's strengths, preferences, and interests" and must include "instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation" (20 U.S.C. § 1401[34][B]-[C]; 8 NYCRR 200.1[fff]). It has been found that "a deficient transition plan is a procedural flaw" that will only rise to a denial of a FAPE if it impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6, *9 [S.D.N.Y. Mar. 21, 2013], citing Klein Indep. Sch. Dist. v. Hovem, 690 F.3d 390, 398 [5th Cir. 2012], and Bd. of Educ. v. Ross, 486 F.3d 267, 276 [7th Cir. 2007]; see A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *11[S.D.N.Y. March 19, 2013).

The student's September 2015 IEP included three measurable postsecondary goals; to acquire the skills to successfully transition to a two-year college, transition to competitive employment, and acquire the necessary daily living skills to allow for independent functioning in a variety of environments (Parent Ex. E at p. 9). In addition, the student's September 2015 IEP

identified the student's transition needs such as developing academic skills, particularly in reading comprehension and writing, and improve organization and study skills, self-advocacy skills, and skills needed to independently access the community (id.). In addition, the September 2015 IEP included a coordinated set of transition activities for instruction including enrolling in academic classes that would prepare the student for the educational challenges of postsecondary education, participating in meetings with the guidance counselor or special education teacher to discuss various educational requirements for career/college, and practicing skills needed for postsecondary education such as study skills, organization, time management, test preparation, note-taking, stress reduction, and how to work in a study group (id. at p. 15). Transition activities also included providing the student with "intensive" counseling services, instruction to develop skills for independent living, and opportunities to participate in extracurricular clubs/activities; identifying student interests, abilities related to career opportunities, and attitudes/behaviors necessary for job success; and developing a career portfolio (id. at p. 16).

The student's postsecondary goals and transition activities remained the same between the 2015-16 school year and the 2016-17 school year (compare Parent Ex. E at pp. 9, 15-16 with Parent Ex. F at pp. 5, 11-12 and Parent Ex. G at pp. 5, 11-12). However, contrary to the parent's assertion, the January and August 2016 IEPs reflected details including the student's interest in pop culture and fashion, physical activity, reading, using the internet, and fashion design, and also reflected the specific transition activity of discussing the educational requirements for careers within the fashion industry (Parent Exs. F at pp. 2-3, 11; G at pp. 2-3, 11). The student was expected to continue developing skills to successfully transition to a two-year college, to prepare to transition to competitive employment, and to continue to acquire skills necessary for independent living (Parent Exs. F at p. 5; G at p. 5). The hearing record reflects that during the 2015-16 school year the student had exhibited progress in these goal areas, as she was performing in the average range academically, achieved grades on the honor roll, identified vocational interests, and improved independent living skills (Parent Exs. F at pp. 2-3; G at pp. 2-3; LL; Dist. Ex. 2 at pp. 3-6). As the student was in 10th grade during the 2016-17 school year and had not yet completed high school, it was appropriate for her to continue working towards the postsecondary goals.

Although the postsecondary goals appear sufficient based on the evaluative information available to the CSE, postsecondary goals should be based upon age appropriate transition assessments related to training, education, employment, and independent living skills (34 CFR 300.320[b][2]; 8 NYCRR 200.4[d][2][ix][a][2]), and there is no indication in the hearing record that the district conducted such a transition assessment. Accordingly, to the extent that it has not already done so, the CSE should conduct a transition or vocational assessment of the student.

3. Appropriateness of Residential Placement and LRE

The parent alleges that the district failed to provide the student with an appropriate educational placement for the 2016-17 school year, and challenges both the January 2016 and August 2016 IEPs. Although the former IEP was generated during the 2015-16 school year, the parent does not contest the appropriateness of the student's residential placement during the 2015-16 school year (see Parent Ex. A), and instead challenges the IHO's determination that the CSE's continued recommendation for residential placement for the 2016-17 school year was appropriate.

The IHO noted that all of the witnesses at the hearing recognized the progress and educational benefit the student received at St. Anne, including the parent (IHO Decision at p. 17). With regard to progress and educational benefit, the IHO is correct that the district and parent witnesses all appear to agree that the student made great strides and thrived in her residential placement, and received educational benefits (Tr. pp. 179, 189, 193-94, 203, 227, 229, 242-43, 643; Dist. Ex. 2; Parent Ex. LL). However, that is not the issue. The parent does not allege that the curriculum and/or support services provided at the student's residential placement were inappropriate to address her educational needs or that she failed make progress in that setting, rather—through her request for consideration of a day treatment program closer to her home—she alleges that a residential placement nevertheless violated the IDEA's mandate that the student be placed in the LRE. A residential placement is one of the most restrictive educational placements available for a student and it is well settled that a residential placement is not appropriate unless it is required for a student to benefit from his or her educational program (M.H. v Monroe-Woodbury Cent. Sch. Dist., 296 Fed Appx 126, 128, 2008 WL 4507592 [2d Cir 2008]; Walczak, 142 F.3d at 122; Mrs. B., 103 F.3d at 1121-22; see Educ. L. § 4402[2][b][2]; 8 NYCRR 200.6[j][iii][d]).[11] The fact that the student performed well in a residential setting does not resolve the question of whether the district fulfilled its obligation to prove that a residential placement was necessary for the student to benefit from her educational program and whether it was her LRE.

