



The University of the State of New York

The State Education Department

State Review Officer

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No. 22-037

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

Appearances:

Harris Beach PLLC, attorneys for petitioner, by Howard J. Goldsmith, Esq. and Anne M. McGinnis, Esq.

Law Office of Courtney L. Haas LLC, attorneys for respondents, by Courtney L. Haas, 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 district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') daughter for the 2021-22 school year. The appeal must be sustained in part.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The student has "significant global delays" secondary to diagnoses of infantile spasms and Lennox-Gastaut Syndrome (Dist. Ex. 3 at p. 5; 4 at p. 1). The student is nonverbal, requires physical assistance for all gross motor activities, and maximal assist for all activities of daily living (ADLs) in the school environment (Parent Ex. F at p. 2; Dist. Ex. 3 at p. 5; 7 at p. 2). The student experiences seizures during the school day and requires close supervision (see Dist. Ex. 12). .¹

¹ The student does not reside with her parents; according to a letter written by the parents, the student resides with a family care provider who the parents have given "full charge of [the student's] personal, medical, educational etc. needs as her parent-legal guardian" and who the parents appointed "to make all decisions on her behalf" (Dist. Ex. 11).

On February 28, 2020, a committee on preschool special education (CPSE) met to determine the student's eligibility for 12-month services as a preschool student with a disability (see Parent Ex. J). Based on the student's "significant delays across all developmental domains" and to prevent "substantial regression" the CPSE recommended that the student attend a 6:1+2 special class and receive three 30-minute sessions per week of individual speech-language therapy; three 30-minute sessions per week of individual occupational therapy (OT); and three 30-minute sessions per week of individual physical therapy (PT) during July and August 2020 (Parent Ex. J at pp. 2, 12). The CSE also recommended that the student be provided with special transportation, consisting of transportation in a small bus or vehicle with adult supervision in the form of nursing services (Parent Ex. J at p. 14). The CSE meeting information summary indicated that the student had a private duty nurse (Parent Ex. J at p. 1).² The nurse accompanied the student to preschool (Tr. pp. 1042-43, 1331-33).

Additionally, on February 28, 2020, a CSE convened to develop an IEP for the student for the 2020-21 school year (kindergarten) with implementation beginning September 9, 2020 (see Parent Ex. I). The CSE found the student eligible for special education as a student with multiple disabilities and recommended that she attend a 12:1+4 special class in the student's home public school (id. at pp. 8, 10).³ Additionally, the CSE recommended the following related services for the student: three 30-minute sessions per week of individual speech-language therapy; three 30-minute sessions per week of individual OT; and three 30-minute sessions per week of individual PT (id. at p. 8). The February 2020 CSE also recommended supports for school personnel on behalf of the student consisting of two 15-minute sessions per day of skilled nursing services; a 1:1 aide as needed throughout the day; three 30-minute sessions per week of OT classroom consultation; four 30-minute sessions per week of PT classroom consultation; and five 30-minute sessions per week of speech-language therapy classroom consultation (id.). Lastly, the February 2020 CSE recommended special transportation consisting of door-to-door transportation on a small bus or vehicle with an attendant, accommodation for a manual wheelchair, and adult supervision in the form of nursing services (id. at p. 10).

According to the parent, the CSE did not inform her that the student would not be able to attend school with a 1:1 nurse and she did not learn that the student could not have a 1:1 nurse at the district public school until she attempted to send the student to school in September 2020 (Tr. pp. 1055-58, 1119-21, 1131, 1134-35). The parent testified that she did not send the student to the assigned district public school (Elmwood) and that she kept the student at home from September 2020 until April 2021 when the student began attending the Board of Cooperative Educational Services (BOCES) Jesse J. Kaplan School (Kaplan) (Tr. pp. 1120-21; see Tr. p. 1211, 1288; Parent Ex. F at p. 2; Dist. Ex. 2 at p. 2).⁴

² The parent reported that the nurse was paid for by Medicaid (Tr. p. 1058).

³ The recommended class included a classroom nurse (see Tr. pp. 350-51, 361).

⁴ The hearing record indicates that the student received some services from Elmwood during the 2020-21 school year (see Tr. pp. 1370; Parent Ex. K). After the parent brought a due process complaint notice in December 2020 regarding the 2020-21 school year, the parent and district came to some sort of agreement as to placement of the student at Kaplan for the 2020-21 school year (see IHO Ex. IV at p. 2).

On June 21, 2021, the CSE convened for the purposes of a reevaluation and annual review and recommended that the student continue to be classified as a student with multiple disabilities (see Dist. Ex. 2). The June 2021 CSE continued to recommend that the student attend the district 12:1+4 special class at Elmwood that included a full-time nurse within the classroom (Dist. Exs. 1 at p. 2; 2 at pp. 1-2, 9, 13). The June 2021 CSE also recommended three 30-minute sessions per week of individual speech-language therapy; two 30-minute sessions per week of individual OT; one 30-minute session per week of individual PT; three 15-minute daily sessions of individual skilled nursing services; and two 45-minute sessions per week of individual PT (*id.* at pp. 9-10). With respect to supplementary aids and services, the June 2021 CSE recommended reteaching of materials for repetition and reinforcement of skills (*id.* at p. 10). The June 2021 CSE recommended assistive technology devices and services that consisted of access to a gait trainer once per day for 60-minutes, access to an adapted stander once per day for two hours, and access to adaptive seating throughout the school day (*id.*). The June 2021 CSE also recommended supports for school personnel on behalf of the student of a 1:1 aide; one 30-minute session per week of classroom-based feeding therapy consultation; one 30-minute team consultation per week; a two hour and 30-minute weekly PT consultation; skilled nursing services as needed throughout the day; a 60-minute weekly assistive technology consultation; a 60-minute weekly OT consultation; and three hours and 45-minutes of weekly speech-language therapy consultation (*id.* at pp. 10-11). The June 2021 CSE further recommended 12-month services consisting of 12:1+4 special class at Elmwood together with three 30-minute sessions per week of individual PT, two 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of individual OT, three 15-minute sessions per day of individual skilled nursing services, a 40-minute weekly OT consultation, a two hour and 30-minute weekly speech-language therapy consultation, and a 60-minute weekly assistive technology consultation (*id.*). The CSE also recommended that the student be provided with a 1:1 aide (*id.* at p. 10). Lastly, the June 2021 CSE recommended special transportation consisting of door-to-door transportation on a small bus or vehicle with an attendant, accommodation for a manual wheelchair, and adult supervision in the form of nursing services (*id.* at p. 13).

A. Due Process Complaint Notice and Subsequent Events

In a due process complaint notice, dated July 5, 2021, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2021-22 school year (see IHO Ex. I).

As an initial matter, the parents requested that the district fund the student's programming at Kaplan during the pendency of the proceeding (IHO Ex. I at pp. 1-2, 6).

Turning the parents' substantive allegations, the parents alleged that for the 2021-22 school year the student was "shoe horned" into the same 12:1+4 special class that the parents previously rejected for the 2020-21 school year (IHO Ex. I at p. 3). According to the parents, the June 2021 CSE failed to consider the student's placement at Kaplan for the 2021-22 school year, which denied them "meaningful participation" in the development of the IEP (*id.* at pp. 5-6). The parents argued that Kaplan was appropriate for the student as it had only special education classrooms, therapeutic accommodations both in the classroom and building, and helped students like their daughter with "mobility issues achieve more independence" (*id.* at p. 6). They maintained that the entire building was "geared around servicing the needs of multiply handicapped students" (*id.*).

The parents alleged that the June 2021 IEP was "procedurally and substantively flawed" and the recommended placement was not appropriate for the student (IHO Ex. I at p. 3). The parents asserted that the June 2021 IEP goals were "insufficient, vague and lack[ed] benchmarks and methods of measurement" (id. at p. 5). More specifically, the parents alleged that there were no academic or feeding goals and the speech-language therapy goals failed to address the student's "severe" speech-language and "communication delays" (id.).

The parents further asserted that the CSE changed the duration of the student's recommended related services to fit the model employed at the district public school, noting that Kaplan provided related services in 30-minute sessions rather than the recommended 45-minute sessions (IHO Ex. I at pp. 3-4). Related to the parents' arguments regarding related services, the parents also assert that the CSE reduced the student's related services recommendations for the 12-month portion of the school year (id. at p. 5). According to the parents, the CSE did not discuss these recommendations with the parents and the CSE changed the related services recommendations in order to fit what was available at the district public school, rather than what was appropriate for the student (id.). Additionally, it is the parents' contention that the student required full-time 1:1 nursing care in school and the recommended three 15-minute daily sessions of skilled nursing services was not safe for the student due to her "potentially life threatening seizures throughout the day" (id. at p. 4). The parents alleged that "[p]roviding a 1:1 aide who [wa]s not a medical professional, would be dangerous for the student absent a full time 1:1 nurse constantly present" (id.). Moreover, the parents contended that while Kaplan permitted the student's Medicaid funded nurse to accompany her to school, the district's public school would not allow the nurse at school (id. at pp. 4-5). Additionally, the parent's asserted that the district's public school would have had one nurse assigned to a class of 12 medically fragile students, which would have been "dangerous" for the student who had "severe, frequent seizures and a g[astrostomy]-tube" (id.). The parents also alleged that the June 2021 IEP failed to recommend a nurse on the bus, which would not have been safe for the student (id. at p. 5).

As relief, the parents sought a 12-month program at Kaplan with a 1:1 full-time nurse, three 30-minute sessions per week of individual speech-language therapy, three 30-minute sessions per week of individual OT, four 30-minute sessions per week of individual PT, with special transportation including a nurse on the bus (IHO Ex. I at pp. 6-7).

Pursuant to the parents pendency request, on July 30, 2021, the district and parents reached a pendency agreement as follows: attendance at a 12:1+4 special class at Kaplan; three 30-minute sessions per week of individual speech-language therapy; three 30-minute sessions per week of individual OT; four 30-minute sessions per week of individual PT; special transportation to accommodate a wheelchair and nurse on the bus; and Kaplan agreed to permit the student's 1:1 Medicaid nurse in the school (IHO Ex. III at pp. 1-2). The parents placed the student in camp for summer 2021 and the student did not attend the district's recommended 12-month program during July and August (IHO Ex. III at p. 2).⁵ The pendency agreement also set forth that the impartial

⁵ According to the July 30, 2021 pendency agreement, since the student attended camp for summer 2021, pendency for the student's 12-month program was not an issue in this matter (IHO Ex. III at p. 2).

hearing would be limited to the issue of whether the district offered the student a FAPE for the 2021-22 school year (id. at p. 2).

By letter dated August 3, 2021, the district responded to the parents' due process complaint notice (IHO Ex. IV). In general, the district asserted that the June 2021 IEP offered the student a FAPE in the least restrictive environment (LRE) and generally denied the allegations asserted by the parents (id. at pp. 1, 3). The district argued that it conducted updated evaluations prior to the June 2021 CSE meeting and the CSE "based their recommendations upon these updated reports as well as through detailed discussions, teacher input, evaluator feedback" and input from the parent and family care provider (id. at p. 3). The district asserted that its recommended program, identified as a "unique medically fragile program, 12:1:4 special education class," with related services, assistive devices, consultation services, and special transportation with a nurse, was appropriate to address the student's needs (id. at pp. 3-5).

