



# **The University of the State of New York**

## **The State Education Department**

**State Review Officer**

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**No. 23-270**

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

### **Appearances:**

Ferrara Fiorenza PC, attorneys for petitioner, by Susan T. Johns, Esq.

Littman Krooks, LLP, attorneys for respondents, by Kevin Pendergast, Esq.

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son for the 2021-22 and 2022-23 school years and ordered it to reimburse the parents for their son's tuition costs at the Chamberlain International School (Chamberlain) for a portion of the 2022-23 school year. The appeal must be sustained.

### **II. Overview—Administrative Procedures**

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

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

The student has received diagnoses of autism spectrum disorder and attention deficit hyperactivity disorder (ADHD) and began receiving special education services in preschool; subsequently, the CSE determined that the student was eligible for school-age special education services as a student with an other-health impairment (Dist. Ex. 40 at p. 1).<sup>1</sup> He attended a district

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<sup>1</sup> The student's eligibility for special education as a student with an other-health impairment is not in dispute (see

public school until fall 2020, when the CSE recommended, and the student began attending, an 8:1+1 special class in a State-approved day school for the remainder of tenth grade (Dist. Exs. 28 at p. 1; 40 at pp. 1-3). The CSE convened on April 27, 2021 for the student's annual review and to develop an IEP for the 2021-22 school year (11th grade) (see generally Dist. Ex. 33). The April 2021 CSE recommended 12-month services consisting of an 8:1+1 special class in the same State-approved day school the student was attending with the related service of one 30-minute session per week of individual counseling (id. at pp. 1, 8-12).

By letter dated September 13, 2021, the parents were notified that the student had been suspended from the day school from September 14, 2021 through September 17, 2021 for refusing to report to his assigned classes; for creating a substantial disruption to the educational process while out of program; and for damaging a window screen in the office (Parent Ex. G). By letter dated October 14, 2021, the parents were notified that the student had been suspended from the day school from October 15, 2021 through October 21, 2021 for destruction of property; harassing a peer; and unsafe behavior (Parent Ex. H).

On October 15, 2021, the CSE reconvened at the parents' request (Dist. Ex. 36 at p. 1).<sup>2</sup> According to a prior written notice dated October 20, 2021, the CSE had convened to review the student's progress toward his IEP goals, the appropriateness of the placement at the State-approved day school, and the parents' request to have the student deemed eligible to participate in the alternate assessment rather than Regents programming (Dist. Ex. 37 at p. 1). The CSE reconvened on November 12, 2021 and November 23, 2021 (Dist. Exs. 38 at p. 1; 39 at p. 1; 41 at p. 1; 42 at p. 1). Corresponding prior written notices reflected that the CSE determined that the student did not meet the criteria for alternate assessment, the CSE agreed that the current placement was not appropriate, home-based tutoring was rejected because it was not a special education program that could be recommended when no documented medical needs prevented the student from attending school, and that the CSE could not recommend placement in a nonpublic school (Dist. Exs. 38 at p. 1; 42 at p. 1). The November 23, 2021 CSE reviewed the student's November 19, 2021 reevaluation conducted by the district and determined that the student was capable of obtaining a local diploma (Dist. Ex. 42 at p. 1; see Dist. Ex. 40). The CSE also discussed having the student participate in a career development and occupational studies (CDOS) program in conjunction with a Regents diploma (Dist. Ex. 42 at p. 1). The prior written notice also noted that the CSE was continuing to seek an alternate placement (id.).

By letter dated December 29, 2021, the student was accepted into the residential program at REACH Academy, located in the Greenburgh-North Castle Union Free School District (Greenburgh-North Castle district) (Dist. Ex. 44 at pp. 1, 2). The CSE reconvened on February 11, 2022 at the request of the parents and to recommend the student attend an approved residential school in the Greenburgh-North Castle district for the remainder of the 2021-22 school year, with an implementation date of February 28, 2022 (Dist. Ex. 45 at pp. 1, 13). The February 2022 CSE

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34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

<sup>2</sup> An audio recording of the CSE meeting was made and later transcribed for the hearing (Parent Ex. Y). The IEP indicated that the CSE convened on October 15, 2021 (Dist. Ex. 36 at p. 1). However, the written transcript of the CSE meeting is dated October 20, 2021, which corresponds with the date of the prior written notice (compare Parent Ex. Y at p. 2, with Dist. Ex. 37 at p. 1).

recommended the student attend a 6:1+2 special class for six hours per day and receive one 30-minute session per week of individual counseling (id. at p. 9).

