



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 23-233

**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 Board of Education of the South Glens Falls Central School District**

### **Appearances:**

Girvin & Ferlazzo, PC, attorneys for respondent, by Tara L. Moffett, Esq.

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which determined that the educational program and services respondent's (the district's) Committee on Special Education (CSE) recommended for the student for the 2022-23 school year were appropriate. 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. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

### **III. Facts and Procedural History**

Evidence in the hearing record reflects that the student in this case has attended the same State-approved nonpublic school day program (day program) since the 2019-20 school year (first grade) (see Dist. Ex. 3 at p. 14; see generally Dist. Exs. 7-13A; 15-20).<sup>1</sup> During the student's attendance at the day program during the 2020-21 school year, the district completed the student's mandated three-year reevaluation, which consisted of a January 2021 occupational therapy (OT)

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<sup>1</sup> The evidence also reflects that the student repeated kindergarten (2017-18 and 2018-19 school years) in a district elementary school in a 12:1+1 special class placement, with the services of a 1:1 aide and related services (speech-language therapy, OT, PT, assistive technology services, and services by a teacher of the visually impaired (TVI) (see Dist. Ex. 3 at p. 14). In addition, the student received 12-month programming during summer 2018 (id.).

evaluation, a February 2021 psychoeducational evaluation, a March 2021 speech-language evaluation, and an April 2021 physical therapy (PT) evaluation (see generally Dist. Exs. 9-12).<sup>2</sup>

According to the January 2021 OT evaluation, the student received OT services to improve her ability to engage in non-preferred fine motor coordination activities in order to promote visual motor skills and more mature grasping ability for functional use or manipulation of items in the classroom and across all settings (see Dist. Ex. 9 at p. 1). In addition, the student was provided with sensory input and strategies for facilitating self-regulation and improved attention to classroom tasks or academic lessons; the OT evaluation noted that the effort had been made to address delays in self-care skills by using task segmentation and multimodal cueing strategies to seek to increase the student's participation in activities, such as hand washing, dressing, and utensil use (id.). Assessment results revealed that the student presented with "[d]efinite [d]ysfunction" or at least "[s]ome [p]roblems" in all five sensory domains in both the classroom and home settings, and the evaluator indicated that "this [wa]s" impacting the student's ability to fully participate in adult-directed therapeutic activities and self-care routines, which limited her overall independence (id. at pp. 2-6). The evaluator further identified student needs in the areas of self-regulation, avoidance behaviors, overall fine motor skills—including bilateral coordination (e.g., cutting, zipping, opening containers)—age-appropriate dressing skills, and visually attending to and completing multistep therapeutic activities (id. at pp. 7, 9).

The February 2021 psychoeducational evaluation report reflected that the student "love[d] coming to school," sometimes struggled interacting with others, and received a high level of support in school in order to monitor her medical and safety needs (Dist. Ex. 10 at p. 2). As part of the evaluation, the evaluator observed the student in her classroom and found the student used an iPad and a picture exchange communication system (PECS) board to communicate with the adults, required and responded to adult prompts, and utilized good proximity and eye contact (id.). The evaluator's observations indicated that the student required a high level of adult prompting and supervision during the observation, and an incident was relayed in which the student stood up and ran toward the door and when approached by an adult, the student punched the adult in the leg (id.). Reportedly, the student complied with a directive to go to the "time away" area, and she responded well to the adult prompt to rejoin when she was calm (id.). According to the evaluator, the student's teacher reported that the student required a high level of adult support in order to attain and sustain attention; she used a variety of prompts (verbal, visual, gestural, partial hand over hand) to navigate her day; she did best with incentives, timers, frequent breaks, bright colors, matching, music, and demonstrating academic skills using a touch screen or technology device; and she required consistent supervision for safety awareness (id. at p. 3).

The evaluator noted that, due to the nature of the student's disability, she could not participate in traditional assessments of cognition and academic abilities, and therefore, the Adaptive Behavior Assessment System, Third Edition (ABAS-3) was administered for the purpose of the evaluation (see Dist. Ex. 11 at p. 3). The results of the teacher rating on the ABAS-3 revealed that the student continued to present with a significant need in the area of adaptive skills and required adult support for most daily tasks (id. at pp. 3-4). The evaluator noted that the student's

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<sup>2</sup> Although the psychological evaluation report was signed in April 2021, the date of the evaluation—February 2021—will be used to identify the evaluation report (see Dist. Ex. 10 at pp. 1, 5).

strongest skills were in the areas of communication and social skills (id. at p. 4). Based on observations, updated adaptive rating scales, and teacher feedback, the evaluator indicated that the student continued to require a specialized program to support her needs (id. at p. 5).

The March 2021 speech-language therapy evaluation report indicated that the student communicated via vocalizations, verbalizations, "some sign," pointing, facial expressions, body language, and alternative augmentative communication (AAC) or the total communication approach for expressive communication (see Dist. Ex. 11 at pp. 1-2). Regarding the use of her AAC device, the evaluator reported that the student learned new items "rather quickly," could navigate through pages and folders, and communicated her wants very well (id. at p. 2). The evaluator further reported that the student could get distracted by her wants at the time and made inaccurate selections, required extensive prompting, and demonstrated difficulty maintaining topic and often needed to be reminded of the question (id.). With respect to receptive skills, the student understood information, such as body parts, some pronouns, colors, clothing, animals, activities, some emotions, weather items, academic vocabulary related to morning meeting, and many verbs; in addition, while the student was self-directed, she could follow routine directions and two-step directions when prompted (id. at p. 3). According to the evaluation report, the student's decreased ability to attend negatively impacted her success, and it was also noted that she lacked safety awareness and would attempt to "escape" from staff (id.). In the area of pragmatics and social skills, the evaluator found that although the student did not demonstrate pretend or cooperative play skills, she demonstrated adequate greeting and departure skills, responded to her name, and could demonstrate adequate eye contact; however, the student tended to be distracted when sitting with someone to complete a task and had difficulty at times following teacher directives (id.). The evaluator reported that the student demonstrated the characteristics of childhood apraxia of speech (coordination) and dysarthria (reduced strength or movement), which made it difficult to understand her words; the evaluator also reported that the student demonstrated adequate oral coordination, lingual lateralization, and trigger of swallow, but was monitored for pacing when dining and reported no concerns regarding hearing (id. at pp. 3-4).<sup>3</sup>

Next, the April 2021 PT evaluation report reflected that the student was independent in ambulation, easily transitioned to PT, was beginning to follow more complex directives from the therapist, did well with using a "first, then" card and token card, was self-directed, and had difficulty participating in gross motor activities that involved nonpreferred items or tasks (Dist. Ex. 12 at p. 1). In addition, the evaluator found the student presented with gross motor delays due to decreased attention to task, decreased body or safety awareness, decreased coordination and balance, poor core strength, and muscle weakness (id. at pp. 1-3). Regarding body and safety awareness, the evaluator indicated that the student needed to improve her ability to navigate her classroom safely without bumping into things or peers, as well as her ability to negotiate stairs, curbs, and uneven surfaces; and she required constant supervision and assistance when loading and unloading the bus, transitioning (due to the student's tendency to be self-directed and moving away from where classmates were transitioning), playground time, mealtime, and toileting (id. at pp. 3-4).

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<sup>3</sup> The evaluator reported that the student was "on a ½" chopped textured diet with thin liquids" and that she demonstrated "piecemeal deglutition, reduced labial seal, reduced jaw strength and an inconsistent rotary chew pattern" (Dist. Ex. 11 at p. 4).