The district also responded to each of the parents' allegations (IHO Ex. IV). For example, the district asserted that the recommendation for 45-minute PT sessions instead of 30-minute sessions was based on the recommendation of the district's physical therapist who conducted an evaluation of the student and not because Kaplan could not provide 45-minute sessions (id. at p. 3). In connection with the parents' request for 1:1 nursing, the district alleged that the CSE discussed the student's medical needs and the district's coordinator of health services observed the student and recommended that the student's medical needs could be met with individual skilled nursing services and a nurse in the classroom throughout the day to observe and monitor the student (id. at p. 4). In addition, the district asserted that the recommended 1:1 aide would meet the student's needs throughout the school day (id.). With respect to the allegations that the district did not meet the student's speech-language and feeding needs, the district argued that the CSE recommended "extensive" individual speech-language therapy with a weekly feeding therapy consultation (id.). In addition, the district argued that the parents together with the grandmother of the student, parent advocate, and family care provider were all provided ample opportunity to participate in the June 2021 CSE meeting (id. at p. 5). Finally, the district argued that Elmwood's medically fragile 12:1+4 special education classroom contained nursing equipment to address the needs of medically fragile students (id. at pp. 4-5). According to the district, its program addressed the student's needs within the student's home school district, which was the LRE for the student (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened on October 12, 2021, after prehearing conferences on August 18, 2021 and October 4, 2021, and concluded on December 22, 2021 after nine days of proceedings (Tr. pp. 1-1830; see IHO Decision at p. 4).⁶ In a decision dated February 27, 2022, the IHO determined that the district failed to offer the student a FAPE for the 2021-22 school year (IHO Decision at pp. 72-82).

⁶ The prehearing conferences are identified in the IHO's decision; however, the hearing record does not include a transcript or written summary of the prehearing conferences as required by State regulation (8 NYCRR 200.5 [j][3][xi]).

As a preliminary matter, the IHO found that the parents' use of the words "shoe horned" in the due process complaint notice was "essentially" a claim for predetermination, and therefore, that issue was properly raised (IHO Decision at pp. 70-71). In connection with the parents' claim that the district failed to consider the student's placement at Kaplan, the IHO found the district was required to notify the parents "as to why the [d]istrict refused to consider the pendency placement" in a prior written notice (IHO Decision at p. 75). The IHO found that the district witnesses were open to the pendency placement as was recorded in the CSE notes by CSE members (*id.* at p. 76). She further found that the June 2021 CSE was aware of the parents' request for the student to remain at Kaplan for the 2021-22 school year (*id.*). However, the IHO found that the June 2021 CSE did not consider funding Kaplan at the June 2021 CSE meeting (*id.* at p. 77). The IHO found that there was inconsistent testimony pertaining to the participation of the Kaplan staff at the June 2021 CSE meeting (IHO Decision at p. 77). Ultimately, the IHO held that the decision not to place the student at Kaplan was made prior to the June 2021 CSE meeting and "made without input from the parent and [Kaplan] staff" (*id.* at p. 78). According to the IHO, this procedural violation denied the student a FAPE because it "impeded the parents' opportunity to participate in the decision making process" (*id.*).

Turning to the parents' allegations related to nursing services, the IHO found it was undisputed that the student was medically fragile and required skilled nursing services in order to receive a FAPE (IHO Decision at p. 72). The IHO found that the district failed to address the medical issues outlined in the student's pediatrician letter dated September 22, 2020 (*id.*). The IHO further found "that skilled nursing services 2 times daily in the special class for 15 minutes (for administration of a bolus of water) and a 1:1 aide as needed throughout the day in the 12:1+4" special class with a classroom nurse "was less nursing services" than directed by the student's pediatrician (*id.*).⁷ The IHO further credited the testimony of the student's pediatrician and found the student "required 1:1 nursing services because she needed a medical professional to monitor her because she was medically fragile" (*id.* at p. 73). The IHO further held that a teaching assistant or paraprofessional "could not replace a nurse" as neither are medically trained to care for the student (*id.*). Further, the IHO held that the existence of a nurse in the 12:1+4 special class with two nurses nearby and a recommendation for a 1:1 aide was not sufficient to meet the student's medical needs (*id.* at p. 74). Ultimately, the IHO held that the district failed to offer the student a FAPE during the 2021-22 school year as the student required a 1:1 nurse (*id.* at p. 75).

Next, the IHO addressed the district's recommendation for two 45-minute and one 30-minute session weekly of individual PT for the student together with an additional two hours and 30-minutes of a PT consultation in the classroom each week (IHO Decision at p. 79). The IHO held that the PT consultation in the classroom "was not mandated" for the student and was "intended to benefit the class" and, therefore, should not be considered in connection with the amount of PT recommended for the student (*id.*). Also, the IHO held that the change in recommendation for PT was made without consulting with the student's physical therapist at Kaplan (*id.*). She further found that the change in the recommendation from 30-minute sessions to 45-minute sessions was "inconsistent" with the student's physical abilities and "inability to withstand more than 30 minutes of PT" (*id.* at p. 80). Ultimately, the IHO found that the

⁷ Although the IHO referenced two daily sessions of skilled nursing services, the June 2021 IEP recommended three daily 15-minute sessions of individual skilled nursing services (Dist. Ex. 2 at pp. 1, 10).

recommendation for 45-minute PT sessions was based on a single evaluation of the student and the change in the frequency and duration of the sessions failed to meet the student's needs and did not offer the student a FAPE (id. at p. 81).

In connection with annual goals, the IHO held that the CSE failed to consider the parent's input in developing the goals (IHO Decision at p. 82). Further, the IHO found the student had "sensory issues" and "feeding issues" and the district's goal for the student to "chew on a chewy tube" failed to address the student's needs (id.). Accordingly, the IHO found that the district failed to demonstrate that the student's IEP was appropriate for the 2021-22 school year (id.).

Lastly, the IHO concluded she had broad equitable powers in determining relief such that if she found that the student required a 1:1 nurse, then she had the authority to order the district to provide the student a 1:1 nurse or order the district to permit the student's Medicaid nurse to attend the district's recommended program for the remainder of the 2021-22 school year (IHO Decision at pp. 82-83). The IHO determined that the student required nursing services 24 hours per day, seven days a week and, therefore, required 1:1 nursing care in school and on the bus (id. at p. 83). The IHO further found that the 45-minute bus ride to and from Kaplan was "arduous" for a medically fragile student (id.). The IHO additionally found that the student was entitled to attend the district schools with her Medicaid nurse (id.). Therefore, the IHO determined that if the district did not permit the Medicaid nurse at Elmwood, the district was ordered to fund the medically fragile class at Kaplan (id. at p. 84). Lastly, the IHO held that the parents met their burden of showing that Kaplan was appropriate for the student as it addressed the student's "academic, social/emotional and physical needs" and was not "overly restrictive" (id. at p. 85).

As relief, the IHO ordered the district to permit the student's 1:1 Medicaid nurse to accompany the student in the medically fragile 12:1+4 special class at Elmwood together with related services of three 30-minute sessions per week of individual speech-language therapy; four 30-minute sessions per week of individual PT; and three 30-minute sessions per week of individual OT, or for the district to fund placement at Kaplan with a 1:1 full-time nurse together with three 30-minute sessions per week of individual speech-language therapy; four 30-minute sessions per week of individual PT; and three 30-minute sessions per week of individual OT, for the 2021-22 school year (IHO Decision at p. 86).

IV. Appeal for State-Level Review

The central issue presented by the district on appeal is whether the IHO erred in finding that the district denied the student a FAPE for the 2021-22 school year.

The district argues that the IHO erred in finding that it predetermined the student's program for the 2021-22 school year resulting in a denial of FAPE. According to the district, the parents' use of the term "shoe-horning" did not equate to a claim that the district predetermined the student's program and, therefore, the IHO erred in finding that the parents properly raised a predetermination claim. The district also argues that the parent, her advocate, the student's family care provider, and grandmother were "all active participants" during the June 2021 CSE meeting. The district further argues that the annual goals were reviewed at the CSE meeting and the parents did not object to the goals and the Kaplan staff agreed with the goals. The district contends that the student's feeding goal was "directly related to needs identified by her Kaplan speech therapist."

Furthermore, the district contends that the IHO's finding that the goals were decided outside the CSE meeting represented "confusion" on the part of the IHO as the email exchange she referenced "focused on the goals to implement while the [s]tudent was in her pendency placement" which was after the goals were developed at the June 2021 CSE meeting. Further, the district contends that the IHO erred in finding that the district did not consider the parents' request to place the student at Kaplan and asserts that the district's consideration of Kaplan is shown in the CSE notes as well as the prior written notice.

Turning to the IHO's finding regarding the student's related services, the district claims the IHO erred in finding that it improperly recommended two 45-minute individual PT sessions and one 30-minute individual PT session instead of the four 30-minute individual PT sessions the student received at Kaplan. The district argues that the student would receive 120-minutes per week either at Elmwood (two 45-minute sessions and one 30-minute session) or Kaplan (four 30-minute sessions). Further, the district argues that the student would receive additional PT at Elmwood because of the CSE's recommendation for a PT consultation in the classroom.

The district asserts that the IHO erred in finding that the June 2021 IEP denied the student a FAPE for failing to recommend a 1:1 nurse for the student. The district argues that the IHO "implicitly acknowledged" that the medically fragile 12:1+4 special class at Elmwood was appropriate based on the IHO's directive that the district had the option to place the student at Elmwood with the student's Medicaid nurse. The district further argues that the IHO ignored evidence that the June 2021 IEP met the student's feeding, communication, and medical needs with the recommended skilled nursing services and classroom nurse. According to the district, the IHO erred in finding that the CSE needed to follow the student's doctor's recommendation for the student to have a 1:1 nurse at school. The district contends that the recommended skilled nursing services and the availability of a classroom nurse would have addressed the student's medical needs.

Next, the district argues that the IHO erred in finding that the district's medically fragile 12:1+4 special class could be made appropriate with the student's Medicaid nurse. The district argues that although the student does not require a 1:1 nurse, if it is determined that the student does, the student should not be permitted to bring her own nurse to school. In fact, the district argues that the IHO's finding that the district could elect to send the student to Kaplan with a 1:1 nurse (without specifying that it must be the Medicaid nurse) "proves that the IHO does not believe the [s]tudent requires the Medicaid nurse to receive a FAPE." Further, the district asserts that it has the sole discretion to assign staff and if it is determined that the student requires a 1:1 nurse it should be permitted to assign a district nurse and not be forced to allow the student's Medicaid nurse to accompany the student to school.