The CSE's recommendation to continue the student's residential placement for the 2016-17 school year, a decision initially made during the January 2016 CSE meeting and reaffirmed when the CSE reconvened to consider a day program for the student in August 2016, is the only time period at issue (Parent Exs. F; G; see Tr. p. 361); however, a review of the September 2015 IEP provides some insight into the student's needs considered by the CSE when a residential placement was initially justified.

Based on a review of the September 2015 IEP, the areas of need the CSE in this case identified as indicating that the student needed the intensive level of support provided by a residential setting included: frequent, prolonged hospital stays resulting in a loss of instructional time, difficulty following teacher directions, decreased ability to complete classwork, teacher reports that the student's emotional difficulties "deter[ed] her from becoming fully engaged in class work," and affected her classroom performance, challenges with peer interactions and peer conflicts, the student's poor sense of self-worth and negative self-talk, challenges with maintaining appropriate behavior in and the expectations of academic settings, low frustration threshold, difficulty with attention and distractibility, and problems with the student's mood that could result in the student shutting down and not engaging with her education (Parent Ex. E at pp. 3-8).

The September 2015 CSE also determined that the student required "intensive educational and clinical services on a continual basis," "total supervision for activities of daily living, intensive practice and reinforcement to sustain educational gains, intensive programming beyond the school day to meet educational goals and maintain educational progress, and intensive programming to accommodate her emotional challenges which interfere with educational progress" (Parent Ex. E

[11] The Second Circuit has stated that "[w]hile some children's disabilities may indeed be so acute as to require that they be educated in residential facilities, it is appropriate to proceed cautiously whenever considering such highly restrictive placements. . . . The norm in American public education is for children to be educated in day programs while they reside at home and receive the support of their families" (Walczak, 142 F.3d at 132).

at p. 7). Specifically, the September 2015 CSE also determined that the student required "the highly structured, consistent and intensive supervision of a non-public school facility on a twenty-four hour basis," as she "cannot meet the demands of the public school environment (size, routine, peer/adult interactions) and requires structured learning situations" (id.). Further, the September 2015 IEP indicated that "intensive related services and specifically intensive programming to accommodate [the student's] emotional challenges which interfere with her participation in an educational experience are required on a twenty-four hour basis to facilitate the management of her educational needs" (id.). The IEP noted that the student had not made any academic gains during the 2014-15 school year, her social/emotional functioning deteriorated, and therefore, to achieve her educational goals and make and maintain educational gains, she required "intensive programming beyond the school day" (id.). According to the IEP, the student required "intensive" counseling support" to enable her to succeed in school, facilitate educational growth, and improve social/emotional school functioning (id.).

The January and August 2016 CSEs were faced with a very similar question, to determine whether, at the time those placement decisions were made, the student's current needs indicated that she required the more restrictive aspects of a residential setting in order to receive a FAPE (see R.E. v. New York City Dept. of Educ., 694 F.3d 167, 188 [2d Cir. 2012] ["an IEP must be evaluated prospectively as of the time it was created"]; M.H., 296 Fed Appx at 128 [2d Cir. 2008]).

The St. Anne quarterly treatment review meeting took place on December 15, 2015, and the parent participated at the meeting by telephone (Parent Ex. AA at p. 2). The documents reviewed at that meeting included a child care report dated December 5, 2015, a treatment review meeting report, and an education report (id. at pp. 3-11). These documents presented a picture of a student who had dramatically improved in many, but not all of the areas of need identified in the September 2015 IEP (compare Parent Ex. E at pp. 3-8, with Parent Ex. AA at pp. 3-6, 9-11). The student's child care report indicated that the student should meet regularly with her coach to work on identifying goals that focus on the areas of need that led to placement (Parent Ex. AA at p. 3). Further, her treatment review meeting report indicated that the student struggled with negative emotions and anxiety, and remembering to use her coping skills and strategies (id. at pp. 4-5). Similarly, the treatment review meeting report indicated that the student and parent were still working on open communication and building trust, and noted that the student often remained quiet and used an infantile voice (id at p. 5). The same report indicated that the student continued to struggle with yelling and shutting down when faced with stress, and similarly becoming angry and frustrated and shutting down when faced with problems (id. at p. 6).

Although some of these observations from the December 2015 information continued to be relevant and weighed in favor of continuing a residential placement as being the least restrictive and appropriate setting for the student for the 2016-17 school year, other factors suggested that the student was making excellent progress, and may not have required a residential placement to benefit from her educational program.

