



The University of the State of New York

The State Education Department
State Review Officer
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No. 20-083

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the Cornwall Central School District

Appearances:

Disability Rights New York, attorneys for petitioner, by Alyssa Galea, Esq.

Honeywell Law Firm, PLLC, attorneys for respondent, by Michael W. Gadomski, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which determined that the educational program and residential placement recommended by respondent's (the district's) Committee on Special Education (CSE) for her son for the 2018-19 and 2019-20 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[a]). 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 presents with behavioral difficulties that impact his learning and that of others (Joint Exs. 1 at pp. 3-4, 6-7; 2 at pp. 3-4, 6-7; 5 at pp. 3, 6-7; 7 at pp. 3, 6-7; 15 at pp. 1, 6; 18 at p. 2). The student has received diagnoses of attention deficit hyperactivity disorder (ADHD) combined type, oppositional defiant disorder (ODD), autistic disorder, transient tic disorder, depression, Tourette's syndrome, and spina bifida occulta (Tr. pp. 283-84, 377-78; Dist. Exs. 15 at p. 1; 17 at p. 1).

With respect to the student's educational history, the student was evaluated as a preschool student and recommended for counseling to address his behavioral concerns; parent counseling and training services were also recommended (Dist. Ex. 1 at p. 1). The student began kindergarten in a "12:+1" special education classroom but was subsequently placed on homebound instruction

due to safety concerns pending a search for an out-of-district therapeutic program (id.). For the 2013-14 school year, the student was parentally placed in a private school for the start of first grade and then was re-enrolled in the district on October 29, 2013 (id.). The student was then placed in a 6:1+1 special class therapeutic day program at a Board of Cooperative Educational Services (BOCES) school (id.). During second grade (2014-15 school year), the student received the support of a 1:1 aide and increased counseling services due to an increase in negative behavior and safety concerns arising in November 2014 (id.). In January 2015, the CSE recommended placement at Green Chimneys due to increased safety concerns (id.).¹ In February 2015, the student entered the therapeutic day program at Green Chimneys where he attended a 12:1+2 special class and received counseling and occupational therapy (OT) as related services (id., see Joint Ex. 49 at p. 1).² The student remained in the therapeutic day program at Green Chimneys for second and third grade (Dist. Ex. 1 at p. 1; Joint Exs. 10 at p. 3; 49 at p. 1).

For the 2016-17 school year, the student began fourth grade in the 12:1+2 therapeutic day program at Green Chimneys (Dist. Ex. 1 at p. 1; see Joint Ex. 8 at pp. 3, 8-9). In November 2016, a CSE convened to discuss the student's program due to a significant decline in his behavior (Joint Ex. 7 at p. 3). According to the meeting information summary, after a lengthy discussion, the November 2016 CSE determined that the student required a higher level of care including psychiatric treatment and increased social skills support (id.). As a result, the CSE recommended that the student attend a 12-month program, consisting of residential placement and instruction in a 12:1+2 special class with counseling and OT services and sent a referral for possible placement (id. at pp. 1, 3). In December 2016, the student began attending the residential program at Green Chimneys and remained in the residential setting for the remainder of the fourth grade and fifth grade (Dist. Ex. 1 at p. 1).

A CSE convened on May 14, 2018 to conduct an annual review for the student's 2018-19 school year (sixth grade) (Joint Ex. 3 at p. 3). The May 2018 CSE determined that the student continued to require the support of a 12-month residential program and maintained its recommendation of a 12:1+2 special class with related services, program modifications, and testing accommodations (id. at pp. 1, 9-10). The May 2018 CSE also recommended individual counseling services for one 45-minute session per week, group (4:1) counseling services for one 60-minute session per week, individual OT services for one 30-minute session per week, and parent counseling and training for one 90-minute session per month (id. at p. 9).

On August 17, 2018, the CSE convened at the parent's request to review the student's residential program at Green Chimneys based on the parent's desire for a day program for the student (Joint Ex. 2 at p. 3). The August 2018 CSE discussed the student's need for "wrap around care with 24 hour milieu support" and continued its recommendation of a 12-month residential placement at Green Chimneys including attendance in a 12:1+2 special class with related services (id. at pp. 3, 4, 9-11).

¹ The Commissioner of Education has approved Green Chimneys as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

² Although the October 2019 psychoeducational evaluation report states that the student entered a "12:1+1" program at Green Chimneys, the hearing record indicates that the student entered a "12:1+2" program in February 2015 (compare Dist. Ex. 1 at p. 1, with Joint Exs. 10 at p. 3; 49 at p. 1).

A subcommittee of the CSE convened on May 28, 2019 to conduct an annual review for the student's 2019-20 school year (seventh grade) (Joint Ex. 1 at p. 1). At the parent's request, Green Chimneys referred the student for "internal review" for possible placement in its day program; however, the student was denied because the CSE determined that he required a high level of care and support (id. at p. 4). The May 2019 CSE recommended conducting a "program search" to several therapeutic residential schools because Green Chimneys could no longer meet the student's therapeutic needs and there was concern with the student's safety on campus (id.). The May 2019 CSE determined that the student continued to require the support of a 12-month residential program and instruction in a 12:1+2 classroom with related services (id. at pp. 4, 10-11). According to the resultant IEP, the CSE recommended that the student continue to attend Green Chimneys (id. at pp. 3, 10-11).

A. Due Process Complaint Notice

In an amended due process complaint notice dated September 6, 2019, the parent alleged that the district failed to offer the student a FAPE in the least restrictive environment (LRE) for the "past two school years" (IHO Ex. IV at p. 4).³

The parent asserted that the district failed to make any "meaningful" attempts to assess the student's academic, social, physical, and behavioral needs, waiting until July 2019 to request consent for updated evaluations and to develop a functional behavioral assessment (FBA) of the student (IHO Ex. IV at p. 4). The parent alleged that the district failed to conduct an FBA since 2014 or develop a BIP, despite evaluations and assessments which stated that the student's behaviors impeded his ability to succeed academically (id. at p. 2). The parent also asserted that she repeatedly raised concerns regarding the appropriateness of a residential placement for the student, but those concerns, as well as concerns regarding the student's health and safety at Green Chimneys, were ignored and met with "cool disregard" (id. at p. 3). Additionally, the parent asserted that her concerns were not reflected in the IEP notes or the prior written notices (id.). The parent further alleged that the program at Green Chimneys was not appropriate because the student had been bullied and assaulted by classmates, had reported mistreatment by staff, had personal property missing, and had to request a dorm change due to an unhygienic environment (id.). In addition, the parent argued that the student believed placement in a residential program was a "punishment" and the environment made him anxious and diminished his self-esteem (id.). The parent also argued that there was no evidence that the student required or would benefit from a residential program and that the hearing record indicated that placement in the residential program resulted in academic, social, emotional, and physical harm (id. at p. 4). The parent also alleged that, although the district was aware the student could produce work when provided with 1:1 attention, the district failed to recommend a 1:1 aide (id. at p. 2). With respect to the student's class at Green Chimneys, the parent argued that the student was placed in a classroom with students who had significantly different academic skills and learning characteristics (id.). The parent further argued that the student had an IQ 40 points higher than some of his classmates (id.). In addition, the parent argued that she and the student had raised concerns that the work provided in class was well below standards expected for his grade level and that this academic disparity with his classmates impacted the student's behavior at school (id.). Additionally, the parent asserted

³ The parent's original due process complaint notice was dated April 15, 2019 (see IHO Ex. I). The district submitted a response dated May 22, 2019 (see IHO Ex. II).

that the student was the only student at the school classified as a student with an other health impairment, while all of the other residents at Green Chimneys were classified as students with an emotional disturbance or autism (*id.*). The parent argued that Green Chimneys was not appropriate for the student's social needs because the student did not have access to typically developing peers (*id.*). The parent further alleged violations of the American with Disabilities Act (ADA), 42 U.S.C. § 12101 et seq., and section 504 of the Rehabilitation Act of 1973 (section 504), 29 U.S.C. § 794(a) (*id.* at p. 5).

For relief, the parent requested a declaratory finding that the student's continued residential placement at Green Chimneys, or any other residential program, was a violation of the IDEA, New York law, the ADA, and section 504 (IHO Ex. IV at p. 5). The parent also requested that the district fund an IEE and FBA by a qualified professional of the parent's choosing (*id.* at p. 6). In addition, the parent requested that the district identify and secure an appropriate day program consistent with the recommendations of the IEE and FBA (*id.*). The parent further requested that the district develop an IEP for the 2019-20 school year that included a provision for staff training and ongoing bi-weekly consulting services by the professional conducting the FBA for the duration of the 2019-20 school year (*id.*). Lastly, the parent requested attorney's fees and any other relief deemed appropriate (*id.*).⁴

B. Impartial Hearing Officer Decision

In a letter to the IHO dated August 9, 2019, the district requested a pendency determination finding that, for the pendency of the proceeding, the student should continue in the residential program at Green Chimneys (Aug. 9, 2019 Dist. Pendency Ltr.). In a letter to the IHO dated August 15, 2019, the parent opposed the district's request for pendency at the residential program at Green Chimneys and instead requested that pendency consist of a day program for the student (Aug. 15, 2019 Parent Pendency Ltr.). After two prehearing conferences related to pendency held on June 20, 2019 and September 3, 2019 (June 20, 2019 Tr. pp. 1-12; Sept. 6, 2019 Tr. pp. 1-50), the IHO issued an interim order on pendency dated September 6, 2019 (IHO Ex. III). The IHO found that the residential program that the student had been attending since December 2016 was the "operative placement" at the time the parent's due process complaint notice was filed (*id.* at p. 5). However, the IHO found that, based on the student's "most recent IEP," the location should not be at Green Chimneys (*id.*). Thus, the IHO found that (1) during the pendency of the hearing, the student shall be placed in a residential program Monday through Friday starting September 9, 2019; (2) the district should immediately send out packets for the student regarding appropriate residential programs to be considered as a permanent pendency placement; (3) the parent should cooperate with any and all requests by the district and/or the residential placement in order to expedite the search; and, (4) in the interim, the student shall remain at Green Chimneys and shall be immediately provided with a 1:1 paraprofessional/aide for the relevant portions of the day where the student has programming outdoors in order to keep the student safe (*id.*).

⁴ In a response dated October 9, 2019, the district asserted denials to the parent's allegations as set forth in the amended due process complaint notice and argued to dismiss the amended due process complaint notice in its entirety (*see* IHO Ex. V). The district also asserted that Green Chimneys' residential program was appropriate and argued that there was no evidence that the student could make progress in a day treatment program (*id.* at pp. 3-6).

Following the issuance of the September 2019 interim decision, the parties participated in another prehearing conference on October 4, 2019 (Oct. 4, 2019 Tr. pp. 1-41).⁵ The parties proceeded with the impartial hearing on December 10, 2019, which concluded on January 28, 2020, after three days of proceedings relating to the merits of the parties' dispute (see Tr. pp. 1-532).

In a decision dated April 3, 2020, the IHO found that the district offered the student a FAPE for the 2018-19 and 2019-20 school years (IHO Decision at pp. 22-24). More specifically, the IHO found that the IEPs accurately presented the "[s]tudent's level of performance" and established appropriate annual goals tailored to the student's deficits, for both school years at issue (id. at pp. 22-23). The IHO further found that the CSEs recommended appropriate special education services and supports to address the student's needs and that the recommended residential program at Green Chimneys provided a "therapeutic milieu" where special education teachers, residential staff, counselors, and clinicians supported the student with behavior supports and mental health services (id. at p. 23). The IHO determined that the student's goals were addressed through a classroom management plan, the school's positive behavioral interventions and supports (PBIS) program, behavior contracts, treatment plans, and counseling (id.). The IHO generally found that the information before the 2018-19 and 2019-20 CSEs supported the recommendation of a residential program for the student (id.). Next, the IHO noted that she agreed with the district's witnesses that the student's and parent's lack of trust in the residential school interfered with the student's ability to fully access the program (id. at p. 24). The IHO also noted that the student's noncompliance with the program appeared to be exacerbated by the parent when she disagreed with the treatment recommendations made by the residential school and shared those disagreements with the student (id.). According to the IHO, when the parent and residential staff "were on the same page," the student made progress in the program, but things changed in September 2017 "without a clear reason why" (id.). Notwithstanding the IHO's finding that the district was correct in recommending a residential placement for the student, the IHO found that, based on the lack of trust between the parties, an independent review of the student's functioning was warranted and the student needed to be assessed in all domains, including the residential setting (id. at p. 25). The IHO opined that the parent and student needed to trust in the recommendations made by the district (id.). Lastly, the IHO found that the district did not violate section 504 (id.).

Based on the foregoing, the IHO ordered that the student be placed in a residential program to address the student's therapeutic needs and that a residential program search be conducted (IHO Decision at p. 25). The IHO further ordered that the parent consent to and visit residential programs in order to facilitate the process and that the student's placement should remain at Green Chimneys until a new residential program could be located (id. at p. 26). Next, the IHO ordered that the district fund an FBA to be conducted by a Board Certified Behavior Analyst (BCBA) at the residential school in both the school and dorm settings at the market rate and an independent

⁵ The parent sent a letter to the IHO dated September 16, 2019 requesting an amendment to the September 2019 interim decision on pendency and requesting an IEE, and in response, the district sent a letter to the IHO dated September 19, 2019, opposing the parent's request, to which the parent replied (Sept. 16, 2019 Parent Ltr.; Sept. 19, 2019 Dist. Ltr.; Sept. 24, 2019 Parent Ltr.). During the October 2019 prehearing conference, the parties discussed the parent's request for IEEs and the IHO allowed the district time to complete its own evaluation of the student (Oct. 4, 2019 Tr. pp. 4-21). On October 10, 2019, the district conducted a psychoeducational reevaluation of the student (Dist. Ex. 1). On December 6, 2019, Green Chimneys conducted an FBA of the student (Dist. Ex. 3).

psychiatric evaluation to be conducted by a qualified individual also at market rate (*id.*). Finally, the IHO directed the CSE to reconvene and review both independent evaluations within 15 days of receiving them (*id.*).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred in finding that the district offered the student a FAPE for the 2018-19 and 2019-20 school years and in finding that the student should be placed in a residential program. After reviewing the factual and procedural history of the case, the parent lays out a number of objections to the IHO's decision. Generally, the parent argues that the IHO's decision contained sparse legal analysis and drew conclusions that were not based on the hearing record. According to the parent, the IHO's decision failed to address multiple points of law, which would have had an outcome on the case. Further, the parent argues that the IHO's decision showed a bias against the parent.