The final issue presented by the district was whether the IHO erred in finding that Kaplan was an appropriate placement for the student when the IHO also found "Elmwood could be made appropriate with a 1:1 nurse." The district argues that its recommended medically fragile 12:1+4 special class is the student's LRE and accordingly seeks a reversal of the IHO's decision in its entirety.

For their answer, the parents deny the allegations contained in the request for review. The parents argue that the IHO correctly held that the district's failure to recommend a 1:1 nurse denied

the student a FAPE for the 2021-22 school year. The parents contend that the district failed to consider the student's placement at Kaplan and predetermined the student's placement at Elmwood, and therefore, they were not meaningful participants in the June 2021 CSE meeting. In addition, the parents seek to uphold the IHO's finding that the change in recommendation for PT services without the input of Kaplan or the parents resulted in a denial of FAPE to the student. The parents also contend that there is "ample evidence" in the hearing record to support the IHO's finding that the student needed a 1:1 nurse during the school day. Additionally, the parents argue that the IHO "correctly held that the [d]istrict's medically fragile program could be made appropriate with the provision of the Medicaid nurse." Further, the parents claim that "both sides agreed if the IHO found a FAPE denial, the [s]tudent would remain in her pendency placement." Lastly, the parents contend that the Elmwood program was not "tailored" to meet the student's "unique needs" and Kaplan was an appropriate placement for the student.

The district submitted a reply to the parents' answer arguing that the parents improperly raised an alleged agreement that the student would remain in her pendency placement if the IHO found a denial of FAPE which was beyond the scope of review and a misrepresentation of the facts. The district contends that there was no such agreement and that the student's placement should not "revert" to Kaplan if it is determined that the student was denied a FAPE. The district argues that prior to ordering placement at Kaplan, it should first be determined if there are any programs, aids, or supplementary services that can be added to the district program at Elmwood to make it appropriate. Additionally, the district asserts that, as the IHO determined that the program at Elmwood could be made appropriate, the IHO left the decision as to whether to place the student at Elmwood or Kaplan with the district. According to the district, if the parents wanted to change this determination, the parents needed to file a cross-appeal.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional

advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. ___, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

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

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

provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).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).

VI. Discussion

For the purposes of this appeal, the issue under review is whether the June 2021 IEP failed to offer the student a FAPE for the 2021-22 school year due to one or more the specific issues described below and if so what relief is appropriate under the circumstances.

A. June 21, 2021 IEP

1. Predetermination

Initially, the IHO found that the parents' use of the words "shoe horned" in their due process complaint notice was "essentially" an allegation that the district predetermined the student's program (IHO Decision at pp. 70-71). The district appeals from this determination asserting that the parents did not sufficiently raise an allegation of predetermination in the due process complaint notice.

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint notice 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]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]).

In their due process complaint notice, the parents alleged as follows: "[a]lthough the parent, grandmother, advocate and [family care provider] were participants at the IEP meeting, it became clear from the outset that the student was being 'shoe horned' into the very same Elmwood school

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" (Endrew F., 137 S. Ct. at 1000).

that the parents had rejected the prior school year in a 12:1+4 special class" (IHO Ex. I at p. 3). The parents further alleged in connection with PT services "that the CSE is again 'shoe horning' the student's IEP to reflect that which is available at the recommended placement, Elmwood, instead of what is appropriate for the student" (*id.* at p. 5).

As part of the direct examination of the CSE chairperson, counsel for the district read the portion of the due process complaint notice with respect to the allegation of "shoe horning" and asked if the chairperson "shoehorn[ed] [her] recommendation to fit any type of model or program available for the student at the Elmwood School" (Tr. pp. 858-59). During cross-examination, the chairperson testified that she understood the parent was using the term "to mean that we had preordained what the decision of the Committee was going to be, and that that it couldn't have mattered what anybody said" (Tr. pp. 914-15). In addition to the CSE chairperson, the district asked other participants at the June 2021 CSE meeting if they had been told prior to the CSE meeting what recommendations the district should make (*see* Tr. pp. 139-40, 203, 701, 820-21, 1643-44).

Based on the above, while use of the term "shoe horn" does not necessarily equate to an allegation of predetermination, in the present matter, the district was aware of the manner in which the parents were using the term and had the opportunity to present witnesses to defend against the claim. Accordingly, there is no reason to depart from the IHO's finding that the parents' due process complaint notice raised a claim for predetermination in this matter.

Turning to the substance of the district's appeal, the district contends that the IHO erred in finding that the CSE predetermined its decision to recommend that the student be placed in a district 12:1+4 special class at Elmwood and that the CSE did not consider the parents' request to place the student at Kaplan.

As to predetermination, the consideration of possible recommendations for a student prior to a CSE meeting is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (T.P., 554 F.3d at 253; A.P., 2015 WL 4597545, at *8-9; *see* 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). The key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; *see* D.D.-S., 2011 WL 3919040, at *10-*11; *R.R. v. Scarsdale Union Free Sch. Dist.*, 615 F. Supp. 2d 283, 294 [E.D.N.Y. 2009], *aff'd*, 366 Fed. App'x 239 [2d Cir. Feb. 18, 2010]). Districts may "prepare reports and come with pre[-]formed opinions regarding the best course of action for the child as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions" (*DiRocco v. Bd. of Educ. of Beacon City Sch. Dist.*, 2013 WL 25959, at *18 [S.D.N.Y. Jan. 2, 2013] [alteration in the original], quoting *M.M. v. New York City Dept. of Educ. Region 9 (Dist. 2)*, 583 F. Supp. 2d 498, 506; [S.D.N.Y. 2008]; *see* *B.K. v. New York City Dept. Of Educ.*, 12 F. Supp. 3d 343, 358-59 [E.D.N.Y. 2014] [holding that "active and meaningful" parent participation undermines a claim of predetermination]).

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]).

Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see T.F. v. New York City Dep't of Educ., 2015 WL 5610769, at *5 [S.D.N.Y. Sept. 23, 2015]; A.P. v. New York City Dep't of Educ., 2015 WL 4597545, at *8, *10 [S.D.N.Y. July 30, 2015]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676 at *17 [E.D.N.Y. Aug. 19, 2013] [stating that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] [noting that "[a] professional disagreement is not an IDEA violation"]; Sch. for Language & Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] [finding that "[m]eaningful participation does not require deferral to parent choice"]). When determining whether a district complied with the IDEA's procedural requirements, the inquiry focuses on whether the parents "had an adequate opportunity to participate in the development" of their child's IEP (Cerra, 427 F.3d at 192). Moreover, "the IDEA only requires that the parents have an opportunity to participate in the drafting process" (D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *11 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80 [2d Cir. Dec. 26, 2012], quoting A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208, 216 [D. Conn. 2006]; see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [noting that the IDEA gives parents the right to participate in the development of their child's IEP, not a veto power over those aspects of the IEP with which they do not agree]).

According to the meeting information section of the June 2021 IEP, attendees at the June 2021 CSE meeting included the CSE chairperson, the district supervisor of case management and nonpublic school services, the district coordinator of health services, three school psychologists as well as a school psychologist from Kaplan, two special education teachers as well as the student's special education teacher from Kaplan, a general education teacher, two speech-language therapists, an occupational therapist, a physical therapist, the principal of Kaplan, counsel for the district, the student's mother, the student's family care provider, and the parents' advocate (Dist. Ex. 2 at p. 1).⁹

In discussing the placement at Kaplan, the IHO noted that the CSE meeting notes indicated that the CSE "was open to the pendency placement" (IHO Decision at p. 76; see Dist. Exs. 12 at pp. 2-3; 14 at pp. 2-3). The district presented notes from the June 2021 CSE meeting, taken by the CSE chairperson, the district supervisor of case management and nonpublic school services, and the district special education teacher (Dist. Exs. 12-14). The notes all indicated that the CSE listened to information presented by Kaplan staff, reviewed aspects of the student's program at Kaplan, and listened to the concerns of the parents, the student's family care provider, and the parents' advocate (id.). While the notes by the special education teacher and the CSE chairperson specifically indicated that the parents were happy with Kaplan and wanted the student to continue attending Kaplan, that the parents were concerned about programming because the student's native language was Yiddish, and that the parents' advocate disagreed with the recommendation for PT,

⁹ The June 2021 IEP identifies the district supervisor of case management and nonpublic services by name; however, she is identified as supervisor of special education (Dist. Ex. 1 at p. 1). As she testified that she is the district supervisor of case management and nonpublic services, she will be referred to with that title throughout this decision (Tr. p. 1682).

the notes by the district supervisor of case management and nonpublic school services indicated that the student's family care provider agreed with the PT recommendation and more generally indicated the parents' disagreed with the CSE's recommendation to place the student in a district class without indicating the parent wanted to continue the student's placement at Kaplan (compare Dist. Exs. 12, 14, with Dist. Ex. 13).

The district also sent the parents a prior written notice identifying the evaluative information relied on by the June 2021 CSE and indicating that the parent, the family care provider, and the parents' advocate had the opportunity to participate, express concerns, and ask questions during the CSE meeting (Dist. Ex. 1 at p. 3). The prior written notice further indicated that the CSE considered placement of the student at Kaplan, but rejected it because the student's needs could be met in a 12:1+4 special class in the district (id.).

The IHO credited testimony of district staff to the extent that they testified that they believed the student's needs could be met within the district's recommended program; however, the IHO also found that she did "not credit the testimony that the team considered the parent or the parent's advocate's request to continue the placement at [Kaplan] at any time during the June 21, 2021" CSE meeting (IHO Decision at p. 77). The IHO based this on her finding that there was "inconsistent testimony" regarding the level of participation of the Kaplan staff (id.). For example, the principal of Kaplan testified that although the meeting lasted approximately 2.5 hours, Kaplan staff had "very little" opportunity to participate or ask or respond to questions; however, he also testified that the parent had the opportunity to ask questions (Tr. p. 1314). Additionally, although the Kaplan principal testified that the meeting was lengthy, when asked to describe what was discussed at the meeting, he testified only that he remembered "the District was discussing that they felt that the program that they had in District would be appropriate to meet [the student's] needs. I remember the family not agreeing, and the family wanting [the student] to remain at Kaplan, and that was the discussion" (Tr. pp. 1298-99). In contrast, the district witnesses testified that the Kaplan principal, special education teacher, and school psychologist were present at the June 2021 CSE meeting, participated, and spoke about the Kaplan program and the progress the student made there (Tr. pp. 89-90, 96, 147, 813, 823-24, 832; see Tr. pp. 79, 1230, 1245, 1291). Further, the supervisor of case management and nonpublic school services testified that the representatives from Kaplan were "very helpful" and "fully engaged" in providing the June 2021 CSE information pertaining to the student since Kaplan was most familiar with her (Tr. pp. 1686-87, 1688-89). The CSE chairperson testified that she proposed allowing the student to attend Elmwood with the Medicaid nurse or district nurse and the mother responded "never" and "absolutely not" which testimony was confirmed by the parent (Tr. pp. 841, 1123-24, 1126-27, 1131; Dist. Exs. 12 at p. 3; 13 at p. 2; 14 at pp. 3-4).