According to a prior written notice dated February 15, 2022, the February 2022 CSE reviewed a report from a private evaluator, reviewed the parents' request for alternate assessment, and recommended placement at a State-approved residential school in the Greenburgh-North Castle district (Dist. Ex. 46 at p. 1). The prior written notice also indicated that home tutoring had "been taking place per parent request as they [we]re refusing [the day school]," that home tutoring was not a long term placement, and that the student "need[ed] to attend the recommended school to obtain an appropriate placement" (id.).

The CSE reconvened on February 28, 2022 to conduct the student's annual review for the 2022-23 school year (Dist. Ex. 47 at p. 1). The CSE developed an individualized education services program (IESP) and recommended 12-month services consisting of an 8:1+1 special class and one 30-minute session of individual counseling to be implemented on July 4, 2022 for the 12-month services, and on September 7, 2022 for the special class placement and September 12, 2022 for the counseling services (id. at pp. 1, 9, 11). The February 28, 2022 CSE further indicated that the student was parentally placed in a nonpublic school and "[h]ome [s]chooled"(id. at pp. 1, 13).

By email dated March 8, 2022, the district's academic administrator for special education (academic administrator) wrote to the parents and reiterated that the CSE recommended that the student be placed in a residential program in the Greenburgh-North Castle district (Dist. Ex. 52). The academic administrator further wrote that "[t]utoring was a temporary accommodation while we were awaiting a placement to support [m]ath. Home tutoring [wa]s not an educational placement and was not recommended by the CSE" (id.). She also stated that "[s]ince placement was found effective 2/28/2022, the tutoring was to end that date as well . . . [Greenburgh-North Castle district] was the CSE recommendation from both the 2/11/2022 Program Review m[ee]t[ing] and the 2/28/22 Annual Review meeting" (id.). On March 10, 2022, the parents provided consent for the district to conduct an assistive technology evaluation of the student (Parent Ex. O). In a letter dated April 4, 2022, the parents were notified that the student had been accepted at Chamberlain, an out-of-State residential school (Parent Ex. P).<sup>3, 4</sup>

By prior written notice dated April 28, 2022, the district advised the parents that the February 28, 2022 CSE continued to recommend a residential placement in the Greenburgh-North Castle district, which the student was eligible to attend as of February 28, 2022 (Dist. Ex. 48 at p. 1). The prior written notice also stated that the recommendation for residential placement in the Greenburgh-North Castle district was to continue for the 2022-23 school year (id.). The prior written notice further reflected that the parents disagreed with the recommendation, that home tutoring was not a long term placement, and that the student needed to attend the recommended school to obtain an appropriate placement (id.).

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<sup>3</sup> The parent testified that in April 2022 when the student was first accepted at Chamberlain, the parents were still looking for other options and did not enroll the student at that time (Tr. p. 249).

<sup>4</sup> Chamberlain has been approved by the Commissioner of Education as an out-of-State school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

A CSE convened on May 17, 2022 to conduct a program review and a Manifestation Determination Review, to "look at the reason for why the student [wa]s not attending [school] to determine if it [wa]s a direct and substantial manifestation of disability" (Parent Ex. Z at p. 4; Dist. Exs. 49 at p. 1; 50 at p. 1).<sup>5</sup> The May 2022 CSE discussed the student's nonattendance, which had occurred as a result of the parents' disagreement with the district's recommendations (Parent Ex. Z at pp. 4-5, 8, 13-15).<sup>6</sup> The parents also requested that the district consider placing the student at Chamberlain (id. at pp. 8, 12-13). By prior written notice dated May 17, 2022, the district advised the parents that the CSE had met to review the student's attendance and determined that the nonattendance was not a direct and substantial manifestation of the student's disability (Dist. Ex. 50 at p. 1). The prior written notice further indicated that the student had not attended school for more than 20 consecutive days, that the parents disagreed with the CSE placement recommendation and would not send the student to school (id.).