At the time of the reevaluations, during the 2020-21 school year, the student's day program consisted of an 8:1+3 special class placement and related services of speech-language therapy, OT, and PT, as well as adapted physical education (see Dist. Exs. 9 at p. 1; 10 at pp. 1, 2; 11 at p. 1; 12 at p. 1).

While attending the day program during the 2021-22 school year, the student received instruction in an 8:1+3 special class placement, and she also received related services consisting of speech-language therapy (four 30-minute sessions per week), OT (three 30-minute sessions per week), and PT (one 30-minute session per week) (see Dist. Ex. 3 at pp. 3, 12, 15). In addition, the student participated in adapted physical education and used an AAC device, among other things, to communicate (id. at pp. 15, 17).

On February 9, 2022, the student was referred for a functional behavioral assessment (FBA) "at the request of her mother and as a result of continued documentation in the areas of [a]ggression, [s]elf-[i]njurious [b]ehavior (SIB), and attempts to elope within the classroom setting" (Dist. Ex. 13 at p. 1). A school behavior intervention specialist (behaviorist) at the student's day program who completed the FBA observed the student over the course of approximately six days from March through May 2022 (id. at pp. 1, 8).

On March 3, 2022, the student underwent a neuropsychological evaluation (March 2022 neuropsychological evaluation) (see Dist. Ex. 14 at p. 1). As reflected in the evaluation report, the parent requested the neuropsychological as part of an independent educational evaluation (IEE) "given [the student's] extensive developmental delays and increasing safety concerns," as well as to "determine [the student's] current levels of functioning and for educational planning purposes" (id.). The evaluation report summarized the student's birth and developmental history, medical history, family and social history, current parental concerns, educational history, evaluation procedures, and behavioral observations of the student (id. at pp. 5-7). In particular, the evaluator indicated that the information related to the student's birth and developmental history was obtained from the parent and from a review of the student's "medical and educational records" (id. at p. 5). Based on these sources, the evaluator noted that the student was "identified as a child with legal blindness, seizure disorder, and intellectual disability associated with an unbalanced translocation of chromosomes . . . as well as an autism spectrum disorder and Attention Deficit Hyperactivity Disorder [ADHD]" (id.). According to one note, the student was "'unable to understand many directives or the concept of danger'" and "'[e]lopement [wa]s a significant concern,' along with aggressive behavior at home dating back to 2019" (id.). Based on another note dated November 2021, the evaluator reported that "'[b]ehavioral and medication management ha[d] been very difficult to manage in an outpatient setting and residential school placement would be ideal as [the student's] environment would remain consistent and behaviors and medications could be managed efficiently'" (id.).<sup>4</sup> With respect to the student's medical history, the evaluator noted that she had been "followed by or ha[d] consulted with a number of specialists, including: pediatric ophthalmology, developmental pediatrics, pediatric neurology, pediatric endocrinology, pediatric

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<sup>4</sup> The November 2021 note was penned by the student's doctor in an autism specialty practice, who had last seen the student for a visit during outpatient hours on July 23, 2021 (see Parent Ex. C). At that time, the parent reported that the student "continue[d] to have very difficult behaviors to manage despite multiple medication trials" (id.). The doctor also noted that the parent was "requesting residential placement" and that he "agree[d] that this w[ould] be the best plan to ensure the health and safety and well-being of [the student]" (id.).

orthopedist, dermatologist and an allergist" and the student also had been "followed by physical, occupational and speech therapist since delivery of Early Intervention services" (id.). Overall, the evaluator indicated that the student's medical history reflected "several hospitalizations due to illnesses and seizure activity," and the student had "provisional eligibility status under the Office of People with Developmental Disabilities [OPWDD]" (id.).

Turning to the evaluation process, the evaluator found that the student was "notably self-directed throughout the evaluation and required repeated task instructions and frequent changes in assessment procedures for even limited participation" and that "several tasks were discontinued due to [her] self-directed behavior," unresponsiveness, or her inability or unwillingness to cooperative to complete tasks (Dist. Ex. 14 at pp. 7-11).

Results of completed assessments revealed that the student performed in the "extremely low" range on subtests in the areas of intellectual functioning, language related functioning, and visual-perceptual and conceptual functions, and her performance was described as "impaired" on completed subtests in areas of visual-motor and fine motor functions and memory and learning (Dist. Ex. 14 at pp. 8-11). The student's performance on academic tasks (including sight word identification and understanding of numerical concepts) were well below expected levels (id. at p. at p. 11). Assessment of the student's emotional and behavioral functioning, based on both parent and teacher reports, revealed concerns in the areas of hyperactivity and impulsivity, attention, dysregulation, social skills, atypical behaviors, functional communication, relating to and interacting with peers and adults across all settings, self-care skills, and safety (id. at pp. 11-15). According to the evaluator's observations of the student throughout the evaluation, the student's behavior "suggested significant difficulty in her ability to regulate her attention as well as her behavioral control, as manifested by substantial inattention as well as extreme impulsivity in the examiner's office (i.e., climbing on chair and desks, darting around the room, disrobing, etc.), which resulted in an extensively modified testing situation" (id. at p. 10).

In light of the student's assessment results, "including the severity of delays and behavioral management needs across settings, but particularly at home where [the student] [wa]s increasingly aggressive and unsafe," the evaluator opined that a "therapeutic residential program would best seem to support [the student's] therapeutic needs and ensure her safety" (Dist. Ex. 14 at p. 2). As set forth in the March 2022 neuropsychological evaluation report, it was the evaluator's "opinion that [the student] would most benefit from a residential facility designed for children with extensive neurodevelopmental challenges and intensive behavioral management needs in order to intensively remediate her functional communication, instructional control and social skills in a highly supervised therapeutic setting" (id.). In addition, the evaluator recommended, among other things, a consultation from a "psychologist/licensed B[oard] C[ertified] B[ehavior] A[nalyst] (BCBA) with expertise in autism spectrum disorder across settings to determine environmental contingencies that promote[d] and maintain[ed] both positive and negative patterns of behavior" (id. at p. 3).

On March 9, 2022, a CSE convened to conduct the student's annual review and develop an IEP for the student for the 2022-23 school year (see Dist. Ex. 3 at pp. 1-2). Finding that the student remained eligible for special education as a student with an other health-impairment, the March 2022 CSE recommended 12-month programming for the student consisting of an 8:1+3 special class placement and the following related services: three 30-minute sessions per week of individual

OT, four 30-minute sessions per week of individual speech-language therapy, and one 30-minute session per week of individual PT (*id.* at pp. 22-23). The March 2022 CSE also recommended that the student participate in adapted physical education and allowed the use of assistive technology (the student's personal communication device) (*id.*). In addition, the March 2022 CSE developed annual goals with corresponding short-term objectives, and recommended strategies to address the student's management needs, testing accommodations, and special transportation (*id.* at pp. 20-25). With regard to management needs, the March 2022 IEP included recommendations for the following strategies: "close supervision for safety," as she demonstrated "unsafe behavior in the classroom and on the playground (elopement, running)"; 1:1 supervision while dining and the use of a "suction cup bowl and plate and toddler sized metal utensils"; "an adult to sit with her during all academic tasks to keep her engaged and sitting"; the use of her "communication device and the Picture Exchange Communication [PEC] system"; the use of "visual prompts throughout the day (go-here boards, visual schedule)"; and the use of a "visual timer" (*id.* at p. 20). As noted in the March 2022 IEP, the CSE recommended implementation of the student's IEP in a State-approved nonpublic day program (*id.* at p. 25).<sup>5</sup>

In a prior written notice dated March 9, 2022, the district summarized the special education and related services recommended in the March 2022 IEP, noting that the CSE also recommended that the student "continue to receive special education services" at the same State-approved nonpublic school day program for the 2022-23 school year (Dist. Ex. 4 at p. 1). The prior written notice also indicated that an "outside evaluation" was being completed and the CSE would convene to review the evaluation upon completion (*id.*).