The hearing record supports a finding that the parents, the student's family care provider, and advocate all participated in the June 2021 CSE meeting and were provided with the opportunities to ask questions during the June 2021 CSE meeting (Tr. pp. 140-41, 809, 811-12, 823, 826, 913, 1314, 1690-91; Dist. Exs. 2 at pp. 1-2, 5, 7; 12 at pp. 1-3; 13 at pp. 1-2; 14 at pp. 1-4). Although the June 2021 CSE did not recommend a 1:1 nurse and did not recommend Kaplan as requested by the parents, this is not tantamount to a denial of meaningful participation. Based on the above, the district presented sufficient evidence, even excluding the testimony that the IHO found not to be credible, to show that it held an open mind in conducting the June 2021 CSE meeting and to the extent that the IHO held the CSE's decision to recommend placement of the

student in the district as opposed to the parents' preferred placement of the student at Kaplan as a factor to show predetermination, the IHO's decision on this issue must be overturned.

2. Physical Therapy

The June 2021 CSE recommended that the student receive one 30-minute session per week of individual PT, two 45-minute sessions per week of individual PT, and also recommended a PT consultation for two hours and 30-minutes per week as a support for school personnel on behalf of the student (Dist. Ex. 2 at pp. 9-10).¹⁰ The IHO found that this was a change from the PT services that the student was receiving at Kaplan, which consisted of four 30-minute sessions per week of individual PT (see IHO Decision at p. 79). According to the IHO, the change from 30-minute sessions to 45-minute sessions was made based on a single evaluation of the student and without input from the student's providers; the IHO found that the CSE did not have sufficient information to support a change in the duration of the student's PT services from 30 minutes to 45 minutes (id. at pp. 80-81). The district appeals from this finding of the IHO.

Reviewing the information available to the June 2021 CSE regarding the student's PT needs, evidence shows that the district physical therapist conducted a PT evaluation on June 11, 2021 for the purposes of the student's annual review (Tr. pp. 628-29; see Dist. Ex. 6). During the evaluation, the physical therapist sang to the student to help her "remain calm throughout the evaluation" (Tr. pp. 631, 638-39, 641). The student's special education teacher at Kaplan acted as the main informant during the evaluation (Tr. pp. 631, 636; Dist. Ex. 6 at p. 1). The district's physical therapist evaluated the student's gross motor development and reported that the student "was dependent on her [sic] transfers and unable to assist in any manner" (Dist. Ex. 6 at p. 1). The physical therapist described the student's sitting balance as "good," as she was able to sit for extended periods of time and maintain her balance (id. at pp. 1-2). The physical therapist reported that the student was able to roll from her stomach to her sides preferring her right side (Tr. p. 632; Dist. Ex. 6 at pp. 1-2). In addition, the physical therapist reported that the student was able to maintain a "quadruped" position—"on all fours on her hands and knees position"—demonstrating "good head control" (Tr. p. 632; Dist. Ex. 6 at pp. 1-2). At the time of the evaluation the student had outgrown her orthotics and was awaiting new ones and therefore, her tolerance for standing in a prone stander was not able to be evaluated although it was reported by the student's special education teacher that the student could stand up with "maximum" assistance while wearing her orthotics (Tr. p. 633; Dist. Ex. 6 at p. 1). The physical therapist indicated that she evaluated the student's range of motion in both upper and lower extremities and found that it was intact except for a "slight" resistance when "going through [range of motion] of her upper extremities right side greater than left side" (Tr. pp. 642, 644; Dist. Ex. 6 at p. 2). Based on the testing results, the district's physical therapist concluded that the student had a "very high demand" for PT (Tr. pp. 649-650). The physical therapist recommended that the student continue to receive PT to help "improve her overall strength, weight bearing tolerance and endurance, balance and pre-walking skills" (Dist. Ex. 6 at p. 2). The district's physical therapist reported that the Kaplan physical therapist was not available to discuss the student, but she spoke with the student's Kaplan special education teacher regarding the student's PT services (Tr. pp. 636, 685-87, 690-91). Furthermore,

¹⁰ The district's physical therapist testified that the consultation for two hours and 30-minutes was an error on the June 2021 IEP and the consultation was a "push in" service for only 30 minutes per week (Tr. p. 668).

she testified that it was not necessary for purposes of the evaluation to speak with the student's current physical therapist as the evaluation was based on her own "independent testing observations" and she would reach out to the student's physical therapist if and when she began providing PT services to the student (Tr. pp. 686-87).

In terms of the student's physical development needs, the June 2021 IEP indicated that the student would benefit from "weightbearing activities, improving her balance and endurance, and standing and prewalking activities" (Dist. Ex. 2 at p. 7). According to the IEP, the student's family care provider reported that the student used a stander at home and could "tolerate" it "from 25 minutes through an hour and a half" (*id.*). The student's 1:1 nurse also testified that at home the nurses placed the student in a stander at a minimum 30 minutes, but she could tolerate 60 minutes (Tr. p. 1336). The district's physical therapist attended the June 2021 CSE meeting and recommended that during the 2021-22 school year the student receive two 45-minute sessions of individual PT and one 30-minute session of individual PT per week (Tr. pp. 145, 650-52; *see* Tr. pp. 825, 852-53, 1180; Dist. Ex. 2 at pp. 9-10). The district's physical therapist testified that the basis for her recommendation was that the student was "severely disabled," and she had a goal of getting the student "into a stander and eventually into a walker" (Tr. p. 652). She further testified that placing the student into the equipment took longer periods of time and recommended the two 45-minute sessions to work on standing and walking, and one 30-minute session for strengthening of the student's range of motion (*id.*). The district's physical therapist testified that she explained this reasoning to the June 2021 CSE members and "everyone was very happy" (Tr. p. 654). The supervisor of case management and nonpublic schools testified that the Kaplan principal agreed with the PT recommendation at the June 2021 CSE meeting (Tr. pp. 1653-54). The district's physical therapist testified that the PT consultation recommended in the student's IEP was for both the student and classroom and consisted of the physical therapist pushing into the classroom once a week to check on the students' positions and seating and to see if the aide's needed assistance with anything pertaining to the students (Tr. p. 668). The CSE chairperson noted that the student's family care provider was in favor of this change in PT services; however, Kaplan could not provide the new mandate (rather it could only provide 30-minute sessions for related services), and the option then became no longer acceptable to the family (Tr. pp. 145-46; *see* Tr. pp. 662-63, 825, 852-53, 856, 1654-56; Dist. Exs. 12 at p. 1; 13 at p. 1; 14 at p. 4). The physical therapist developed two annual goals for the student pertaining to walking with a walker and tolerating the prone stander (Tr. pp. 664-65; *see* Dist. Ex. 2 at p. 9).

The Kaplan physical therapy assistant testified that she began working with the student in April 2021 (Tr. pp. 1471, 1482).¹¹ At Kaplan, pursuant to the pendency agreement of the parties, the student was receiving four times 30 minutes per week of individual PT (IHO Ex. III at pp. 1-2; *see* Tr. pp. 1471, 1492). The Kaplan physical therapist assistant testified that it had been the case since she started working at BOCES that the program offered only 30-minute PT sessions for students (Tr. p. 1492; *see* Tr. pp. 1292, 1294, 1325, 1655). The physical therapy assistant opined that four 30-minute sessions of PT were appropriate for the student because she was working on a lot of skills, which required four days per week of PT to address (Tr. p. 1473-74). She further

¹¹ The physical therapy assistant testified that she could perform the same duties as a physical therapist but has a physical therapist supervising her (Tr. pp. 1470-71).

opined that the student required four days of PT per week in order to meet her IEP goals (Tr. p. 1474). The physical therapy assistant reported that typically the student could tolerate 30-minute therapy sessions but by the end she was fatigued and needed a break (Tr. p. 1474). The Kaplan physical therapy assistant opined that 45-minute PT sessions were not appropriate for the student because she would get "too tired" and noted that she had a hard time getting through 30 minutes of therapy without giving the student little breaks (Tr. p. 1497). She stated that 30-minute PT sessions were appropriate given the student's level of fatigue and "endurance level" (Tr. p. 1497; see Tr. p. 1253).¹²

The IHO held that the June 2021 CSE reviewed and relied on the PT annual review report conducted in June 2021 (IHO Decision at p. 79). The IHO acknowledged the district physical therapist's recommendations and her reasoning, but noted that she did not talk to the student's then-current PT provider (id.). The IHO credited the physical therapist's testimony that she believed the longer sessions would be beneficial to the student and that she recommended the change in PT services based on her professional judgement and the fact that it took time to position the student in her assistive devices (id. at pp. 79-80; see Dist. Ex. 2 at pp. 9-10). However, the IHO found that the CSE's PT recommendations were made without consultation with the student's physical therapist at Kaplan (IHO Decision at pp. 79-80). The IHO relied on and credited the testimony of the Kaplan physical therapy assistant who testified that 30-minutes of PT per session was appropriate for the student because the student fatigued (id. at pp. 80-81). Ultimately, the IHO held that since the district performed a "single evaluation" and the student was not able to be assessed standing or walking because her orthotics were too small, the June 2021 CSE had "insufficient information" to recommend two 45-minute sessions of PT, which denied the student a FAPE (id. at p. 81).

In summary, although the recommendation for PT in the June 2021 IEP was at a different frequency and duration than the PT services being provided at Kaplan, the total amount of PT remained the same—120 minutes per week. The district presented the testimony of a physical therapist who evaluated the student and came to the conclusion that the student would benefit from the recommended two 45-minute sessions per week and one 30-minute session per week of PT (Tr. pp. 651-55). While the IHO's finding that a discussion with the student's physical therapist at Kaplan may have provided the physical therapist with more information about the student's needs is understandable, the district physical therapist was able to discuss the student's functioning in the classroom with the student's special education teacher (Tr. pp. 636-37, 691; Dist. Ex. 6 at p. 1). In addition, as discussed above, the June 2021 CSE included 20 participants, including the Kaplan principal and the student's special education teacher at Kaplan (Dist. Ex. 2 at p. 1). The June 2021 CSE discussed the recommended PT services and the hearing record indicates that the student's family care provider agreed to the longer duration; however, the parents' advocate disagreed with the PT recommendation (Dist. Ex. 12 at p. 1; 13 at p. 1, 14 at p. 3).

Based on the information presented in the hearing record, the IHO's finding that the CSE did not have sufficient information to support the PT recommendation was in error and the recommended PT services that included a difference of 15 minutes in two of the sessions did not

¹² The Kaplan principal testified that the student would be available for the full 30-minutes of a PT session because prior to the start of the session the staff would prepare her for positioning (Tr. p. 1294).

result in a denial of FAPE for the student. The evidence does not show that the CSE's approach of proposing a slightly more ambitious duration of certain PT sessions was unreasonable or that the student would fail to receive educational benefits as a result of that approach under the IEP.