In a letter dated December 12, 2022, the parents were notified that the student had been accepted at Chamberlain (Parent Ex. R). On February 7, 2023, the parents provided the district with ten-day written notice that they were rejecting the May 17, 2022 IEP and the CSE's recommended placement of the student at the REACH Academy located in the Greenburgh-North Castle district (Parent Ex. S at p. 1).<sup>7</sup> The parents further notified the district that they were unilaterally enrolling the student at Chamberlain for the remainder of the 2022-23 school year and seeking tuition reimbursement (id.). The parents also asserted that the district had failed to offer the student a free appropriate public education (FAPE) for the 2021-22 and 2022-23 school years and that they would seek further relief (id.).

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

By amended due process complaint notice dated March 2, 2023, the parents alleged that the April 2021 IEP set the student up to fail (Parent Ex. T at p. 5). The parents asserted that the April 2021 CSE proposed only individual counseling, failed to recommend group counseling to address the student's need for guided socialization, and failed to recommend strategies to build reading or communication skills (id.). The parents further argued that the CSE failed to recommend speech-language therapy, failed to properly conduct a functional behavioral assessment (FBA) and failed to update the student's behavioral intervention plan (BIP) (id.). With regard to the 2022-23 school year, the parents alleged that the February and May 2022 CSEs did not review the student's present levels of educational performance, did not seek updates on his progress or lack thereof, did not establish updated management needs or hold a discussion thereon,

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<sup>5</sup> Parent exhibit Z incorrectly lists the date of the CSE meeting as May 17, 2021 (Parent Ex. Z at p. 3).

<sup>6</sup> According to the transcript of the May 17, 2022 CSE meeting, the academic administrator stated that the CSE had placed the student at REACH Academy in the Greenburgh-North Castle district, the student was enrolled in the district and had failed to attend for more than 20 consecutive days (Parent Ex. Z at p. 13). The academic administrator further stated that the reason for nonattendance was "parent choice" based on their disagreement with the CSE's recommendation (id.). The academic administrator then stated that she would "let our enrollment officer know and he will be disenrolled" and that the parents could reenroll the student in the district "at any point" (id.).

<sup>7</sup> The letter is incorrectly dated February 7, 2022 (Tr. p. 240).

and did not include professionals from the Greenburgh-North Castle district, the placement the CSE was recommending for the remainder of the 2021-22 school year and for all of the 2022-23 school year (id. at p. 8). The parents contended that the CSE "instead came to the meeting with the whole recommended program predetermined for the [s]tudent" and improperly recommended REACH Academy, which specialized in students with "severe emotional disabilities and with behavior disorders" (id. at pp. 8-9).

Next, the parents alleged that the May 17, 2022 CSE could not enroll the student at REACH Academy without the parents' consent and therefore the CSE could not "disenroll" the student "from a placement to which the [p]arents had never enrolled him" (Parent Ex. T at p. 10). The parents further asserted that the "content of the 2022-2023 IEP that the CSE pre-determined [wa]s a "Save As" or copy-and-paste duplicate of [the prior] year's IEP, the only difference a one-sentence addition of Assistive Technology" (id.). Specifically, the parents argued that the IEP did not include any writing, math, or reading goals and did not include any special education instruction (id.). Next, the parents contend that a 2018 BIP was updated only once during 2020 and the district failed to consider updated progress monitoring and failed to conduct an FBA to determine whether changes to the BIP should be made (id.). The parents further asserted that the CSE approved the request for an assistive technology evaluation but failed to conduct one (id.).