On or about May 19, 2022, the student's pediatric neurologist provided the district with forms outlining the "recommended management of [the student's] condition within the school environment including a Seizure Action Plan, Medication Administration Form, and Seizure Safety Instructions" (Dist. Ex. 19 at pp. 1-5).

On or about June 22, 2022, the behaviorist completed the student's FBA (June 2022 FBA) (*see* Dist. Ex. 13 at p. 1).<sup>6</sup> As reflected in the FBA, the parent had requested the assessment to determine the student's current behavioral functioning in the areas of aggression, SIB, and elopement within the classroom setting (*see* Dist. Ex. 13 at p. 1). As part of the background information related to the student's family and social history, the behaviorist noted that the student "often" attempted to elope from within the home as well, especially when the student became overstimulated during social engagement with peers (*id.*). Based on the results of the Motivation Assessment Scale (MAS) and Questions About Behavioral Function (QABF), direct observation, and staff and parent interviews, the behaviorist determined that the hypothesized function of the student's aggressive behavior in the classroom was to "gain access to tangible items"; however, it was also noted that the student was "least likely to engage in aggressive behaviors for attention purposes when being supported within the classroom setting" (*id.* at pp. 2, 7). In addition, the behaviorist indicated that the student may throw an object to "gain sensory input from her actions"

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<sup>5</sup> The student's March 2022 IEP included information within the special alerts section, which, among other things, noted that the student's health care plan (HCP) "from [the] neurologist [was] on file" (Dist. Ex. 3 at p. 1).

<sup>6</sup> Although the FBA is dated June 22, 2022, it appears that the behaviorist signed the FBA on August 11, 2022 (*see* Dist. Ex. 13 at pp. 1, 8).

(id. at p. 2). With regard to the student's elopement and attempted elopement, the hypothesized function was for "sensory purposes" and a "[n]on-[s]ocial" purpose, such as "self-stimulation, nothing to do, [or] seem[ing] to enjoy the behavior" (id. at pp. 2-4, 7-8).<sup>7</sup> According to the June 2022 FBA, the behaviorist recommended developing a behavioral intervention plan (BIP) for the student to specifically address her elopement or attempted elopement behaviors, but noted that the "classroom management plan c[ould] effectively support [the student's] SIB and her aggressive behaviors within the learning environment" at the student's day program (id. at p. 8).

Evidence in the hearing record indicates that the student continued to attend the day program for the 2022-23 school year (12-month programming) (see, e.g., Dist. Exs. 8; 13A; 15-18; 20-24).

On August 11, 2022, a CSE reconvened for a requested review to discuss the student's March 2022 neuropsychological evaluation and the June 2022 FBA (August 2022 IEP) (see Dist. Ex. 5 at pp. 1-2). As reflected in the meeting information portion of the August 2022 IEP, the CSE noted that the student's aggression, elopement, and SIB were "target behaviors" (id. at p. 2). The CSE also noted that the student had an "elopement plan with alarms on doors in the event the student trie[d] to elope," that she attempted to "elope due to sensory purposes" with antecedents of "down-time, [and a] non-preferred object or opportunity" (id.). Additionally, the CSE indicated that the student had not demonstrated any SIBs that "result[ed] in injury" during the FBA and that "[a]ggressive behaviors happen[ed] during transition times and after eating" (id.). Accordingly, the CSE noted that a "BIP [wa]s being recommended for [e]lopement and [a]ggression" but the "classroom [wa]s able to manage the behaviors with the classroom management plan and with the BIP" (id.).

In addition to reporting the discussion of the FBA at the meeting, the CSE also reported the parent's concerns expressed at the August 2022 meeting (see Dist. Ex. 5 at p. 2). For example, the CSE indicated that the parent "asked questions regarding school progress" and "request[ed] a residential placement" (id.). The CSE also indicated that the parent "fe[lt] the student require[d] consistency and [wa]s not making much progress," and moreover, that she "struggle[d] with safety at home" (id.).

With regard to a discussion of the March 2022 neuropsychological evaluation, the CSE noted in the meeting information portion of the August 2022 IEP that the student's "cognitive and adaptive abilities [were found] to be consistent with the school's evaluation" of the student (id.). It was also noted that the "[a]cademic recommendations made on the [March 2022 neuropsychological] evaluation c[ould] be administered in the current program" (Dist. Ex. 5 at p. 2). The August 2022 CSE further noted that the evaluator who completed the March 2022 neuropsychological evaluation "recommended residential placement due to the 'severity of delays

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<sup>7</sup> The behaviorist defined the student's aggression as "[a]ny attempt [or] actual instance of [the student] forcefully pinching, hitting, biting, pulling hair, spitting, scratching, throwing items more than a foot or grabbing others" (Dist. Ex. 13 at p. 1). Self-injurious behaviors were defined as "[a]ny behavior that could cause physical injury or harm to one's body" (id.). Elopement or attempted elopement was defined as "[a]ny attempt or instance of [the student] being within three feet of an exit door (door into classroom or door outside) without adult permission for any duration of time" (id.).



and behavioral management needs across settings, but particularly at home where she [wa]s increasingly aggressive and unsafe" (id.).

At that time, based on the FBA and school data, the August 2022 CSE indicated in the IEP that the student's "program [wa]s meeting [her] needs" and a "residential placement [wa]s not being recommended through [the] CSE"; however, the district's director of special education (director) "agreed to help [the parent] discuss her options with the care manager as a residential placement request due to home concerns should go through those services" (Dist. Ex. 5 at p. 2). Although the August 2022 CSE made no changes to the student's program recommendations, the CSE "agree[d] to contract with an outside behavior specialist to observe the student in her current program" due to the parent's continued "concerns regarding safety at school even after seeing the [current] FBA data" (id.). In addition, the August 2022 IEP reflected that the student had a BIP that addressed aggression and elopement or elopement attempts, and included an additional annual goal targeting the use of strategies outlined in the BIP to reduce the daily average of aggression, attempts to elope, and actual elopement behaviors (id. at pp. 20-23).<sup>8</sup>

In a prior written notice dated August 11, 2022, the district summarized the special education program and related services recommended for the student for the 2022-23 school year (see Dist. Ex. 6 at p. 1). The prior written notice indicated that the CSE was "not recommending [a BIP] as the classroom management plan m[et the student's] behavioral and safety needs" (id.). Additionally, the prior written notice reflected the parent's request for a "residential placement" and her concerns that the student needed "consistency" and was "not making much progress" (id.). The prior written notice further reflected the parent's concern with "safety at home" and that the "outside evaluation found the student's cognitive and adaptive abilities to be consistent with the schools' evaluation" (id.). In addition, the prior written notice reported that the outside evaluation recommended a residential placement, which the evaluator made due to the student's delays and management needs across settings, but particularly within the home (id.).