3. Annual Goals

The district appeals from the IHO's determinations that the June 2021 CSE did not consider the parent's input in developing the student's annual goals and that the June 2021 CSE did not include a sufficient annual goal to address the student's needs related to feeding.

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

The IHO held that the CSE did not consider the parental input in development of the June 2021 IEP goals as was evidenced by a series of emails dated August 2, 2021, between the Kaplan principal and the district's supervisor of case management and nonpublic school services (IHO Decision at p. 82; see Dist. Ex. 15). However, this finding is inconsistent with the testimony and reported purpose of the emails. On August 2, 2021, the district's supervisor of case management and nonpublic school services emailed the Kaplan principal to confirm that the student would be returning to Kaplan as of September 10, 2021 for purposes of pendency (Tr. pp. 1638-39, 1641; Dist. Ex. 15 at p. 3). Thereafter, both engaged in a dialogue pertaining to which IEP would be used for pendency and the district's supervisor of case management and nonpublic school services stated that since the parent was "not challenging the goals" included on the June 2021 IEP that those annual goals should be used (Tr. pp. 1639-40, 1666-67, 1673; Dist. Ex. 15 at pp. 2-3). As for related services, it was agreed that the IEP for the 2019-20 school year was to be used (Tr. pp. 1666-67; Dist. Ex. 15 at p. 1). Accordingly, these email discussions solely pertained to pendency services and were not pertinent to an analysis regarding parental input as to the proposed annual goals.

Turning to the IHO's finding related to the sufficiency of the annual goals, the IHO agreed with the parents' assertion that the June 2021 IEP did not address that the student has a "reverse swallow," does not "lateralize food in her mouth," does not chew food, and has seizures while eating (IHO Decision at p. 82; see IHO Ex. I at p. 5). The IHO found that the annual goal included in the June 2021 IEP directed at establishing a chewing pattern, failed to address the student's sensory or feeding issues and as a result the district "failed to demonstrate" that the student's June 2021 IEP was appropriate for the 2021-22 school year (IHO Decision at p. 82; see Dist. Ex. 2 at p. 9).

A speech-language pathologist, who served as the district's feeding therapist, conducted a feeding observation on June 17, 2021 as part of the student's annual review (Tr. pp. 427-28; see

Dist. Ex. 8).¹³ The student was initially fed her snack by her 1:1 nurse but since the nurse was new, the student's special education teacher, who was more familiar with the student, "ended up taking over and finishing the snack" (Tr. pp. 429, 433, 437, 476-77; Dist. Ex. 8 at p. 2). The feeding therapist testified that a classroom aide or teacher could be trained to provide the student's food properly as feeding the student was not a nursing skill (Tr. pp. 480-81). The feeding therapist reported that during the feeding evaluation the student "opened actively" for the spoon of food to be placed in her mouth and attempted to close her lips around the spoon but required the person feeding her to scrape off the food into her mouth (Tr. pp. 434-35; Dist. Ex. 8 at p. 2). At times she would push the food back out of her mouth when something in the food bothered her and other times, she just swallowed the food (Dist. Ex. 8 at p. 2). The student did not "evidence" chewing or "tongue lateralization" and instead tongue thrust and gummed food (*id.*). When the student was finished with her snack, she turned her head away and did not allow anyone to overstuff her mouth (Tr. p. 436; Dist. Ex. 8 at p. 2). The feeding therapist testified that as long as the student was not given food that "she can't manage," like solid foods, she was not concerned about the student choking (Tr. p. 440). According to the feeding therapist, there was no mention by Kaplan staff during the observation that the student was at risk for choking or being unable to breathe while eating (Tr. p. 436). The feeding therapist noted that the student did not tolerate liquids by mouth, only through the g-tube (Dist. Ex. 8 at p. 2). She testified that the student exhibited no seizures, discomfort, or agitation during her observation (Tr. pp. 437-38). The Kaplan staff reported similar findings in the present levels of performance of their annual report and further noted that the student was "safely able to consume soft solids such as bananas, avocados, egg, softened bread, and cooked vegetables" but was unable to grasp a spoon to assist with self-feeding (Parent Ex. F at p. 2).

The district's feeding therapist testified that she spoke with the speech-language pathologist at Kaplan who was working with the student on a "chewing pattern" using a chewy tube but this skill had not yet emerged (Tr. pp. 475-76; Dist. Ex. 8 at p. 2). The Kaplan speech-language therapist testified that the student did not receive feeding therapy or work on a feeding goal at Kaplan because staff was implementing the IEP from the prior year (Tr. pp. 1462, 1466; *see* Tr. pp. 1443, 1459, 1463, 1466). Based on her observations of the student, the feeding therapist opined that the student was a "safe feeder" and had some "foundational skills" and with therapy the student had the "potential to improve the quality" of the way she ate (Tr. pp. 438-39). She testified that she developed a feeding goal for the student to "demonstrate emergence of up down motion on chewy tube to begin establish a chewing pattern" (Tr. pp. 444-46, 471-72, 479; Dist. Ex. 2 at p. 9). She further testified that this was a "foundational skill" that was necessary and "potentially obtainable" for the student and "[n]o other goal can really be worked on or addressed until we start to get that pattern" (Tr. pp. 446-47). The feeding therapist recommended a "weekly feeding consultation" for 30-minutes in the classroom to train classroom staff on how to feed the student safely, how to use the chewy tube and to understand emergency protocols and the signs of respiratory distress (Tr. pp. 447-449, 451-52, 482-83; Dist. Ex. 2 at p. 10). District staff testified that per the student's June 2021 IEP she was recommended to receive three 30-minute sessions per week of speech-language therapy which would have addressed the student's communication needs and feeding needs (Tr. pp. 449-50, 454-55, 465-66, 529; Dist. Ex. 2 at pp. 1, 9).

¹³ The district's speech-language pathologist was also a feeding therapist (Tr. p. 427).

Despite the findings of the IHO, the hearing record shows that the CSE recommended a feeding goal that was consistent with the student's needs and the IHO's erroneous finding must be reversed as the June 2021 IEP appropriately addressed the student's feeding needs.

4. 1:1 Nursing Services

One of the sharpest disputes presented in this case is whether the student required 1:1 nursing from the Medicaid-funded nurse during 100% of the school day during the 2021-22 school year instead of the periodic 1:1 nurse and classroom nurse proposed in the student's IEP. The district appeals from the IHO's finding that the failure to provide for 1:1 nursing on the June 2021 IEP resulted in a denial of FAPE. More specifically, the district asserts that the CSE addressed the student's need for skilled nursing services in recommending a 1:1 nurse for three 15-minute sessions per day and that the student's medical needs could have been addressed by the classroom nurse available at Elmwood, the classroom teacher, and the recommended 1:1 aide. Although the parties seek a substantive determination as to whether the student required 1:1 nursing services, the evidence implicated concerns regarding the process of how the CSE arrived at the decision on that issue and centers more on whether the CSE, when provided with a doctor's order that recommended a 1:1 nurse throughout the school day for the student, could permissibly rely on the opinions of district's coordinator of health services in declining to recommend 1:1 nursing for the student throughout the day.

As acknowledged by the IHO, it is undisputed that the student is medically fragile (IHO Decision at p. 72). A child who is medically fragile and needs school health services¹⁴ or school nurse services¹⁵ to receive a FAPE must be provided such services as indicated in the student's IEP (see School Health Services and School Nurse Services, 71 Fed. Reg. 46,574 [Aug. 14, 2006]; see also 34 CFR 300.34[a], [c][13]; 8 NYCRR 200.1[qq], [ss]; Cedar Rapids Community Sch. Dist. v. Garret, 526 U.S. 66, 79 [1999] [school districts must fund related services such as continuous one-on-one nursing services during the school day "in order to help guarantee that students . . . are integrated into the public schools"]). With regard to skilled nursing services on a student's IEP, State guidance provides that "[d]ue to the frequency of changes to orders for nursing treatment and/or medications, the specific nursing service and/or medication to be provided should not be detailed in the IEP" ("Guidelines for Determining a Student with a Disability's Need for a One-to-One Nurse," at p. 4, Office of Special Educ. Mem. [Jan. 2019], available at <http://www.p12.nysed.gov/specialed/publications/documents/guidelines-for-determining-a-student-with-a-disability-need-for-a-1-1-nurse.pdf>). Instead, the guidance document provides that "[t]he nursing treatment and/or medication orders [should be] documented on an Individualized Health Plan (IHP), which is a nursing care plan developed by an RN [and] maintained in the student's cumulative health record . . . and . . . updated as necessary" ("Guidelines for Determining

¹⁴ "School health services means health services provided by either a qualified school nurse or other qualified person that are designed to enable a student with a disability to receive a free appropriate public education as described in the individualized education program of the student" (8 NYCRR 200.1[ss][1]).

¹⁵ "School nurse services means services provided by a qualified school nurse pursuant to section 902(2)(b) of the Education Law that are designed to enable a student with a disability to receive a free appropriate public education as described in the individualized education program of the student" (8 NYCRR 200.1[ss][2]).

a Student with a Disability's Need for a One-to-One Nurse," at p. 4).¹⁶ For administration of medication in school, provider orders must be obtained, and, according to State guidance, "[i]f a school has concerns or questions regarding a provider's order, the school's medical director or school nurse school call the provider to resolve concerns and/or clarify the order" ("Guidelines for Medication Management in Schools," at p. 14, Office of Student Support Servs. [Dec. 2017], available at <http://www.p12.nysed.gov/sss/documents/MedicationManagement-DEC2017.pdf>).

State guidance indicates that in determining whether a student needs a 1:1 nurse, a CSE must obtain evaluative information in all areas of the student's disability or suspected disability; it is expected that "[t]his information may include information from a physician, such as a written order to the school nurse from a student's health care provider" ("Guidelines for Determining a Student with a Disability's Need for a One-to-One Nurse," at p. 2, Office of Special Educ. Mem. [Jan. 2019], available at <http://www.p12.nysed.gov/specialed/publications/documents/guidelines-for-determining-a-student-with-a-disability-need-for-a-1-1-nurse.pdf>). Additionally, in providing school nurse services "the school remains responsible for the health and safety of the student and ensuring the care provided to the student is appropriate and done in accordance with healthcare provider orders" (*id.* at p. 5). However, there is also State guidance indicating that "[i]f the CSE/CPSE determine that a student's health needs in accordance with provider orders for treatment can be appropriately met by the school's building nurse, a shared nurse, a 1:1 aide to monitor and alert the school nurse, then a 1:1 nurse is not necessary" ("Provision of Nursing Services in School Settings - Including One-to-One Nursing Services to Students with Special Needs," at pp. 11-12, Office of Student Support Servs., [Jan. 2019], available at <https://www.p12.nysed.gov/sss/documents/OnetoOneNSGQAFINAL1.7.19.pdf>). In determining whether a student requires the support of a full-day continuous 1:1 nurse, State guidance indicates the CSE "must weigh the factors of both the student's individual health needs and what specific school health and/or school nurse services are required to meet those needs" providing a set of factors to consider:

- The complexity of the student's individual health needs and level of care needed during the school day to enable the student to attend school and benefit from special education;
- The qualifications required to meet the student's health needs;
- The student's proximity to a nurse;
- The building nurse's student case load; and
- The extent and frequency the student would need the services of a nurse (e.g., portions of the school day or continuously throughout the day).