The student's December 15, 2015 child care report also indicated that the student had adjusted well and was able to comply with expectations with minimal prompts and reminders from staff (Parent Ex. AA at p. 3). The report indicated that the student consistently attended and participated in groups, and contributed to discussions and engaged in activities without difficulty (id.). Furthermore, the student was noted to have appropriate interpersonal relationships with her

peers, presented as kind and helpful with them, and was noted to be able to make friends easily (id.). The report additionally noted that the student's need for behavioral intervention was very limited because she was able to comply with expectations, had good responses to basic prompting, and was generally able to seek out staff independently if she required assistance (id.). Under behaviors of concern, the report indicated that the student had exhibited no incidents of at-risk behavior since her admission (id.).[12] Finally, the student's education report noted that the student "cares about her work and will take her work to the unit to complete it," that she participated and displayed polite and cooperative behavior in multiple classes, displayed a positive attitude and was motivated and interested in art class, was on task and very hardworking in health class and completed assignments in a timely manner, had excellent attendance and participated daily in English class, and was noted to be "very inquisitive, and steps outside her comfort zone often" in physical education class (id. at pp. 9-10).

As noted above, the descriptions of the student's functioning available to the January 2016 CSE presented a starkly different picture of the student when planning for the 2016-17 school year as compared to her presentation at the time of the September 2015 CSE meeting (compare Parent Ex. AA; with Parent Ex. E at pp. 1-8). During the hearing, witness testimony noted the student's performance in her new environment and her significant progress in terms of her academics, as well as her social/emotional functioning, and tended to note them as as factors that weighed in favor keeping her in a residential setting (Tr. pp. 185, 188-89, 229-30, 338-40, 643; Dist. Ex. 11). However, this witness testimony appears to be focused on the appropriateness of St. Anne and the student's progress there, more so than the necessity of a residential setting to achieve educational benefit. For instance, the district's school psychologist testified that the January 2016 CSE considered a referral to the CBST for a day program, which was ultimately not recommended because the student was "doing so well" at St. Anne, she had only been at St. Anne for four months, and because the CSE had concerns about the student's safety in the community and that she would regress to exhibiting the behaviors she had demonstrated prior to attending St. Anne (Tr. pp. 354-57). The school psychologist stated that although at the end of the January 2016 CSE meeting the parent requested that the CSE reconvene over the summer to consider a day program, the CSE continued to recommend a residential placement because "everyone agreed [the student] was doing beautifully" (Tr. pp. 337-40). I agree that the evidence shows that the student was doing well and receiving educational benefits at St. Anne, but that type of analysis does not address the question the residential placement was a necessity. The district's task in the impartial hearing process was to explain why the student would have been unlikely to make progress appropriate in light of her

[12] An incident took place in September 2016, in which the student was hospitalized for a suicide attempt which followed a home visit (see Parent Ex. JJJ). Although the seriousness of this incident is not to be underestimated, the parent correctly notes, on appeal, that consideration of this event to assess the adequacy of the January or August 2016 IEPs would constitute impermissible retrospective testimony (see R.E., 694 F.3d at 188 ["an IEP must be evaluated prospectively as of the time it was created"]). Accordingly, it is not weighed in the analysis addressing the substantive adequacy of the those IEPs. Relatedly, the parent asserts that the IHO impermissibly relied upon evidence of this incident when determining whether the student's program was appropriate for the 2016-17 school year. I find this argument unavailing, because although the IHO does reference the September 2016 events to provide detail regarding the student's then-current functioning, it does not appear that the IHO relied on this incident in assessing the appropriateness of the January and August 2016 IEPs (see IHO Decision at pp. 14-22).

circumstances if the CSE were to place her in a setting less restrictive than a residential setting (see Endrew F., 137 S. Ct. 988, 1002 [2017]; Walczak, 142 F.3d at 132).

At the time of the August 2016 CSE meeting the St. Anne documentation, including progress reports for goals and objectives, child care reports, and quarterly treatment review meeting reports generated between the January 2016 and August 2016 CSE meetings, continued to show a consistent pattern of improvement in terms of the student's academics and social/emotional functioning (see Parent Exs. BB-CC; EE-FF; Dist. Exs. 2-4). The child care report, dated June 2016, noted that the student continued to comply with unit routine and expectations either independently or with basic prompts, had earned the privilege of leaving the campus and going on walks and outings with staff, and had largely "remained appropriate" when off campus (Dist. Ex. 3). The report indicated that the student had maintained respectful and positive interpersonal relationships with staff, improved relationships with peers, and learned to avoid becoming involved with peer conflicts (id.). She continued to respond well to basic prompts and directives from staff, was responsive to staff assistance, and made good use of reading and writing as a means of self-regulation (id.). The report noted that the student continued to do well in the program, consistently complied with routine expectations, and improved her interactions with others (id.).

