The University of the State of New York

The State Education Department
State Review Officer
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No. 23-043

Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the Southampton Union Free School District

Appearances:
Disability Rights New York, attorneys for petitioner, by Jessica K. Cochrane, Esq.

Volz & Vigliotta, PLLC, attorneys for respondent, by Joshua S. Shteierman, Esq

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which dismissed the parent's amended due process complaint notice.[1] The appeal must be dismissed.

II. Overview—Administrative Procedures

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

[1] For purposes of this decision, all references to the parent are to the student's legal guardian (see 20 U.S.C. § 1401[23]; 34 CFR 300.30[a]; 8 NYCRR 200.1[ii]).

§§ 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 received diagnoses of cerebral palsy and autism (Parent Ex. C at p. 1; Dist. Ex. 24 at p. 1). The student also presents with "heel cord tightening due to cerebral palsy and having plantar flexion contractures causing toe walking and unsafe gait and stair negotiation compounded by cognitive impairments secondary to [her diagnosis] of autism" (Parent Ex. C at p. 4).

On June 8, 2021, the CSE convened to create an IEP for the student for the 2021-22 school year (Dist. Ex. 7). Finding the student eligible for special education as a student with multiple disabilities, the CSE recommended that the student be placed in a 12:1+2 special class for English language arts (ELA), math, social studies, and science, along with related services consisting of two 30-minute sessions per week of individual physical therapy (PT), one 30-minute session per week of individual occupational therapy (OT), two 30-minute sessions per week of small group OT pushed into recess, three 30-minute sessions per week of individual speech-language therapy, and one 30-minute session per week of small group speech-language therapy (id. at p. 7). The CSE further recommended that the student receive supplemental aides and services, program modifications, and accommodations consisting of a 1:1 teaching assistant for seven hours per day in order to implement behavioral strategies and ten hours per year of behavior intervention support (id.). The CSE also recommended that the student receive 12-month services consisting of placement in a 12:1+2 special class for five hours per day with related services of two 30-minute sessions per week of individual PT, two 30-minute sessions per week of individual OT, and three 30-minute sessions per week of individual speech-language therapy, as well as the support of a 1:1 teaching assistant for five hours per day (id. at p. 8).

On July 28, 2021, the CSE amended the student's IEP without a meeting to reflect a change in the special class recommendation from a 12:1+2 special class to a 12:1+1 special class (Dist. Exs. 8 at p. 1; 9 at pp. 1-2, 9). The district indicated that the change was made "so that there [wa]s a teaching assistant versus two classroom aides" (Dist. Exs. 8 at p. 1; 9 at p. 2).

On August 24, 2021, the parent sent an email to the district assistant superintendent for student services in which she indicated that she just learned the student was going to be in a "third floor classroom" for the 2021-22 school year (Tr. pp. 259, 423-24; Parent Ex. M; Dist. Ex. 25). The parent expressed her position that this would place the student "in a very dangerous situation, since she cannot negotiate steps" and there was "NO WAY that she could safely evacuate a building, descending three flights of steps, during a chaotic scene of classrooms of children and staff pushing past her" (Parent Ex. M).

Also, on August 24, 2021, the parent sent an email to the district superintendent, in which she indicated there had been issues with school during the summer that jeopardized the student's safety and required the student's removal from summer school (Tr. pp. 423-24; Parent Ex. L). The parent further indicated that "the most recent outrageous situation that [wa]s being implemented this September, [wa]s placing your special Ed class on the third floor" (Parent Ex. L at pp. 1-2). The parent repeated her concerns regarding an event that could require evacuation of the building and indicated that she was not pleased with district staff's response that an aide could carry the student down the stairs, expressing "[t]his is a recipe for the most tragic and preventable catastrophe that I can imagine" (id. at p. 2).

On September 3, 2021, the assistant superintendent for student services sent an email to the parent indicating that, after reviewing all options, the district determined that having the student "remain with her peer group and classmates, in the special class program located on the 3rd floor" was "safe and appropriate" (Dist. Ex. 25 at p. 1). The assistant superintendent further informed the parent that the district would "create a safety plan with [her], and most importantly, do all that [they] c[ould] to keep [the student] safe" (id. at p. 2).

On September 13, 2021, the school principal circulated a draft safety plan in advance of a safety committee meeting (Dist. Ex. 38).

On September 14, 2021 the school convened a "personal school emergency evacuation plan" review meeting with the parent, the district assistant superintendent for student services, the school principal, the school assistant principal, a school psychologist, the district director of facilities, the district director of school safety, the student's teacher, a local fire marshal, two fire chiefs, two school resource officers, the school nurse, and the student's physical therapist (Dist. Ex. 27 at p. 4).

On September 28, 2021, the CSE convened for a program review for the student (Dist. Exs. 10; 11). The CSE continued to recommend the same class placement and related services as recommended in the July 2021 IEP (compare Dist. Ex. 9 at p. 9, with Dist. Ex. 11 at p. 7). However, the prior written notice for the September 2021 CSE meeting indicated that, in order to accommodate the parent, as she continued to keep the student out of school due to safety concerns regarding the location of the student's class on the 3rd floor, the district agreed to send placement requests to a board of cooperative educational services (BOCES) and other local districts that had one-level buildings, as well as to arrange for home instruction and related services until an appropriate placement could be located (Dist. Ex. 10 at p. 1).

On October 19, 2021, the CSE convened for a program review for the student (Dist. Exs. 12; 13). According to the prior written notice for the October 2021 CSE meeting, the CSE decided to continue the student's educational program in the recommended 12:1+1 special class placement but indicated that the district would set up visits with neighboring school districts to tour programs offered (Dist. Ex. 12 at p. 1).

On December 1, 2021, the CSE convened for a program review for the student (Dist. Exs. 14; 15). The CSE kept the student's educational program in place and added an additional 30-minute session of individual PT per week and a 30-minute PT consultation per month (compare Dist. Exs. 9 at p. 9; 11 at p. 7; 13 at p. 7, with Dist. Ex. 15 at pp. 10-11).

On January 6, 2022, the CSE convened for a program review for the student at the parent's request (Dist. Exs. 16 at p. 1; 17 at p. 2).[2] As a result of the January 2022 CSE meeting, the CSE requested parental consent for a reevaluation of the student, indicating an intention to conduct a psychological evaluation, an educational evaluation, a speech-language evaluation, a social history update, an OT evaluation, and a PT evaluation (Dist. Exs. 16 at pp. 1-2; 17 at p. 2).

The district conducted a PT evaluation on February 8, 2022 (Dist. Ex. 24).