With regard to their specific claims, the parents alleged that the district failed to offer a program and IEP that were appropriately ambitious in light of the student's unique circumstances and needs, which included language and reading deficits, math deficits, executive functioning deficits, attentional, and social/emotional needs (Parent Ex. T at p. 12). The parents asserted that the "2021-22 IEP placement was inappropriate according to that placement's administration and according to the [d]istrict itself" and failed to provide direct instruction for the student's documented disabilities and academic weaknesses (id.). The parents also alleged that the 2022-23 IEP was not appropriate "because it [wa]s a repeat of its predecessor and because it [wa]s a program lacking individualized goals, among other grave problems" (id.). The parents argued that the April 2021 IEP and May 2022 IESP failed to include appropriate services, including speech-language therapy, and neglected the student's need for more intensive counseling (id.). The parents further asserted that the 2019 FBA failed to include the views of teachers and service providers and was misdated by the district as December 2020 (id.). The parents also contended that the district failed to review and update the student's 2018 BIP (id.). Lastly the parents asserted that the district predetermined the 2022-23 IEP and "denied parental rights to consent and decision-making under the IDEA" (id.). As relief the parents requested reimbursement for the cost of the student's attendance at Chamberlain for the 2022-23 school year, reimbursement for the cost of tutoring and counseling during the 2021-22 school year, and funding for an independent neuropsychological evaluation (id. at p. 14).

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

An impartial hearing convened on May 23, 2023 and concluded on July 25, 2023 after six days of proceedings (Tr. pp. 1-615). In a decision dated October 26, 2023, the IHO determined that the district's CSE engaged in numerous errors in developing the student's IEP for the 2021-22 school year, "which require[d] that such determination and recommendation be considered null and void" (IHO Decision at pp. 15, 17). Turning to the February and May 2022 CSE meetings and recommendations for the 2022-23 school year, the IHO found that the district's "attempt to

disenroll [the s]tudent so as to be relieved from providing educational services to him during the 2022-2023 school year [wa]s just as null and void as [the d]istrict's original placement" (*id.* at p. 19). The IHO found that the district had "offered no proof that it offered any educational [s]ervices to [the s]tudent during the 2022-2023 school year" and "[t]o the extent that the C[SE], at its meeting of February 11, 2022 intended [the s]tudent's placement at Greenburgh North Castle was to extend into the following year," his finding "that such recommendation [wa]s null and void constitute[d] [his] finding that [the d]istrict failed to offer an appropriate program to [the s]tudent during the 2022-2023 school year" (*id.* at p. 19). The IHO further found that Chamberlain was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parents' request for an award of tuition reimbursement for the 2022-23 school year (*id.* at pp. 20-22). As relief for the 2022-23 school year, the IHO ordered the district to reimburse the parents for the cost of the student's tuition at Chamberlain and the IHO did not award any relief for the 2021-22 school year (*id.* at pp. 18, 23).

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

The district appeals and argues that each of the IHO's reasons for annulling and voiding the student's placement were based on his findings of procedural violations that had not been raised by the parents in the amended due process complaint notice. The district further asserts that the IHO erred in finding a denial of a FAPE for the 2021-22 and 2022-23 school years based on procedural violations without first determining whether the purported procedural violations impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student or caused a deprivation of educational benefits. The district also contends that it demonstrated the student was offered a FAPE for the 2021-22 and 2022-23 school years in that the CSE recommended an appropriate program and placement and demonstrated that the recommended placement could implement the student's IEPs. As relief, the district requests that the IHO's decision be reversed in its entirety.

In an answer, the parents respond with admissions and denials and argue that the IHO's decision should be upheld 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>8</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).

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. Scope of Review**

It is necessary to identify what issues are properly before me on appeal. State regulations governing practice before the Office of State Review require that the parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see 8 NYCRR 279.4[a]). Further, an IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

The IHO failed to address any of the substantive claims raised by the parents in their amended due process complaint notice and further failed to consider the parents' requested relief for the alleged denial of a FAPE for the 2021-22 school year (IHO Decision at pp. 15-19).

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<sup>8</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).

Nevertheless, the parents have not cross-appealed any aspect of the IHO's decision. Consequently, these claims have been abandoned and will not be further discussed (8 NYCRR 279.8[c][4]).