The CSE chairperson for residential students at St. Anne, who was present at the August 2016 CSE meeting, testified that the student was doing well in the residential program, that her demeanor in class was good, that her teachers reported she was polite and cooperative, and that she interacted well with peers and adults (Tr. pp. 93-94, 96-99). She also stated that the student was not displaying any dangerous behaviors at the time of the either the January 2016 or the August 2016 CSE meetings, a point also testified to by the district's school psychologist (Tr. pp. 134, 148-49, 353). The St. Anne CSE chairperson also testified that although there was a concern raised that the student would not be able to maintain self-regulation skills in a less restrictive setting, she was not aware of any documentation supporting that concern (Tr. pp. 136-37). The district school psychologist testified that there was no discussion at the August 2016 CSE meeting regarding regression or the student's display of at-risk behaviors (Tr. p. 365). The school psychologist also testified that the CSE likely would have referred the student to a day program, except that the St. Anne step-down program was raised as a possibility, and ultimately the course chosen by the CSE (Tr. p. 363). These facts strongly undermine the notion that a residential setting was required for the student at that time of the August 2016 CSE meeting, and present a fairly explicit acknowledgement by district staff at the impartial hearing that a less restrictive setting could have been appropriate for the student based on the information considered by the CSE.

The district's most concrete argument in favor of continuing the student's residential placement into the 2016-17 school year is the assertion that more time in a residential setting, in a step-down unit with comparably more freedom and responsibility, would allow the student to internalize the progress from her previous year and prevent regression to previous at-risk behavioral patterns, and better prepare the student for a day program thereafter (Tr. p. 386). The student's therapist at St. Anne testified that she was concerned that the student might regress and that the student could sometimes become more infantile (Tr. pp. 451-52). The therapist also stated she was concerned about regression in terms of the progress the student had made with her relationship with the parent (Tr. pp. 446, 452). On the other hand, it was also noted by the parent's private neuropsychologist that the three-hour distance between the student and her mother could

be making it harder for the student to internalize skills that she could successfully demonstrate at St. Anne. (Tr. p. 425), and that more involvement of the family (Tr. p. 428).[13]

It also appears that in this particular case some of the St. Anne staff's concerns are based on speculation, and witnesses' general beliefs and experiences with other students—for instance, the St. Anne CSE chairperson for residential students expressed concern about the student's ability to retain new self-regulation skills, but when discussing the possibility of regression, she argued that "when anybody learns and is using new skills, sometimes you fall back a little bit," rather than speaking specifically to this particular student's individual needs and circumstances (Tr. pp. 388-89).[14] Moreover, witness testimony focused more on the choice to continue the student's residential placement as a better option, best next step for the student's progress, or a preferable option that avoided interruption of the student's progress, not as a necessity to allow her access to her curriculum in light of the acute nature of her condition (Tr. pp. 146, 169, 171, 365, 384-88, 395-96, 452, 974; see Walczak, 142 F.3d at 131-32 [finding a residential placement not appropriate where student made meaningful social and academic progress in a day program]).

In a case such as this, where the parent is asking the CSE to consider a day treatment program instead of a residential placement, it would have been particularly helpful to understand the CSE's expectations, viewed from the vantage point of when it was formulating the student's IEPs, for how the student would exit from a residential setting to a less restrictive environment. State regulation requires a school district to have such a strategy for each student that is placed in a residential setting. When a CSE determines that a residential placement is appropriate due to the nature or severity of the student's disability, State regulation requires the CSE to document that residential services are necessary to meet the student's educational needs as identified in the student's IEP, including a proposed plan and timetable for enabling the student to return to a less restrictive environment or a statement of reasons for why such a plan is not currently appropriate (8 NYCRR 200.6 [j][1][iii][d]). The information in the hearing record that would be relevant to such a proposed plan and timetable in this case seemed to become less distinct over time. Compared to the September 2015 IEP, which contained a detailed explanation of the student's needs, and why she could not meet the demands of a public school environment and required intensive 24-hour support services, the January 2016 and August 2016 IEPs contain minimal information addressing the student's current management needs, simply noting that there was "[n]o change in needs other than they are being met in a residential academic setting" (compare Parent Ex. E at p. 7, with Parent Ex. F at p. 4, and Parent Ex. G at p. 4). Actual evidence of the proposed plan and timetable for this student called for by State regulation might have helped show that the

[13] In addition to his criticism of the three-hour distance from the family and the need for more family involvement, this expert also expressed approval of the "stepdown" approach of St. Anne.

[14] The track records of similar students in the facility may be a relevant factor to consider, but it is not dispositive. As one district court explained, "[w]hile each student is unique, and the success or failure of one does not guarantee the same outcome for another, it would be naive not to consider the track record of the institution in evaluating future placements" (R.C. v. Bd. of Educ. of the Wappingers Cent. Sch. Dist., 2016 WL 5477747, at *11 [S.D.N.Y. Sept. 29, 2016]). I did not find this general opinion testimony about similar students in the facility as persuasive in this case in light of the LRE aspects of the parents claims, where, as here, the testimony seemed to be focused on supporting the best option available option to produce educational benefit but without clarifying how the LRE mandate factored in among the other less optimal options on the continuum of placements.