Next, the parent argues that the IHO failed to address procedural violations committed by the district. More specifically, the parent argues that the IHO failed to address the district's failure to reevaluate the student. The parent contends that the IHO failed to consider that an FBA and a BIP were required based on the student's needs and that the IHO further erred in relying on the school's PBIS program and crisis plan as they were not the equivalent of an FBA or a BIP. According to the parent, the district failed to provide the student with quarterly progress reports as required by the student's IEP and the law. In addition, the parent argues that the IHO failed to address the district's denial of her meaningful participation in the development of the student's IEP.⁶

With respect to the district's program recommendations, the parent alleges that the IHO failed to address the district's lack of evidence to support its recommendation of a residential placement. According to the parent, the IHO did not consider that the staff from Green Chimneys, who testified that the student needed a residential placement, also testified that they were not aware of supports available in less restrictive settings or how the student functioned outside of school. The parent alleges that the IHO failed to address the lack of individualized attention in the student's program and failed to consider any of the safety concerns raised by the student or evidence presented that the student was physically assaulted. Next, the parent argues that the IHO failed to address her LRE claims beyond mere mention of the legal standard. Among other things, the parent alleges that the IHO ignored evidence that the student was identified to need positive peer role models, that the student was successful at home, that county level services were available, and that the district violated its obligation to have a discharge plan for the student.

As relief, the parent requests that the district identify and secure an appropriate day program consistent with recommendations from the IEE and FBA and develop an IEP for the 2019-20 school year that includes a provision for staff training and ongoing bi-weekly consulting services by the professional conducting the FBA for the duration of the 2019-20 school year. The

⁶ Under the circumstances of this case, the parent's claims relating to predetermination or parental participation will not be given separate treatment; rather, to the extent that the claims overlap and relate to the substantive grounds alleged for the district's denial of a FAPE—namely, the CSEs' recommendations for a residential program for the student—they shall be discussed in that context.

parent also requests a declaratory finding that the student's continued placement in any residential program is a violation of the IDEA and New York law, the ADA, and section 504.⁷

In an answer, the district responds to the parent's request for review and argues to uphold the IHO's decision that the district offered the student a FAPE during the 2018-19 and 2019-20 school years. The district also argues that the IHO correctly found that it did not commit cumulative procedural violations and that the IHO was not biased against the student or parent. The district also argues that the SRO lacks jurisdiction to consider section 504 and ADA claims.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. ___, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C.

⁷ For both the 2018-19 and 2019-20 school years, the parent argues that the IHO failed to address her ADA claims and erred in finding that the district did not violate section 504.

§ 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

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

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).⁸

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).

⁸ The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Andrew F., 137 S. Ct. at 1000).

VI. Discussion

A. Preliminary Matters

1. Scope of Review

Before addressing the merits, a determination must be made regarding which claims are properly before me on appeal. State regulations governing practice before the Office of State Review require that the 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]; see 8 NYCRR 279.4[a]).

Initially, the parent asserted claims in her due process complaint notice related to the district's failure to appropriately group the student and the lack of a recommendation for a 1:1 aide, which were not raised in her request for review. The IHO found that the student was provided with 1:1 instruction at Green Chimneys (IHO Decision at pp. 19, 23) and did not address the claims regarding grouping in her decision, and the parent does not raise these claims in her request for review or argue that the IHO erred or failed to address them.⁹ Accordingly, these claims are deemed abandoned and will not be further addressed (8 NYCRR 279.8[c][2], [4]).

Also related to the scope of the issues properly before me on appeal, in her request for review, the parent claims that the IHO erred in not addressing the district's alleged failure to provide the parent with quarterly reports regarding the student's progress as required by law (Req. for Rev. ¶ 31). However, the parent did not raise this issue in her due process complaint notice, and, therefore, it is improperly raised for the first time on appeal (see IHO Ex. IV). The IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Here, the parent did not seek the district's agreement to expand the scope of the impartial hearing to include this issue or file another amended due process complaint notice to add this claim. Nor can it be said that the district "opened the door" to this claim by raising evidence as a defense to a claim that was not identified in the due process complaint notice (M.H., 685 F.3d at 250-51). Therefore, I will not review this issue raised for the first time on appeal.

⁹ The only allegation contained in the request for review that is possibly related to the parent's claims regarding grouping is an allegation contained within the factual background section asserting that the student "had significantly different academic skills and learning characteristics from his classmates during the 2018-2019 school year" and that the student's IQ was 40 points higher than other students in the class (compare Req. for Rev. ¶15, with IHO Ex. IV at p. 2). However, within the statements contained in the request for review, there is no allegation that the IHO erred in not addressing this claim. As such, I find this issue was insufficiently raised for review on appeal.

Lastly, the parent asserts that the IHO erred in finding that the district did not violate section 504 and in failing to address her claim based on the ADA. A State Review Officer lacks jurisdiction to consider the parent's challenge to the IHO's refusal to rule on her section 504 or ADA claims, as an SRO's jurisdiction is limited by State law to matters arising under the IDEA and Article 89 of the Education Law (Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Courts have also recognized that the Education Law makes no provision for State-level administrative review of IHO decisions with regard to section 504 or the ADA (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 & n.17 [E.D.N.Y. 2012] [noting that "[u]nder New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"], aff'd, 513 Fed. App'x 95 [2d Cir. 2013]; see also F.C. v. New York City Dep't of Educ., 2016 WL 8716232, at *11 [S.D.N.Y. Aug. 5, 2016]). Therefore, an SRO has no jurisdiction to review any portion of the parent's claims regarding section 504 or the ADA and, to the extent such claims are asserted in this proceeding, they will not be further addressed.

2. Sufficiency of IHO Decision / IHO Bias

Turning to the parent's allegations that the IHO's decision reflected her bias against the parent, it is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, according each party the right to be heard, and shall not, by words or conduct, manifest bias or prejudice (e.g., Application of a Student with a Disability, Appeal No. 12-064). An IHO may not be an employee of the district that is involved in the education or care of the child, may not have any personal or professional interest that conflicts with the IHO's objectivity, must be knowledgeable of the provisions of the IDEA and State and federal regulations and the legal interpretations of the IDEA and its implementing regulations, and must possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]). While not defined by regulation, citations to the hearing record and to applicable law and application of that law to the facts of the case are generally considered to be the norm in "appropriate standard legal practice" and should be included in any IHO decision. In addition, State regulations provide in relevant part that "[t]he decision of the impartial hearing officer shall be based solely upon the record of the proceeding before the impartial hearing officer, and shall set forth the reasons and the factual basis for the determination. The decision shall reference the hearing record to support the findings of fact" (8 NYCRR 200.5[j][5][v]).

In the instant case, the IHO's decision set forth a detailed recitation of facts, which included citations to the testimonial and documentary evidence in the hearing record (IHO Decision at pp. 5-19). In addition, the IHO set forth applicable legal standards with citations to federal and State law and regulations, as well as controlling case law (id. at pp. 20-22). While the IHO's analysis of the parent's claims does not repeat the citations or specify the law being applied (see id. at pp. 22-25), the decision as a whole contains sufficient citations such that the lack of elaboration in this portion of the decision does not provide an independent basis for reversal. As for the specific

examples of findings or characterizations in the IHO's decision to which the parent points to as support for her allegations of bias, the parent alleges that the decision contained unsupported remarks attributed to the parent that she did not make, attributed the student's lack of success in the program to the parent and student while ignoring evidence of failures on the part of Green Chimneys and the district, portrayed the parent as being uncooperative by omitting facts and testimony that explained her decision to not have the student sleep overnight at Green Chimneys, and contained an improper emphasis on the parent's decision to take the student off of medication. While the IHO may have erred in specific determinations, such allegations of error are the subject of the present review and do not rise to the level of establishing bias by the IHO (see Chen v. Chen Qualified Settlement Fund, 552 F.3d 218, 227 [2d Cir. 2009] [finding that "[g]enerally, claims of judicial bias must be based on extrajudicial matters, and adverse rulings, without more, will rarely suffice to provide a reasonable basis for questioning a judge's impartiality"]; see also Liteky v. United States, 510 U.S. 540, 555 [1994]; Application of a Student with a Disability, Appeal No. 13-083). Accordingly, the parent's allegations to the contrary are without merit.

B. 2018-19 School Year

1. Sufficiency of Evaluative Information / Consideration of Special Factors— Interfering Behaviors

Turning to the merits of this case, the parent argues that the IHO erred in failing to find that the district did not have sufficient evaluative information about the student and should have conducted an FBA and developed a BIP for the student. Given the predominance of the student's behaviors as the area of concern to the parent in terms of the information available to the CSE, the allegations relating to the sufficiency of the evaluative information and the district's failure to conduct an FBA or develop a BIP shall be considered together.

An initial evaluation of a student must include a physical examination, a psychological evaluation, a social history, a classroom observation of the student and any other "appropriate assessments or evaluations," as necessary to determine factors contributing to the student's disability (8 NYCRR 200.4[b][1]). 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]; 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 agree otherwise (34 CFR 300.303[b][1]; 8 NYCRR 200.4[b][4]). Pursuant to 8 NYCRR 200.4(b)(4), a reevaluation of a student with a disability must be conducted by a multidisciplinary team or group that includes at least one teacher or specialist with knowledge in the area of the student's disability and, in accordance with 8 NYCRR 200.4(b)(5), the reevaluation must be "sufficient to determine the student's ability to participate in instructional programs in regular education and the student's continuing eligibility for special education." 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], [B]; 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]). Whether it is an initial evaluation or a reevaluation of a student, 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]; see Application of the Dep't of Educ., Appeal No. 07-018).

In addition, under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ. of Shenendehowa Cent. Sch. Dist., 361 Fed. App'x 156, 160 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider developing a BIP for a student that is based upon an FBA (8 NYCRR 200.4[d][3][i], 200.22[a], [b]). Additionally, a district is required to conduct an FBA in an initial evaluation for students who engage in behaviors that impede their learning or that of other students (8 NYCRR 200.4[b][1][v]). State regulation defines an FBA as the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and includes, but is not limited to,

the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it

(8 NYCRR 200.1[r]). According to State regulation, an FBA shall be based on multiple sources of data including, but not limited to, "information obtained from direct observation of the student, information from the student, the student's teacher(s) and/or related service provider(s), a review of available data and information from the student's record and other sources including any relevant information provided by the student's parent" (8 NYCRR 200.22[a][2]). An FBA must also be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]).

Although State regulations call for the procedure of using an FBA when developing a BIP, the Second Circuit has indicated that, when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F.3d at 190; see L.O. v. New York City Dep't of Educ., 822 F.3d 95, 113 [2d Cir. 2016]). The Court also noted that "[t]he failure to conduct an FBA will not always rise to

the level of a denial of a FAPE," but that in such instances particular care must be taken to determine whether the IEP addresses the student's problem behaviors (id.).

With regard to a BIP, the special factor procedures set forth in State regulations note that the CSE or CPSE shall consider the development of a BIP for a student with a disability when:

- (i) the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions;
- (ii) the student's behavior places the student or others at risk of harm or injury;
- (iii) the CSE or CPSE is considering more restrictive programs or placements as a result of the student's behavior; and/or
- (iv) as required pursuant to" 8 NYCRR 201.3

(8 NYCRR 200.22[b][1]). If the CSE determines that a BIP is necessary for a student the BIP shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . . ; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR 200.22[b][4]).¹⁰

As with the failure to conduct an FBA, the district's failure to develop a BIP in conformity with State regulations does not, in and of itself, automatically render the IEP deficient, as the IEP must be closely examined to determine whether it otherwise addressed the student's interfering behaviors (see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 80 [2d Cir. 2014]; F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 6-7 [2d Cir. Jan. 8, 2014]; M.W. v. New York City Dep't of Educ., 725 F.3d 131, 139-41 [2d Cir. 2013]; R.E., 694 F.3d at 190).

As an initial matter, in order to determine whether the district had conducted sufficient evaluative information about the student's behavioral needs and/or should have conducted an FBA and developed a BIP for the school years at issue, it is necessary to discuss the history of the student's behaviors beginning with the student's attendance at the therapeutic day program at Green Chimneys and continuing through the student's attendance at the residential program at Green

¹⁰ The Official Analysis of Comments to the federal regulations explains that the decision regarding whether a student requires interventions such as a BIP rests with the CSE and is made on an individual basis (Consideration of Special Factors, 71 Fed. Reg. 46683 [August 14, 2006]). However, neither the IDEA nor its implementing regulations require that the elements of a student's BIP be set forth in the student's IEP. State guidance indicates that New York State regulations merely "require that a student's need for a BIP be documented in the student's IEP" ("Student Needs Related to Special Factors," Office of Special Educ. [April 2011], available at <http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf>). Once a student's BIP is developed and implemented, "such plan shall be reviewed at least annually by the CSE or CPSE" (8 NYCRR 200.22[b][2]). Furthermore, "[t]he implementation of a student's [BIP] shall include regular progress monitoring of the frequency, duration and intensity of the behavioral interventions at scheduled intervals, as specified in the [BIP] and on the student's IEP. The results of the progress monitoring shall be documented and reported to the student's parents and to the CSE or CPSE and shall be considered in any determination to revise a student's [BIP] or IEP" (8 NYCRR 200.22[b][5]).