## **B. FAPE**

The IHO did not address the issue of whether the April, October, or November 2021 IEPs offered the student a FAPE for the 2021-22 school year; rather, the IHO focused his determinations on the recommendations made at the February 2022 CSE for the student to attend the State-approved residential school placement in the Greenburgh-North Castle district (see IHO Decision at pp. 14-19). However, as the parents had originally alleged a denial of a FAPE for the entire 2021-22 school year and because the events leading up to the February 2022 CSE meeting provide background for the issues before me, I will briefly address each CSE meeting. As will be elaborated upon below, the evidence in the hearing record demonstrates that the April 2021 IEP at the time it was written was reasonably calculated to confer educational benefit to the student in light of his circumstances. In addition, review of the hearing record indicates that, thereafter, the CSE frequently reconvened to address the parents' concerns. When the recommended day school was no longer appropriate for the student, the CSE reconvened to amend the IEP to provide for a modified schedule and home-based tutoring support, while the CSE located an appropriate State-approved residential placement.

### **1. April 2021 IEP**

For the 2021-22 school year, the April 2021 CSE recommended 12-month services consisting of an 8:1+1 special class in an approved day school with the related services of one 30-minute session per week of individual counseling (Dist. Ex. 33 at pp. 1, 8).

In English language arts (ELA), the April 2021 IEP described the student as very quiet and more likely to listen and receive information in the classroom than to participate (Dist. Ex. 33 at p. 4). The April 2021 IEP also noted that the student would not read aloud in class but would listen as others read (id.). The student required extended time for processing before answering questions and during 1:1 exchanges it was noted that the student "would at times take up to 45 seconds to respond to a reading comprehension question with a few repeated prompts every 10 to 20 seconds or so for him to respond" (id.). The April 2021 IEP indicated that most often the student answered correctly and at times he would ask for questions or passages to be re-read to him and he needed time for processing before answering (id.). The student was able to answer "wh" questions and basic inferencing questions but struggled with more complex texts (id.). The April 2021 IEP also reflected that the student struggled with writing in class, "however he w[ould] write a full-page personal note to a friend" (id.). In addition, in class the student would write one sentence, with each subsequent sentence requiring a prompt for him to write something down (id.). The April 2021 IEP further stated that the student benefitted from detailed graphic organizers and that his writing consisted "of mostly short, simple, sentences" (id.). The student was described as being able to do a minimal amount of writing independently (id.). The student required significant scaffolding and support and was very resistant to writing (id.). The April 2021 IEP further indicated that in literacy, the student seemed "unable/unwilling to complete any academic writing task independently, and refuse[d] typing or using a computer" (id.). In social studies, the student was described as "exceptionally disruptive" (id.). It was noted that the student had social studies after lunch and gym "so by the time he g[ot] to the classroom he [wa]s highly escalated" (id.).

According to the IEP, the student was "constantly shouting or making loud distracting noises," antagonizing "peers in a number of ways," and often needed to be removed from the classroom, which resulted in him creating disruptions in the hallway (id.). The student had completed one assignment in social studies at the time the April 2021 IEP was written (id.). In social studies, it was noted that it was difficult to assess the student's current academic ability because he was able to read passages but did not demonstrate the extent of his comprehension (id.). It was also noted that in social studies, the student's behavior had improved recently, in that the student screamed less and seemed less escalated (id.). The student was described as often laying on the floor in the classroom and as hanging out by the door (id.). The student reportedly had shown an increased willingness to engage with the teacher (id.).