On February 15, 2022, the CSE convened for a program review for the student (Dist. Exs. 18; 19). According to the prior written notice, the CSE updated the descriptions of the student's skills and revised the student's annual goals, continuing the same educational program from the student's prior IEP (Dist. Ex. 18 at p. 1).

[2] As of January 6, 2022, the student had missed 72 days of school (Dist. Ex. 17 at p. 3).

Subsequent to the February 2022 CSE meeting the parent obtained letters from the student's podiatrist and prosthetist, as well as a physical therapist (Joint Exs. 4-5, 7). Collectively they indicated that the student had difficulty negotiating stairs and was at risk of falling when attempting to do so (Joint Exs. 4-7). They opined that the student's classroom should be on the first floor (Joint Exs. 4-6; see Joint Ex. 7).[3]

The parent submitted these letters, along with an August 2021 letter from the student's pediatric neurologist to the district and they were considered by the CSE at a meeting held on April 7, 2022 (Dist. Exs. 43 at p. 8; 19a at p. 3).[4]

The April 2022 CSE recommended that the student be placed at a BOCES in an 8:1:1+3 special life skills class with the same frequency and duration of related services as recommended in the student's prior IEP (Dist. Ex. 19a at p. 11; compare Dist. Ex. 19a at p. 11, with Dist. Ex. 19 at p. 10). The CSE did not continue the recommendations for a 1:1 teaching assistant or behavior intervention support (compare Dist. Ex. 19a at p. 11, with Dist. Ex. 19 at p. 10). The April 2022 IEP indicated that at the time it was developed the student was receiving instruction in a 1:1 setting (Dist. Ex. 19a at p. 8). In this setting, the student required frequent prompts and redirection during instruction to remain on task (id.). The student's academic skills were below grade level expectations and, although she was able to engage in conversations with peers and adults, they were not consistently appropriate due to pragmatic language deficits (id. at pp. 6-7). The IEP

[3] In a letter dated March 10, 2022, the student's podiatrist indicated that the student was a "habitual toe walker" and had "the propensity to fall especially while walking up and down the stairs" (Joint Ex. 4). He opined that it was "imperative that [the student] have her classroom on the ground floor to ensure easy entrance and exit from the school building" (id.). He further stated that "[b]y refusing to have [the student's] classroom on the first floor [the] school was placing [the student] and other students at risk of injury during an emergency" (id.). In a letter dated March 18, 2022, the student's prosthetist indicated that the student was autistic and a toe walker (Joint Ex. 5). He explained that she had tight heel cords and when she walked, she did so on her "tip-toes" with her heels off the ground (id.). The prosthetist opined that in an emergency situation the student would be "unable to successfully descend three flights of stairs because she walk[ed] on her toes" (id.). He suggested that the student would fall forward and noted that "any fall on stairs carries with it the risk of catastrophic injury or death" (id.). The prosthetist stated that the student's toe walking, combined with her cognitive difficulties, made it "extremely unlikely—more like impossible" that she would be able to exit the building safely in an emergency (id.). Based on his observation of the student he opined that anything more than three steps was unsafe for her (id.). The prosthetist asked the district to "consider [the student's] situation and move her to a classroom on the first floor" (id.). The physical therapist reported that the student's ankles were contracted, she had moderate to severe tone in her bilateral calves/achilles, exhibited only functional strength in her lower extremities, ambulated with bilateral AFOs, had uncontrollable forward propulsion and was afraid of stairs due to previous falls (Joint Ex. 7). The physical therapist reported that it took the student "4 min[utes] and 36 seconds to descend stairs with assistance" (id.). She opined that because the student was unable to safely descend stairs and ambulate independently, especially in the case of an emergency, a third-floor classroom was not an option for the student (id.).

[4] In a letter dated August 31, 2021 the student's pediatric neurologist described the student as having autism spectrum disorder, attention deficit hyperactivity disorder "and cognitive disabilities" and requested that the district "place the student on the first floor of the school building to avoid any physical harm to [the student]" (Joint Ex. 1). The April 7, 2022 CSE meeting summary indicated that the CSE was provided a second letter from the student's pediatric neurologist; however, this letter was not entered into evidence at the impartial hearing (Dist. Ex. 19a at p. 3). The April 2022 CSE meeting also indicated that the CSE considered an undated letter from the student's physiatrist (Dist. Ex. 19a at p. 3; see Tr. p. 700; Joint Ex. 6).

stated that the student needed to increase her attending behaviors in order to increase her access to the academic and social curriculum presented (id. at p. 6). With regard to the student's physical development, the IEP stated that the student presented with gross motor deficits that "affected her ability to focus in the classroom, participate with peers, and safely negotiate her school environment" (id. at p. 8). Among other things, the IEP indicated that the student ambulated with "severe plantar flexion for which she ha[d] recently been prescribed and provided with bilateral hinged AFOs and new sneakers" (id.at p. 7). The IEP characterized the student's dynamic balance as fair and noted that "when [the student] was required to move throughout her classroom and hallways, she exhibited moderate difficulties adjusting her cadence speed and avoiding obstacles" (id.). The IEP further noted that the student demonstrated significant motor planning deficits and poor endurance for physical activity (id. at p. 8). In terms of the student's ability to negotiate stairs, the IEP indicated that she employed a "step-to cadence to ascend and to descend holding a hand rail with 1:1 [a]dult supervision" (id.). In addition, the IEP stated that the student was able to perform reciprocal cadence to ascend stairs with verbal prompts (id.).

A. Due Process Complaint Notice and Subsequent Events

In a due process complaint notice dated April 29, 2022 the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) in the least restrictive environment (LRE) during the 2021-22 school year (IHO Ex. I at p. 5).[5] The remainder of the claims raised in the parent's due process complaint notice related to alleged violations of section 504 of the Rehabilitation Act of 1973 ("section 504"), 29 U.S.C. § 794(a) and the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 et seq. (id. at p. 6). Finally, the parent "invoke[d]" the student's right to pendency and alleged pendency was based on the October 2021 IEP; however, the parent also stated that "the location of the services specified on said IEP must be provided in a safe and accessible location as required by the IDEA" (id. pp. 6-7).

For relief, the parent requested, among other things, a "declaratory finding" that the district failed to provide the student a FAPE in the LRE for the 2021-22 school year; that the district be required to provide the student with the educational and related services as recommended in the October 2021 IEP and placement in a 12:1+1 special class "in a physical location that lawfully and safely accommodates [the student]'s disabilities" for the 2021-22 and 2022-23 school years; that the district be required to withdraw its recommendation that the student be alternately assessed; and that the district be required to provide compensatory education for services not provided to the student during the 2021-22 school year because the student was "constructively precluded from receiving a [FAPE]" (IHO Ex. I at p. 6).