Chimneys. This background also frames the substantive issues to be discussed, namely, whether or not the CSEs' recommendation for a residential placement for the student was appropriate. In addition to the evaluations conducted by the district and the description of the student's needs in the IEPs, the hearing record also includes a significant amount of paperwork generated by Green Chimneys including comprehensive treatment plans, quarterly treatment reviews, childcare case conferences and quarterly reports, and individual crisis management plans. While it is largely unclear the degree to which the CSEs had these documents available to review, staff from Green Chimneys attended the May and August 2018 CSE meetings and described the student's needs and progress. Accordingly, the documentation in the hearing record from Green Chimneys is set forth below to the extent it informs the hearing record either on the issue of the sufficiency of the information available to the CSEs or the issue of the appropriateness of the CSEs' residential placement recommendations.

The hearing record shows that at the time the CSE met in March 2016 for the student's annual review and to develop his IEP for the 2016-17 school year the student was attending the therapeutic day school at Green Chimneys (Joint Exs. 8; 15 at p. 1). According to the CSE meeting information summary, the student was making progress both academically and behaviorally at Green Chimneys (Joint Ex. 8 at p. 3). The meeting summary noted that at times the student continued to require behavioral support but that "incidents" had decreased (id.). Additionally, the summary noted that the student continued to benefit academically, behaviorally, socially, and emotionally from the structure, support, and consistency of the program (id.). The CSE engaged in a lengthy discussion regarding regression, noting that the student regressed significantly over long weekends and holiday breaks (id.). Finally, the CSE concluded that the student continued to require the support of a therapeutic setting and for the 2016-17 school year, including the extended school year, the student would attend Green Chimneys (id.).

With respect to the student's behaviors, the March 2016 IEP indicated that at times the student struggled with interacting appropriately with peers and that he was working on identifying behaviors and conversations that were appropriate for a school setting (Joint Ex. 8 at p. 5). Additionally, the IEP indicated that the student struggled to maintain appropriate school behavior, often relied on staff for support, prompting, and reminders, could be extremely impulsive at times, and had poor self-control (id.). With regard to the student's social development, the March 2016 IEP indicated that the student needed to improve his ability to understand different emotions, including understanding what he was feeling and why in certain social situations (id.). According to the IEP, the student struggled to identify his emotions in the moment but at times was able to reflect on past feelings, and he was working on employing coping skills when he felt a negative emotion at school (id.). The IEP noted that during counseling sessions the student was working on a book that focused on anger and was learning how to be more mindful of his behaviors when things did not go his way (id.). In addition, the student was working on self-control and maintaining appropriate behaviors throughout the day (id.).

During the 2016-17 school year, Green Chimneys reported "a significant decline in [the student's] behavior" (Joint Ex. 7 at p. 3). The CSE met on November 18, 2016 for a requested review of the student's program (id. at pp. 1, 3). The meeting information summary indicated that the student's time in crisis support had significantly increased and he was spending less time in the classroom due to behaviors such as inappropriate comments, yelling, and overly sexual comments (id. at p. 3). After a lengthy discussion that included a review of available community supports and mental health/medical supports, and the student's history and significant regression, the CSE

determined that the strategies and interventions that had been put into place had not been successful and further determined that the student required a higher level of care including psychiatric treatment and increased social skills support (*id.*). As a result, the November 2016 CSE recommended the student for residential placement and determined it would send a referral for possible placement (*id.*).¹¹

The CSE met again on December 8, 2016 to conduct a program review in order to finalize its recommendation for residential placement (Joint Ex. 6 at pp. 1, 3). The meeting information summary indicated that, due to a significant regression in behavior and academic performance, the CSE recommended that the student required the support of a residential setting (*id.* at p. 3). The summary further indicated that the CSE met with county representatives to discuss the single point of access (SPOA) process for care referrals and available county supports but that county staff determined that the available county supports would not address the student's needs at that time (*id.*). Furthermore, the summary indicated that the student had been accepted into the residential program at Green Chimneys with a start date of December 13, 2016 (*id.*).¹² In addition to the residential placement, the CSE recommended a change in the student's counseling services from two 30-minute sessions of individual counseling per week to one 40-minute session of individual counseling per week and one 60-minute session of small group counseling per week (*compare* Joint Ex. 6 at pp. 9-10, *with* Joint Ex. 7 at pp. 9-10). In addition, one 90-minute session of parent counseling and training per month was added to the student's IEP (Joint Ex. 6 at p. 10).

On February 16, 2017, the student's residential unit supervisor completed a "G.L.A.S." behavior rating scale to assess the student's adjustment (Joint Ex. 48; *see* Joint Ex. 47 at pp. 1, 2).¹³ The behavior scales included a list of behaviors along with a numerical scale that described the frequency of the behaviors as follows: (1) never, (2) occasionally, (3) 50% of the time, (4) more than half of the time, and (5) goal achieved (Joint Ex. 48).¹⁴ According to the completed scales,

¹¹ The November 2016 prior written notice indicated that the CSE did not consider any other options at that time (Joint Ex. 7 at p. 1).

¹² The December 2016 prior written notice indicated that the CSE did not consider any other options at that time (Joint Ex. 6 at p. 1).

¹³ The hearing record does not indicate what the abbreviation "G.L.A.S." stands for.

¹⁴ Further description of the ratings indicated that "[n]ever" meant that the student never demonstrated the desired behavior; "[o]ccasionally" meant that that the student inconsistently demonstrated the behavior and needed extra supervision, redirection, or counseling to demonstrate desired behaviors; "50% of the time" meant that the student may need supervision reminders or prompts to evidence new behaviors but was able to recognize the difference between old and new behavior patterns; "[m]ore than half the time" meant that the student reverted to old behavior under stress, in crisis, or when supervision or prompts were less frequent; and "[a]chieved" meant the student almost always used new adaptive behaviors (Joint Ex. 48). In some instances, the descriptors do not appear to make sense – for example the completed rating scale indicates that the student "never demonstrates the desired behavior" of self-abuse or physical aggression (*id.*). In addition, the points on the scale are confusing given that some of the behaviors listed are desirable behaviors, such as relationship with peers and pro-social behavior, and some, such as self-abuse and oppositional behavior, are not (*id.*). For example, the unit supervisor rated the student's verbal aggression a 4, which according to the 1-5 scale would suggest that the student was performing well in this area as he was nearing a "5," goal achieved; however, this was actually an area in which the student struggled (Joint Exs. 47 at p. 2; Joint Ex. 48). Neither the district nor Green Chimneys explained the G.L.A.S. behavior rating scale during the impartial hearing.

the student "never" demonstrated self-abuse, the need for supervision, or physical aggression (Joint Ex. 48). In addition, the student "occasionally" demonstrated a relationship with peers, personal hygiene, care of possessions, pro-social behavior, receptiveness to intervention, oppositional behavior, and withdrawal behavior (id.). The unit supervisor indicated that "50% of the time" the student demonstrated a relationship with authority, interactive participation, and independence (id.). Lastly, the student was rated as demonstrating verbal aggression "more than half the time" (id.). The student's overall adjustment was rated as (2) "occasionally," meaning that it was inconsistent and the student needed extra supervision, redirection, or counseling to demonstrate desired behaviors (id.). The unit supervisor recommended the following goals for the student that were characterized as "long term" and "discharge relevant:" 1) will continue to develop coping and anger management strategies to regulate his emotions and behaviors while interacting with others in a safe manner; 2) will work with staff to learn how to communicate his needs, control his impulsive, self-directed behaviors so that he can interact with peers and adults in a more positive and productive manner; 3) will work with adults to learn coping skills to improve his tolerance of delayed gratification, receiving limit setting and improving his ability to request for assistance when needed so that he can communicate his needs in a respectful manner to adults and peers; 4) will work with staff to follow program rules to help him focus his attention on the task at hand, and to learn how to increase his frustration tolerance to improve task completion and academic performance (id.). Finally, the unit supervisor identified the following strengths of the student: "reading, [L]egos, helpful, caring" (id.).

On February 28, 2017, Green Chimneys held a case conference to discuss the student's first few months in the residential program and to review the student's treatment plan (see Joint Ex. 47).¹⁵ Conference participants included the unit supervisor, supervising teacher, teacher, social work supervisor, therapist (social worker), psychiatrist, CSE representative, and the parent, who participated by phone (id. at p. 1). The February 2017 case conference report noted that the student participated in the review of the treatment plan during a "post conference with the social worker" (id.). According to the February 2017 case conference report, the student presented with numerous problems and reasons for referral, among them physical and verbal aggression, hyperactivity and impulsivity, low frustration tolerance, poor social skills and labile moods, oppositional behaviors and work refusal, anxiety, perseveration, difficulty transitioning, and difficulty managing frustration and anger (id. at p. 2). The case conference report indicated that the student presented as friendly and talkative during topics of interest but also noted that he made noises and acted silly and immature and argued with the teacher (id.). The report further noted that the student had experienced "matting" at a prior placement and might be wary of the behavior intervention room and staff (id.). The report advised that the student may have experienced sexual abuse in daycare and showed some sexualized talk and behaviors (id.). According to the case review report, the parent stated the detailed behaviors occurred only at school and not at home (id.).

¹⁵ This exhibit is dated February 28, 2017; however, on the final page it is signed and dated August 25, 2017 (Joint Ex. 47 at pp. 1, 4). Page four seems to be the continuation of the treatment plan discussed beginning on page three, with goals that appear to be identical to those contained in the case conference report dated February 16, 2017 (reporting the results of the administration of the G.L.A.S. scale), which is indicated to have been reviewed at the February 28, 2017 case conference (Joint Ex. 47 at p. 2; compare Joint Ex. 47 at pp. 3-4, with Joint Ex. 48). Additionally, Joint Exhibit 47 consists of five pages; however, page five appears to be a duplicate of page four (see Joint Ex. 47 at pp. 4-5).

According to the dorm summary provided by the unit supervisor, the student had adjusted "fairly well to the program overall" and was very engaged with peers and staff and sought out attention from both (Joint Ex. 47 at p. 2). The dorm summary indicated that the student tended to avoid working with residents who were more mature and goal oriented and chose to interact with residents who required redirection to stay on task, which resulted in the student needing frequent redirection (id.). The unit supervisor reported that the student responded to redirection safely but that it took approximately five prompts in order to get him to refocus (id.). The unit director described the student as highly anxious and impulsive and noted that he would often ask questions or express thoughts at inopportune times due to his anxiety and social skills deficits but that the student could be redirected at those times (id.). The unit supervisor suggested that working with no more than two peers at a time seemed to lessen the student's anxiety and peer issues (id.).

The home summary, provided by the parent, indicated that the student did very well at home and was consistently safe but needed a lot of guidance in peer matters (Joint Ex. 47 at p. 3). The parent emphasized that the reason the student was placed at Green Chimneys' residential program was because he struggled in school and not at home (id.). The parent shared that she worried about the student's transitions back to campus because he had a hard time leaving her following a visit (id.).

With respect to the student's behavior in the classroom, the school summary, provided by the student's then-current teacher, indicated that he was an intelligent student whose behavioral issues interfered with his ability to remain in the classroom (Joint Ex. 47 at p. 3). This in turn impacted the student's ability to learn new skills and information (id.). The teacher reported that the student was incredibly impulsive and disruptive and that he exhibited low frustration tolerance for academics and therefore needed frequent, extended breaks to make it through the school day (id.). Finally, the teacher reported that the student struggled with peer relationships and it was difficult for him to engage with peers safely for a "blocked period of time" (id.).

The psychiatric summary contained in the February 2017 case conference report, provided by the psychiatrist, indicated that the student was not on any psychotropic drugs and that the parent was hesitant with regard to the use of medication due to the student experiencing poor reactions in the past (Joint Ex. 47 at p. 3). The psychiatrist reported that the idea of medication would continue to be explored in order to assist the student with impulsivity (id.).

The therapy summary, provided by the student's then-current therapist (social worker), indicated that the student was engaged during therapy sessions (Joint Ex. 47 at p. 3). The therapist reported that the student thrived on individual attention and was open to working on concerns, especially related to verbalizing his thoughts and feelings (id.). She further reported that the student could still be impulsive within the confines of therapy sessions but was easily redirected (id.). Finally, the therapist indicated that she wanted to explore working on specific dialectical behavior therapy skills to help with some of the student's issues with decision-making (id.). The participants in the February 2017 case conference adopted the goals recommended by the unit supervisor on February 16, 2017 as the basis for the student's Green Chimneys' treatment plan (id. at pp. 3-4; see Joint Ex. 48).

In addition to the treatment plan, in February 2017, Green Chimneys developed an individual crisis management plan that identified the student's potential triggers, his high risk behaviors, and intervention strategies for dealing with the student's maladaptive behaviors (Joint

Ex. 27 at p. 5).¹⁶ Between February 1, 2017 and March 28, 2017 Green Chimneys' staff filed three incident reports related to the student's verbal aggression, aggression toward peers, non-compliance, and inappropriate comments (Joint Ex. 28 at pp. 21-35).

The student's report card grades for the 2016-17 school year ranged from B to D (Joint Ex. 12 at pp. 1-4). Despite teacher comments that the student had difficulty remaining on task and failed to submit many assignments, the student's grades in his core academic classes improved over the course of the school year (id. at pp. 1-2).