In art class, the student was described as "doing better than he was in the winter" (Dist. Ex. 33 at p. 4). The student was participating more and was able to sit in his seat and behave appropriately (id.). The student was also described as able to speak and act very appropriately when he wanted to; however, he still liked to lay on the counters and the floor when he was not participating (id.). It was further noted that the student got along well with the other students in the room, but the teacher had "heard that he c[ould] have issues with other students in the school" (id.). The teacher further stated that the student had "always been very polite with staff in the [a]rt room" (id.). In science, the student was described as able to copy answers from the board but required constant prompting to do so (id.). The student reportedly needed to work on completing his classwork, he did very poorly on quizzes or tests and mostly refused to participate in lab class, as it was his last class of the day (id.). The student was noted to "currently get[] along with the peers he ha[d] in our class" (id.). The April 2021 IEP also reflected that the student was often outside the door of the science room when a preferred peer was in the class (id.). In math, the student demonstrated inconsistent abilities, depending on his level of focus (id.). The class was working on two step equations and the student had shown he was capable of adding and subtracting, as well as some multiplication and division (id.). The student was also capable of listening and following directions but did so inconsistently (id.). The April 2021 IEP also noted that the student's academic needs included clear classroom rules and expectations, a clear plan for learning, clear and preset consequences for breaking classroom rules, extended time for processing information before responding to a question, and prompts to support him with staying focused and on-task (id. at p. 5).

Socially, the April 2021 IEP indicated that the student was learning which students had his best interests in mind and which did not (Dist. Ex. 33 at p. 5). The student was reportedly making friends and becoming more able to banter appropriately in the classroom (id.). The student was described as empathetic toward others and would check in with peers and staff alike to make sure they were doing okay (id.). The student would also notify staff if he felt another student was being picked on (id.). The student liked to be able to check in with a preferred staff member and would "poke his head in at the beginning of the day and at times when he [wa]s struggling" (id.). The student benefitted from having a staff member explain or interpret situations for him; the student was described as "very interested in how he look[ed] to the outside world. He want[ed] to know how to improve, mature and grow into a respected young man" (id.). According to the IEP the student struggled with social cues and social norms (id.). When he trusted staff members and/or peers, he would open up in discussion; however, it was also noted that when the student felt someone was a threat or against him, he would retaliate (id.). The student was also described as having low self-esteem and would sometimes state that he was a loser or stupid (id.). The April

2021 IEP further noted that in school, the student struggled to understand what was appropriate to say and what was not (id.). The student's social strengths included that he loved to have friends and liked to make people laugh (id.). It was also noted that when fully applying himself, the student did well in his classes (id.). The student's social needs reflected that the student would benefit from learning accountability for his actions, learning to utilize "stop-n-think" and learn proactive or reactive choices (id.). The parents indicated that the student needed to learn self-regulation and accountability (id.). The April 2021 IEP also stated that the student could benefit from learning social cues and social norms, as well as conversational norms (id.).

According to the April 2021 IEP the student did not demonstrate physical deficits that interfered with his learning (Dist. Ex. 33 at p. 5). The student's management needs reflected that he benefitted from flexible scheduling and allowing extra time for transitions (id. at p. 6). The student had increasingly demonstrated that he was able to participate in classes and in school in a positive, productive manner (id.). The application of a specific behavior program that was linked to his positive socialization and participation in school was indicated for the student throughout the school day (id.). The student verbalized that he wished to do better in school and that his initial experience at the day school was negative (id.). The April 2021 IEP recommended specific management supports for the student which included flexible scheduling (allowing for extended transitions), provision of incentives centered around positive peer interactions and time with preferred peers and staff, clear and consistent directions/expectations for each subject/class, communicated repeatedly, processing time with a preferred staff when upset or concerned about himself or others, continued participation in positive behavioral interventions and supports (PBIS) and careful discussion of points at the close of each period, provision of a safe space equipped with a weighted blanket during times of agitation/upset, continuous prompts to remain on task and 1:1 assistance as needed, and a BIP (id.).

The April 2021 IEP also noted that the student's diagnoses of autism and ADHD were consistent with observed delays in attentional skills and social skills, which interfered with the student's participation in age appropriate activities and consistent acquisition of the skills required for successful participation in grade level curriculum (Dist. Ex. 33 at p. 6). Additionally, the IEP indicated that the student's "disabilities including ADHD and [a]utism impact[ed] the rate at which he acquire[d] new academic and social skills" (id.). The April 2021 IEP included annual goals in the areas of study skills to complete required assignments, in the area of writing to produce multi-sentence paragraphs, and in the area of social/emotional/behavioral skills related to using strategies to make choices and complying with classroom rules (id. at pp. 7-8).