According to the IHO, after the filing of the initial April 2022 due process complaint notice, three prehearing conferences were held on June 16, 2022, July 18, 2022, and September 12, 2022

[5] The IHO's decision includes a list of exhibits, which identifies four IHO exhibits (IHO Decision at p. 25; see IHO Ex. I-IV). The IHO also issued an interim decision on pendency on October 10, 2022 (IHO Ex. IV), which identified six IHO exhibits that were considered as part of the interim decision on pendency and are attached to the end of the decision; for purposes of clarity the six IHO exhibits identified in the interim decision on pendency will be referred to as pendency exhibits (Pendency Exs. I-VI).

(IHO Decision at p. 3).[6] The IHO indicated that he informed the parties that the parent's due process complaint notice made no allegation regarding the placement of the student in the district public school, referring only to the BOCES placement, and he suggested that the parent amend the due process complaint notice (IHO Ex. IV at p. 3; see IHO Decision at p. 3).

The parent filed an amended due process complaint notice on September 13, 2022, which removed the factual assertions regarding the BOCES placement from the original due process complaint notice, but kept the same claims, including the allegation that the district failed to offer the student a FAPE in the LRE during the 2021-22 school year (IHO Ex. II). The amended due process complaint notice also modified the requested relief by removing language that the district "recommend[ed] an inappropriate and overly restrictive placement" and by requesting that pendency be based on the recommendations set forth in the December 2021 IEP rather than the October 2021 IEP (compare IHO Ex. II at p. 4, with IHO Ex. I at pp. 6-7). The parent's other requested relief remained the same; however, the parent withdrew her request that the district be required to withdraw its recommendation that the student be alternately assessed (compare IHO Ex. I at p. 6 with IHO Ex. II at p. 4).

After receiving the amended due process complaint notice, the IHO found that the amended due process complaint notice "continued the errors of the original [c]omplaint" and that it "failed to address the issue both [parties] contended was the basis for the proceeding" (IHO Decision at p. 3). After the IHO indicated that he intended to declare the amended due process complaint insufficient and cancelled hearing dates scheduled for September 19, 2022 and September 20, 2022, parent's counsel sent a letter to the IHO dated September 20, 2022, in which the parent argued that the IHO had no authority to reject the amended due process complaint notice as insufficient; in response, the IHO agreed that, because the district accepted the amended due process complaint notice, he had no authority to deem it insufficient (Pendency Exs. IV; V). The IHO further cautioned that his intention was to only hear matters that were raised in the amended due process complaint notice (Pendency Ex. V at p. 2).

On September 27, 2022 the parties proceeded to another prehearing conference; at that conference, the parties indicated to the IHO that they had entered into an agreement as to the issue being presented in this proceeding and the IHO advised the parties that he would be guided by the parties' agreement as to the issue to be decided in this proceeding (September 29, 2022 letter; see IHO Ex. IV at p. 4). Additionally, at the conference, the parent's attorney raised the issue of pendency to which the district contended that the singular issue regarding the location of the student's classroom was also the sole issue in determining the student's pendency and that the IHO's determination on one issue would necessarily determine the other (September 29, 2022 letter). The IHO agreed with this position and determined a ruling on pendency was not appropriate at

[6] According to State regulation, the hearing record should include "written and electronic transcripts of the hearing," and for prehearing conferences either a transcript or written summary of the prehearing conference (8 NYCRR 200.5[j][3][xi], [5][vi][e]). The hearing record includes letters from the IHO to the parties summarizing the prehearing conferences (July 18, 2022 letter; July 20, 2022 letter). While the IHO decision indicated a September 12, 2022 prehearing conference, there is no written summary of that conference.

that time (id.). On September 28, 2022, counsel for the parent requested that the IHO issue a decision on pendency in writing (Pendency Ex. VI).

In a stipulated statement of facts, the parties agreed that, among other things, the educational program and services recommended and provided by the district in the December 2021 IEP were appropriate for the student and that the only disagreement between the parties was over the physical location of the classroom and whether compensatory education was warranted (IHO Ex. III ¶ 18).

In an interim decision dated October 5, 2022, the IHO determined that the location at which the student would receive her program was not an element of a pendency hearing and further determined that the student's pendency must be based solely on her program and not "on the bricks and mortar building in which such program was to be offered" (IHO Ex. IV at p. 5). As such, the IHO held that the parent was not entitled to a pendency hearing (id.).[7]

B. Impartial Hearing Officer Decision

An impartial hearing convened on October 27, 2022 and concluded on November 10, 2022 after four days of proceedings (Tr. pp. 1-753).[8] In a decision dated January 31, 2023, the IHO found that the district offered the student a "free, appropriate and safe [pu]blic education" for the 2021-22 school year and dismissed the parent's due process complaint notice (IHO Decision at p. 18).

Initially, after a summary of the proceedings that took place before and during the impartial hearing, the IHO noted the parties entered into a stipulated statement of facts and agreed that for the 2021-22 school year the district offered the student an educational program in a school placement that the parent conceded was appropriate and further that the only issue left for review was whether the district failed to offer the student a FAPE because such program was not offered in a "safe place" (IHO Decision at pp. 9-10). Specifically, the IHO noted that, in August 2021, the parent "learned" that the district intended to locate the student's third grade 12:1+2 special class on the third floor of the district's elementary school building, which the parent opposed contending that a class on the third floor was unsafe for the student because the student could not ascend stairs

[7] In the IHO's October 5, 2022 interim decision, he noted that the decision was issued at the request of the parent's attorney to have the IHO's determination in writing (IHO Ex. IV at p. 5). In a December 2, 2022 letter to the parties, the IHO rejected the parent's request to reconsider his interim decision on pendency (December 2, 2022 letter).

[8] Following the conclusion of the impartial hearing, both parties submitted closing briefs to the IHO—both dated January 12, 2023 (see Parent Post-Hr'g Br. at pp. 1-28; Dist. Post-Hr'g Br. at pp. 1-25).

and further that in an event of a fire, the district's staff was not equipped to get the student out of the building quickly (id. at p. 11).[9, 10]

The IHO noted that, for most emergency situations that might arise during the school day, the district's elementary school building had an elevator that the student had unrestricted use of and could have used to exit the building, except during a fire when use of the elevator was prohibited (IHO Decision at p. 12). The IHO noted that the parent pressed her objections to the third floor placement "based on [the s]tudent's risk if or when a fire might occur" (id. at pp. 12-13).