Moving on to the student's 2017-18 school year, the CSE met on April 27, 2017 to conduct an annual review and reevaluation of the student and to develop the student's IEP for the coming school year (Joint Ex. 5 at p. 3). In addition to other evaluative information, the April 2017 CSE reviewed the results of a March 30, 2017 psychoeducational evaluation of the student (id. at p. 5). The psychoeducational evaluation report indicated that the student's full-scale IQ was in the "[h]igh [a]verage range" and his academic performance "was generally at the low end of the [a]verage range of functioning and slightly below grade level with an exception noted in [r]eading [c]omprehension," which was above grade level (Joint Ex. 15 at pp. 3, 5). The student's social/emotional functioning was assessed using the Behavior Assessment System for Children - Third Edition (BASC-3) - Teacher Report (id. at p. 5). The teacher's responses indicated that the student's behavior was "elevated" in all areas assessed including externalizing behaviors of hyperactivity, aggression, and conduct problems; internalizing behaviors such as anxiety and depression; school-based problems of attention and learning problems; and behavioral symptoms of atypicality and withdrawal (id. at pp. 5-6). The results further indicated that the student was below expected levels for all adaptive skills including adaptability, social skills, leadership, study skills, and functional communication (id. at p. 6). Additionally, the student was elevated on the content scales of anger control, bullying, emotional self-control, and executive functioning, and the evaluator opined that all of these resulted in functional impairments (id.). With regard to executive functioning, the BASC-3 results suggested that the student's overall executive functioning was highly impaired including his problem solving, attentional control, behavioral control, and emotional control (id.). The evaluator opined that the student's "pattern of results suggest[ed] many behavioral and emotional difficulties" and that the structure and therapeutic nature of his then-current environment was needed to provide sufficient supports to address his ongoing needs (id.).

According to the April 2017 CSE meeting information summary the student's behavioral difficulties were believed to have impacted his performance during testing as well as his day-to-day functioning in the classroom (Joint Ex. 5 at p. 3). The summary included information from an OT evaluation, which indicated that the student presented with mild deficits in visual perceptual skills, higher level social skills, and self-regulation skills (id.). In counseling, the meeting summary indicated that the student had made inconsistent progress and continued to work towards using coping skills to manage challenging or emotionally intense situations and also toward maintaining appropriate prosocial behaviors (id.). According to the meeting summary, the student continued to meet the criteria to be classified as having an other health impairment (id.). The

¹⁶ individual crisis management plans were developed monthly thereafter (Joint Ex. 27 at pp. 1-4). The student's individual crisis management plans for March, April, May, and June included some modifications and additions (compare Joint Ex. 27 at pp. 1-4, with Joint Ex. 27 at p. 5).

student benefitted from a multisensory learning approach and had been most successful working one-on-one with staff (id.).

In order to address the student's identified needs, the April 2017 CSE recommended the student attend a 12-month school year program in a 12:1+2 special class in a State-approved nonpublic residential school and receive the related services of psychological counseling once per week individually for 45 minutes and once per week in a small group for 60 minutes and OT individually once per week for 30 minutes; the CSE also recommended parent counseling and training once monthly for 90 minutes (Joint Ex. 5 at pp. 10-13).

During the 2017-18 school year, Green Chimneys generated four quarterly treatment reviews dated August 2017, November 2017, February 2018, and May 2018 (Joint Exs. 41; 43; 44; 46). According to the August 2017 quarterly treatment plan, the student's anticipated discharge date was June 2018 (Joint Ex. 46 at p. 3); as of the November 2017 treatment plan, this was changed to September 2018 (Joint Ex. 44 at p. 3). The August 2017 quarterly treatment plan included four goals that targeted the student's ability to ask for an adult's help when upset, complete a task within two prompts from staff, interact appropriately with peers, and use a coping skill when he identified an intense emotion (Joint Ex. 46 at pp. 1-2). The goals remained the same throughout the 2017-18 school year (compare Joint Ex. 46 at pp. 1-2, with Joint Exs. 41 at pp. 1-2; 43 at pp. 1-2; 44 at pp. 1-2). The May 2018 quarterly review report indicated that the student continued to struggle with the first goal and had difficulty asking for support when he felt triggered (Joint Ex. 41 at p. 1). The treatment review report noted that it had been helpful in some circumstances to have the student speak to his parent and that she had been encouraging him to use words that made him feel better (id.). The parent opined that the home environment was less stimulating and, there, the student seemed more motivated to remove himself and take a break (id.). The report indicated that, going forward, in therapy sessions there would a greater focus on the use of behavioral chains to help the student determine the root of his frustration and also on practicing other things to say or do (id.). In addition, the review team discussed helping the student to "explore more non-verbal [sic] ways to communicate his feeling and needs" and the use of diary cards as a tracking tool (id.). With regard to the student's second goal, the treatment review report indicated that the student had been struggling to complete a task within two prompts from staff and would often need several prompts to comply (id.). Dorm staff reported that the student struggled with redirection and at times would be triggered by staff prompts (id.). The treatment review report noted that, at home, the student had made improvements in his ability to complete tasks and had responded well to frontloading certain tasks (id.). In therapy, the student reported that this goal could be challenging for him (id.). According to the May 2018 treatment review report, the student was able to express that both in the dorm and at school he just "d[id] not want to do" certain tasks (id.). The student was able to process this; however, at times he could "get stuck in his thinking" and struggled with exploring solutions or skill use (id. at pp.1-2). In terms of the student's third goal, related to interacting appropriately with peers, the team reported that overall the student struggled with this goal as well (id. at p. 2). The treatment review report indicated that, while the student tried to engage with and enjoyed interacting with peers, he could become triggered by them and at times became quick to provoke others (id.). In the dorm, the student struggled to engage in appropriate interactions with peers, and he was overly silly in group settings, requiring redirection prompts from staff (id.). Furthermore, the treatment review report indicated that the student continued to struggle with reading body language of peers, which could lead to unwanted peer interactions, and that he needed continued processing "in the moment" and in therapy to improve

his social skills (id.). With regard to the student's fourth treatment goal, the treatment review report noted that the student struggled in all areas to use coping skills (id.). The report further noted that the student responded well to one-on-one staff support and help co-regulating in emotionally charged situations and that he needed assistance identifying appropriate times to use a coping skill and choosing one appropriate for that moment (id.). Finally, the treatment review included a report that at home the student responded well to his parent using skills with him to help him co-regulate (id.).

The May 2018 quarterly treatment review discharge planning section indicated that the student needed to continue to show consistent progress in his treatment goals to build and maintain relationships with peers using appropriate language and social skills (Joint Ex. 41 at p. 3). The anticipated discharge date remained September 2018 (compare Joint Ex. 43 at p. 3, with Joint Ex. 41 at p. 3).

In addition to the student's treatment plan for the 2017-18 school year, Green Chimneys developed individual crisis management plans to address the student's behavioral needs. The August 2017 through February 2018 individual crisis management plans were identical to the plans from the end of the 2016-17 school year (compare Joint Ex. 27 at p. 1, with Joint Ex. 26 at pp. 9-15). The individual crisis management plans for August 2017 through February 2018 indicated that the student continued to struggle with issues such as low frustration tolerance, difficulty focusing, hyperactivity, anxiety, low self-esteem, transition difficulty, work refusal, making noises, and labile moods (Joint Ex. 26 at pp. 9-15). The March 2018 individual crisis management plan noted that the student struggled with the same issues identified in the August 2017 plan, however, the format for intervention strategies changed, providing a more detailed description of the student's behaviors during each stage of intervention (id. at pp. 7-8). The intervention strategies did not change (id.). Specifically, the March 2018 individual crisis management plan noted that, during the pre-crisis stage, the student interacted well with peers and staff; enjoyed making people laugh and sharing his own knowledge; enjoyed playing games with peers and playing with Rubik's Cubes, and that he was always willing to share toys and to speak with peers (id. at p. 7). During the triggering stage, the student would be triggered by peers, boredom, rules, or being asked to do something he did not want to do, and would usually express his frustration (id.). During the escalation stage, the student would curse, become verbally oppositional, and tell staff he would not follow directions and that he would do the opposite of what was asked of him (id.). During the outburst stage the student would cry and do "a lot of negative things in order to get attention from the people around him"; he would go into his room and slam his door or walk around the dorm being verbally abusive to someone in his area (id.). During the recovery stage, which included a life space interview, the student would usually ask a staff member to come talk with him in his room and he respectfully expressed his frustration (id.). According to the individual crisis management plan, the student usually wanted staff to add input once he expressed his feelings and his side of the story (id.). The April through June 2018 individual crisis management plans were identical to the March 2018 individual crisis management plan, indicating that the student's issues and high-risk behaviors remained constant throughout the 2017-18 school year (compare Joint Ex. 26 at pp. 1-6, with Joint Ex. 26 at pp. 7-8).

In addition to the student's treatment plan and individual crisis management plans, psychiatric progress notes indicated that the student continued to struggle in terms of social/emotional and behavioral functioning throughout the 2017-18 school year (see Joint Ex. 17 at pp. 30-44). The July 2017 psychiatric progress note indicated that the student had been doing

well after his dorm had changed but that he continued to struggle with staff in other programs, had poor focus, and was impulsive (*id.* at p. 44; *see* Tr. pp. 386-87). The student had a difficult time taking responsibility for his behavior and often felt that he was smarter than the adults (*id.*). By August 2017 the student had made significant improvements in verbalizing his frustrations, complying with staff requests and improving his peer interactions, but he continued to struggle in school and was still "figuring out" how to appropriately interact with peers (*id.* at pp. 42-43). In September 2017, the psychiatrist noted that the student was removed from programs in school and in the dorm due to difficulty complying with simple rules or directions and that he "constantly [sought] to be the center of attention" (*id.* at p. 41). The progress note indicated that the parent had difficulty holding the student accountable for his actions and often blamed the student's peers or staff members and would tell the student that she would resolve the issue (*id.*). The December 2017 psychiatric progress note indicated that the student had not made notable progress in the dorm and that he continued to struggle with home-to-school transitions, peer interactions, and personal hygiene (*id.* at p. 35). The psychiatrist reported that the student had expressed suicidal ideation to his social worker in November 2017 and that he only had these thoughts at Green Chimneys and not at home (*id.*). Finally, the psychiatrist reported that the student had begun a points sheet behavior plan in December, and it was "going well" (*id.*).

Turning to the school year at issue, the CSE convened on May 14, 2018 in order to conduct the student's annual review and to develop his IEP for the 2018-19 school year (Joint Ex. 3 at p. 3).¹⁷ According to the May 2018 CSE meeting information summary, the CSE described the student as bright and noted that when motivated he did well academically and socially (*id.*). The meeting summary indicated that the student had displayed difficulty over the past several months, adding that, when he became frustrated, he would curse, be rude towards staff, and refuse to complete his work (*id.*). In counseling, the student was working towards using coping skills; however, when in a group setting, he struggled to stay within the group (*id.*). The meeting summary stated that the student was doing well in OT, working on self-regulation skills, handwriting, and visual perceptual skills (*id.*).

The May 2018 IEP present levels of academic performance indicated that the student enjoyed reading and did well in math but that he exhibited difficulty completing assignments and homework, had difficulty transitioning from one activity to another and from classroom to programs, often refused to complete work, and needed constant reminders and staff prompting to stay on task (Joint Ex. 3 at p. 5). In addition to the above difficulties, the student needed to improve his multiplication and division facts and to review the writing process and apply the steps to his writing (*id.*). With regard to social development, the May 2018 IEP indicated that the student was kind and caring and enjoyed helping peers but that he could become dysregulated and "hyper when the environment around him [wa]s hyper" (*id.* at pp. 5-6). According to the IEP, the student could become disruptive and inappropriate around his peers "in hopes of gaining a reaction and building a connection" with them; he wanted to have a relationship with peers and could struggle in the

¹⁷ According to the IEP, the May 2018 CSE considered the results of a February 2017 OT reevaluation, a March 2017 classroom observation, a March 2017 psychological evaluation, a March 2017 psychoeducational reevaluation, an April 2017 social history update, and an April 2017 counseling progress summary (Joint Ex. 3 at pp. 1, 4; *see* Joint Ex. 15). In addition, the CSE also included staff from Green Chimneys who worked with the student, such as his special education teacher and a social worker, and who participated in the student's treatment review meetings; as such, they should have been familiar with the documentation produced by Green Chimneys (*compare* Joint Ex. 3 at p. 3, *with* Joint Exs. 23 at p. 4; 41 at p. 1; 43 at p. 1; 44 at p. 1).

classroom when peers were struggling (id. at p. 6). The May 2018 IEP stated that the student needed to improve his ability to make positive connections to build relationships with peers, to ignore negative peer interactions, and to recognize when he was dysregulated and to use a coping skill (id.).

The May 2018 present levels of physical performance indicated that the student had made gradual progress with his self-regulation skills; although he continued to require moderate prompting to use them appropriately across academic settings, he had difficulty recognizing what strategies to use and how to use them in a purposeful manner (Joint Ex. 3 at p. 6). The IEP stated that the student had made steady progress in visual perceptual skills and noted that he benefitted from having an extended amount of time and moderate prompting during tasks which required visual attention, spatial relationship skills, and locating objects with a busy background (id.).

The May 2018 CSE determined that, in order to address the student's management needs, he required a structured environment with clear and consistent rules, expectations, and routines, as well as encouragement and positive reinforcement to feel successful in his academic abilities (Joint Ex. 3 at p. 6). Additionally, the IEP indicated that the student needed prompting to stay focused and to interact with peers, and support in expressing feelings of sadness and anger (id.).

With regard to the student's needs relating to special factors, the May 2018 IEP indicated that the student needed strategies, including positive behavioral interventions, supports and other strategies to address behaviors that impeded his learning or that of others but that he did not require a BIP (Joint Ex. 3 at p. 6).

The May 2018 CSE recommended the student continue to attend a 12-month program in a 12:1+2 special class in a State-approved nonpublic residential school with the related services of psychological counseling once per week individually for 30 minutes and once per week in a small group for 60 minutes and OT once per week for 30 minutes individually; the CSE also recommended parent counseling and training once per month for 90 minutes (Joint Ex. 3 at pp. 9-10).

The student's report card grades for the 2017-18 school year ranged from A to D (Joint Ex.13). The majority of the student's grades remained stable through-out the school year with improvement noted in some non-academic classes by the fourth quarter and a decline noted (from B to C+) in the student's grades for science and language arts (id.).