In sum the April 2021 IEP's present levels of performance detailed the student's struggles with participation in his academic classes, low work output, peer interactions and his disruptive behavior (Dist. Ex. 33 at pp. 4-5). The IEP included annual goals in the areas of study skills, writing, and social/emotional/behavioral skills and the CSE recommended that the student continue to receive counseling and attend an 8:1+1 special class at the day school (id. at pp. 1, 7-8, 12). A June 30, 2021 prior written notice explained the following changes made in the April 2021 IEP: the addition of 12-month services which included an 8:1+1 special class for six hours to prevent substantial regression and the removal of special transportation as it was deemed that it was not required on the school bus route as the bus was smaller with a limited number of students (Dist. Ex. 34 at p. 1).

The academic administrator testified that the student's day school had programs that focused on the social/emotional needs of students, and noted that some students had significant learning disabilities and some were on the autism spectrum and that the school worked with students who had "that combined mental health component in addition to any kind of learning or social needs" (Tr. p. 34). The academic administrator testified that at the April 2021 annual review meeting the CSE felt that the day school continued to be an appropriate placement and that the student required services on a 12-month basis (Tr. p. 36).

## **2. October and November 2021 IEPs**

Turning to the start of the 2021-22 academic school year, the hearing record indicates that the student was disciplined and suspended from school on at least two occasions in September and October 2021, which led to a reconvening of the CSE on October 15, 2021 (Parent Ex. Y; Dist. Ex. 36). According to the transcript of the October 2021 CSE meeting, the CSE discussed the student's progress, behavior and attendance issues, and adjusting the student's annual goals (Parent Ex. Y at pp. 3, 14-16, 18-27). The academic administrator proposed a change in the direction of the IEP annual goals to focus on the student's behavior as it was "what the significant impact is right now" and suggested adding a "remaining in program" goal in lieu of a writing goal (id. at pp. 25-26, 52). The day school administrator stated at the meeting that she did not believe the student had been in his classes long enough to determine whether the student's behaviors stemmed from his inability to academically keep up with the pace of the Regents classes and that she prioritized addressing the student's behaviors first and "then getting the academics" (id. at pp. 37-38). While the day school principal stated at the October 2021 CSE meeting that the student was not a typical student "for us" and that their school was not typically for students with autism, the academic administrator noted that the day school did complete an intake process and accept him meaning that "at some point [the day school] did look through his files and say yes, we have a program that can accommodate him" (id. at pp. 32-34). The day school administrator added that they did have many students that were on the autism spectrum that could "very well fit in" (id. at pp. 34-35). The day school principal stated that the day school was not meeting the student's needs, and the academic administrator indicated that there were other programs currently reviewing the student's "packet," but that he would need to stay at the day school until an alternate placement was found (id. at pp. 34-36). Consistent with the CSE's discussion, the October 15, 2021 IEP reflects changes to the student's annual goals (Dist. Ex. 36 at pp. 7-8). The October 2021 IEP included one annual goal in the area of study skills and three annual goals in the area of social/emotional/behavioral skills (id.).

According to a prior written notice dated October 20, 2021, the CSE had convened to review the student's progress toward his IEP goals, the appropriateness of the placement at the State-approved day school and to review the parents' request to have the student alternately assessed (Dist. Ex. 37 at p. 1). According to the October 2021 prior written notice, the October 2021 CSE determined that the student was making slow progress toward his study skills goal and social/emotional goal (id.). The student's writing goal was determined to be inappropriate and removed (id.). A program engagement goal was added because the student's "nonengagement in program [wa]s the priority concern" at that time (id.). The prior written notice further indicated that during the CSE meeting, the administration of the day school reported that they could not meet the student's needs (id.; see Parent Ex. Y at pp. 33-34, 49-50). The prior written notice also stated that the student would remain at the day school while the CSE conducted a search for a new

placement (Dist. Ex. 37 at p. 1; see Parent Ex. Y at pp. 35, 36). The CSE recommended a modified schedule and home-based tutoring (Dist. Ex. 37 at p. 1; see Parent Ex. Y at pp. 41-43). The CSE then reviewed the parents' request for alternate assessment and determined that the student did not meet the criteria (Dist. Ex. 37 at p. 1; see Parent Ex. Y at p. 38). The prior written notice further indicated that application packets would be sent to other placements, a reevaluation of the student would be conducted and the CSE would reconvene to reassess the recommendation (Dist. Ex. 37 at p. 1; see Parent Ex. Y at pp. 49-50).