Next, the IHO addressed the district's response to the parent's repeated concerns about the safety of the student if she was placed in a classroom on the third floor (IHO Decision at pp. 13-15). The IHO noted that the district convened a safety committee to create a personal school emergency evacuation plan for the student "'in the spirit of working towards addressing'" the concerns of the parent about the student navigating the stairs in the event there "ever" was a fire (id. at p. 13). The IHO stated that he was "impressed by the breadth" of the safety committee because it "displayed a conscious determination to have wide input into the review" of the drafted emergency evacuation plan (id. at p. 14). The IHO reviewed the specifics of the evacuation plan and noted that the plan was approved by fourteen of the fifteen members of the safety committee, with disapproval lodged only by the parent who maintained that the student remained unsafe in a classroom located on the third floor (id.). The IHO further noted that the evacuation plan was signed by the town fire chief and a village police officer (id.). Based on the acceptance of the plan by the safety committee, the IHO determined that it was "presumptively entitled to acceptance" (id. at p. 15).

Next, the IHO addressed the testimony of the parent's witnesses challenging the efficacy of the emergency evacuation plan (IHO Decision at pp. 15-16). Regarding the testimony of the parent's apartment building superintendent, the IHO gave "little, if any weight to the testimony"

[9] The IHO also noted the parent's disagreement with the district's decision to assign the student a different teaching assistant for the 2021-22 school year and further acknowledged the parent's concession that, if the district would have retained the student's prior teaching assistant, she would have agreed to allow the student's program to be conducted on the third floor (IHO Decision at p. 11). The IHO noted the parent's testimony that she expected that, if there were a fire while the student was on the third floor, the student's prior teaching assistant would have "throw[n] her over her shoulder and take[n] her down" (id.). The IHO noted that the district, in its closing brief, argued that the parent's claim that permitting the student's program to be conducted on the third floor was unsafe was "a ploy" by the parent to get the district to change its decision to reassign the student's teaching assistant elsewhere (id. at p. 12). The IHO acknowledged that the district's argument may have had some validity but found that he did not need to consider the argument given that his determination "rest[ed] solely [o]n whether [the district's] program was offered in a safe location" (id.).

[10] The IHO also acknowledged the parent's testimony that she attempted to locate another educational facility to place the student but, after failing to find one, requested that the CSE offer the student a placement in the kindergarten through and second grade special educational program, which was located on the first floor (IHO Decision at p. 12). The IHO noted the district's argument in its closing brief that placing the student in the kindergarten, first grade, or second grade special educational program would have been " inappropriate both for [the s]tudent and the other students in such class"; the IHO again found that he need not consider the parent's search for a better site for the student's program as it did not address the issue before him (id.).

(id. at p. 16). According to the IHO, the building superintendent questioned whether the assigned personnel identified in the emergency evacuation plan could manage the student at the time of an emergency evacuation because of her weight and opined that, if emergency personnel were trying to reach the student, they may be coming upstairs at the time others were trying to come down, creating a fired hazard (id. at p. 15). The IHO noted that the building superintendent conceded that he was unaware of the locations of either assigned personnel identified in the emergency evacuation plan or how physically fit either of them were (id.).[11]

Regarding the testimony of the parent's witness who served as a fire marshal for another state, the IHO "found none of his testimony persuasive or sufficient to impeach or contradict the [emergency evacuation] Plan that had been reviewed and approved by, among others, a fire marshal, a department fire chief and the Village Police member" (IHO Decision at p. 16).

Regarding the student's podiatrist who testified regarding the student's inability to manage walking on stairs, the IHO found the testimony was "irrelevant to the limited scope of this proceeding, as nowhere in District's Emergency Evacuation Plan [wa]s [the s]tudent expected to walk or descend stairs" (IHO Decision at p. 16).

In conclusion, the IHO noted that he was unsure if the emergency evacuation plan was the "very best" that the district could have developed or if it would work, but, further opined that if the parent permitted the district to hold a practice emergency evacuation drill, any problems with the emergency evacuation plan would have become apparent (IHO Decision at p. 17). The IHO found that the testimony by the district's elementary school principal was "true" in comparison to the parent's testimony regarding the practice emergency evacuation drill (id. at pp. 17-18). The IHO noted the testimony of the district's elementary school principal that the district scheduled a practice emergency evacuation drill, the parent agreed to bring the student to the drill, but when the parent was made aware of the intention to test the emergency evacuation plan, the parent would not take the student to school (id. at p. 17). In contrast, the IHO did not credit the parent's testimony that she was going to bring the student to school at two o'clock on the day that the practice emergency evacuation drill was scheduled but, when the student arrived at school, the practice emergency evacuation drill had already been completed (id.).[12] Specifically, the IHO found "that Parent's claim that [the d]istrict had already conducted the drill makes no sense, as there would have been little purpose in conduct[ing] the drill without [the s]tudent" and further that the principal specifically testified that no test drill had been conducted (id. at p. 18).[13] The IHO held

[11] The IHO found it concerning that the building superintendent testified that if a fire broke out at the parent's apartment, he would ascend the stairs to the parent's apartment on the thirteenth floor while other occupants "flood[] down from the upper floors" to then carry the student down on his shoulder (IHO Decision at p. 16). Further, the IHO found it "even more bizarre" that, in the case of a fire at the apartment building, the evacuation plan was for the parent to carry the student up two flights of stairs to the building's roof on the fifteenth floor to wait for rescue (id.).

[12] The IHO noted that the parent conceded that she did not ask the district to reschedule another practice emergency evacuation drill (IHO Decision at p. 17).

[13] Further, the IHO opined that he could "only assume that [the p]arent feared that the drill would prove that [the d]istrict's Plan was appropriate - for otherwise, [the p]arent would have had everything to gain b[y] permitting the

that, absent information gathered from a practice emergency evacuation drill to the contrary, the emergency evacuation plan was "presumptively appropriate and, as such, offered [the s]tudent an appropriate program in a safe location" (id.). As that was the only issue to be addressed in the proceeding, the IHO dismissed the parent's due process complaint notice (id.).

IV. Appeal for State-Level Review

The parent appeals and alleges that the IHO erroneously concluded that the location of the proposed class on the third floor provided the student a FAPE. Specifically, the parent alleges that the IHO erred in presuming the validity of the district's emergency evacuation plan and erroneously shifted the burden of proof onto the parent. The parent also alleges that the IHO failed to address her claims relating to section 504 and the ADA.