On July 18, 2018, the parent emailed the district and requested that the student be "reevaluated to see if residential placement is absolutely necessary for him" (Joint Ex. 55 at p. 1). The parent requested the reevaluation be conducted prior to the start of the 10-month portion of the 2018-19 school year in September and noted that the timeline should be attainable since data should be available from before and during the student's attendance in the Green Chimneys residential program (id.). On July 27, 2018, the assistant director of pupil personnel services (assistant director) responded and indicated that the student had underwent "a full re-evaluation," which the April 2017 CSE reviewed, but that "[u]pdated information is helpful when reviewing/discussing a student's placement" (id. at p. 2). The assistant director asked the parent to confirm whether she was requesting a full reevaluation and stated that she would send her a consent form (id.). She also recommended updating the student's psychiatric evaluation at district expense

(id.).¹⁸ According to an email from the parent dated August 13, 2018, the assistant director had provided her "the reevaluation papers" (Joint Ex. 56).

Moving forward, on August 17, 2018 the CSE convened at the request of the parent to review its placement recommendation for the student (Joint Ex. 2 at pp. 1, 3).¹⁹ According to the CSE meeting information summary, the parent's goal was for the student to "become a day student" (id. at pp. 1, 3). The meeting summary indicated that the student continued to struggle with his behavior and that, even though he was motivated to participate in counseling sessions and was able to process his emotions, he had a hard time problem solving "which ha[d]been a barrier" (id. at p. 3). The Green Chimneys team reported that the student had no buy-in to the program; his behavior and academics had been inconsistent and erratic, and he was disruptive and disrespectful towards adults (id.). In contrast, the parent reported that the student did well at home, was respectful, completed his work, and engaged with peers (id.). No changes were made to the program (id.).²⁰

According to the assistant director of pupil personnel services (assistant director), when the student became frustrated, cursed, became rude towards staff, and refused to complete his work, the Green Chimneys staff addressed these behaviors in the classroom setting by providing the student with one-to-one support, flexible seating, the positive behavior intervention strategies (PBIS) program that was built into the classroom management plan, and an individual treatment plan created for him as part of the residential program (Tr. pp. 41-42). She described the PBIS program as a school-based points program for students struggling with behaviors, and specifically noted that all students were part of that program (Tr. p. 42). With specific respect to the parent's claims relating to the district's failure to conduct an FBA, the hearing record shows that the May and August 2018 CSEs had ample information to show that the student's behavior impeded his learning and that of others and that an FBA was warranted (Joint Exs. 17 at pp. 30-44; 26 at pp. 9-15; 41;43; 44; 46). The student's maladaptive behaviors persisted over the course of the 2017-18 school year despite consistently implemented school-wide, classroom-wide, and individual behavioral interventions.

The hearing record shows that when the student's behavior escalated, there were very few changes to the quarterly treatment plans or the individual crisis management plans to address these behavioral changes or the student's social/emotional needs. Furthermore, the November 2017 quarterly treatment review showed that the student's progress on his treatment goals began to decrease as the student's maladaptive behaviors increased, yet an FBA was still not considered

¹⁸ The hearing record does not include a copy of a psychiatric evaluation of the student; however, the March 2017 psychoeducational evaluation conducted by the district referenced a December 2016 psychiatric evaluation conducted by the student's psychiatrist at Green Chimneys (Joint Ex. 15 at p. 1).

¹⁹ According to the IEP, the August 2018 CSE considered the results of the same evaluations as the May 2018 CSE (compare Joint Ex. 2 at pp. 1, 4, with Joint Ex. 3 at pp. 1, 4). In addition, the August 2018 CSE also included the same social worker who participated in the May 2018 CSE meeting, as well as additional staff from Green Chimneys (Joint Ex. 2 at p. 4).

²⁰ The information provided in the meeting information attached to the August 2018 IEP is reiterated in the August 2018 prior written notice (compare Joint Ex. 2 at pp. 3-4, with Joint 2 at p. 1). Additionally, the prior written notice indicated that no other options were considered at that time (Joint Ex. 2 at p. 2).

(Joint Ex. 44). Notably, the student began expressing suicidal ideation to his social worker beginning in November 2017; however, there is scant information in the hearing record as to how the student's team responded (Joint Ex. 17 at p. 35). By February 2018, the treatment team recommended development of a behavior plan for the classroom, but the hearing record does not contain any additional information about that plan or its effectiveness (Joint Ex. 43 at p. 2). While Green Chimneys recorded some data regarding triggers and consequences for the student's behavior, in the form of incident reports, there is no evidence that either Green Chimneys or the district used this data to establish a baseline of frequency, duration, intensity or latency of the student's maladaptive behaviors or that it examined how the student's behavior varied across activities, settings, people or times of day.

Moreover, during the 2017-18 school year Green Chimneys staff filed approximately eight incident reports in response to the student's self-aggression, verbal aggression, non-compliance, and aggression toward peers (Joint Ex. 29).²¹ Between January 1, 2018 and August 14, 2018 the student went to Green Chimneys' "school room" and "redirection room" over 40 times (Joint Ex. 16 at pp. 4-5). The redirection room use log indicated that in some instances the student went to the room because he requested time away and other times the student was sent to the room due to verbal aggression, cursing and destroying property, disrupting the classroom, not following directions, being disrespectful to staff, and provoking peers (Tr. pp. 220-24, 249-50, 252, 266; Joint Ex. 16 at pp. 4-5).²²

With regard to the student's need for an FBA and BIP, the use of a "redirection room" to address the student's behaviors at Green Chimneys is reason enough to conclude that the student required a BIP. According to State regulations, "a time out room is an area for a student to safely deescalate, regain control and prepare to meet expectations to return to his or her education program" (8 NYCRR 200.22[c]). Time out rooms "are to be used in conjunction with a [BIP] in which a student is removed to a supervised area in order to facilitate self-control or to remove a student from a potentially dangerous situation" in order to "teach and reinforce alternative appropriate behaviors," except that a time out room may also be used as an emergency intervention in "unanticipated situations that pose an immediate concern for the physical safety of a student or others" (8 NYCRR 200.22[c], [c][3]; see "Policy and Guidance on the Use of Time Out Rooms,"

²¹ The incident report form solicited information regarding the time and date of the incident, the type and level of incident that occurred, the location and duration of the incident, and the "activity when [the] [i]ncident initiated" (Joint Ex. 29 at p. 1). In addition, the form solicited information regarding triggers, and whether restraint was used and what type (id.). The incident report form included a chart that called for a description of the student's behavior, the type of behavior support techniques used with the student, an intervention description, and a description of the student's response (id. at p. 2). The report included a check box to indicate whether a life skills interview (LSI) was performed and a place to describe the LSI plan (id.). The incident report form also included a place to record the results of any medical evaluation and treatment that took place (id. at p. 3).

²² The student's teacher testified that the redirection room was a safe place for students who were struggling or "having an issue" in the classroom to go (Tr. p. 221). She described it as an area that students could go to "deescalate and calm down and be able to rejoin the classroom once they're in a better place" (Tr. p. 221). The teacher testified that "student support" referred to a staff person who served as an additional support to classroom staff who were unable to get a student to deescalate (Tr. p. 221). She indicated "student support" was listed on the redirection room use log because they were the staff in the redirection room (Tr. p. 221, 267). Use of the redirection room was not considered a disciplinary action (Tr. p. 266).

Field Mem. [Apr. 1994], available at <http://www.p12.nysed.gov/specialed/publications/policy/timeout.pdf>). In addition, a student's IEP must "specify when a [BIP] includes the use of a time out room for a student with a disability, including the maximum amount of time a student will need to be in a time out room as a behavioral consequence as determined on an individual basis in consideration of the student's age and individual needs" (8 NYCRR 200.22[c][2]). All schools that use a time out room for behavior management are required to develop and implement policies and procedures related to the use of the time out room (8 NYCRR 200.22[c][1]).²³ State regulation also imposes requirements that schools "document the use of the time out room, including information to monitor the effectiveness of the use of the time out room to decrease specified behaviors" (8 NYCRR 200.22[c][8]). Further, before implementing a BIP "that will incorporate the use of a time out room," districts must afford parents "the opportunity to see the physical space that will be used as a time out room" and provide the parent with a copy of the school's policy related to time out rooms (8 NYCRR 200.22[c][4]).²⁴

Here, consistent with the definition of a time out room in State regulation, the "redirection room" used at Green Chimneys was reportedly available for the student to deescalate (see Tr. pp. 220-23, 249-50; see also 8 NYCRR 200.22[c]). Although there may be documentation regarding the use of the "redirection room" maintained by Green Chimneys (see Joint Ex. 16), this does not supplant the district's obligation to review the student's need for such an intervention through the CSE process, to set parameters for its use, and to follow the procedural protections outlined in State regulation for the benefit of students and parents.

The district's attempt to offload the responsibility to consider the student's behaviors and develop an appropriate plan to address them goes beyond the use of the redirection room. While Green Chimneys developed individual crisis management plans for the student, collected some data regarding the student's behaviors, and attended the student's CSE meetings, Green Chimneys staff is but one part of the CSE membership and it is unclear from the hearing record that the CSE reviewed the individual crisis management plans being used by Green Chimneys. While the setting at the Green Chimneys residential placement was undoubtedly a therapeutic milieu with wrap-around services and built-in behavioral supports, the reports of the student's sustained behaviors and the reported inconsistent progress in the behavioral area should have, at the least, triggered action by the CSE to pursue additional information to understand whether the supports being implemented were meeting the student's needs.

While the district's failure to conduct an FBA, on its own, might not result in a finding of a denial of a FAPE given the behavioral supports built into the program at Green Chimneys, including the individualized individual crisis management plans developed to address the student's behaviors, there is also no indication in the hearing record that, in response to the parent's request

²³ At a minimum, the school's policies and procedures are required to include: prohibitions on placing a student in a locked room or a room in which the student cannot be continuously observed; circumstances under which the time out room may be used; limitations on the duration of time for which the time out room may be used; data collection to monitor the effectiveness of the use of the time out room; information that will be provided to parents; and staff training on the policies and procedures related to the use of the time out room (8 NYCRR 200.22[c][1][i]-[vi]).

²⁴ State regulations also include specific requirements relating to the physical structure and features of a time out room (8 NYCRR 200.22[c][5]-[7]).

for a re-evaluation of the student (see Joint Ex. 55 at p. 1), that such evaluations were conducted or that a prior written notice was provided stating reasons why the district felt that a re-evaluation was unnecessary (8 NYCRR 200.5[a]; see 34 CFR 300.503, 300.305[d]). On the contrary, the district assistant director stated that updated information would be useful (see Joint Ex. 55 at p. 2).

Ultimately, given the below discussion regarding the appropriateness of the residential placement recommendation, the district would have been in a better position to justify the CSEs' recommendations had it obtained additional evaluative information that explored the student's social/emotional and behavioral needs and how those needs affected his ability to receive educational benefit. As the information in the hearing record is insufficient to establish that the student needed a residential placement, the district's failure to conduct further evaluations, including an FBA, or develop a BIP, constituted a serious procedural violation which contributed to a denial of a FAPE for the student for the 2018-19 school year.

2. Appropriateness of Residential Placement and LRE

On appeal, the parent argues that the IHO erred in finding that the CSEs' recommendation for the student's continued placement in a residential program was appropriate. In so arguing, the parent raises issues related to the sufficiency of the objective evidence supporting the CSEs' recommendations, such as evidence that the student needed a residential placement or that he had made progress in the residential setting in the years leading up to the May and August 2018 CSE meetings, as well as LRE concerns, including the CSE's failure to develop a discharge plan for the student to return to a less restrictive setting as required by State regulation.

The IDEA requires that a student's recommended program must be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.107, 300.114[a][2][i], 300.116[a][2], 300.117; 8 NYCRR 200.1[cc], 200.6[a][1]; see T.M., 752 F.3d at 161-67; Newington, 546 F.3d at 111; Gagliardo, 489 F.3d at 105; Walczak, 142 F.3d at 132; Patskin v. Bd. of Educ. of Webster Cent. Sch. Dist., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling, or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ. of Borough of Clementon Sch. Dist., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. N. Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobol, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 CFR 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 CFR 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 CFR 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special

classes, special schools, home instruction, and instruction in hospitals and institutions; the continuum also makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 CFR 300.115[b]).

With respect to residential placements, the Second Circuit has stated that "[w]hile some children's disabilities may indeed be so acute as to require that they be educated in residential facilities, it is appropriate to proceed cautiously whenever considering such highly restrictive placements. . . . The norm in American public education is for children to be educated in day programs while they reside at home and receive the support of their families" (Walczak, 142 F.3d at 132). A residential placement is not appropriate unless it is required for a student to benefit from his or her educational program (M.H. v. Monroe-Woodbury Cent. Sch. Dist., 296 Fed. App'x 126, 128 [2d Cir. Oct. 7, 2008]; Walczak, 142 F.3d at 122; Mrs. B., 103 F.3d at 1121-22; see Educ. Law § 4402[2][b][2]; 34 CFR 300.104; 8 NYCRR 200.6[j][1][iii][d]). In general, the Second Circuit has required objective evidence that a student cannot obtain educational benefit in a less restrictive setting before finding that a residential placement is required by the IDEA (M.H., 296 Fed. App'x at 128; Walczak, 142 F.3d at 131-32). Additionally, State law 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]).

As noted above, during the 2016-17 school year, the November 2016 CSE convened to discuss the student's program due to Green Chimneys (day program) reporting "a significant decline in the student's behavior"; the CSE determined that the student required "a higher level of care including psychiatric treatment and increased social skills support" in a residential placement (Joint Ex. 7 at p. 3). According to the assistant director, at that time, she spoke with the parent regarding the student having "wrap-around care" and the importance of having a team approach and there not being enough county supports to provide the "wrap-around care"; she explained to the parent that the residential students at Green Chimneys received medical care, psychiatric care, specific genetic testing, as well as 24-hour supervision, and that a family training component was available (Tr. pp. 28-29, 30, 32).²⁵ The assistant director stated that the residential program at Green Chimneys had behavioral support programs that were built in the residential setting, animal therapy, psychiatric support, dental support and medical support if needed (Tr. p. 38). The student began attending the residential program at Green Chimneys in December 2016 and he remained in the residential program for the remainder of the 2016-17 and 2017-18 school years (Dist. Ex. 1 at p. 1; Joint Exs. 4 at pp. 1, 3; 6 at pp. 1, 3).