("Guidelines for Determining a Student with a Disability's Need for a One-to-One Nurse," at pp. 2-3, Office of Special Educ. Mem. [Jan. 2019], available at

¹⁶ In another State guidance document, it is acknowledged that an IHP is not required by law but "is strongly recommended for all students with special health needs-particularly those with nurse services as a related service on their individualized education plan (IEP)" ("Provision of Nursing Services in School Settings - Including One-to-One Nursing Services to Students with Special Needs," at p. 9, Office of Student Support Servs. [Jan. 2019], available at <http://www.p12.nysed.gov/sss/documents/OnetoOneNSGQAFINAL1.7.19.pdf>).

<http://www.p12.nysed.gov/specialed/publications/documents/guidelines-for-determining-a-student-with-a-disability-need-for-a-1-1-nurse.pdf>).

At the outset, a review of the student's medical history as known to the June 2021 CSE is necessary. Prior to the June 2021 CSE meeting, the district conducted several evaluations of the student (see Dist. Exs. 3-8). In addition, the district's coordinator of health services conducted an observation of the student in April and May 2021 on two separate occasions, both for approximately one hour (Tr. p. 201; Dist. Ex. 9). The June 2021 IEP indicates that the CSE had the following evaluative information available to it: a June 17, 2021 feeding report, a June 14 2021 adaptive behavior scale, a June 14 2021 bilingual educational evaluation report, a June 14, 2021 bilingual psychological evaluation report, a June 11, 2021 bilingual speech-language evaluation report, a June 11, 2021 OT evaluation report, a June 11, 2021 PT evaluation report, a May 20, 2021 classroom observation report, a September 22, 2020 medical letter, and an April 10, 2018 social history report (Dist. Ex. 2 at p. 3; see Dist. Exs. 3-10).

The September 22, 2020 medical document referenced in the June 2021 IEP was a letter from the student's pediatrician (Dist. Exs. 2 at p. 3; 10). In the September 2020 letter, the pediatrician indicated that the student presented with complex medical needs, including "global delay, a progressive seizure disorder, and G-tube dependence" (Dist. Ex. 10 at p. 1). The physician noted that the student had a "wide variety of seizures, including more subtle types, such as staring spells, head drops, stiffness, hand-stretching, and pill-rolling" (*id.*). The pediatrician noted that because of her complex needs, the student "require[d] a 1:1 nurse in order to carefully monitor her seizure activity and manage her meals/G-tube feeds" (*id.*). Although the physician indicated that the student's seizure disorder was "well-controlled," she also noted that the student's seizure activity increased when she was uncomfortable in her environment (*id.*).¹⁷ Further, the physician indicated that all of the student's "abnormal movements and seizures need[ed] to be recorded continuously throughout the day in order to continue her trial medication" (*id.*). The physician expressed that it was "of the utmost importance that [the student] maintain[] her home nursing care at school" indicating that any disruption of her regular nursing services would cause the student's seizure activity to increase (*id.*). The letter also included recommendations as to a g-tube feeding schedule and meals (*id.* at pp. 1-2). Finally, the physician noted that the student received her seizure medication at home; however, she also noted that if the student had a cluster of seizures lasting longer than ten minutes, the student needed to be administered medication as ordered by the student's neurologist (*id.* at p. 2).¹⁸ During the impartial hearing, however, the pediatrician testified that the student's family care provider asked her to write the order in the letter to the

¹⁷ In her letter the pediatrician described the student's seizure disorder as "well-controlled" which she testified meant that the student was "not being hospitalized" but still had continuous seizures throughout the day (Tr. pp. 1529, 1569).

¹⁸ The hearing record demonstrated that if the student has seizures lasting more than ten minutes, she required emergency medication administered by the nurse (Tr. pp. 228, 289, 324, 326, 382, 1065; Dist. Ex. 10 at p. 2).

district because she wanted the student to attend school with her own 1:1 nurse from home (Tr. p. 1548; see Dist. Ex. 10).

The district's coordinator of health services testified she is a registered nurse (RN) and is able to conduct "skilled nursing care, including assessments and administering blood" (Tr. p. 196). The coordinator of health services testified that she conducted observations of the student in order to obtain more information regarding the student's needs, in part due to a disconnect between the medical information provided to the district and her conversation with the student's family care provider (Tr. p. 307-08). She testified that she spoke with the student's family care provider who indicated the seizures were not "life threatening seizures," an assessment with which she agreed (Tr. pp. 210-11, 307-08, 327, 333). However, she confirmed that no doctor who cared for the student told her that the student's seizures were not life threatening (Tr. p. 283).

The coordinator of health services reported that upon arrival for her first observation on April 29, 2001, she observed the student's diaper being changed by a teacher aide; the student's 1:1 nurse was not in the room because she was at lunch (Tr. p. 203; Dist. Ex. 9). Following the diaper change the student was placed on the floor for a music activity and subsequently placed in her wheelchair (Dist. Ex. 9). According to the district's coordinator of health services, although the student's 1:1 nurse returned from lunch she "did not engage with" the student, moreover she left the room for a short period and upon return sat in a chair "behind" the student "approximately 3 feet away" (id.). While engaged in a "sensory task using shaving creme" the teacher aide requested that the student's 1:1 nurse wipe the student's face as she had shaving creme on her cheek (Tr. p. 204; Dist. Ex. 9). The district's coordinator of health services observed that the 1:1 nurse "returned to her chair and looked at her phone for several minutes" and "appeared to close her eyes and be sleeping" (Dist. Ex. 9). The coordinator of health services reported that the 1:1 nurse remained in her chair for the remainder of the observation (id.). A teacher aide fed the student her snack (id.). Overall, the district's coordinator of health services indicated that she did not observe the student's 1:1 nurse engage with her or perform any nursing services other to wipe the shaving cream off her face (Tr. p. 204; Dist. Ex. 9). The coordinator of health services stated that she did not observe the student have any seizures (Tr. p. 326; Dist. Ex. 9).

During a second observation that took place on May 25, 2021, the district's coordinator of health services observed the student working with a teacher aide, and the student's 1:1 nurse was "seated directly behind" the student "approximately [three] feet away" (Tr. p. 204; Dist. Ex. 9). According to the coordinator of health services, the student's 1:1 nurse was different from the nurse she observed on April 29th (Tr. pp. 204, 277; Dist. Ex. 9).¹⁹ The district's coordinator of health services observed another teacher aide from the classroom change the student and then place her on a mat (id.). She observed that the student's 1:1 nurse did not engage with the student and remained seated (Tr. p. 204; Dist. Ex. 9). The coordinator of health services reported that at one point the 1:1 nurse gave the student a bolus of water through her g-tube but as soon as the bolus was completed (within two minutes) the 1:1 nurse returned to her seat behind the student (id.). The district's coordinator of health services noted that the student's 1:1 nurse left the classroom at

¹⁹ Although the pediatrician recommended that the student use the "same nursing staff at school and home," the district's coordinator of health services testified that there were two different nurses that she observed and reported that the student had various nurses who covered her medical care throughout the day (Tr. p. 216).

12:35 p.m. and did not return before the conclusion of the observation at 12:45 p.m. (Dist. Ex. 9). The district's coordinator of health services did not observe the student have a seizure (Tr. pp. 206, 326; Dist. Ex. 9). Based upon her observations over the two days, the district's coordinator of health services stated that she saw "very little interaction between the nurse" and the student (Tr. pp. 234-35). She further stated that based on the placement of the student's 1:1 nurse in the classroom, the 1:1 nurse could not see if the student was having a seizure as the student's back was to her (Tr. p. 234). The district's coordinator of health services testified that during the observations she did not observe either of the student's 1:1 nurses record anything (Tr. pp. 215-16, 236). Lastly, the district's coordinator of health services noted that the student was driven to Kaplan in a car without a nurse and remained in the health office for approximately five minutes waiting for the student's 1:1 nurse to arrive at school (Dist. Ex. 9).

Turning to the other evaluative information available to the June 2021 CSE regarding the student's medical needs, during the district's June 2021 bilingual psychological reevaluation, the evaluator observed the student "stare into space" and "begin to giggle" (Dist. Ex. 3 at p. 2).²⁰ The Kaplan special education teacher told the evaluator that the student was "most likely having a seizure" and the student's 1:1 nurse stated that the student "giggle[d]" when having a seizure (*id.*). Additionally, the district's bilingual education evaluator testified that the student had "one of these atypical absence seizures" during her evaluation which the student's special education teacher pointed out to her (Tr. pp. 130-31; *see* Dist. Ex. 4 at p. 2). During the seizure she observed the student look to her right, then the student giggled and returned to the evaluation after a few seconds (Tr. pp. 130-32; Dist. Ex. 4 at p. 2). The evaluator reported that she did not observe the student's 1:1 nurse conduct any medical procedures while the student was having the seizure, rather she stayed in her seat and did not assist in any way and had no interactions with the student (Tr. pp. 130-32; *see* Dist. Ex. 4 at p. 2). In her evaluation report the evaluator stated that the student's 1:1 nurse was "by her side during the seizure" and the student recovered without the need for medical intervention (Dist. Ex. 4 at p. 2).

The district's occupational therapist, who completed an assessment of the student in June 2021, also observed the student have a seizure during her assessment in which the student's head moved forward to the table (Tr. pp. 708, 753; Dist. Ex. 5 at p. 1). The special education teacher informed the occupational therapist that the student was starting to have the seizure and the 1:1 nurse put a towel in front of the student on the table (Tr. pp. 708-09; Dist. Ex. 5 at p. 1). The district's occupational therapist observed that the student was smiling throughout the seizure and once the seizure, which lasted for seconds, was over the evaluation resumed (Tr. pp. 708-10; Dist. Ex. 5 at p. 1). According to the occupational therapist, the student's special education teacher told her that "this happens all the time" (Tr. p. 708). The occupational therapist testified that the 1:1 nurse put a towel on the table in case the student's head fell forward but that she did not observe any skilled nursing care during the student's seizure (Tr. p. 709; Dist. Ex. 5 at p. 1).

The district's speech-language pathologist testified that during her June 2021 evaluation of the student she did not observe the student have a seizure nor was she made aware by anyone that the student had a seizure (Tr. pp. 559, 562-63; *see* Dist. Ex. 7). She further testified that during the approximately 45-60 minutes she spent with the student, the student did not require any

²⁰ The evaluator was with the student for about 45 minutes (Tr. pp. 122-24).

services from the 1:1 nurse (Tr. pp. 559-60). Similarly, during an observation conducted by the district feeding therapist, she did not notice the student have any seizures and did not observe the student's 1:1 nurse provide skilled nursing services or medical assistance to the student (Tr. pp. 437-38). Furthermore, during the district PT evaluation, the physical therapist did not observe the student to have any seizures (Tr. p. 638; see Dist. Ex. 6).