The parent argues that the Second Circuit Court of Appeals has "clearly recognized safety as an element of a FAPE determination" and that it was incumbent on the district to demonstrate that the student's classroom located on the third floor was safe. Further the parent alleges that the IHO failed to cite to any legal authority to support his finding that the emergency evacuation plan was "presumptively acceptable". According to the parent, the district bore the burden of "show[ing] that the Plan was, in fact, appropriate, not just presumably appropriate."

The parent also alleges that the IHO failed to address unrebutted safety concerns identified by the only fire experts to testify at the hearing. Specifically, the parent claims that her witnesses testified as to "at least nine practical deficits in the Plan" and the IHO failed to address them.

In addition, the parent claims that the IHO relied on irrelevant evidence. More specifically, the parent argues that the IHO suggested that it was the parent's responsibility to ensure the adequacy of the district's emergency evacuation plan by participating in the practice emergency evacuation drill. The parent claims that, while participating in the drill may or may not have led to an improvement in the emergency evacuation plan, it was nevertheless the district's responsibility to create an acceptable emergency evacuation plan, regardless of the parent's participation.[14] The parent argues that the IHO's reliance on the parent's conduct to arrive at his decision was neither well-reasoned nor supported by the evidence.

Next, the parent alleges that the IHO wrongly denied the petitioner's request for a pendency order compelling the district to locate all or at least some of the educational and related services identified on student's IEP on the first floor of the building or at another location. Specifically, the parent claims that the district acted in bad faith by refusing to provide any educational and related services to the student in any other location since the commencement of the 2021-22 school year.[15]

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drill and exposing its flaws" (IHO Decision at p. 18).

[14] The parent also alleges that the IHO should not have considered the testimony of the building superintendent regarding an emergency evacuation at the parent's apartment, asserting that whether the parent has an adequate safety plan for the student has no bearing on whether the district's emergency evacuation plan was safe.

[15] The parent identifies three exceptions to this claim and alleges that the district provided educational and related services to the student: (1) from October 16 to November 28, 2021 when the district contracted with an outside

The parent alleges that the IHO's refusal to issue a pendency order condoned the district's bad faith actions and was a "flagrant failure" to implement the purpose of the stay-put provision and to enforce the requirement that districts act in good faith in pendency matters.

Lastly, the parent claims that the IHO failed to determine whether the student was entitled to compensatory education. Specifically, the parent alleges that the IHO failed to award compensatory education for the 2021-22 and 2022-23 school years claiming that the student missed nearly all of third grade and most of fourth grade due to the district's failure to accommodate her. According to the parent, compensatory education was warranted to remedy the "near-complete denial of instruction and related services" that the student experienced.

For relief the parent requests a "declaratory finding" that the district's actions deprived the student of a FAPE during the 2021-22 and 2022-23 school years; an order directing the district to provide the student with both education and related services in a safe and accessible location; a "declaratory finding" that the student was wrongly denied education and services during the pendency of this proceeding; and an order directing the district to provide the student with compensatory educational and related services to make up for the district's "deficient program" during the 2021-22 and 2022-23 school years.[16]

In an answer, the district responds to the parent's allegations and generally argues to uphold the IHO's decision in its entirety, including the decision not to conduct a pendency hearing or award compensatory education. Further, the district argues that the parent's due process complaint notice was limited to the 2021-22 school year and that all of the references to the 2022-23 school year in the request for review are an attempt to raise claims for the first time on appeal and should be rejected. In addition, the district asserts that the parent's appeal of the IHO's interim decision on pendency should be dismissed for being untimely.

The parent submits a reply to the district's answer, asserting that the parent's appeal of the IHO's interim decision on pendency was timely as the parent is permitted to appeal from an interim decision as part of an appeal from a final determination.

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agency to provide related services off-site; (2) from January 12 through February 18, 2022 for the purpose of reevaluating the student as requested by the parent; and (3) from March 2 to May 2, 2022 in order to implement compensatory education services as ordered in a prior IHO decision for the district's failure to provide the student with a FAPE during the 2020-2021 school year.

[16] The parent attaches additional evidence to her request for review (Req. for Rev. Exs. A1-A7). Much of the additional evidence consists of correspondence between the IHO and the parties and is already included as a part of the hearing record (see Req. for Rev. Exs. A3-A4; A7); however, as noted above, the hearing record did not include a written summary of the September 12, 2022 prehearing conference and, additionally, the correspondence included with the parent's additional evidence provides some information as to what occurred during and after that conference (see Req. for Rev. Exs. A1-A2). Accordingly, these documents are accepted into the hearing record for completeness. Further, the parent's additional evidence also included correspondence that was relied on by the IHO in the IHO's issuance of his December 2, 2022 letter declining to reconsider his pendency decision and is accepted for completeness of the record as it should have been included as a part of the hearing record (see Req. for Rev. Exs. A5-A6).

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. 386, 399 [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., 580 U.S. at 404). 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., 580 U.S. at 403 [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 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]).[17]

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

VI. Discussion

A. Assigned School – Location of Classroom

In this matter, the parent did not challenge the sufficiency of the student's IEPs, nor did she raise specific allegations that the IEPs developed for the student for the 2021-22 school year, as written, could not be implemented at the recommended school location or that the student could not access her education (see generally IHO Exs. I at pp. 1-7; II at pp. 1-4), and further, the parties agreed that the IEPs created for the student for the 2021-22 school year were appropriate for the student and that the only substantive disagreement between the parties was over the physical location of the classroom (IHO Ex. III ¶ 18).

[17] 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., 580 U.S. at 402).