district was following a process that would in turn enable the district to defend itself against an LRE claim of this nature, but the hearing record is silent with regard to whether the district had created any plan and timetable for enabling the student in this case to return to a less restrictive environment, or statement of reasons for why such a plan was not currently appropriate. Further to the point, the principal of St. Anne acknowledged that St. Anne staff are only one part of the CSE membership, and they are not typically the party that recommends or initiates the discharge of a student (Tr. pp. 650-51), showing how this responsibility to set initial expectations and prospectively plan for exiting students from residential placements to lesser restrictive settings ultimately falls on the district.[15]

State law also requires that in order to properly recommend a residential placement, a district must make the determination that there is no appropriate non-residential school available consistent with the needs of the student (Educ. Law § 4402[2][b][2]). Unlike the September 2015 IEP, which provided a detailed statement indicating why various non-residential placement options were not appropriate, the January 2016 and August 2016 IEPs simply listed that it considered integrated co-teaching (ICT) and home/hospital instruction, and noted that "[t]he former recommendation is not restrictive enough and the latter is too restrictive" (compare Parent Ex. E at p. 20, with Parent Ex. F at p. 15, and Parent Ex. G at p. 15).[16] There is no indication in the hearing record that the district actively searched for a non-residential school that could meet the needs of the student, or determined whether there was any appropriate day programs that would have met the student's needs for the 2016-17 school year. During the impartial hearing, the St. Anne clinical supervisor testified that St. Anne staff did not bring up or consider any non-residential programs that were not raised by the parent (Tr. p. 194).

In light of the foregoing, the hearing record presents a picture of a student in a great deal of crisis during the 2014-15 school year, who was able to make substantial progress once she was provided with sufficient supports and access to the curriculum in a residential setting for the 2015-16 school year. However, the district did not accomplish the task of establishing evidence at the impartial hearing that showed that a residential placement continued to be required to enable the student to receive an educational benefit during the 2016-17 school year, at either the January 2016 or August 2016 CSE meetings (see M.H., 296 Fed Appx at 128, 2008 WL 4507592 [2d Cir 2008][residential placement not found to be necessary where there was no testimony by certified experts that supported the parents' fears of relapse]). Furthermore, it does not appear that the district adequately pursued less restrictive environments for the student, nor does the record reflect that the district had a proposed plan and timetable in place to transition the student to a less

[15] Obviously, this is hardly an easy task, and any proposed plan and timetable may not turn out as predicted and require adjustment over time to reflect changing circumstances. Similar to an IEP, such a plan to exit a student from a residential setting is prospective in nature and the district cannot guarantee that the exit strategy will occur in exactly the manner predicted.

[16] The district school psychologist testified that the January 2016 CSE did consider deferral to the CBST for a day program, but that she neglected to document that on the IEP itself (Tr. p. 354). As mentioned above, she also testified that the August 2016 CSE likely would have recommended a day program if not for the mention of the St. Anne step-down program during the meeting (Tr. p. 363). This is at odds with testimony from the St. Anne clinical supervisor, who stated that there was no discussion of a day treatment program "on our end" during the August 2016 CSE meeting (Tr. p. 189).

restrictive setting (Educ. Law § 4402[2][b][2]; 8 NYCRR 200.6 [j][1][iii][d]). Accordingly, I must conclude that the district failed to show that it satisfied the IDEA's LRE mandate for the 2016-17 school year and that the IHO's conclusion to the contrary is not supported by the evidence.[17]

D. Relief

1. Independent Neuropsychological Evaluation

The parent contends that she is entitled to an independent neuropsychological evaluation conducted by a specific provider at his usual rate of $3,500. The district agrees that it has consented to the requested evaluation, and contends that the parent has not availed herself of the opportunity to obtain that evaluation.[18] As further explained below, the parent is entitled to the requested independent educational evaluation (IEE) at district expense.

Both the IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent disagrees with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl River Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE [at public expense] is a disagreement with a specific evaluation conducted by the district"]). If a parent requests an IEE at public expense, the district must, without unnecessary delay, either ensure that an IEE is provided at public expense or initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]).

Additionally, when a parent requests an IEE, the district must provide the parent with a list of independent evaluators from whom the parent can obtain an IEE, as well as the district's criteria applicable to IEEs should the parents wish to obtain evaluations from individuals who are not on the list (Educ. Law § 4402[3]; 34 CFR 300.502[a][2]; [e]; 8 NYCRR 200.5[g][1][i], [ii]; see Letter to Parker, 41 IDELR 155 [OSEP 2004]). Upon request, the district is required to provide the parents with information regarding where IEEs may be obtained, as well as the district's criteria

[17] I have no reason to disturb the IHO's underlying fact conclusions that the placement, while not the student's LRE for the 2016-17 school year, was otherwise appropriate for the student. I hope that the parent, while understandably unwilling to prolong the separation of the student from her family any longer than necessary, can be comforted to some degree by the fact that St. Anne has been able to provide a number of substantial benefits to the student through their programming.