At least as early as November 2017, the parent expressed her desire for the student to be moved into a day program (Joint Ex. 44 at p. 1). At that time, the student's treatment team indicated that, in order for the student "to go home, he will need to improve his coping skills to be respectful to adults and peers, build his social skills to relate to peers in appropriate ways, and engage in programs with a reduction in oppositional behaviors" (id.). At that time, the student's anticipated

²⁵ When a student is at risk of future placement in a residential school, the CSE must "request in writing that a designee of the appropriate county or State agency participate in any proceeding of the committee to make recommendations concerning the appropriateness of residential placement and other programs and placement alternatives, including but not limited to, community support services that may be available to the family (8 NYCRR 200.4[d][4][i][b]).

discharge date was listed on his quarterly treatment review as September 2018 (*id.*). This anticipated discharge date continued on the student's quarterly treatment plans in February 2018 and May 2018 (Joint Exs. 41; 43).

In late April 2018, the parent again expressed concerns with the residential program, particularly noting what the parent characterized as the student "heading into crisis and . . . calling out for help" and the student's refusal to return home, exposure to physical aggression and intimidation from peers and staff at Green Chimneys, and general decline in the areas of anxiety and depression (Joint Ex. 52).

The CSE convened on May 14, 2018 and maintained its recommendation for a residential program consisting of a 12:1+2 special class with related services, program modifications, and testing accommodations for the student (Joint Ex. 3 at pp. 1, 9-10). The prior written notice indicated that the CSE did not consider any other options at that time (*id.* at p. 1). The assistant director testified that the CSE recommended a residential placement again based on the student's behaviors and "all of the data and information that was presented at the CSE meeting" (Tr. p. 43). She further testified that there was a consensus that the student continued to require that level of care (*id.*).

In late June 2018, the parent again reached out to the district to express her "reservations about [the student] even needing any sort of residential setting" (Joint Ex. 54). She stated that the residential setting was originally recommended for the "therapeutic environment" but that, after a year and a half, the student was "worse off," again citing concerns about physical aggression by peers and staff (*id.*). The district assistant director responded that the CSE determined after "a lot of consideration" that the student "require[d] the support of a residential placement" and that, therefore, the parent could not send him to Green Chimneys "as a day student"; however, she indicated that the CSE would reconvene and, if it was determined that Green Chimneys was not an appropriate setting, the district could send out referral packets to other residential placements (*id.*). As noted above, on July 18, 2018, the parent requested that the district conduct a re-evaluation of the student to see if a residential placement was absolutely necessary (Joint Ex. 55 at p. 1). On August 13, 2018, the parent informed the district assistant director that she had spoken to the executive director of Green Chimneys, who had assured her that Green Chimneys had room for the student as a day student (Joint Ex. 56 at p. 1). The district assistant director responded that the CSE would discuss the student's progress and placement at the upcoming meeting (*id.*).

The CSE convened on August 17, 2018 at the parent's request to review the student's residential placement at Green Chimneys based on the parent's desire for a day program for the student (Joint Ex. 2 at p. 3). According to the meeting information summary included in the August 2018 IEP, the CSE discussed the purpose of a residential setting and the student's need for "wrap around care with 24 hour milieu support" (*id.* at p. 3). As summarized above, the meeting summary also noted that the student's "academics and behavior have been inconsistent" and "his behavior [wa]s e[r]ratic, disruptive, and disrespectful towards adults" but that the parent reported the student did well at home, was "respectful, complete[d] his work, and engage[d] with peers" (*id.*). However, according to the meeting summary, because the student continued to require clear expectations to continue to practice and learn skills, reinforce positive behaviors, and correct maladaptive behaviors, the CSE recommended continuation of a residential placement (*id.* at p. 4). Additionally, because the team believed the student shared the parent's uncertainty about the Green Chimneys program, the CSE discussed a program search for other residential programs (*id.*).

Finally, the CSE discussed the student's decision to return home every weekend, stating that it was preventing him from practicing skills learned throughout the week in social situations with his peers and in the community (*id.*). The CSE continued its recommendation of a 12-month residential placement at Green Chimneys including attendance in a 12:1+2 special class with related services (*id.* at pp. 3, 4, 10-11). The prior written notice again indicated that no other options were considered (*id.* at p. 2).

The parent testified that she told the August 2018 CSE that the residential program was not working and that she wanted the CSE to compare the data from before the student attended the residential program to afterwards (Tr. pp. 424-25). The parent further testified that the CSE refused her request and that she was trying to prove to the CSE that the residential program was hurting the student (Tr. p. 425). Similarly, the assistant director testified that the parent expressed to her that the student wasn't getting what he needed in the residential program (Tr. p. 46). The assistant director further testified that the parent thought the student was getting worse by attending the residential program (*id.*). The assistant director also testified that there wasn't any "buy-in" from the student or the parent about the program and that the student would say, "I don't care. I don't need to do it" (Tr. p. 48). According to the assistant director, the lack of "buying in" impacted the student's academic progress because, once the trust was broken, it was very hard for the student to comply with the PBIS program (Tr. p. 49). The assistant director testified that the CSE determined the student continued to require a residential placement based on his continued severe behavioral concerns, which she described as "inconsistent, sporadic, disruptive behavior, disrespectful towards adults, refusing to complete work" (Tr. pp. 55-56).

Based on the above, the hearing record indicates that the student had been educated in a residential setting at Green Chimneys since December 2016, and it appears that the district had continually recommended a residential placement at Green Chimneys for the student each year, attributing the recommendations to the student's in-school behaviors. However, while the hearing record reflects the CSE's rationale for the continued recommendation for the residential placement—i.e., that the student required clear expectations to continue to practice and learn skills, reinforce positive behaviors, and correct maladaptive behaviors (Joint Ex. 2 at p. 4)—it is unclear from the hearing record why these interventions and supports could not be delivered in a day program or why the CSE felt that the wrap-around aspect of the residential placement was so crucial. Instead, the explanations offered by the district for the CSEs' views that the student continued to require a residential placement read as foregone conclusions.

As noted above, CSEs should proceed cautiously when recommending a residential placement (*Walczak*, 142 F.3d at 132). Here, while the student attended the day program at Green Chimneys during the 2015-16 school year, it appears that the student made progress in his academic subjects (Joint Ex. 11). Moreover, according to the meeting information summary attached to the March 2016 IEP, the student was making progress academically and behaviorally during the 2015-16 school year (Joint Ex. 8 at p. 3). The meeting information specifically noted that, although at times the student continued to require behavioral support, incidents had decreased (*id.*). With respect to the student's report cards for the 2016-17 and 2017-18 school years, the student was passing his academic subjects while at the residential program in Green Chimneys but his grades had slightly decreased from his time in the day program (*compare* Joint Exs. 12; 13, *with* Joint Ex. 11). Additionally, as discussed above, the parent continued to report that the student was not exhibiting the same behaviors at home as he exhibited at school, that the student was doing well at home and was safe there, and that the residential placement was made due to the student's

behaviors in school (Joint Exs. 2 at p. 3; 17 at p. 35, 41 at pp. 1-2, 47 at p. 3). Accordingly, without the more detailed information about why the student needed a residential placement in order to receive educational benefit, I cannot find that the CSEs took the cautious approach required in recommending that the student be removed from his home.

Additionally, under the present circumstance—where the parent had been asking the CSE to consider a day treatment program instead of a residential placement—it would have been particularly helpful to understand the CSEs' 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 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 a statement of reasons for why such a plan was not currently appropriate. Further, Green Chimneys' anticipated discharge date for the student of September 2018 (see Joint Exs. 41 at p. 3; 43 at p. 3; 44 at p. 3) was apparently abandoned without explanation when the CSEs continued to recommend that the student attend the residential placement for the 2018-19 school year.

Based on the above, there is not enough information in the hearing record that shows that a residential placement was required to enable the student to receive an educational benefit for the 2018-19 school year (see M.H., 296 Fed App'x at 128). 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 restrictive setting (Educ. Law § 4402[2][b][2]; 8 NYCRR 200.6 [j][1][iii][d]). Accordingly, the district failed to show that it satisfied the IDEA's LRE mandate for the 2018-19 school year and the evidence in the hearing record does not support the IHO's finding that the district offered the student a FAPE for the 2018-19 school year.

C. 2019-20 School Year

1. Sufficiency of Evaluative Information/Consideration of Special Factors— Interfering Behaviors

Turning to the parent's allegations regarding the sufficiency of the evaluative information before the May 2019 CSE and the district's failure to conduct an FBA or develop a BIP for the student for the 2019-20 school year as of the date of the May 2019 CSE, the legal standards set forth above shall be taken into account, as well as the recitation of the information available to the CSEs thus far and the parent's communicated concerns.

First, it is necessary to examine the information in the hearing record regarding the student's progress in the Green Chimneys residential program during the 2018-19 school year leading up to the May 2019 CSE meeting. The hearing record contains quarterly treatment reviews for the 2018-

19 school year from September 2018, November 2018, and February 2019 (Joint Exs. 34, 37, 39). The goals and planning information contained in the 2018-19 treatment reviews appear to be very similar to the information found in student's treatment plans for the 2017-18 school year (compare Joint Exs. 41; 43; 44; 46, with Joint Exs. 34; 37; 39). A review of the 2018-19 treatment review reports shows that the student continued to demonstrate inconsistent progress and struggled with all four treatment plan goals (Joint Ex. 34; 37; 39).

The September 2018 quarterly treatment review report indicated that the student's behavior was inconsistent, and he continued to struggle to meet his treatment goals (Joint Ex. 39 at pp. 1-2). The anticipated discharge date for the student was reported as "[u]nknown" (id. at p. 3). Subsequently, when staff met for the student's November 2018 quarterly treatment review, they revised his treatment goals and objectives, generally increasing the number of prompts provided to the student in order to get him to demonstrate the desired behavior (Joint Ex. 37 at pp. 1-2).²⁶ Despite this change, the February 2018 quarterly treatment review report indicated that the student continued to struggle and demonstrate inconsistent progress with all four of his goals (Joint Ex. 34 at p. 2). The review team reported that the student struggled to accept help, noting that it could take many prompts for him to do so, and that when the student was not in a positive mindset, he could become stuck in his thoughts and could not let the situation go (id. at p. 1). The student's teacher reported when she used "TCI skill hurdle help" to give the student more support he would respond with inappropriate language or would throw things at her (id.). In the dorm, the student often provoked peers instead of asking for help, and when he did ask for help, he often would not accept the help offered (id.). At home, the parent reported that the student did not have issues accepting help (id.). The review team determined that the student's first goal should be revised to "will ask and accept help within three prompts" (id.). The student demonstrated inconsistent progress toward his second goal, "completing a task within four prompts," and his teacher reported that the student had been "struggling more often in the past three months in meeting this goal than she ha[d] seen in the past" (id. at p. 2). The parent reported that the student was struggling with this goal at home as well and had started to become verbally aggressive with her when told to turn off his video game (id.). In addition, the student had begun to call his mother names (id.). The review team decided that the social worker would create a chart to track the student's behaviors, which appeared to be a tally system used to reward the student when he was able to follow directions and complete a task (id.). The team also decided to continue the student's second goal and to discuss the efficiency of the tally chart at the next quarterly review (id.). With regard to the student's third treatment goal, the February 2019 treatment review report indicated that the student showed an inconsistent ability to accept boundaries and interact appropriately with peers (id.). Green Chimneys staff reported that in both the dorm and at school the student required many prompts to accept boundaries with peers and staff, and he would be disrespectful and curse at staff when he was not accepting boundaries (id.). On the fourth goal, the team reported that the student continued to struggle with using coping strategies and that he would often revert to cursing as a coping skill (id.). The review team noted that the student engaged in negative self-talk and became disrespectful toward staff (id.). In therapy, the social worker reported that at the beginning of the quarter the student showed improvement in his ability to identify coping skills; however, the student stated that he did not have any coping skills and that they did not work for him (id.). The

²⁶ The names of the people listed as present at the November 2018 quarterly review meeting are different than those listed within the narrative as reporting the updated information (Joint Ex. 37 at p. 1; see Joint Ex. 37 at pp. 1-3).

review team determined that the student's primary maladaptive behavior was running out of program and decided to work with him to identify "safety spots" on campus that he could go to when he was feeling triggered (*id.*). The team also decided that the social worker would work with the student to introduce new coping skills and create a coping skill chart (*id.* at p. 3). The parent suggested using a weighted blanket as it had helped the student to calm down in the past when he was becoming escalated (*id.*). The team agreed to continue the student's third and fourth treatment goals (*id.* at pp. 2-3). The discharge planning and other case management issues section of the February 2019 quarterly treatment review remained the same as the previous quarterly treatment review, and the anticipated discharge date continued to be "N/A" (*id.* at p. 3).

For the 2018-19 school year, the hearing record contains childcare case conference quarterly reports from July 2018, October 2018, and January 2019 which provide much of the same information as the quarterly treatment reviews (Joint Exs. 35, 38, 40). The case conference reports show that throughout the 2018-19 school year the student's adaptability, attention/concentration, opposition, anxiety, impulsivity, emotional control, anger control, and decision making/judgement were rated as "inadequate" while his relationship with peers was rated as grossly impaired or inadequate (Joint Exs. 35; 38; 40).²⁷

The January 2019 childcare case conference quarterly report noted some improvement and some regression in the student's behavior when compared to the October 2018 report (compare Joint Ex. 38 with Joint Ex. 35). The student's social relationship with adults improved from inadequate to adequate and the following skills "improved" from inadequate to marginal or borderline: anger control, sleep, self-harm, and bullying (Joint Ex. 35 at p. 1). With regard to the Green Chimneys life skills program, the quarterly report indicated that the student struggled to remain in the program, which addressed decision-making, and would ask to take a break or walk out of the program (*id.* at p. 3).