To the extent this issue could be framed as an allegation that the district could not properly implement the student's IEP in the proposed third floor classroom, a review of relevant caselaw is warranted. Generally, the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis" for rejecting the public program (R.E., 694 F.3d at 195; see E.H. v. New York City Dep't of Educ., 611 Fed. App'x 728, 731 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 40 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]). However, a district's assignment of a student to a particular public school site must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (M.O. v. New York City Dep't of Educ, 793 F.3d 236, 244 [2d Cir. 2015]; R.E., 694 F.3d at 191-92; T.Y. 584 F.3d at 419-20). The Second Circuit has held that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (M.O., 793 F.3d at 245; see Y.F. v. New York City Dep't of Educ., 659 Fed. App'x 3, 5-6 [2d Cir. Aug. 24, 2016]; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. Mar. 16, 2016]; B.P. v. New York City Dep't of Educ., 634 Fed. App'x 845, 847-49 [2d Cir. Dec. 30, 2015]). Permissible prospective challenges must be "tethered" to actual mandates in the student's IEP (see Y.F., 659 Fed. App'x at 5). Additionally, the Second Circuit indicated that such challenges are only appropriate if they are evaluated prospectively (as of the time the parent made the placement decision) and if they were based on more than "mere speculation" that the school would not adequately adhere to the IEP despite its ability to do so (M.O., 793 F.3d at 244). In order for such challenges to be based on more than speculation, a parent must allege that the school is "factually incapable" of implementing the IEP (see M.E. v. New York City Dep't of Educ., 2018 WL 582601, at *12 [S.D.N.Y. Jan. 26, 2018]; Z.C. v. New York City Dep't of Educ., 222 F. Supp. 3d 326, 338 [S.D.N.Y. 2016]; L.B. v. New York City Dep't of Educ., 2016 WL 5404654, at *25 [S.D.N.Y. Sept. 27, 2016]; G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at *15 [S.D.N.Y. Sept. 19, 2016]; M.T. v. New York City Dep't of Educ., 2016 WL 1267794, at *14 [S.D.N.Y. Mar. 29, 2016]). Such challenges must be based on something more than the parent's speculative "personal belief" that the assigned public school site was not appropriate (K.F. v. New York City Dep't of Educ., 2016 WL 3981370, at *13 [S.D.N.Y. Mar. 31, 2016]; Q.W.H. v. New York City Dep't of Educ., 2016 WL 916422, at *9 [S.D.N.Y. Mar. 7, 2016]; N.K. v. New York City Dep't of Educ., 2016 WL 590234, at *7 [S.D.N.Y. Feb. 11, 2016]).

On appeal, the parent contends that "it was incumbent on the [d]istrict to demonstrate, the 12:1 classroom's location on the third floor of the school building was safe for [the student], a child with significant mobility impairments and autism" (Req. for Rev. at p. 2). However, the parent's allegation the district failed to offer the student a FAPE for the 2021-22 school year by locating her classroom on the third floor of the school building rather than the first floor is not a permissible challenge to the assigned school's ability to implement the student's educational program because the claim is not sufficiently tethered to the student's IEP, which does not mandate a particular location for the classroom (see N.K., 2016 WL 590234, at *6 [noting that "[t]o be a cognizable

claim, i.e., one that triggers the school district's burden of proof, the 'problem' with the placement cannot be a disguised attack on the IEP"]).

Legal requirements related to facility accessibility are more directly defined within section 504 and Title II of the ADA. Generally, under the IDEA and State law a parent may seek an impartial hearing regarding "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child" (20 U.S.C. § 1415[b][6][A]; Educ. Law § 4404[1]; Winkelman, 550 U.S. at 531). However, an SRO lacks jurisdiction to consider challenges to an IHO's rulings, or failures to rule on section 504 or ADA claims, as an SRO's jurisdiction is limited by State law to matters arising under the IDEA and Article 89 of the Education Law (Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Courts have also recognized that the Education Law makes no provision for State-level administrative review of IHO decisions with regard to section 504 (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 & n.17 [E.D.N.Y. 2012] [noting that "[u]nder New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"], aff'd, 513 Fed. App'x 95 [2d Cir. 2013]; see also F.C. v. New York City Dep't of Educ., 2016 WL 8716232, at *11 [S.D.N.Y. Aug. 5, 2016]). Therefore, an SRO would have no jurisdiction to review any portion of a parents' claims regarding section 504 or the ADA, and the parents' arguments pertaining to section 504 and the ADA will not be further addressed.[18]

On the other hand, with specific regard to the health or safety of a student with a disability, a school district denies a student the benefits guaranteed by the IDEA if it proposes a placement that threatens a student's health in a manner that undermines his or her ability to learn (A.S. v. Trumbull Bd. of Educ., 414 F. Supp. 2d 152, 178 [D. Conn. 2006]; citing Lillbask v. Conn. Dep't of Educ., 397 F.3d 77, 93 [2d Cir. 2005] [noting that Congress did not intend to exclude from consideration any subject matter, including safety concerns, that could interfere with a disabled student's right to receive a FAPE]; L.K. v. Dep't of Educ. of the City of New York, 2011 WL 127063, at *9 [E.D.N.Y. Jan. 13, 2011] [finding failure to identify a serious allergy to citrus fruits on a student's IEP did not constitute a denial of a FAPE]).

In this instance, the parent's arguments regarding the student's assigned classroom do not allege that the student would have been unable to learn in the school environment as proposed by the district; rather, the parent's argument focuses on assertions that the emergency evacuation plan developed for the student was not sufficient to ensure the student's safety in the event of a fire and the parent was therefore justified in not sending the student to the school.

[18] It is unclear in this matter if the IHO was assigned to hear the parent's 504 claims. School districts are required to have certain policies and practices in place to implement the provisions of section 504 and to provide the opportunity for an impartial hearing and a review procedure, and districts may elect to satisfy the 504 hearing requirement using the IDEA impartial hearing procedures (see 34 CFR 104.36). Even if the IHO was assigned to hear the 504 claims, however, the undersigned would still not have jurisdiction to review the IHO's findings or lack thereof.

In reviewing the hearing record, the evidence shows that the district school building had an elevator that was available to the student at any time throughout the school day with the assistance of the student's 1:1 teaching assistant except when there was an evacuation emergency which prohibited use of the elevator (see Tr. pp. 46, 70-72, 252, 303, 496-97; IHO Ex. III at ¶ 15). The district convened a safety committee to develop an emergency evacuation plan specifically for the student in the event that there was an emergency at the assigned school (Dist. Ex. 27). According to the plan, the student's 1:1 teaching assistant who was assigned to her throughout the day, as well as another service provider would have assisted the student down the stairwell with a one-person assist (see Tr. pp. 56-63, 70-72, 92-93, 127; Dist. Ex. 27).[19]

As discussed above, in reviewing the emergency evacuation plan, the IHO noted that on September 14, 2021 the school convened a "personal school emergency evacuation plan" review meeting with 15 participants (IHO Decision at pp. 13-15). The participants at the September 14, 2021 meeting included the parent, the district assistant superintendent for student services, the school principal, the school assistant principal, a school psychologist, the district director of facilities, the district director of school safety, the student's teacher, a local fire marshal, two fire chiefs, two school resource officers, the school nurse, and the student's physical therapist (Dist. Ex. 27 at p. 4). Additionally, as noted by the IHO, the principal of the school testified that the evacuation plan was approved by all of the participants except for the parent (Tr. p. 100; see IHO Decision at p. 14). The plan was also signed by the town fire chief and a village police officer (Dist. Ex. 27 at p. 4; see IHO Decision at p. 14). Based on this, the IHO found that the evacuation plan was "presumptively entitled to acceptance" (IHO Decision at pp. 14-15).