[18] The district concurrently argues that the parent's request for an IEE was satisfied by the IHO's award of reimbursement for a private psychiatric assessment (see IHO Decision at p. 17). This argument is unavailing, as the parent has consistently requested a neuropsychological assessment specifically (see Parent Exs. A at p. 7; DDD; IHO Ex. II at p. 11), and the hearing record reflects that the parent's request for a neuropsychological evaluation is distinct from her pursuit of a psychiatric evaluation (see Parent Exs. DDD; PPP; IHO Ex. II at p. 11).

applicable to IEEs should the parents wish to obtain evaluations from individuals who are not on the district's list of independent evaluators (34 CFR 300.502[a][2]; [e]; 8 NYCRR 200.5[g][1][i], [ii], [vi]; see Letter to Parker, 41 IDELR 155 [OSEP 2004]). The criteria under which the publicly-funded IEE is obtained, including the location of the evaluation and the qualifications of the independent evaluator, must be the same as the criteria that the public agency uses when it initiates an evaluation (34 CFR 300.502[e][1]; 8 NYCRR 200.5[g][1][ii]; see Letter to Anonymous, 103 LRP 22731 [OSEP 2002]). If the district has a policy regarding reimbursement rates for IEEs, it may apply such policy to the amounts it reimburses the parent for the private evaluations (34 CFR 300.502[e][1]; see Individual Educational Evaluation, 71 Fed. Reg. 46689-90 [Aug. 14, 2006]). The district may also establish maximum allowable charges for specific tests to avoid unreasonable charges for IEEs (see Letter to Anonymous, 103 LRP 22731 [OSEP 2002]). When enforcing reasonable cost containment criteria, the district must allow parents the opportunity to demonstrate that "unique circumstances" justify an IEE that does not fall within the district's cost criteria (id.; Individual Educational Evaluation, 71 Fed. Reg. 46689-90 [Aug. 14, 2006]).

In this instance, the parent requested an independent neuropsychological evaluation from a specific licensed psychologist, at a rate of $3,500.00 (Parent Ex. UU). It is not in dispute that the parent is entitled to the neuropsychological IEE that she requested, and the district has demonstrated its willingness to fund an independent neuropsychological evaluation in the documentation that it provided the parent, which also allowed her to identify the evaluator of her choice (Parent Ex. VV at p. 3). The hearing record does not provide a clear explanation for why the evaluation was not performed, although there is some indication that there was a conflict between the parties regarding the acceptable rate or cost of the requested evaluation, which may have been discussed off the record (see Parent Ex. DDD).[19, 20] However, the district has not taken the position on appeal that their acceptance of the parent's request was conditional on a specific rate, nor has the district presented evidence of its cost containment policy with respect to the parent's request for an IEE.[21] Furthermore, the district allowed the parent to provide her own

[19] It appears that the sole source of information about alleged discussions that occurred between the parties about the cost of the evaluation is the parent's written motion for an IEE before the IHO requesting that evaluation (see Parent Ex. DDD). It was the parent's position that several communications occurred between the parent, the IHO, and the representative for the district, regarding the cost of such an evaluation (id. at p. 2). Allegedly, the district representative informed the IHO and parent that the maximum amount the district would be willing to pay was $2,500.00 (id.). The parent alleged that this limit was also stated in an email, dated August 2, 2016, to the IHO and the parent's counsel (id.). Neither of these communications are included in the hearing record, although the parties do reference the parent's request in general terms without discussing any disagreement over cost limitations (see Tr. pp. 85, 784).

[20] The hearing record reflects that the IHO went "off the record" with the parties with some frequency, limiting the record of discussions between the parties and the IHO. To some degree, this practice diminishes the clarity of some of the arguments and positions of the parties and should be avoided (Tr. pp. 77, 79, 85-86, 119, 151-52, 196, 211, 274, 285, 319, 383, 402, 432-33, 492, 525, 539, 605, 632, 655, 662, 665, 682, 699, 755, 758, 808, 864, 932, 961, 1022, 1090, 1164, 1187).

[21] The hearing record includes a document listing the acceptable rates for different types of evaluations attached to the parent's motion requesting the IHO to award an IEE as interim relief (Parent Ex. DDD at p. 6). The motion indicates that the document was part of the district's standard operating procedure manual; however, it is not clear whether the district provided the document to the parent or if it was obtained independently by the parent (Parent Ex. DDD at p. 2). Regardless, the district has not referenced this document or raised any argument with regard to the cost of the requested IEE in its answer or memorandum of law.

information on the "student, parent/guardian and independent evaluator information" form, including the evaluator's name, work address, license number, and required rate (Parent Ex. VV at p. 3). In consideration of these facts, I find that the parent is entitled to the requested independent neuropsychological evaluation by the specific licensed psychologist she selected, at the requested rate of $3,500.00, and order the district to fund the cost of the IEE. I expect that the parent will fully cooperate in making the student available for the evaluation.