Consistent with the August 2022 CSE's offer to contract with an outside behavior specialist to observe the student at her day program, a BCBA began this process on October 6, 2022 (see Dist. Ex. 15 at p. 1). She captured her observations in a behavioral observation summary report and recommendations, dated October 13, 2022 (id.). Based on her observations, the BCBA made recommendations in the areas of building independence, building leisure skills, reinforcement, communication, sensory input, and a BIP (id. at pp. 1-4). Regarding building independence, the BCBA recommended the use of a three-step visual schedule (first, next, then), visual cards for transitions, visual or picture prompts that would be less intrusive than verbal and physical prompts, and data collection on her independence throughout the day (id. at pp. 2-3). To build leisure skills, the BCBA recommended presenting the student with multiple activities (possibly in the form of a task box) that would include building activities (blocks, magna tiles), activities to make items (lacing, beads), playing doctor or vet, sequencing activities, puzzles, or drawing (id. at p. 3). The BCBA recommended a reinforcement assessment and the use of a token board as a system to

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<sup>8</sup> Within the August 2022 IEP, the CSE noted that the student had a BIP that "addresse[d] aggression and elopement [or] elopement attempts" (Dist. Ex. 5 at p. 20). In addition, the IEP indicated that the "goal of the plan [wa]s to fade all three behaviors as a means of increasing academic opportunities within the classroom setting" (id.). The student's March 2022 IEP did not include this information (compare Dist. Ex. 3 at p. 20, with Dist. Ex. 5 at p. 20).

reinforce appropriate behaviors, and she recommended targeting increased iPad use for communication by presenting her iPad to make a choice when she was not engaged, as well as adding sentence starters and preprogrammed "quick phrases" to the device (id. at p. 4). The BCBA also recommended using a sensory profile, which the parent suggested had been completed, to determine if environmental aspects resulted in an increase of behaviors, such as eloping, and offered the use of a sensory program as an appropriate proactive approach for the student (id.). Finally, the BCBA indicated that the student should have a formalized elopement plan and a BIP to acknowledge the use of that plan and other supports and strategies (id.).

On December 2, 2022, the BCBA returned for a second observation of the student (see Dist. Ex. 16 at p. 1). In a behavioral observation summary report and recommendations, dated December 3, 2022, the BCBA noted the student's following behaviors: under the table (one time), knocked over chairs (two times), stomped feet (one time), pulled down pants (ten times) (id. at pp. 1-2). At that time, staff reported that the student had not eloped, although she would walk to the door—which happened in one case during the December 2022 observation and "set off the alarm" (id.). Within the summary report, the BCBA noted the student's use of her iPad when it was presented to her, and the BCBA recommended a goal of having the student identify that she needed to carry it and to offer visuals for the student to "get talker" or "get iPad" (id. at pp. 2-3). The BCBA noted the "very clever idea" the staff had developed of having the student don and doff plastic gloves to help her with transitions, as it kept her hands busy and occupied; the BCBA also noted that the student was more involved in the activities presented in choice time and thus, she made suggestions to build on that success (id. at p. 3). The BCBA offered interventions to address the student's disrobing behaviors, including the use of her communication device or a visual card to make request to "fix underwear," as well as the use of tokens to encourage the use of a private location to make needed adjustments (id.). The BCBA also noted the student's use of the token board and first-then board (id.).

Based on the behaviorist's FBA completed in June 2022, staff at the student's day program developed a BIP (dated December 23, 2022) "over several dates" in October 2022, targeting behaviors of aggression, attempted elopement, and elopement and which included preventative strategies and school protocol (Dist. Ex. 13A at pp. 1-3). For each of the target behaviors, the BIP included a hypothesized function of the target behavior, teaching strategies, reinforcement strategies, and intervention strategies (id. at pp. 3-8).

### **A. Due Process Complaint Notice**

By due process complaint notice dated February 7, 2023, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year, and, as relevant to this appeal, requested an order directing the district to convene a CSE meeting to "investigate and secure a residential placement" for the student in a specifically identified State-approved residential program (Dist. Ex. 1 at pp. 1, 8-9). In support of her contention that the district failed to offer the student a FAPE, the parent asserted that the CSE failed to make decisions based on the student's individual needs for a residential placement; the IEP failed to adequately or appropriately address all of the student's needs; the annual goals in the IEP were insufficient to address all of the student's needs and were vague, unmeasurable, and did not include "appropriate evaluation measures"; the annual goals and services failed to address all of the ways the student's disability impacted her school performance, and did not adequately address her needs in the areas

of activities of daily living (ADL skills), behavior, focus or attention, social interaction, generalization, self-care skills, community integration, her danger awareness, and sensory integration; the CSE failed to rely on sufficient evaluative data; the CSE impermissibly engaged in predetermination; the CSE failed to recommend sufficient afterschool related services; and the CSE applied blanket policies and availability of resources when making recommendations, rather than the student's needs (id. at p. 6). In addition, the parent alleged that the CSE's recommended special education placement and program, including related services and the student's classification, were "arbitrary and not tied" to the student's needs; the CSE failed to recommend appropriate services and supports and annual goals to address the student's ADL skills, leisure skills, generalization, or community integration; the CSE failed to recommend any supports or services to address the student's significant communication delays; the recommended placement lacked sufficient staffing to implement the student's program; the recommended program was not reasonably calculated to enable the student to receive meaningful educational benefit; and the district failed to implement the student's program (id. at p. 7).

As relief, the parent requested an unspecified amount of compensatory educational services and for a remand of the matter to the CSE to "investigate and secure a residential placement for the [s]tudent," at the Center for Discovery "or a similar program" (Dist. Ex. 1 at pp. 8-9).

## **B. Impartial Hearing Officer Decision**

On March 29, 2023, the parties proceeded to an impartial hearing, which concluded on June 27, 2023 after six total days of proceedings (see Tr. pp. 1-897).<sup>9</sup> In a decision dated September 21, 2023, the IHO found that the district offered the student a FAPE in the least restrictive environment (LRE) for the 2022-23 school year and contrary to the parent's contentions, a residential placement was not warranted for the student (see IHO Decision at pp. 3-23). Additionally, the IHO found that even if the district had failed to offer the student a FAPE for the 2022-23 school year, the parent had failed to sustain her burden to establish that the Center for Discovery (State-approved residential school) was appropriate to meet the student's needs, as the hearing record did not contain sufficient evidence on this point (id. at pp. 22-23). Based on these findings, the IHO denied the parent's request to remand the matter to the CSE to investigate and secure a residential placement at the Center for Discovery or at a similar residential placement (id. at p. 27).

In support of the conclusion that the district offered the student a FAPE in the LRE for the 2022-23 school year, the IHO separately addressed each issue identified and alleged as violations by the parent in her due process complaint notice (compare IHO Decision at pp. 6-16, with Dist. Ex. 1 at pp. 7-8). The IHO also addressed arguments raised by the parent in her closing brief in support of her position that the student required a residential placement (compare IHO Decision at pp. 16-23, with IHO Ex. III at pp. 5-20). Overall, the IHO found that the district presented sufficient evidence to conclude that the special education program and related services recommended for the student for the 2022-23 school year were appropriate, noting that "extensive

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<sup>9</sup> At the impartial hearing, the parent's attorney stated that there was really no "problem with the program or the services [in the student's IEP], but there[ wa]s an issue about whether or not a residential [placement] would be appropriate" (Tr. p. 24). In addition, the parent's attorney noted that the parent was "completely overwhelmed" (Tr. p. 25).

testimony" established that the program addressed the student's developmental delays, total communication and speech needs, OT needs, behavioral needs, medical and health needs, ADL skills and needs, her social interactions with peers, and provided individualized instruction to meet her needs (see IHO Decision at pp. 6-7). With regard to the annual goals, the IHO found that the district presented sufficient evidence demonstrating how the annual goals were developed and why those specific selected annual goals were appropriate, and further noted that the parent did not voice any objections at the CSE meetings with respect to the student's annual goals (id. at p. 7). Relatedly, the IHO concluded that the district's testimonial evidence established that the annual goals addressed the student's eating skills, her behavior both in school and at home, the student's attention and focusing skills, her ability to ascertain danger or safety concerns, and her social interactions (including language needs in this area) (id. at pp. 7-8). Turning to the parent's allegation that the CSEs failed to rely on sufficient evaluative information to develop the student's IEP, the IHO found that, contrary to this assertion, the district presented sufficient evidence to explain how the data was taken and used at the CSE meetings to develop the student's IEP (id. at p. 8).