In addition to the evaluations conducted by the district, the June 2021 CSE considered the recommendations made by the student's pediatrician in her September 2020 letter (Tr. pp. 282, 832-33; Dist. Exs. 2 at p. 3; 10). No physician—either the student's or the district's—participated in the June 2021 CSE meeting (Tr. pp. 183, 218, 281-82).²¹

The June 2021 CSE recommended that the student attend a 12:1+4 special class that included one teacher assistant and three teacher aides, along with a full-time nurse assigned to the class (Tr. pp. 36-37, 39, 46, 59; Dist. Ex. 2 at pp. 9-10). The CSE also recommended that the student be provided with a full time 1:1 aide (Dist. Ex. 2 at p. 10). To address her medical needs, the June 2021 CSE recommended that the student receive three 15-minute sessions daily of individual skilled nursing services together with skilled nursing services throughout the school day as needed (Dist. Ex. 2 at pp. 1-2, 10; see Tr. p. 414). The district's 12:1+4 classroom nurse testified that the recommendation for skilled nursing services throughout the school day was for things during the school day that were "not predictable" like recording seizures, or administering emergency medications (Tr. pp. 387-89, 414-16). The CSE chairperson testified that in recommending placement in the district's medically fragile 12:1+4 special class, her primary concern was safety, because the student was dependent on the nurse for her g-tube feeding, she was dependent on the therapists, and she was dependent on the 1:1 aide; the chairperson also testified that the CSE did not recommend a 1:1 nurse because the program had a nurse available for emergencies and the CSE, with information from the Kaplan staff, believed the student did not need her own nurse throughout the day (Tr. pp. 814-16, 829). The chairperson further testified that the CSE recommended a 1:1 aide for toileting, to help with feeding, and to observe the student, along with the classroom nurse, for seizures (Tr. pp. 830, 868-69). The CSE chairperson further testified to the roles of a nurse and 1:1 aide with respect to the student and opined that the student "really needed a one-on-one, somebody who would sit with her, and always observe her and be in front of her" because as observed by the district's coordinator of health services the 1:1 Medicaid nurse sat behind the student yet her seizures were described as "possible absent seizures, where the head drops and the eyes close sometimes, not all the time, but you have to be in front of the child to see that" (Tr. p. 838).

The IHO found that there was conflicting information in the hearing record regarding what information the Kaplan staff provided to the June 2021 CSE regarding the student's need for a 1:1 nurse (IHO Decision at pp. 77-78). The parent testified that the student was not allowed to attend Kaplan if her 1:1 Medicaid nurse was not able to accompany her (Tr. pp. 1083, 1102, 1104). The mother testified that this happened only two or three times and the student would remain at the

²¹ The district's coordinator of health services testified that she requested updated medical information from the student's pediatrician in "October" but never received anything (Tr. pp. 282-83).

family care provider's home (Tr. pp. 1102-03, 1170).²² As discussed above, the meeting notes and prior written notice indicated that the principal of Kaplan informed the CSE that the student's medical needs could be addressed by the presence of a classroom nurse with added skilled nursing services (Dist. Exs. 1 at p. 12-14). The Kaplan special education teacher testified that she did not recall the principal making that statement and the principal also testified that he did not remember making that statement (Tr. pp. 1256, 1314, 1320-22). In contrast, the district's coordinator for health services and supervisor of case management and nonpublic school services both recalled that, at the June 2021 CSE meeting, the Kaplan principal stated during the meeting he agreed with the CSE that the student did not need a 1:1 nurse in the classroom (Tr. pp. 864, 1656-57, 1747). The CSE chairperson testified that at the CSE meeting "the people from BOCES were very clear, that even if they didn't have the Medicaid nurse that the family sent, they still would not have put a nurse in the classroom, that they have a nurse that's on call, and they didn't give her a one-on-one either" (Tr. pp. 838, 944).

The student's special education teacher at Kaplan testified that the student had seizures during the school day, but it fluctuated "day to day" and the student had days without any seizures (Tr. pp. 1228, 1238, 1266-67). She testified that the Kaplan 12:1+4 special class did not have a classroom nurse (Tr. p. 1238). When asked about what skilled nursing services were provided while the student was having a seizure, the Kaplan special education teacher testified that "the only thing we do is put a towel in front of her on the table, if she should have a head drop seizure" (Tr. p. 1239). She further testified that placing of the towel could be performed by whoever is closest to the student and that the 1:1 nurse was not required for this task (Tr. pp. 1239). She testified that the 1:1 nurse gave the student water through the g-tube three times a day (Tr. pp. 1239-40). She testified that one of the teacher aides and herself changed and fed the student and those services could be done by a 1:1 aide and did not require a 1:1 nurse (Tr. p. 1240). She testified that some of the student's 1:1 nurses recorded seizures and some did not (Tr. p. 1241). The Kaplan special education teacher testified that she was able to determine when the student was having a seizure because she either laughed or stared off into space (Tr. pp. 1241-42). Ultimately, she testified that other than the water bolus there was no other skilled nursing services performed by the student's 1:1 nurse during the day (Tr. p. 1257).

The district's coordinator of health services testified that in making a recommendation for nursing services, she reviews a student's medical needs, as indicated in the medical orders, and determines how they can be met (Tr. pp. 211-12, 267). She asserted that the student's need for skilled nursing services could be met with the classroom nurse rather than a 1:1 nurse and agreed with the recommendation for a 1:1 aide (Tr. pp. 229, 232). She further opined that a consistent 1:1 aide would provide the student with a level of comfort, security, and familiarity, and that with that support along with the classroom nurse and the other staff in the classroom, the student would be safe and secure (Tr. p. 232).

Although not present at the June 2021 CSE meeting, the nurse assigned to the district's medically fragile 12:1+4 special class testified as to her duties, which included administering g-tube feedings, assessing students for seizure activity, observing students in response to health

²² When the nurse is not available in the home "sometimes" the mother goes to the family care provider's house to sit with the student and the family care provider (Tr. pp. 1102-03, 1167-68, 1352).

concerns raised by classroom staff, administering medication, and intervening in the event of an emergency (Tr. pp. 351-52, 355). The district's coordinator of health services and classroom nurse both testified that the aides in the classroom could feed, change, transfer, and assist the students with daily care and staff were aware of what to look for and would alert the classroom nurse of any health-related concerns in the classroom (Tr. pp. 222, 313-14, 353-54, 379). The nurse noted that the student's seizures were well controlled and not life threatening, and the student's medical needs were typical of the students in the district's medically fragile 12:1+4 special class (Tr. pp. 416-17).

The classroom nurse suggested that there was a thirty-minute window of time with regard to carrying out doctors' orders related to medication administration and g-tube feedings, which would allow her to address the needs of students who required services at the same time (Tr. pp. 372-73). She indicated that there were other nurses at the school available in the event of problems or emergencies and to cover for her during breaks (Tr. pp. 373-74, 390, 404-07). The nurse stated that she was in the classroom every day from 8:30 a.m. to 2:30 p.m. and that she was very familiar with the students in her class (Tr. pp. 377, 406).

The evidence in the hearing record does not suggest that under the parents' preferred approach at Kaplan the same nursing staff consistently provided services to the student, even though the pediatrician wrote that the student was "sensitive to changes in the staff that cares for her" or that disruptions would cause and increase in seizure activity (see Dist. Ext. 10 at p. 1). One of the student's Medicaid nurses, who was a licensed practical nurse (LPN), testified that she went to Kaplan with the student generally one day a week and sometimes two days a week (see Tr. pp. 1331-32, 1335, 1340-41).²³ The Medicaid nurse testified that she could not usually detect when the student was about to have a seizure and that the first sign of the student seizing was usually a head drop followed by laughing (Tr. p. 1338). She testified that she was "always looking at [the student]" and sat "right next" to her unless the student was receiving one-to-one therapy and she was a "few inches further away" (Tr. p. 1339, 1343). She testified that she recorded the time and duration of the student's seizures at school, along with other characteristics, and later put her notes in the student's nursing book at home (Tr. p. 1350). The Medicaid nurse reported that the student had a towel on her chair and when staff saw a head drop seizure coming, they would position the towel so the student hit her head on that instead of her chair tray (Tr. pp. 1345, 1375). The Medicaid nurse confirmed that someone other than a nurse, including a 1:1 aide, could also put a towel down so that the student did not hit her head, but they needed to be close to her (Tr. p. 1375-77).

The student's certified pediatric nurse practitioner testified that she agreed with the pediatrician's recommendation of 1:1 nursing for the student and did not think it would be safe for the student to share a classroom nurse with other medically fragile students (Tr. pp. 1797, 1806, 1818-19). She explained that she would have concerns if the student was placed in the district's proposed classroom because she had frequent seizures and required basically full care in all activities of daily living (Tr. p. 1809). The certified pediatric nurse practitioner opined that the student "require[d] more intensive care than being in a room with eight other kids that [we]re

²³ The district's coordinator of health services testified that an LPN must perform his/her responsibilities "under the supervision of a registered nurse" (Tr. p. 196).

medically fragile, who m[ight] all have different needs at different times," and suggested that there was a higher risk of the student getting injured in the setting proposed by the district (Tr. p. 1809). The student's certified pediatric nurse practitioner testified that when the student experienced a head drop seizure someone needed to immediately make sure she did not hit her head or fall (Tr. pp. 1811-12). However, she also testified that a nurse would not have to be the one to put the towel down in front of the student, that a trained aide could do it if they knew how to "pick up on the seizure" and could differentiate between a seizure the student's hypotonia (Tr. p. 1812). She opined that a 1:1 nurse was needed to record the student's seizures in terms of frequency and duration (Tr. pp. 1812-13).

Much of the evidence regarding the conflict between the district's position and the parents' position regarding whether the student required the support of a full-time continuous 1:1 nurse during the school day appears to stem from a differing perspective between the student's physician and the district coordinator of health services as to the severity of the student's seizures. The district coordinator of health services identified the types of seizures that the student exhibited such as staring spells, head drops, stiffness, hand-stretching, and pill rolling (Tr. pp. 207-08; Dist. Ex. 10 at p. 1). She described the student's seizures as benign and not life-threatening, and indicated that the seizures did not result in a significant loss of consciousness or difficulty with breathing (Tr. p. 210, 327-29). She explained that the nurse in the medically fragile classroom would be able to see the student as well as the staff who are aware of what a seizure looks like and everyone worked as a team to watch the students and alert the nurse immediately, which the nurse could then document (Tr. pp. 215, 353-54). Based upon the foregoing, the district's coordinator of health services testified that the classroom nurse "certainly could document any type of seizure activity that [the student] may have" (*id.* at pp. 215, 225). Furthermore, she, as well as the classroom nurse and CSE chairperson, testified that with the classroom nurse and 1:1 aide the student would be safe (Tr. pp. 232, 416-17, 820, 872). Finally, the coordinator asserted that although it was possible that a seizure could go unnoticed, there was no concern that a seizure could cause harm or damage to the student (Tr. pp. 208-09, 337-38, 341-42). The district coordinator of health services confirmed that there were doctors who served as consultants for the school district, but she was not aware if they had been in contact with the student's family or doctors regarding the student's condition (Tr. pp. 281-82).