2. Compensatory Education

Another form of relief requested by the parent on appeal is for 623 hours of compensatory education in the form of tutoring at the Huntington Learning Center (HLC), as well as enrollment and evaluation fees. On appeal, the parent's request for tutoring follows a request to reverse the IHO's findings with regard to the district's provision of a FAPE for the 2015-16 and 2016-17 school years.

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]). Compensatory education relief may be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; see also Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; S.A. v. New York City Dep't of Educ., 2014 WL 1311761, at *7 [E.D.N.Y. Mar. 30. 2014] [noting that compensatory education "serves to compensate a student who was actually educated under an inadequate IEP and to catch-up the student to where he [or she] should have been absent the denial of a FAPE"] [internal quotations and citation omitted]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

In this instance, the parent's request for compensatory education is not appropriate under the circumstances. In her initial request for an impartial hearing, the parent requested compensatory education specifically and solely "to remedy the [district's] failure to appropriately provide these services for the 2014-15 school year" (Parent Ex. A at p. 8). Addressing the 2014-15 school year, and the district's failure to identify and evaluate the student, the IHO found that the student received a variety of outside supports and intervention services during that period, including an at-home crisis intervention therapist, child therapist, and a medical doctor, and that the district was "aware of the crisis intervention support being provided" to the student and stayed in continual contact with the parent and support services throughout the year (IHO Decision at pp. 16-17). The IHO further noted that the ultimate referral for special education in April 2015 followed multiple "Tier One" interventions within the school (id. at p. 17). Accordingly, the IHO found it was "impossible to predict what effect, if any, a referral a few months earlier would have had," noting that the student's issues were "not alleviated" despite the "substantial amount of services and interventions" she received that "may have affected her circumstances" (id.). Therefore, as a remedy for the district's 2014-15 school year child find failure, the IHO awarded reimbursement for the psychiatric evaluation, but denied the parent's request for compensatory educational tutoring services at HLC (id.).

The parent's request for review does not appeal as error, or even address the IHO's findings regarding the 2014-15 school year.[22] Neither does the request for review address or appeal from the IHO's reasoning behind her decision relating to the services the student was receiving during the 2014-15 school year, or the IHO's decision to limit her award for that deprivation to reimbursement for a psychiatric evaluation. Instead, on appeal the parent specifically links her request for compensatory educational services to alleged denials of FAPE for the 2015-16 and 2016-17 school years, without further explanation in her request for review. The parent does not connect her request for compensatory education to her allegations related to the 2015-16 and 2016-17 school years, regarding the present levels of performance, annual and postsecondary goals, or the restrictiveness of the residential placement. The regulations governing practice before the Office of State Review require that parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]). Specifically, with regard to the parent's request for relief, pursuant to the IDEA, the due process complaint notice must also provide a "proposed resolution of the problem to the extent known and available to the party at the time" (20 U.S.C. § 1415[b][7][A][ii][IV]; 34 CFR 300.508[b][6]; 8 NYCRR 200.5[i][1][v] [emphasis added]; see M.R., 2011 WL 6307563, at *12-*13 [upholding

[22] Although not alleging any error of the IHO in her pleading regarding the 2014-15 school year, the parent does raise arguments relating to the 2014-15 school year, and her request for compensatory education, solely toward the end of her memorandum of law, wherein she asserts factual allegations regarding the student's alleged deficits that are not present in her request for review (Parent Mem of Law at pp. 25-28). It has long been held that a memorandum of law is not a substitute for a petition for review, which is expected to set forth the petitioner's allegations of the IHO's error with appropriate citation to the IHO's decision and the hearing record (8 NYCRR 279.8 [c][3], [d]; see, e.g., Application of a Student with a Disability, Appeal No. 15-070). To hold otherwise would permit parties to circumvent the page limitations set by State regulation (8 NYCRR 279.8[b], [c]). Thus, any argument included solely within a memorandum of law has not been properly asserted.

SRO's decision denying an award of compensatory education services based upon the parents' failure to raise such claim for relief in the due process complaint notice]; see also J.M. v. Kingston City Sch. Dist., 2015 WL 7432374, at *15-*16 [N.D.N.Y. Nov. 23, 2015] [dismissing "late-blossoming claim for compensatory education" due to parents' failure to raise such a claim for relief in the due process complaint notice]). Some federal district courts have found the parents' failure to raise a request for compensatory education in their due process complaint notice was, alone, sufficient for dismissing a belatedly asserted request for compensatory education services (see Toth, 2017 WL 78483, at *12-*13; J.M., 2015 WL 7432374, at *15-*16; M.R., 2011 WL 6307563, at *12-*13). In this instance, while the parent raised a claim for compensatory education in her due process complaint notice, it was specifically linked to her child-find claim related to the 2014-25 school year (Parent Ex. A at p. 8) and, understandably, that is the claim that the IHO ruled on. However, having failed to pursue appeal from that aspect of the IHO's decision that the student was not entitled to compensatory education services due to the denial of a FAPE during the 2014-15 school year in their request for review, the matter is foreclosed because the parent has abandoned the claim (8 NYCRR 279.8 [c][4]). Consequently, I decline to award the requested relief. [23]