Next, the IHO indicated that the parent failed to elicit any evidence to support her claim that the CSE impermissibly engaged in predetermination in the development of the special education program and related services recommended for the student for the 2022-23 school year (see IHO Decision at p. 8). With respect to the parent's allegation that the district failed to recommend afterschool services, the IHO indicated that, generally, school districts are not required to design educational programs to address a student's difficulties with generalization of skills across settings, especially if, in cases such as this one, the student was otherwise likely to make progress in the classroom (id. at p. 9). As a result, the IHO concluded that even if afterschool services could have been beneficial to the student, the service was not necessary in this case for the student to receive a FAPE (id.).

The IHO also found that the day program had the appropriate nursing services and staff to meet the student's needs, and the student's 1:1 provider accompanied the student during transitions; consequently, the IHO found no merit to the parent's assertion that the day program lacked sufficient staff to implement the student's program (see IHO Decision at p. 10).

With regard to whether the recommended special education program and related services were reasonably calculated to enable the student to receive a FAPE, the IHO pointed to extensive testimonial evidence demonstrating how the program and services met the student's needs (see IHO Decision at pp. 10-16). The IHO dismissed the parent's claim that the CSE developed an arbitrary IEP not tied to the student's individual needs and noted that the student's classification was not an issue during the proceedings (id. at p. 10). The IHO found that the evidence demonstrated, among other things, how the day program ensured consistency in its delivery of services and supports to the student; the student's team of providers had received training with respect to her "academic, health, communication and medical needs"; how the program met the student's learning profile and provided for her needs, which included the implementation of an alarm system, specific adaptive furniture, and communication between the home and school; that the nursing staff and program staff worked closely with the student to monitor her health needs throughout the day; how the program supported the student, at times, with hand-over-hand assistance; the student's behaviors were addressed and the program did not have any concerns with its ability to meet the student's needs; and that the day program was an appropriate placement in

the LRE to meet the student's "medical, academic, behavioral, safety, and related services' needs" (id. at pp. 13-15). Based on the evidence presented, the IHO found that the student was making meaningful progress in light of her circumstances and thus, the program was appropriate (id. at p. 15).

In addition to the foregoing, the IHO noted that the BCBA's testimony and opinion expressed at the impartial hearing lent further support to conclude that the district's recommended special education program and related services were appropriate (see IHO Decision at p. 15). The IHO noted that the BCBA testified that the program was meeting the student's needs, including through the provision of instruction in life skills, task initiation communication, behavior support, [an] elopement system, a small ratio of student to staff and an alternative curriculum and related services" (id.). In contrast, the IHO found that, although the evaluator who conducted the student's March 2022 neuropsychological evaluation had opined that the program was not appropriate for the student, the IHO determined that her opinion was unsubstantiated (id. at pp. 15-16). For example, the IHO noted that the evaluator had never visited the day program; she had no familiarity with the program's "design, environment, adaptive programming and/or curriculum (as it related to mathematics and reading); she had neither written nor oral communication with the day program's staff with regard to their reports or impressions of the student's needs; the evaluator was not aware of the day program's behaviorist who worked with the student; she had never observed the student in her home, but wrote within the evaluation report that the student was "increasingly aggressive and unsafe at home"; she did not have the student use her AAC device during the evaluation although the evaluator was aware that the student used the device; and the evaluator was not aware of the token system used at the day program, as referenced in the BCBA's report (id.).

Turning to the parent's arguments in support of finding that a residential placement was appropriate for the student, the IHO addressed, and rejected, each of the parent's arguments based on the evidence in the hearing record (see IHO Decision at pp. 16-22). The IHO found that the district's alleged failure to handle the student's behaviors did not constitute a material failure to implement the student's IEP, or as a result, require the student's placement in a residential program (id. at pp. 16-17). The IHO also found that the evidence in the hearing record did not support the parent's contention that a residential placement was required due to the student's deficits in "functioning, continuing bouts of regression, safety concerns at [s]chool and home and longitudinal medical history"—especially since the evidence demonstrated that the student was making progress (id. at pp. 17-18). The IHO similarly rejected the parent's assertion that the student's regression constituted a basis upon which to conclude that the student needed a residential placement (id. at pp. 18-20). Next, the IHO rejected the parent's assertion that, with additional information, the BCBA would have changed her opinion that the student's day program was appropriate for the student (id. at p. 20). On this point, the IHO found that the parent misconstrued the BCBA's testimony (id.).

As noted previously, the IHO found that, contrary to the parent's allegation, the day program could appropriately address the student's medical needs, and, therefore, the student did not require a residential placement on a medical basis (see IHO Decision at pp. 10, 20). Relatedly, the IHO found that the evaluator's reliance on various medical notes drafted by the student's doctors to formulate her recommendation for a residential placement was outweighed by the facts elicited during cross-examination, which indicated that the evaluator had never spoken to either doctor

and, thus, she could not ascertain the basis for the doctors' recommendations for a residential placement for the student (id. at pp. 20-21). Moreover, the IHO noted that one of the doctor's letters had been written in 2021—nearly two years ago, which, according to the IHO, brought into question the relevance of the information contained therein (id. at p. 21). In addition, the IHO noted that, as previously discussed, the evaluator's opinion concerning the appropriateness of the district's recommended program was deemed to be without merit, which, according to the IHO, "undermine[d] her opinion regarding the appropriateness of a residential placement" for the student (id.). As a result, the IHO gave little weight to the evaluator's opinion with respect to the necessity of a residential placement for the student (id.).

Finally, the IHO addressed the parent's contention that the student's lack of generalization across environments—namely, home, school, and the community—warranted a residential placement (see IHO Decision at pp. 21-22). Here, the IHO indicated that, as previously noted, school districts were not required to design an educational program to address a student's generalization of skills when, as here, the student was likely to make progress in the classroom (id.). Relatedly, the IHO found that a residential placement was not warranted for the student in this case because the district had presented sufficient evidence demonstrating the student's progress within the day program, which constituted the student's LRE (id. at p. 22).

With respect to the parent's request to remand the matter back to the CSE to secure a residential placement for the student at the Center for Discovery, the IHO determined that the hearing record lacked sufficient evidence "demonstrating the appropriateness" of this particular residential placement (IHO Decision at pp. 22-23). The IHO indicated that the parent testified that the Center for Discovery was a "good fit" for the student, notwithstanding that the parent had never visited the school and had only spoken with someone from admissions during the 2019-20 school year who had "informed" the parent that the student "would be a good fit for this program" (id. at p. 23). Given the paucity of evidence, the IHO could not find that the Center for Discovery was an appropriate placement for the student (id.).