The parent challenges the IHO's finding that the plan was "presumptively appropriate," asserting that this finding shifted the burden of proof to the parent. As discussed above, the IHO's finding that the evacuation plan was presumptively appropriate was based on how the evacuation plan was developed and that it had the approval of almost all of the participants of the September 14, 2021 meeting, including the fire chief and a village police officer. Additionally, the IHO's decision shows that the IHO considered the evidence presented by the parent challenging the appropriateness of the evacuation plan and determined that it was outweighed by the evidence presented by the district in its support (IHO Decision at pp. 15-18). The IHO explored the parent's claims at the impartial hearing, during which time the parties and the IHO examined and discussed at length and the parent testified about her concerns relating to the physical location of the student's classroom on the third floor of the building and the student's emergency evacuation plan (see Tr. pp. 373-570, 617-75; see generally Parent Exs. M; N; S; Dist. Ex. 27). Further, the IHO examined and discussed at length the testimony of the fire experts called on by the parent to contest the emergency evacuation plan created by the district's safety committee and found such testimony

[19] During the impartial hearing, the parent testified that, because she was desperate and the student had been out of school for a year and a half, she would have agreed for the student to attend the recommended special education class on the third floor of the school building if the district would have retained the student's teaching assistant from her kindergarten school year as her teaching assistant for the 2022-23 school year (Tr. pp. 494-95). The parent further testified that, although it was not ideal, she would have considered it because she believed the teaching assistant would have kept the student safe and she would have expected the teaching assistant "to throw [the student] over her shoulder and take her down" (Tr. pp. 495-96). According to the district assistant superintendent for student services, the district had reassigned the teaching assistant to another student in the district (Tr. p. 257).

insufficient to refute the appropriateness of the emergency evacuation plan as written or irrelevant to the scope of the proceeding as limited by the parties in their September 2022 stipulated statement of facts (see Tr. pp. 581-616, 713-49; IHO Decision at pp. 15-16).[20] Accordingly, the decision when read in its entirety reveals that the IHO made his decision based on an assessment of the relative strengths and weaknesses of the evidence presented by both the district and the parents rather than by solely allocating the burden of persuasion to one party or the other (see generally IHO Decision). Moreover, even assuming the IHO misallocated the burden of proof to the parent (Educ. Law § 4404[1][c]), the error would not require reversal in this case insofar as the hearing record does not support a finding that this was one of those "very few cases" in which the evidence was in equipoise (Schaffer v. Weast, 546 U.S. 49, 58 [2005]; M.H., 685 F.3d at 225 n.3).

On appeal, the parent specifically challenges the validity of the district's emergency evacuation plan for the student and requests an order directing the district to provide the student with both education and related services in a safe and accessible location (Req. for Rev. at pp. 1-4, 7). However, without evidence, or even an argument that the evacuation plan was not developed in accordance with State guidance or State regulation, or that the plan was not properly supported by appropriate personnel, including the town fire chief and a village police officer, the parent's argument that the evacuation plan was not appropriate must fail. To the extent that the parent is requesting State administrative review of the specific contours of the student's evacuation plan, based on disagreements of various experts, such a determination is not appropriate for this forum. That is, as noted in one of the district court cases cited by the parent for the proposition that health and safety issues fall within the jurisdiction of administrative proceedings, the court, in finding that the assigned school was "reasonably safe," noted that "'while [the school district's] and [the parent's] experts disagreed, IDEA requires great deference to the views of the school system rather than those of even the most well-meaning parent'" (A.S. v. Trumbull Bd. of Educ., 414 F. Supp. 2d 152, 182 [D. Conn. 2006], citing A.B. v. Lawson, 354 F. 3d 315, 328 [4th Cir. 2004]). This appears to be in line with the proposition that the selection of a public school site for providing special education and related services is an administrative decision within the discretion of a district (R.E., 694 F.3d at 191-92; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419-20 [2d Cir. 2009]; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014] [holding that while parents are entitled to participate in the decision-making process with regard to the type

[20] The parent, in her request for review, argues that the fire safety experts identified "at least nine practical deficits" in the student's emergency evacuation plan, such as, due to the student's slow pace, it would take the student "well over half and hour" for her and her aids or assistants to descend three flights of stairs (see Req. for Rev. at pp. 2-3; Tr. p. 726). However, the district assistant superintendent for curriculum and instruction testified that the safety committee intended to test the emergency evacuation plan but that the test could not be conducted because, on the day the drill was scheduled, the parent did not bring the student to school (Tr. pp. 75, 108). The IHO found that the parent's contrary testimony about the drill was not credible (see IHO Decision at pp. 17-18), and the IHO's credibility determination is accorded deference as the hearing record, read in its entirety, does not compel a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v. City Sch. Dist. of New York, 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 12-076).). The school principal testified that if the drill took place the committee would have made changes as needed (see Tr. p. 75). Accordingly, absent evidence derived from participation in a practice evacuation drill that the plan was deficient, the concerns are too speculative to warrant disturbing the IHO's decision that the evacuation plan was appropriate.

of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]).

This matter is not a case regarding parents' disagreement with the identification, evaluation, or educational placement of the child nor does the parent claim the assigned school does not have the capacity to provide the services recommended in the IEP.[21] In sum, under the IDEA, the evidence in the hearing record shows that the location of the classroom did not undermine the district's provision of a FAPE and accordingly, the IHO was correct in dismissing the parent's September 2022 amended due process complaint notice.

I further want to highlight that the parent has decided not to send the student to school for most of the 2021-22 school year and, according to the available evidence, has not sent her to school for any portion of the 2022-23 school year (Tr. pp. 234, 303; see Parent Exs. L; M; N; see Dist. Ex. 20 at p. 1). Based on the evidence in the hearing record, since the start of the 2021-22 school year, from September 2021 through December 2021, the parent refused to send the student to the district's recommended special class program located on the third floor because she believed that it would be unsafe in case of a fire (Parent Ex. J at p. 4). To accommodate the parent's concerns the CSE convened on September 28, 2021 and again on October 19, 2021 (Dist. Exs. 10; 12). At the September 28, 2021 IEP meeting, the CSE considered placing the student at more restrictive BOCES program that was located in another school district "in the spirit of honoring" the parent's concerns, however at the October 19, 2021 CSE meeting, the parent declined the BOCES option (Dist. Exs. 10 at p. 2; 12 at p. 2). According to the October 19, 2021 prior written notice, the district began reaching out to surrounding school districts with special class programs "as a courtesy, to honor" the parent's concerns (Dist. Ex. 12 at p. 2). Further, the CSE created an interim plan with an outside agency to ensure the student received some level of services because the parent refused to send the student school (id.; Dist. Ex. 26). According to the December 1, 2021 prior written notice, the outside services ended on December 3, 2021 and the parent indicated that she "may" home school the student (Dist. Ex. 14 at p. 2).[22] However, the parent did not home school the student (Tr. p. 294).