3. Other Relief

As noted above, the hearing record supports the IHO's finding that the district provided the student with a FAPE for the 2015-16 school year. However, the district failed to establish that the January 2016 and August 2016 CSE's recommendation of a residential placement was necessary to enable the student to benefit educationally, and therefore the district denied the student a FAPE in the LRE for the 2016-17 school year. The remaining relief that the parent requests on appeal includes an order that the CSE reconvene, defer the student to the CBST for a day program closer to the parent's home, and to conduct and draft a new FBA and BIP. However, as mentioned above, some of these events have already taken place. According to the additional evidence submitted by the district, the CSE has reconvened since the conclusion of the impartial hearing and the parent's requests for a new CSE meeting and deferral to the district's CBST for a day treatment program have been granted and those particular matters have been rendered moot.

Specifically, the CSE reconvened and developed a new IEP for the student on May 3, 2017 (Answer Ex. 2). The district referred the student to the CBST, which has, as of May 16, 2017, referred the student to 11 schools seeking admission to a day program (Answer Ex. 4). Considering the parent's requests to reconvene the CSE and have the matter deferred to the CBST to locate a day program have already been addressed outside of the due process context, the parent's requests

[23] State regulations explicitly provide that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" Even assuming the parent raised some relevant error of the IHO in the appropriate pleading and I was able to reach the merits of the parents' request for compensatory education as presented in the context of the 2015-16 and 2016-17 school years, it a far more difficult argument to follow than the one in their due process complaint that they abandoned. With respect to tutoring from HLC to compensate for some deficiency in the academic programing during the 2015-16 and 2016-17 school years, the bulk of the evidence in the hearing record is contrary to the evidence provided by HLC that the student has current deficits in academic skills and weighs in favor of the conclusion student has flourished academically at St. Anne during the years in question (compare Tr. pp. 882-85, and Parent Ex. GG, with Tr. at pp. 179, 189, 193-94, 203, 227, 643; Parent Exs. AA-CC; EE-FF; II-LL, and Dist. Exs. 2-4; 11).

no longer present a "real and live" controversy, and are "academic" and, therefore, moot, and shall not be granted (see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]; J.N. v. Depew Union Free Sch. Dist., 2008 WL 4501940, at *3-*4 [W.D.N.Y. Sept. 30, 2008]).

The sole remaining issue is the parent's request that the district conduct a new FBA and develop a BIP that "takes into account [the student's] transition into a day program" (Parent Ex. A at p. 8). In its answer, apparently in light of the CSE's decision in May 2017 to pursue a day treatment program and exit the student from residential placement, the district argues that the parent's request for an FBA and BIP is not "ripe," as the purpose of the FBA/BIP, according to the parent, is to aid in transitioning the student to a less restrictive placement. Therefore, the district asserts "the presence or absence of an FBA is an issue to be addressed in the context of any potential due process complaint regarding the IEP for the 2017/2018 school year, a matter which is not currently at issue." I am not entirely convinced that such a claim would be no longer justiciable as the district suggests because an FBA may have some limited utility given the student's history, however, the parent in her reply agrees that the new IEP should be considered and appears to abandon that branch of her requested relief that was related for an FBA and a new BIP, suggesting that, a least for purposes of this proceeding, the parent's request was intertwined with the request to order the CSE to consider placing the student in a day-treatment program.[24] Consequently, there does not appear to be a need at this time to further consider ordering the district to conduct a FBA of the student. Given the history of the student's difficulty with family relationships, the presentation of her emotional states over the course of time in this case that includes brief periods of extreme self-injurious behavior, elopement, and absenteeism followed by longer periods of successfully reduced interfering behaviors after intervention, and her immanent transition between settings, I encourage all parties involved in the planning and execution of the student's programming to be attentive to potential sudden changes in the student's in the student's behavior. Despite the LRE violation, as the IHO appeared to recognize, it is undeniable that she has made great progress and I hope for her sake that her progress continues unabated.

VII. Conclusion

In summary, the IHO's determinations with respect to the 2014-15 school year were not appealed and became final and binding upon the parties as a result. The evidence in the hearing record establishes that the district provided the student with a FAPE for the 2015-16 school year, but failed to establish that the student required the restrictiveness of a residential setting for the 2016-17 school year, thus denying her a FAPE in the LRE for the 2016-17 school year.

I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

[24] The parent is abundantly clear in her reply that she expects that the district will carry through in its efforts to implement an appropriate day treatment program as envisioned by the May 2017 CSE and IEP.

IT IS ORDERED that the IHO's decision, dated March 23, 2017, is modified by reversing those portions which found that the district provided the student a FAPE in the LRE for the 2016-17 school year; and

IT IS FURTHER ORDERED that the district shall fund the cost of the requested independent neuropsychological evaluation, at the requested rate, as described above.

Dated: **Albany, New York**
June 29, 2017

JUSTYN P. BATES
STATE REVIEW OFFICER