Based on the evidence in the hearing record, the IHO denied the parent's request for compensatory educational services and to direct the CSE to secure the student's placement at the Center for Discovery or in a similar program (see IHO Decision at pp. 23-27).

#### **IV. Appeal for State-Level Review**

The parent appeals, arguing that the IHO erred by finding that the district offered the student a FAPE in the LRE for the 2022-23 school year. The parent further argues that the IHO misapplied the burden of proof throughout her decision. Next, the parent contends that the IHO improperly applied the concept of the LRE when finding that a residential placement was not appropriate for the student. And finally, the parent contends that the IHO improperly rejected the recommendation for a residential placement within the March 2022 neuropsychological evaluation report and improperly weighed the testimonial evidence by the district's BCBA witness on this issue. As relief, the parent seeks to reverse the IHO's finding that the district offered the student a FAPE in the LRE for the 2022-23 school year, and to direct the CSE to establish a placement for the student at the Center for Discovery.

In an answer, the district responds to the parent's allegations and generally argues to uphold the IHO's decision in its entirety.

## 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 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]).<sup>10</sup>

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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<sup>10</sup> 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).



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. Preliminary Matters**

#### **1. Additional Documentary Evidence**

The parent attaches additional documentary evidence to the request for review for consideration on appeal (see generally Parent Exs. I-O). Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). Upon review, all but three documents proffered by the parent as additional documentary evidence were available at the time of the impartial hearing, and are now not necessary in order to render a decision. With regard to the remaining three documents—all of which purportedly reflect evidence of the student's behaviors at the day program during summer 2023 and September 2023—these documents were not available at the time of the impartial hearing. However, given that all three documents pertain to the student's behavior at the day program during the 2023-24 school year, such evidence would not be relevant to whether the district offered the student a FAPE in the LRE for the 2022-23 school year at issue in the present matter. Therefore, based on my discretion, I decline to accept or consider all of the additional documentary evidence submitted by the parent, as well as the parent's affidavit in support of admitting the additional documentary evidence.

#### **2. Burden of Proof**

The parent contends that although the IHO properly recited the burden of production and persuasion in the decision, the IHO misapplied it throughout the decision. For example, the parent initially asserts that the IHO reversed the burden of proof onto the parent by seeking an explanation of a district witness's use of the term "aggression" in her testimony at the impartial hearing from the parent. However, the parent does not cite to any portion of the IHO's decision in support of this assertion, and a review of the IHO's decision does not reveal an instance where the IHO required the parent to explain this portion of the district witness's testimony.

Next, the parent asserts that the IHO improperly found that the parent's failure to object to the annual goals at the March 2022 CSE meeting precluded the parent from raising issues with the annual goals in the due process complaint notice. The parent further argues in a footnote that the evidence reflected that the annual goals were not achievable, and thus, were not appropriate to meet the student's needs. To be clear, there is no requirement that a parent object to annual goals at a CSE meeting in order to pursue issues with the annual goals in a subsequent due process complaint notice. State regulations permit a party to file a due process complaint notice regarding

"any matter relating to the identification, evaluation or educational placement of a student with a disability" (8 NYCRR 200.5[i][1]). But even if the IHO misstated a legal standard pertaining to the appropriateness of annual goals, that, alone, does not constitute an improper shifting of the burden of proof such that the IHO's decision must be reversed with respect to whether the district offered the student a FAPE in the LRE for the 2022-23 school year.

### **3. Scope of Review**

On this point, it does not go unnoticed that the parent has not appealed the IHO's finding that, even if the district had failed to offer the student a FAPE in the LRE for the 2022-23 school year, the parent had also failed to present sufficient evidence to establish that the Center for Discovery—or any other similar State-approved nonpublic, residential school—was an appropriate placement for the student had the IHO determined that a residential placement was warranted (compare Req. for Rev., with IHO Decision at pp. 22-23). As a result, this determination has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*6-\*7, \*10 [S.D.N.Y. Mar. 21, 2013]). The parent's failure to appeal this adverse finding is fatal because State regulation governing practice before the Office of State Review requires that the parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see 8 NYCRR 279.4[a]). An IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]). Therefore, even if the undersigned concluded that the district failed to offer the student a FAPE in the LRE for the 2022-23 school year, the parent would not be entitled to the requested relief because the IHO's finding that the hearing record failed to contain sufficient evidence upon which to conclude that the Center for Discovery—or a similar residential placement—was an appropriate unilateral placement is now final and binding.

Nevertheless, as discussed more fully below, an independent and thorough review of the entire hearing record supports the IHO's conclusion that the district offered the student a FAPE in the LRE for the 2022-23 school year, and the parent's appeal must be dismissed.

#### **B. FAPE and Residential Placement**

Here, the parent initially contends that the IHO's finding that the district offered the student a FAPE for the 2022-23 school year was inconsistent with evidence reflecting ongoing safety concerns and the student's lack of progress. With respect to the safety concerns, the parent asserts that, after the development of the student's BIP, she continued to display aggression and elopement attempts, which demonstrated the district's inability to contain the student. In addition, the parent contends that the IHO ignored evidence of the student's continued seizure activity, and evidence that the student's condition required "more intensive treatment." With regard to the alleged lack of progress, the parent argues that the IHO's finding was similarly inconsistent with the evidence in the hearing record, which demonstrated that the district had "no effective remedy at the current placement" to address the student's behaviors and was not addressing the student's "documented medical issues." In support of this assertion, the parent points to the student's progress reports,

which she interprets as evidence of the student's regression and failure to make progress. In addition to the parent's allegations concerning the district's failure to address the student's behavior and safety issues as a basis to reverse the IHO's finding, the parent also argues that the IHO misapplied the LRE requirement when finding that a residential placement was not appropriate for the student, and the IHO improperly weighed the recommendation for a residential placement made by the evaluator who completed the student's March 2022 neuropsychological evaluation against the BCBA's opinion that the day program was meeting the student's needs.

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

With respect to residential placements, the Second Circuit has stated that "[w]hile some children's disabilities may indeed be so acute as to require that they be educated in residential facilities, it is appropriate to proceed cautiously whenever considering such highly restrictive placements. . . . The norm in American public education is for children to be educated in day programs while they reside at home and receive the support of their families" (Walczak, 142 F.3d at 132). A residential placement is not appropriate unless it is required for a student to benefit from his or her educational program (M.H. v. Monroe-Woodbury Cent. Sch. Dist., 296 Fed. App'x 126, 128 [2d Cir. Oct. 7, 2008]; Walczak, 142 F.3d at 122; Mrs. B., 103 F.3d at 1121-22; see Educ.

Law § 4402[2][b][2]; 34 CFR 300.104; 8 NYCRR 200.6[j][1][iii][d]). In general, the Second Circuit has required objective evidence that a student cannot obtain educational benefit in a less restrictive setting before finding that a residential placement is required by the IDEA (M.H., 296 Fed. App'x at 128; Walczak, 142 F.3d at 131-32; see MN v. Katonah Lewisboro Sch. Dist., 2020 WL 7496435, at \*9 [S.D.N.Y. Dec. 21, 2020]). Additionally, State law requires that in order to properly recommend a residential placement, a district must make the determination that there is no appropriate non-residential school available consistent with the needs of the student (Educ. Law § 4402[2][b][2]).