Additional reports from the student's recreational therapist indicated that the student struggled to participate in recreational therapy groups and that when he attended a group he would become a distraction by yelling out inappropriate comments, cursing, and provoking the other participants (Joint Exs. 33; 36). Quarterly reviews written in February and May 2019 described incidents in which the student began shouting inappropriate sexual comments, using inappropriate language, and getting louder when asked to stop, causing the group to leave the dorm in order to give the student some space (Joint Exs. 33; 36). The February and May 2019 reports explained that the student attempted to participate in a few specialized groups but that he was asked to leave because he was falling asleep, using inappropriate language, or needed a lot of redirection from staff (*id.*). During one group the student engaged in inappropriate physical behaviors and refused to leave (*id.*).

The hearing record shows that the student's individual crisis management plan for the 2018-19 school year remained the same as the previous school year's until October 2018 when "elopement - recently running towards the road" was added to the student's high risk behaviors, and the format of the intervention strategies was changed (Joint Ex. 25 at pp. 12-13; see Joint Ex. 25 at pp. 14-18). The format change provided direction to staff on what to do, as well as what not

²⁷ The rating scale, without further explanation, is confusing - for example it is not clear what "inadequate" self-harm means.

to do, in order to prevent the student's behaviors from escalating during pre-crisis, triggering, escalation, outburst, and recovery stages (Joint Ex. 25 at pp. 12-13). The subsequent individual crisis management plans remained the same until February 2019 when "low frustration tolerance - recently walking out of program over smaller issues, unwilling to work with staff," and "foul language that triggers others around him" were added to current issues and potential triggers (id. at p. 4). The current issues and potential triggers that were added in February 2019 were removed from the March 2019 individual crisis management plan and "struggles - hyperactive peers, engages in negative behaviors for attention" were added to the sensory modulation/sensory tools section of the plan (id. at p. 2). In addition, a note related to a recent incident in the dorm was added to high risk behaviors (id. at p. 2). The April 2019 individual crisis management plan further defined some of the student's current issues noting that the student cursed and escalated when hyperactive and that he struggled to communicate his needs which lead to defiant behavior (id. at p. 1). The list of the student's high-risk behavior was also modified to indicate that the student engaged in "sexually inappropriate" behavior, which included screaming "rape," and that his verbal aggression was racially and sexually explicit (id.). The April 2019 individual crisis management plan also reflected a change in format for intervention strategies but still provided detailed descriptions of what to avoid and what to provide to the student to prevent his behaviors from escalating (id.).

Between September 2018 and May 2019 Green Chimneys staff filed approximately 24 incident reports related to the student's maladaptive behaviors, which included verbal aggression, property destruction, running away from staff, sexual verbalizations/gestures, and suicidal verbalizations (Joint Ex. 30).²⁸ In addition, Green Chimneys records show that the student went to the redirection room on approximately 120 occasions between September 2018 and May 2019, in some instances by request and in other instances as a result of verbal aggression, walking out of class/program, disruptive behavior, sexual verbalization/gestures toward staff, disrespectful behavior, and provoking peers (id.).

In addition to the quarterly reviews and individual crisis management plans, psychiatric notes contained in the student's health records log described the student's functioning during the 2018-19 school year (see Joint Ex. 17 at pp. 1-24). A review of these progress notes shows that the student continued to exhibit disrespectful, oppositional, defiant, and inappropriate behaviors with both staff and peers; engaged in self-harm on one occasion; and often expressed how unhappy he was attending Green Chimneys residential program (Joint Ex. 17 at pp. 3, 9, 13, 15-16, 19, 21, 23). The May 2019 psychiatric progress note indicated that Green Chimneys had recently suggested a "transfer of placement," and the psychiatric nurse practitioner opined that because the parent was uncooperative with the program the student was repeating "her sentiments and [wa]s not engaged or cooperative in his treatment" (id. at p. 3).

The hearing record contains a March 2019 teacher's report which appears to have been discussed at the May 2019 CSE meeting (Tr. p. 208; Joint Exs. 1 at pp. 3-4; 19). The teacher's report indicated that the student was performing at a fifth to sixth-grade level in reading decoding and comprehending; a fifth-grade level in math computation and conceptual skills, and a fourth grade level in writing (Joint Ex. 19 at p. 1). The teacher reported that the student had displayed

²⁸ The incident reports confirmed that the student did not have a BIP during the 2018-19 school year (Joint Ex. 30 at pp. 32, 48, 60, 64, 68, 76, 84, 87, 95, 99).

difficulty during the year in academics and in classroom behavior, but he was "making strides to improve" (*id.*). The teacher further reported that the student could go from being highly motivated to succeed to struggling tremendously and that at times he would refuse to complete work and disrupt the class (*id.*). Additionally, when the student was asked to stop, he would become inappropriate, curse and act rudely towards staff (*id.*). The teacher opined that the student was a bright child who when motivated did very well academically and socially (*id.*). She noted that he had great potential to do well but that his behavior and refusal to participate in programs and class was preventing him from showing his full potential (*id.*). The teacher explained that the student was working on the sixth-grade curriculum and could work independently in most areas, but he benefitted from smaller group review in math (*id.*). With regard to behavior and social interaction, the teacher rated the student as "fair" and noted that he had difficulty (*id.*). She indicated that the student could be helpful and kind to his peers when "in a good place" and that he would "go out of his way to help struggling students or try to cheer peers up" (*id.* at p. 2). She explained that the student did better in smaller groups during social interactions (*id.*). According to the teacher, the student was "on a tally system and sticker chart," which could be useful at times, but at other times the student would state that he "d[id] not care about anything" (*id.*). The teacher opined that even though the student had made improvements during the year, his behavior was hindering his academic progress and his progress at Green Chimneys (*id.*).

With respect to the educational planning for the student's 2019-20 school year, the CSE convened on May 28, 2019 to conduct the student's annual review and to develop the student's IEP (Joint Ex. 1 at pp. 1, 3). According to the meeting information summary attached to the May 2019 IEP, the CSE considered information provided by the student's teacher, counselor, and occupational therapist (*see id.* at pp. 3-4).²⁹ The classroom teacher reported that the student exhibited difficulty in academics and in the classroom throughout the school year and indicated that he could go from being highly motivated to struggling tremendously (Joint Ex 1 at p. 3). According to the teacher, the student's behaviors in the classroom included, but were not limited to, refusal to follow directions, the use of vulgar language, and walking out of the classroom (*id.*). She reported that the student's negative behaviors occurred daily and that he was the lowest earner in the PBIS program due to his behavior (*id.*). With regard to counseling, Green Chimneys staff reported that when the student was focused and "in a good mindset" he was able to participate in sessions but that he continued to struggle with processing his emotions and connecting them to his behavior (*id.*). Additionally, staff noted that at times the student became angry in counseling sessions and would walk out of group or family sessions, he did not attend group sessions, and cursed at his social worker or told her to "go die" (*id.*). The occupational therapist reported that the student was talkative and energetic; typically engaged well in most of the presented activities; and had met his OT goals and no longer required this support in the school setting (*id.*).³⁰ The CSE noted that the parent took the student home every weekend and occasionally during the week (*id.* at p. 4). The meeting summary indicated that the student did not see the medical staff or

²⁹ According to the IEP, the May 2019 CSE considered the results of the same evaluations as the May 2018 CSE and the August 2018 CSE (*compare* Joint Ex. 1 at pp. 2, 5, *with* Joint Exs. 2 at pp. 1, 4; 3 at pp. 1, 4). In addition, the May 2019 CSE also included a social worker and special education teacher, who participated in the student's treatment team meetings at Green Chimneys during the 2018-19 school year (*compare* Joint Ex. 1 at p. 3, *with* Joint Exs. 19; 20 at p. 3; 21 at p. 3; 34 at p. 1; 37 at p. 1).

³⁰ The parent was not in agreement with discontinuing OT (Joint Ex. 1 at pp. 3-4).

psychiatrists at Green Chimneys as components of the residential placement's wrap around care (id.). According to the meeting summary, the parent indicated that "she was unsure if she would continue in the program for the summer months" (id.). Green Chimneys determined that it could no longer meet the student's therapeutic needs (id.).

The May 2019 IEP present levels of academic performance indicated that the student was a multi-sensory learner, who, when in a negative mind set had difficulty completing class assignments and could display difficulty in transitioning from one activity to another as well as from classroom to program (Joint Ex. 1 at p. 6).³¹ Additionally, the IEP stated that the student would at times refuse to complete work which significantly impacted his academic performance and that he needed constant reminders and staff prompting to stay on task and complete his work (id.). The IEP indicated that the student enjoyed reading and would occasionally use it as a coping skill but that he would refuse to read material that he did not find interesting (id.). Additionally, the student had good fluency and recall, could determine the message or "lesson of different literatures," and could use literary elements to identify cause and effect, word meaning, and point of view (id.). The IEP noted that while the student had creative ideas and enjoyed writing, he struggled with the writing process of planning, revising, and editing (id.). The student could produce well thought out work when allowed to type; however, he would often answer questions using incomplete sentences and would do "the bare minimum needed" (id.). The IEP indicated that the student did well in mathematics and that it was an area of strength for him but that he struggled with learning new concepts and was quick to give up on work, and he would also give up quickly if he thought the work was too easy (id.).

With regard to social development, the May 2019 IEP indicated that the student was creative, kind, smart and caring but that he could become dysregulated and "hyper when the environment around him [wa]s high energy" (Joint Ex. 1 at p. 7). The IEP explained that the student became disruptive and inappropriate around his peers "in hopes of gaining a reaction and building connections" with them (id.). The IEP noted that the student could become verbally inappropriate around adults and staff and although he trusted very few adults, he was motivated to maintain relationships (id.). With regard to social development, the May 2019 IEP stated that the student needed to improve his ability to make positive connections to build relationships with peers and staff while ignoring negative peer interactions; and to improve his ability to recognize when he was dysregulated and use a coping skill (id.).

The May 2019 CSE determined that in order to address the student's management needs, he required a structured environment with clear and consistent rules, expectations, and routines, as well as encouragement and positive reinforcement to feel successful in his academic abilities (Joint Ex. 1 at p. 7). Additionally, the IEP indicated that the student needed prompting to stay focused and to interact with peers, and support in expressing feelings of sadness and anger appropriately (id.). The IEP noted that the student's difficulties with emotional regulation and behavioral management had a significant impact on his involvement and progress in the general education curriculum (id.).

³¹ The May 2019 IEP present levels of performance appear to be very similar, if not exactly the same at times, to the August 2018 IEP present levels of performance (compare Joint Ex. 1 at pp. 6-7 with Joint Ex. 2 at pp. 6-7).

With regard to the student's needs relating to special factors, the May 2019 IEP indicated that the student needed strategies, including positive behavioral interventions, supports and other strategies to address behaviors that impeded his learning or that of others but that he did not require a BIP (Joint Ex. 1 at pp. 7-8).

With regard to the student's behaviors throughout the 2018-19 school year, the student's teacher testified that the student struggled a bit in the beginning but was then able to develop relationships with staff and things improved (Tr. pp. 264-65). However, she also explained that the student's motivation changed from day to day and he could have three fantastic days in a row and then three weeks of negative behaviors and that it really depended on the moment (*id.*). The teacher testified that, during the 2018-19 school year, the student would be "very disruptive in the classroom," use very vulgar language, and would walk out of the classroom for extended periods of time (Tr. p. 209). She further explained that when he left the classroom, she, along with staff from student support or his social worker would try to get him to deescalate, but oftentimes they had to "wait it out" and that could take from five to 30 minutes (*id.*). The teacher explained that the other students in the class knew to ignore the student's profane language but sometimes they talked back to the student to try to get him to stop and other times they would join in and it became "a lot more disruptive to the classroom" (Tr. p. 211). She explained that to maintain the student's motivation, when staff noticed the student was beginning to struggle they would provide one-on-one attention, lots of visuals, or try to get him unstuck if he was stuck on something, in order to prevent escalation (Tr. p. 212). With regard to the tally system and sticker chart, the teacher explained that the sticker chart was used to decrease the amount of vulgar language the student was using (*id.*). For every period the student did not curse he received a sticker and when he acquired ten stickers, the student was able to get cards (*id.*). The teacher indicated that the sticker chart lasted approximately one week (*id.*). She testified that if the student knew he wasn't going to earn enough stickers it would cause him anxiety, which in turn caused "some issues also" (Tr. pp. 212-13). The tally system was used for following directions: if the student was able to follow a direction within three prompts, he got a tally mark (Tr. p. 212). According to the teacher, the student was motivated by tally marks because he was getting rewards at home for tallies (*id.*). The teacher reported that the tally system "had its moments" and Green Chimneys "kept it going for the rest of the school year" (Tr. pp. 212-13). The student would say that he wanted to earn his tallies for the week and that he was "going to do really well this week" (Tr. p. 213). In addition, the teacher testified that compared to the 2018-19 school year the student was not walking out of the program as much but that he was using vulgar language more frequently which "hindered" classroom lessons (Tr. p. 214). She explained that, if she asked the student to step outside for a few minutes, he would refuse to leave and that in turn escalated the other students (*id.*). The teacher testified that an FBA was not implemented during the 2018-19 school year because Green Chimneys was using a tally system and sticker chart and provided the student with extra support in the student's areas of needed (Tr. p. 216).