The CSE chairperson also stated that there was no documentation before the June 2021 CSE which indicated that the student's seizures were so severe as to be life threatening (Tr. p. 849). The CSE chairperson testified that her understanding was that "life threatening seizures are when you have static epilepsy" meaning when a person goes into a seizure and no medication will stop it (Tr. p. 849). She testified that she knew that having thousands of petit mal seizures would eventually create more brain damage but that they were not necessarily life threatening (Tr. p. 849). The CSE chairperson explained that the only medical document the CSE had before it was from 2020 (Tr. p. 849). The CSE chairperson testified that "[n]o one ever said [the student] had intractable epilepsy (Tr. pp. 849-50). She indicated that the student still had seizures, even with medication but noted that it did not appear that the student was having grand mal or tonic clonic seizures (Tr. p. 850).

In contrast, the student's pediatrician testified that without 1:1 nursing in school the student could be placed in danger as a result of a seizure and explained that the student "ha[d] poor muscle tone, so when she ha[d] a seizure, she ha[d] to be carefully watched so she d[id]n't thrash or hit herself anywhere. She also ha[d] clusters of seizures, so she need[ed] to be observed [to make sure} that she d[id]n't have a longer seizure" (Tr. p. 1529-30) The physician continued testifying that "[t]he other major issue is that she [ate] soft foods, and if she ha[d] a seizure when feeding, food ha[d] to be removed from her mouth in order to prevent choking" (Tr. p. 1530). When asked about head drop seizures, the pediatrician testified that someone need[ed] to be right next to [the student] to make sure [she] d[id] not hit a hard surface (Tr. p. 1551). Upon further questioning, the pediatrician testified that placing a towel in front of the student would not "be enough" because the student had low muscle tone and could not hold herself up so someone needed to physically support her (Tr. pp. 1551-52). She testified that a nurse would be able to recognize the seizure prior to its occurrence, provide support for the student, and monitor the length of the student's seizures (Tr. pp. 1550-52, 1557-58, 1561), however, I note that the testimony of the student's Medicaid-funded nurse described above tended to conflict with the doctor, essentially conceding that she was unable to anticipate the student's seizures, she was not physically supporting the student, and she was in fact focused on the need for an individual, not necessarily a nurse, to ensure the towel was in place. When questioned about whether a teacher's aide, special education teacher or related service provider could identify a seizure and then make sure the student did not hurt herself, the pediatrician testified that support was not "adequate" and she would not be "comfortable" with that type of support and the student requires a medically trained individual – a nurse (Tr. pp. 1530-31, 1551-53, 1567-68). Also in conflict with the pedestrian's concern is that district coordinator of health services personal observations that the Medicaid nurses would leave the student unattended without nursing services for observable periods of time.

The CSE chairperson was asked on cross-examination whether she should have "tabled" the CSE meeting if she felt there was insufficient medical information to make a determination and she testified that she did not believe that more medical records were necessary "[b]ecause I had all the experts at the meeting, and we're not a medical model, nor is BOCES, and we're not a hospital and we're not clinical" (Tr. p. 890). She further testified that additional medical records would be "helpful" but not "necessary to make the decision that was made at the [June 2021] CSE" (id.). The CSE chairperson testified that the pediatrician's order for 1:1 nursing at school with the student's home nursing staff was not a "mandate" but a recommendation and further noted that the October 2020 prescription was over one year old and should have been updated (Tr. pp. 932-33; see Dist. Ex. 10 at p. 4).

The problem for the district's case is that it is relying upon this absence of information to discredit the medical opinion of the student's treating physician. There is evidence to support district coordinator of health services had reason to question the physician's medical opinion, especially since the evidence shows that even the parent's preferred Medicaid-funded nurses that the doctor was recommending did not actually adhere to the same stringent level of protocols described by the doctor. However district coordinator of health services also conceded in her testimony that although the district had consulting physicians of its own, the CSE did not make use of them in this case. The Education Law requires a school district to employ a qualified physician, or a nurse practitioner to the extent authorized by the nurse practice act to perform the

duties of the director of school health services and that an RN (in this case the "coordinator" of health services) was to "aid" the district's director of school health services consistent with the practice act for a registered nurse (Educ. Law § 902 [2][a]). As such the actions of the CSE put the nurse in the untenable position of contesting the viewpoints of the student's physician who expressed the medical opinion that the seizures required 1:1 nursing to be controlled. While I find that there were ample reasons for the coordinator of health services to take the matter to the district's consulting physician, who would be in a position to take the discrepancies up with the student's treating physician(s), the record is clear that such communications were not done in this matter.

Considering the above, it does not appear that the June 2021 CSE had sufficient information available to it to determine that the student's medical needs did not require the support of 1:1 school nursing services throughout the school day. The district coordinator of health services acknowledged that her job entailed providing support services that meet a student's medical needs as those needs are explained to the CSE by a physician through medical orders (Tr. pp. 211-12). However, the coordinator disagreed with the student's physician's recommendations, leading to the June 2021 CSE not including a recommendation for a 1:1 nurse on the June 2021 IEP. Additionally, as discussed above, the basis for the coordinator's disagreement with the physician appears to relate to a disagreement as to the student's medical needs.

To be clear, it may very well be that the coordinator is correct and the student's seizures while serious, were not quite as dangerous as portrayed by the student's pediatrician and it may very well be that the recommended 12:1+4 special class at Elmwood with added skilled nursing services could have addressed the student's medical needs. However, in reviewing the hearing record, a choice must be made between whether to follow the medical directives laid out by the student's physician or the plan set forth by the coordinator of health services whose medical qualifications are as a registered nurse without any effort by the CSE to consult with a director of school health services in compliance with the Education Law. Certainly, a district is not always bound by the recommendation or preferences of a student's physician and may rely upon the sound advice of its own physician. As the Seventh Circuit has opined, "a physician's diagnosis and input on a child's medical condition is important and bears on the team's informed decision on a student's needs... But a physician cannot simply prescribe special education; rather, the Act dictates a full review by an IEP team composed of parents, regular education teachers, special education teachers, and a representative of the local educational agency." (Marshall Joint Sch. Dist. No. 2 v. C.D. ex rel. Brian D., 616 F.3d 632, 640–41 [7th Cir. 2010] [citations omitted]) Unlike the case before the Seventh Circuit, here the issue was less educational in nature and focused more on an issue of medical safety while the student was in an educational environment. The CSE gathered some clinically relevant information that began to call into question the private physician's viewpoint, but failed to obtain a medical opinion from its own school district physician supporting its position. Based on the above, the only remaining prudent course based upon the evidence was to follow the medical directives as laid out by the student's physician.

One final issue must be addressed. After finding that the student required a 1:1 nurse, the IHO engaged in analysis to determine whether she would allow the district to provide the student with its own nurse or would require the district to permit the student's nurse funded through Medicaid to accompany the student to Elmwood (see IHO Decision at pp. 82-84). The IHO found that "it would be helpful and meaningful to have the Medicaid nurse who was familiar with [the

student] to bring her to school and then bring her home" (*id.* at p. 83). Additionally, the IHO found that ordering the district to allow the student's Medicaid nurse to accompany the student to the district public school would provide continuity in the student's nursing services (*id.* at pp. 83-84). The IHO also found that the district's prohibition on the Medicaid nurse at school was due to a "protocol" and there was no other reason to prevent the Medicaid nurse from accompanying the student in the building (*id.* at p. 84). As a result, the IHO ordered that the student was permitted to attend the Elmwood medically fragile special class with her Medicaid nurse (*id.*). The IHO concluded that if the district did not permit the Medicaid nurse to accompany the student into the Elmwood medically fragile special class, then the district was directed to fund the student's placement in the Kaplan medically fragile class (*id.* at pp. 84, 86).

The district appeals from the IHO's finding and asserts that it has "the obligation to provide any nursing services a student requires in school, and such services must be delivered by a 'qualified school nurse.'"

As discussed above the evidence leads to the conclusion that the June 2021 CSE did not have sufficient information from a physician to have departed from the private physician's medical opinion that a full-time 1:1 nurse was necessary for solely medical reasons for the student and accordingly, going forward 1:1 full-time school nurse services must be included in the student's educational program until the CSE reconvenes and develops a new program for the student. However, it is within the district's authority to determine how to provide the student's educational programming including which personnel shall provide related services such as the 1:1 nursing (*Ventura de Paulino v. New York City Dept. of Educ.*, 959 F.3d 519, 534 [2d Cir. 2020], cert. denied, 141 S. Ct. 1075 (2021), reh'g denied, 141 S. Ct. 1530 [2021]). Additionally, it would not be appropriate to require the district to utilize a specific person to provide the student with services as "[t]he prospective nature of the IEP also forecloses the school district from relying on evidence that a child would have had a specific teacher or specific aide . . . [and] the [district] cannot guarantee that a particular teacher or aide will not quit or become otherwise unavailable for the upcoming school year" (*R.E.*, 694 F.3d at 187; see *R.B. v. New York City Dep't. of Educ.*, 15 F. Supp. 3d 421, 436 [S.D.N.Y. 2014], *aff'd* 603 Fed. App'x 36 [2d Cir. Mar. 19, 2015]). The provision of school nursing services on a 1:1 basis in conformity with the Education Law is no different and no provision in the IDEA or State law requires the district to use a particular nurse that is selected by the parents or funded through Medicaid. Accordingly, the more appropriate course is to allow the district to exercise its discretion in providing for the student's educational program, which at this point includes a 1:1 nurse.

VII. Conclusion

Having determined that the evidence in the hearing record was insufficient to determine whether the student requires 1:1 nursing throughout the school day, if the district desires to remove a 1:1 nurse from the student's educational program, the district may reconvene the CSE with the written opinion or attendance of the proper medical professionals for a determination as to the extent of student's medical needs. Until this occurs, the district is directed to provide the student with full-time 1:1 school nurse services as part of the student's educational program.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated February 27, 2022, is modified by reversing those portions which held that the district predetermined the student's program and related services for the 2021-22 school year, that the CSE's recommendation for PT services for the 2021-22 school year denied the student a FAPE, and held that the CSE failed to address the student's feeding needs for the 2021-22 school year;

IT IS FURTHER ORDERED that the IHO's decision dated February 27, 2022, is modified by reversing that portion which directed the district to allow the student's Medicaid nurse to accompany the student to Elmwood; and

IT IS FURTHER ORDERED that the district is directed to add full-time 1:1 school nurse services to the student's educational programming until such time as the CSE reconvenes with appropriate medical personnel to assess the student's medical needs.

Dated: **Albany, New York**
 June 9, 2022

JUSTYN P. BATES
STATE REVIEW OFFICER