After independently reviewing the hearing record and upon consideration of the parties' respective arguments on appeal, the evidence does not support the parent's arguments to reverse the IHO's finding that the district offered the student a FAPE in the LRE for the 2022-23 school year or that the IHO's ultimate conclusion was inconsistent with the evidence in the hearing record with respect to the student's safety or seizure activity (see IHO Decision at pp. 6-16, 20). Instead, the evidence in the hearing record demonstrates that the IHO carefully and accurately recounted the issues to be resolved at the impartial hearing, the positions of the parties, as well as the procedural and factual background of the case (id. at pp. 1-16). In addition, the hearing record reflects that the IHO accurately identified and analyzed the crux of the parent's arguments related to the student's behavioral and related safety needs, as well as the student's health or seizure activity, and whether any of the parent's alleged procedural or substantive violations in the due process complaint notice constituted a failure to offer the student a FAPE in the LRE for the 2022-23 school year by relying on the relevant facts and proper legal standards in order to reach her conclusions of law on these issues (id. at pp. 6-16). For example, the IHO found that the district presented sufficient evidence to determine that the student's day program addressed her developmental delays, behavioral needs, health and medical needs, and how the instruction provided to the student was individualized to her needs (id. at pp. 6-7, citing Tr. pp. 260-62, 266-71, 507, 522-23, 526-27). The IHO also determined that the district's evidence supported a finding that the day program provided appropriate nursing staff to meet the student's needs and that the student's needs were further supported by a one-to-one provider, who accompanied her during transitions from location to location (id. at p. 10, citing Tr. pp. 627, 632, 824). With regard to the student's seizure activity, the student's pediatric neurologist provided the district with an updated health care plan (HCP) in May 2022, which provided instructions and guidance in handling the student's seizures and which was documented on the student's IEP under special alerts (see Dist. Ex. 5 at p. 1; see generally Dist. Ex. 19).<sup>11</sup>

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<sup>11</sup> The parent presented a note, dated April 5, 2023, penned by the student's pediatric neurologist as evidence at the impartial hearing (see Parent Ex. A). According to the note, the doctor last saw the student on April 4, 2023, and he indicated that the student continued to struggle with seizures that were difficult to control and occurred daily and that the student required close and attentive monitoring not only for her seizures but for her severe behavioral problems (id.). The doctor further indicated that the parent had requested a residential placement and that he agreed that this was "medically appropriate and would be the best plan to ensure her health and safety" (id.). This note, however, postdated both the March 2022 and the August 2022 CSE meetings, and there is no indication in the hearing record that the parent provided the district with a copy of this note. Nevertheless, the content of this April 2023 note does not differ from the November 2021 note written by the student's pediatrician, who had agreed with the parent's request for a residential placement because it would "be the best plan to ensure the health and safety and well-being" of the student (compare Parent Ex. C, with Parent Ex. A).

Moreover, a review of the evidence in the hearing record reflects that the student's day program staff, as well as the March and August 2022 CSEs, identified the student's behavior needs with regard to her aggression, elopement, safety, and medical needs. In particular, the day program's behaviorist conducted an FBA, which the August 2022 CSE followed-up with by contracting with another BCBA to observe the student at the day program (see Dist. Exs. 13; 15-16). The June 2022 FBA completed by the behaviorist served as the basis for the development of the student's BIP in December 2022, after the BCBA had completed her observations and made recommendations to assist in addressing the student's behavior needs (see Dist. Exs. 13A; 15-16). In addition, as reflected in the student's August 2022 IEP, the day program had an elopement plan in place, with alarmed doors (see Dist. Ex. 5 at p. 1).

With respect to progress, the parent points to one of the student's annual goals (following two-step directions while dining) and what she characterizes on appeal as "worrisome results," "variable progress," and as demonstrating "severe regression." Upon review, the evidence in the hearing record reflects that, consistent with the IDEA and State and federal regulations, the annual goals and short-term objectives are consistent with, and relate to, the identified needs and abilities of the student (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]). The August 2022 IEP included a study skills annual goal targeting sustained attention and included short-term objectives in the areas of education (completing instructional academic tasks), OT (tracing letters, bilateral coordination and cutting), PT (improved attention to task and body awareness), adapted physical education (improved attention and participation), and one objective without a heading that was to be monitored by the speech-language pathologist (improved attention to maintain topic by responding to academic-related tasks) (see Dist. Ex. 5 at p. 21). The August 2022 IEP included a social/emotional/behavioral annual goal targeting the use of strategies outlined in the BIP to reduce the daily average of aggression, attempts to elope, and actual elopement behaviors (id. at pp. 21-22). Additionally, the IEP included an annual goal addressing daily living skills (id. at p. 22). All the annual goals included evaluative criteria (i.e., 80 percent success on three consecutive occasions, 90 percent over 10 weeks), evaluation procedures (recorded observations, data collection), and schedules used to measure progress (daily, every two weeks) (id. at pp. 21-22).

A review of the progress report for the student's annual goals and short-term objectives reveals that, over the course of the 2022-23 school year, the student improved her ability to sustain her attention to academic tasks with adult prompts (see Dist. Ex. 8 at p. 1); she improved her ability to trace letters in her name during OT sessions while working on sustaining her attention to tasks (id. at p. 2); she improved her ability to complete more activities during PT sessions with improved attention to task (id. at p. 3); she improved her ability to independently position scissors in her hand, independently open and close the scissors, and to make consecutive cuts along a straight-line during OT sessions (id. at p. 4); during speech-language therapy sessions, the student made progress in building a picture vocabulary, demonstrating improved attention to tasks when responding to questions, and in accessing her communication device (id. at p. 5); in adapted physical education, the student maintained her level of support to complete activities and showed interest in movement activities (id. at p. 6); and finally, the student made progress with regard to her ability to follow two-step directions during dining (id. at p. 15).

Within the progress report, it was noted that in March 2023, the student's medication changed, which, at times, appeared to have affected the student's progress on some of her annual

goals and short-term objectives during the April reporting period (see, e.g., Dist. Ex. 8 at pp. 3, 5, 15, 17). As to the student's ability to follow two-step directions while dining, which the parent noted as demonstrating concerning rates of progress and regression, the progress report indicated that when the student reached "two weeks at 100 [percent]," the provider would then begin to fade the prompting support (id. at p. 17). By October 2022, the student achieved the "two weeks at 100 [percent]," and the provider noted that they would begin fading the prompt support at that time (id.). However, the progress report reflected little, if any, additional progress made on this particular annual goal, but noted the student's medication change in March 2023 and changes thereafter in the student's "swallowing, coordination, dining posture, [and a] possible change in appetite" (id.). The student also reportedly spent less time at the table and requested to rest on a beanbag chair (id.).

Thus, while the parent correctly notes that the progress report indicated that the student had some difficulties in April of that year in the areas of PT, speech-language therapy, and daily living skills, upon closer inspection, within the April 2023 progress report in the areas of PT, speech-language therapy, and ADL skills, it was noted that the student had experienced recent changes with medication and thus presented with decreased attention and balance, increased difficulty with motor planning, increased fleeting attention, some difficulty with understanding and processing familiar, simple instructions, and some changes in coordination with dining skills such as swallowing (see Dist. Ex. 8 at pp. 3, 5, 15; see also Dist. Ex. 23 at p. 1).