With respect to the PBIS program at Green Chimneys, the district's assistant director testified that, based on the report made by Green Chimneys in May 2019, the PBIS program was not successfully managing the student's challenging behaviors (Tr. p. 106). She further testified that that PBIS was supplemented with an individualized behavior program that was based on the student's needs and through treatment meeting plans, individualized classroom management goals, and Green Chimneys working together with the parent and herself to develop different plans that could be carried over at home (Tr. pp. 106-07). The assistant director testified that the student had

not had a BIP since prior to starting at Green Chimneys (Tr. p. 102). The assistant director further explained that an FBA was not recommended by the May 2019 CSE because typically when the CSE recommended an FBA it was in a "school-based setting, a public school setting, a BOCES setting to identify what the behaviors are, the frequency, and come up with a plan, usually one or two behaviors" (Tr. p. 121). The assistant director noted that the student experienced several behaviors and the purpose of him attending Green Chimneys therapeutic program was that the entire program worked toward behavior (*id.*). She further noted that the student had a classroom plan and a treatment plan (*id.*).

By February 2019, the student's behaviors had escalated to a point that all of his skills were considered inadequate, he was not using coping strategies that had been taught, prompted, reminded, and supported throughout the student's time at Green Chimneys (Joint Ex. 34 at p. 2). The student's monthly crisis management plans rarely changed and when changes were made, they were mainly format changes with very little revision to the intervention strategies (*see* Joint Ex. 25). Overall, it appears that the student's program continued month to month with very few changes even though the student was making inconsistent or minimal progress towards his treatment goals (*see* Joint Exs. 20; 25; 34; 35; 37; 38; 39; 40).

Similar to the discussion above regarding the 2018-19 school year, the evidence in the hearing record shows that the district did not conduct a re-evaluation of the student per the parent's request and did not otherwise conduct an FBA or develop a BIP despite the student's interfering behaviors, Green Chimneys use of a "redirection room," and the inconsistent progress that the student exhibited in response to the interventions utilized during the 2018-19 school year. While Green Chimneys collected some data regarding triggers and consequences for the student's behavior, in the form of incident reports, there is no evidence that either Green Chimneys or the district used this data to establish a baseline of the frequency, duration, intensity or latency of the student's maladaptive behaviors or that it examined how the student's behavior varied across activities, settings, people or times of day. Based on the legal standards set forth above, the district's failure to conduct an FBA or develop a BIP constituted a procedural violation, which contributed to a denial of a FAPE for the student during the 2019-20 school year, particularly given the insufficiency of the evidence in the hearing record to support the CSE's continued recommendation of a residential placement for the student for the 2019-20 school year, discussed below.

2. Appropriateness of Residential Placement and LRE

On appeal, the parent repeats the same arguments related to the district's recommendation for placement of the student in a residential program for the 2019-20 school year as she raised for the 2018-19 school year. Taking into account the legal standards set forth above relating to LRE considerations and residential placements, the evidence in the hearing record is again insufficient to support the CSE's continuation of the recommendation for a residential placement for the student for the 2019-20 school year.

With respect to the 2019-20 school year, the CSE convened on May 28, 2019 to conduct the student's annual review and to develop the student's IEP (Joint Ex. 1 at pp. 1, 3). The CSE noted that, at parent request, the student was referred to an internal review for possible discharge to the day program, which was denied due to the determination that he required a higher level of care and support (*id.*). The parent reported that the student no longer took any medication and

expressed that she was unsure the student would attend the summer program (*id.*). Green Chimneys staff then informed the CSE that, if the student was not in attendance for the summer months, they could not hold a seat for him because he was recommended for a 12-month program (*id.* at pp. 1-2, 4). The CSE determined that the student continued to require the support of a 12-month therapeutic residential setting; however, Green Chimneys determined that they could no longer meet the student's therapeutic needs and were concerned with his safety on campus (*id.* at pp. 2, 4). The May 2019 CSE recommended conducting a program search to several therapeutic residential schools within the State (*id.*). Ultimately, the May 2019 CSE recommended that the student attend a 12:1+2 special class in a State-approved nonpublic residential placement with counseling services once per week individually for 45 minutes and once per week in a small group for 30 minutes, along with annual goals, supplementary aids and services, program modifications and accommodations, and testing accommodations (*id.* at pp. 8-12).³² The May 2019 prior written notice reported that no other options were considered at that time (Joint Ex. 1 at p. 2).

According to the assistant director, the parent did not consent to sending out referrals therefore, none were sent at that time (Tr. p. 64-65). She testified that subsequent to the initial pendency order approximately 11 to 12 referrals were sent out to other programs; however, while several programs requested additional information only one had expressed interest in accepting the student (Tr. pp. 62-63, 65). The parent did not respond to the invitation to tour the program so that program ended up rejecting the student (Tr. p. 63).

Based on the information discussed in more detail above, the student's behaviors were becoming more severe while he was attending the residential placement at Green Chimneys (*see, e.g.,* Tr. pp. 57-58).³³ However, the parties appear to disagree as to the reasons as to why this happened, with the district indicating that the staff at Green Chimneys "felt neither the Student nor the Parent trusted Green Chimneys as educators and clinicians" and further noting that information in the IEP suggested the student was no longer complying with the program, particularly in that the student was not seeing the medical team or psychiatrists on campus as part of the residential "wrap-around care" (Dist. Post H'rg Brief at p. 4; *see* Tr. pp. 59-61; Joint Ex. 1 at pp. 1, 4).³⁴ The parent testified as to the inappropriateness of Green Chimneys raising concerns regarding the student's safety (*see* Tr. pp. 388-95), and pertinent to the parent's trust in the program, in a May 2018 email to Green Chimneys and district staff, the parent said she believed the student's not being in a safe environment was contributing to his overall stress and anxiety (Parent Ex. F).

³² The hearing record showed that Green Chimneys provided the student with a one-to-one aide during the 2019-20 school year; however, this does not appear to be a recommendation in the May 2019 IEP (Tr. p. 216; Joint Ex. 1 at pp. 3-12).

³³ With respect to the student's functioning at home, the parent noted during the February 2019 treatment review that the student "struggled lately" in completing tasks with four prompts and had recently verbally aggressive with her when asked to turn off his video games (Joint Ex. 34 at p. 2).

³⁴ As discussed in more detail above, the primary reason provided by the district for the initial placement of the student in a residential program was the availability of "wrap-around care" (Tr. pp. 28-29).

Adding to the lack of clarity as to what was causing the student's difficulties at Green Chimneys, as of the May 2019 CSE meeting, the district had not yet conducted an FBA.³⁵ In addition, based on the standards set forth above, the May 2019 CSE failed to set forth or discuss a plan as to when the student could return to a less restrictive setting. As to Green Chimneys' plan for the student's discharge, it appears to have become less clear over time. The September 2018 quarterly treatment review under the heading "Discharge Plan & other Case Management Issues (including barriers to discharge)" described that the student needed "to continue to show consistent progress on his treatment goals to build and maintain relationships with peers using appropriate language and social skills" (Joint Ex. 39 at p. 3). The anticipated discharge date was noted to be "unknown" (*id.*).³⁶ This was a change from earlier quarterly treatment reviews, which had indicated September 2018 as the anticipated discharge date (compare Joint Ex. 39, with Joint Exs. 41 at p. 3; 43 at p. 3; 44 at p. 3). Additionally, the November 2018 quarterly treatment review under the same "discharge plan" heading indicated that the student needed to continue to show consistent progress on his treatment goals with accepting limits and ability to build and maintain relationships with peers using appropriate language and social skills, specifically noting that he continued to struggle with managing his anxiety (Joint Ex. 37 at p. 3). The anticipated discharge date was changed to "N/A" (not applicable) (*id.*). Furthermore, the student's discharge date was "N/A" in the February 2019 quarterly treatment review and there was no change in the information provided under the discharge planning heading (compare Joint Ex. 37 at p. 3, with Joint Ex. 34 at p. 3).

Similar to the finding above regarding the 2018-19 school year, there is not enough information in the hearing record to show that the residential program was necessary to enable the student to receive an educational benefit for the 2019-20 school year (see M.H., 296 Fed Appx at 128). In addition, the CSE failed to reflect that it considered less restrictive options for the student or that it had a proposed timetable as to when the student could transition into a less restrictive setting. Therefore, the district failed to show that it satisfied the IDEA's LRE mandate for the 2019-20 school year and therefore, the district denied the student a FAPE for the 2019-20 school year.

D. Relief

As described in detail above, a review of the hearing record supports a finding that the district failed to establish that the May 2018, August 2018, and May 2019 CSE's recommendations of a residential placement were necessary to enable the student to benefit educationally, and therefore the district denied the student a FAPE in the LRE for the 2018-19 and 2019-20 school years. As relief, the parent requests an order directing the district to identify and secure an appropriate day program for the student consistent with the recommendations of the IEE and FBA already ordered by the IHO and for the CSE to develop an IEP for the 2019-20 school year that includes a provision for staff training and ongoing bi-weekly consulting services by the professional conducting the FBA for the duration of the 2019-20 school year. The parent also

³⁵ Green Chimneys completed an FBA of the student in December 2019 while the impartial hearing was pending (Dist. Ex. 3).

³⁶ The student's teacher testified that they did not discuss the student's discharge at these quarterly treatment meetings (Tr. p. 235).

requests a declaratory finding that a residential program for the student is a violation of the IDEA and New York law.

Awarding prospective placement of a student, under certain circumstances, has the effect of circumventing the statutory process, pursuant to which the CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing the student's needs (see Adams v. Dist. of Columbia, 285 F. Supp. 3d 381, 393, 396-97 [D.D.C. 2018] [noting with approval the hearing officer's finding "that the directives of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective placement in a private school"]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008] [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]).

This is especially true here, as the 2019-20 school year has essentially been completed and the CSE should have met to develop the student's program for the 2020-21 school year (see 20 U.S.C. § 1414[d][4][A]; Educ. Law § 4402[2]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]). In addition, since the May 2019 CSE meeting, the district has completed an October 2019 psychoeducational evaluation, an October 2019 social history update, and a December 2019 FBA (Dist. Exs. 1-3). The IHO also awarded the parent an independent FBA and an independent psychiatric evaluation and directed the CSE to convene within 15 days of receiving the evaluations (IHO Decision at p. 26). Neither party appealed from the IHO's decision regarding the evaluations, so at this point the parties should be moving forward with having them completed. Accordingly, when the CSE reconvenes it will have additional information to consider and should have the first attempt to determine a placement for the student along the continuum of services, assessing the extent to which the student can be educated with nondisabled peers in a public school setting before considering more restrictive nonpublic school options (see E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *15 [E.D.N.Y. Aug. 19, 2013] [explaining that "under the law, once [the district] determined that [the public school setting] was the least restrictive environment in which [the student] could be educated, it was not obligated to consider a more restrictive environment, such as [the nonpublic school]"; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *7-*8 [S.D.N.Y. Mar. 19, 2013] [finding that "[o]nce the CSE determined that [public school setting] would be appropriate for the [s]tudent, it had identified the least restrictive environment that could meet the [s]tudent's needs and did not need to inquire into more restrictive options such as nonpublic programs"]). Additionally, as discussed in more detail above, prior to recommending a residential placement for the student, the district must first 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]).

While I understand the parent's frustration with this process, especially considering her belief that the district has delayed evaluating the student, this is not one of those few cases where a prospective placement might be appropriate (see Connors v. Mills, 34 F.Supp.2d 795, 799, 804-06 [N.D.N.Y. Sept. 24, 1998] [noting a prospective placement would be appropriate where "both the school and the parent agree[d] that the child's unique needs require[d] placement in a private non-approved school and that there [we]re no approved schools that would be appropriate"]).

Accordingly, the CSE should reconvene and consider the additional evaluations, as well as all other non-residential possibilities, prior to deciding whether the student needs to be in a

residential program. Anything less would eliminate the important statutory purpose of attempting, whenever possible, to have disabled students meaningfully access the public school system each year by first attempting placement in a public school (see Cooke Center for Learning and Dev. v. Mills, 19 A.D.3d 834, 836 [3rd Dep't 2005] ["The federal law prefers a 'public' education, where a 'child is educated in the school that he or she would attend if nondisabled,' if possible"]; Matter of Pelose, 66 A.D.3d 1342, 1344 [4th Dep't 2009] ["Indeed, the central purpose of the IDEA . . . and article 89 of the Education Law . . . is to afford a 'public' education for children with disabilities"]).

After due consideration of the foregoing, the district shall be required to provide the parent with prior written notice on the form prescribed by the Commissioner, specifically indicating whether the CSE recommended or refused to recommend such services on the student's IEP and explaining the basis for the CSE's recommendation therein, as well as describing the evaluative information relied upon in reaching these determinations (8 NYCRR 200.5[a]; see 34 CFR 300.503[b]). Moreover, the CSE must consider whether the student can be successfully placed in a non-residential program. If the parent continues to disagree with the CSE's recommendation for the student's program for the 2020-21 school year, she may obtain appropriate relief by challenging the district's determinations regarding that school year at that time (see Eley v. Dist. of Columbia, 2012 WL 3656471, at *11 [D.D.C. Aug. 24, 2012] [noting that prospective placement is not an appropriate remedy until the IEP for the current school year has been completed and the parent challenges the IEP for the current year]).

VII. Conclusion

In summary, the evidence in the hearing record establishes that, contrary to the IHO's decision, the district failed to meet its burden to show that it offered the student a FAPE in the LRE for the 2018-19 and 2019-20 school years. While the parent's request that the CSE be required to convene and recommend a non-residential placement is denied, the CSE shall be required to convene and consider the new evaluative information available to it and the possibility of a non-residential placement for the student consistent with the above.

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated April 30, 2020, is modified by reversing that portion which found that the district offered the student a FAPE for the 2018-19 and 2019-20 school years, directed the district to place the student in a residential program, and directed the student to remain at Green Chimneys until a new residential program could be located.

**Dated: Albany, New York
June 26, 2020**

**SARAH L. HARRINGTON
STATE REVIEW OFFICER**