According to the hearing record, the only education the student received was compensatory education services that she received from March 2, 2022 to May 2, 2022 on the first floor of the district school building pursuant to a prior IHO order which found the district denied the student a

[21] The parent has not put forth claims that the CSE failed to mandate in any of the student IEPs for the 2021-22 school year that the student must receive her special education instruction and related services only on the first floor of a school building (see Tr. pp. 226-27, 250-52; Dist. Exs. 6 at pp. 1-2; 8 at pp. 1-2; 10 at pp. 1-2; 12 at pp. 1-3; 14 at pp. 1-2; 16 at pp. 1-2; 18 at pp. 1-3; 20 at pp. 1-2; IHO Exs. II; IV). The district assistant superintendent for student services testified that the student's ability to walk up the stairs did not influence the CSE's decision to place the student in a classroom located on the third floor because there was an elevator available for the student to use during the school day (Tr. p. 252).

[22] According to the December 2021 prior written notice, if the parent chose to home school the student, the district would have provided the student with all her recommended related services on the first floor of the school building (Dist. Ex. 14 at p. 2).

FAPE for the 2020-21 school year and the 2022-23 extended school year program which was also provided on the first floor of a district school (see Tr. pp. 464-66, 478; Parent Ex. O).[23]

Based on the student's absences throughout the 2021-22 and 2022-23 school year and the parent's acknowledgements that she decided not to send the student to school (Tr. pp. 234, 303; Parent Exs. L; M; N; O; Dist. Ex. 20 at p. 1), it appears that the parent held the mistaken belief that, if she disagreed with the district's program, she could keep the student home without home schooling her or enrolling her in any other educational program (see Parent Exs. L; M; N; O; Dist. Exs. 10; 12; 14; 16). If the parent disagreed with the proposed placement, she was entitled to request an impartial hearing (as she ultimately did), and she, like all parents, had three choices relative to educating the student in the interim: (1) she could choose to enroll the student in what the CSE had determined to be an appropriate educational program and await the outcome of the hearing; (2) she could choose to home school the student by filling out all the necessary paperwork and submitting an individualized home instruction plan, in conjunction with which the student might have received some supplemental support services from the district; or (3) she could choose to enroll the student at her own expense in a private school of her choosing while awaiting the outcome of the hearing. State compulsory education laws require that parents ensure children ages six to sixteen attend public school or receive a substantially equivalent education through enrollment in a private school or home school program each year (Educ. Law §§ 3205; 3212[2][b]). In short, if the parent rejects the district's program, she must enroll the student in another program to educate her each year.

B. Pendency

Turning to the parent's appeal from the IHO's interim decision on pendency, initially, the parent's appeal of the IHO's interim decision as part the appeal from the IHO's final determination is permissible. While parties have the option of interposing an interlocutory appeal of an interim decision on pendency, State regulation also permits an appeal of any interim decisions in an appeal from the final determination of an IHO (8 NYCRR 279.10[d]).

Regarding the merits of the parent's claim that the IHO wrongly denied the petitioner's request for a pendency order compelling the district to locate all or at least some of the educational and related services identified on student's IEPs on the first floor of the building or another location, I find no reason in the hearing record to disturb the IHO's determination.

During the pendency of any proceedings relating to the identification, evaluation or placement of the student, the IDEA and the New York State Education Law require that a student remain in his or her then-current educational placement, unless the student's parents and the board of education otherwise agree (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 531 [2d Cir. 2020]; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014]; Mackey

[23] According to a decision from New York State Education Department's Office of Special Education Quality Assurance (SEQA), dated January 26, 2022, the student attended the 2021-22 extended summer program for three days, was marked absent for thirteen days, and then was dropped from the class (see Tr. p. 122; Parent Ex. J at p. 5).

v. Bd. of Educ. of the Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]).[24] Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and to "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (Ventura de Paulino, 959 F.3d at 532; T.M., 752 F.3d at 170-71; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then-current educational placement (Ventura de Paulino, 959 F.3d at 532; Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then-current placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71 [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]; Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). Furthermore, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753, 756), and that "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers" (T.M., 752 F.3d at 171). If there is an

[24] In Ventura de Paulino, the Court concluded that parents may not transfer a student from one nonpublic school to another nonpublic school and simultaneously transfer a district's obligation to fund that pendency placement based upon a substantial similarity analysis (see Ventura de Paulino, 959 F.3d at 532-36).

agreement between the parties on the student's educational placement during the due process proceedings, it need not be reduced to a new IEP, and the agreement can supersede the prior unchallenged IEP as the student's then-current educational placement (see Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; Evans, 921 F. Supp. at 1189 n.3; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 86 F. Supp. 2d 354, 366 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2d Cir. 2002]; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Moreover, a prior unappealed IHO decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440, at *23; Letter to Hampden, 49 IDELR 197).

In this matter, the parties did not disagree as to the basis of the student's pendency program, instead the parent's disagreement was with the physical location of where the pendency program would have been implemented (see generally Tr. pp. 1-753; Parent Exs. A-D; H-S; Dist. Exs. 1-27; 31-32; 34; 36; 38; Joint Exs. 1-7; IHO Exs. 1-4; IHO Pendency Exs. I-VI). However, as noted above, the pendency provision does not require that a student remain in a particular site or location; rather, pendency is focused on the general level and type of services (Ventura de Paulino, 959 F.3d at 532; T.M., 752 F.3d at 170-71; Concerned Parents, 629 F.2d at 753, 756). Accordingly, the IHO was correct in determining that the relief the parent requested in the form of pendency was identical to the issue raised for the hearing on the merits and that a ruling on pendency was not required (see Pendency Ex. VI; IHO Ex. IV).

VII. Conclusion

Having determined that the parent's claims regarding the emergency evacuation plan and the physical location of the student's special education classroom fall under different statutory and regulatory schemes and that the parent has not raised any challenges to the IHO's decision that are properly addressed in this type of administrative proceeding, the IHO was correct in dismissing the parent's amended due process complaint notice.

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

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
May 3, 2023

SARAH L. HARRINGTON
STATE REVIEW OFFICER