The principal of the day program testified that the student was recently placed on a seizure medication that made her a little lethargic, uncoordinated, and unbalanced, and she noted the student had a "little bit of waning" when she was going through the medication change, but overall, this was "really a blip on the radar this year" and the student had been maintaining her skills and showing some "really nice" growth in her ability to attend and participate (Tr. pp. 159, 173; see Tr. pp. 196-97). The speech-language therapist also noted the student's medication change in spring 2023 and that she appeared "a little more shaky"; however, the therapist testified that when the student's medication changed, she might show a little bit more difficulty as she adjusted to the medication and required a little bit more prompting to get back to her baseline (Tr. pp. 376, 403, 407). The director also noted the medication change in spring 2023 and further noted that when there was a medication change for the student, the staff would sometimes observe differences in the student's behavior, such as her gait, shakiness, and "those types of safety awareness" issues (Tr. pp. 626, 643).

The day program's nurse testified that in March 2023, the student's medication change resulted in some side effects, including increased shakiness, unsteadiness, and delayed responses to direction (see IHO Ex. I ¶¶ 18-19). She explained that she had assessed the student a few times since the medication changes, based on staff observations of shakiness or unsteadiness, and she would do a "quick check" and the student was consistently deemed safe and able to return to class (id. ¶ 19). The nurse further testified that staff had been trained to accommodate the student if she was having an "off" day in terms of increased shakiness or delayed responses (id. ¶ 20).

In this instance, while the student may not have mastered or achieved her annual goals, the evidence demonstrates that the student made progress toward the annual goals, even if the progress was slow or variable, at times, as the parent noted with respect to the student's ability to follow two-step directions while dining. In summary, the progress report shows that the student was

making progress during the 2022-23 school year before the medication change occurred and, in some cases, continued to make progress in the midst of those changes. Notably, the student had "definitely improved" her attention and ability to follow therapist directed tasks during PT sessions in August and November and continued to do well in February of that school year and progress towards improving her skills to achieve her PT goals (see Dist. Ex. 8 at p. 3). During the marking periods through February, the student made progress in her annual goals and short-term objectives in the areas of OT, speech-language therapy, and ADL skills (id. at pp. 4-5, 15). The student was working toward her annual goal of maintaining sustained attention in academic tasks; OT tasks, including visual attention to task and scissor use; and in adapted physical education (id. at pp. 1-2, 4, 6). Finally, the student made steady progress in increasing her attention to task from "several minutes" at a time with adult prompting and redirection in August, to six to seven minutes with some adult support in April of the same school year (id. at p. 1).<sup>12, 13</sup>

In light of the foregoing evidence and my independent review of the hearing record, I find that the IHO relied on the proper legal standards to conclude that the district sustained its burden to establish that it offered the student a FAPE in the LRE for the 2022-23 school year (see IHO Decision at pp. 6-16). The IHO's decision also shows that the IHO carefully recited and considered the testimonial and documentary evidence presented by both parties, and furthermore, that she carefully marshaled and weighed the evidence in support of her conclusions (id.). Consequently, there is no reason to disturb the IHO's findings and conclusions, and the parent's arguments must be dismissed.

One final note, however. Notwithstanding the behavioral or safety difficulties the parent experiences with the student at home, compounded in this instance by the additional burden of the lack of available resources from outside agencies, these circumstances do not warrant a CSE pursuing a residential placement when, as here, the student continues to make progress at her day program. While I am sympathetic to the challenges faced by the parent, and encourage the parent to continue to pursue outside resources for assistance with the student in the home, and also encourage the district to offer any information or referrals to outside agencies it has available with respect to the home-specific needs of the student and parent, the IDEA addresses a disabled

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<sup>12</sup> Without explanation, the progress report for the 2022-23 school year did not include reporting for the social/emotional/behavioral annual goal of reducing the daily average of challenging behaviors using strategies outlined in the BIP (see Dist. Ex. 8 at p. 14).

<sup>13</sup> The evidence in the hearing record included the student's progress report on her annual goals and short-term objectives during the 2021-22 school year as well (see generally Dist. Ex. 7). Regarding the student's speech-language annual goal of using her AAC device to communicate a message during an academic related task, the student had made progress in receptively identifying items to expand her picture vocabulary and in sorting items by category, she had improved her ability to respond to yes/no questions verbally, and her ability to engage and attend to non-preferred tasks had "improved greatly" (noting on average the student would attend to tasks for five to seven minutes with use of manipulatives) (Dist. Ex. 7 at p. 2). With respect to motor skills, the 2021-22 progress report indicated that the student had achieved her annual goals of attending to a four-step gross motor obstacle course and sitting and completing a therapist directed three-step fine motor coordination activity (id. at pp. 6, 10, 12). The student was reportedly progressing gradually toward her adapted physical education annual goal involving attending to a directed task for up to three repetitions without running away (id. at pp. 15-16). Regarding her annual goal involving ADL skills, the student demonstrated the ability to dine and follow two-step directions for up to 20 minutes with fewer than two to three prompts and had progressed with her post-meal activities as well (id. at p. 17).

student's right to a FAPE which does not extend to a student's, or parent's, needs which are specific to the home environment and do not impact the student's ability to be educated pursuant to an appropriate IEP in school.

### **C. Relief—Prospective Placement in a State-Approved Nonpublic Residential School**

While the relief sought by the parent was addressed by the IHO in the context of the lack of sufficient evidence in the hearing record that the Center for Discovery would be an appropriate placement for the student, the difficulties inherent to the award of a prospective placement as relief for a denial of FAPE also warrants some discussion here. Generally, a parent's request to prospectively place students in a particular type of program and placement through IEP amendments can, under certain circumstances, have the effect of circumventing the statutory process, pursuant to which the CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing the student's needs (see Adams v. Dist. of Columbia, 285 F. Supp. 3d 381, 393, 396-97 [D.D.C. 2018] [noting with approval the hearing officer's finding "that the directives of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective placement in a private school"]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, at \*16 [E.D.N.Y. Oct. 30, 2008] [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"])).

Here, the parent's requested relief is not only unsupported by the evidence in the hearing record and unwarranted, but at this point, the school year at issue—2022-23—is over and, in accordance with its obligation to review a student's IEP at least annually, a CSE should have already produced an IEP that will be in effect for the 2023-24 school year, which has not been the subject of a due process proceeding (see also Eley v. Dist. of Columbia, 2012 WL 3656471, at \*11 [D.D.C. Aug. 24, 2012] [noting that prospective placement is not an appropriate remedy until the IEP for the current school year has been completed and the parent challenges the IEP for the current year]). To award specific changes to the student's IEP would, in effect, provide an award for the 2023-24 school year that bears no relation to whether or not the district's recommended program or placement for that year is appropriate. Indeed, such an award would demonstrate that prospective placements almost always serve to circumvent the statutorily required CSE process and generally, except in rare circumstances not present here, constitute an improper usurpation of the CSE's role by the due process system, rather than serve as appropriate remediation for the district's denial of a FAPE to the student for the time periods claimed. Accordingly, even if I were to find that the district denied the student a FAPE for the 2022-23 school year as opposed to my finding that the IHO correctly determined that the district offered the student a FAPE for that school year, I would nonetheless be constrained to deny the parent's request to prospectively place the student through changes to her IEP—or to direct a CSE to convene to prospectively place the student at a State-approved nonpublic residential program selected by the parent—based on the unavailability of an award of the prospective placement sought by the parent under the circumstances present in the instant matter and the legal standards referenced above.



## **VII. Conclusion**

Having found that the IHO properly determined that the district offered the student a FAPE in the LRE for the 2022-23 school year, the necessary inquiry is at an end.

**THE APPEAL IS DISMISSED.**

**Dated:**           **Albany, New York**  
                      **December 8, 2023**

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**CAROL H. HAUGE**  
**STATE REVIEW OFFICER**