A review of the transcript from the October 15, 2021 CSE meeting demonstrates that the CSE gathered input from the members and developed the student's programming and annual goals during the meeting (Parent Ex. Y at pp. 14-40). The CSE also discussed the student's behaviors and developed interventions and planned to address the student's needs (id.).

The transcript also demonstrates that the academic administrator acknowledged that the student would need to remain at the day school until a new placement was found and she facilitated a discussion to put a plan into place to protect the student and other students "right now" (Parent Ex. Y at pp. 35, 41). Planning at the CSE meeting included discussing the advantages and disadvantages of a self-contained classroom, a modified morning schedule because the student was more likely to participate in the morning, tutoring, virtual programming, and participation in lunch (id. at pp. 42-50). The academic administrator also testified that the modified schedule included the student attending a couple of classes working virtually and that the district would supplement with tutoring for courses the student "could not plug into virtually" (Tr. pp. 39-40). Regarding whether the student was appropriate for the Regents pathway or alternate assessment, the academic administrator said that the student did not meet the criteria "in the sense that he's cognitively disabled" and that the last time they "looked at it" the student did not meet the criteria because he was academically capable, but noted that they would take a look when they did the reevaluation and then reconvene (Parent Ex. Y at pp. 37, 39).

Although the October 15, 2021 CSE made recommendations to alter the student's program at the day school to support him while seeking a new placement, the parent testified that "[t]here was no way [she] was going to send [the student] back there when they stated they c[ould not] meet his needs, and nothing ha[d] changed in how they were going to handle [the student] and his behaviors due to not understanding the coursework and copying the peers at that school" (Tr. pp. 217-18).

In October 2021 the parents obtained a brief updated psychological evaluation from a private evaluator, which found the student's cognitive functioning was in the mild intellectually disabled range, consistent with his adaptive functioning, and included recommendations for a modified curriculum, a change from Regents to certificate track, a current FBA, and programming in life skills and vocational skills (Dist. Ex. 35 at pp. 1-4; see Dist. Ex. 27 at pp. 4, 8).

The CSE reconvened on November 12, 2021 for a program review, to reconsider the parents' request for alternate assessment and to consider the parents' requests for a change in placement, for home-based tutoring due to medical needs, to place the student in a nonpublic residential school, and to review the parents' privately obtained evaluation (Dist. Exs. 38 at p. 1; 39 at p. 1). A November 12, 2021 prior written notice reflected that the CSE determined that the student did not meet the criteria for alternate assessment, the CSE agreed that the current placement

was not appropriate, home-based tutoring was rejected because it was not a special education program that could be recommended when no documented medical needs prevented the student from attending school, and that the CSE could not recommend placement in a nonpublic school (Dist. Ex. 38 at p. 1). The prior written notice further stated that the student's issues at school were behavioral and that the CSE would continue to follow up with schools that were considering the student and to send requests to State-approved residential schools (id.). The prior written notice also indicated that the CSE would reconvene in two weeks to review the student's reevaluation to determine if alternate assessment was appropriate, that the day school would provide asynchronous work for the student, and that the parents stated they would not send the student back to the day school (id.). The academic administrator testified that the CSE did not have any evidence that there was a medical issue for the student and that was why they did not place him on home tutoring (Tr. p. 43).

A prior written notice and IEP reflect that the CSE reconvened on November 23, 2021, for a program review to consider the results of the student's reevaluation, to reconsider the parents' request for alternate assessment and to review the parents' request for vocational programming (Dist. Exs. 41 at p. 1; 42 at p. 1). According to a November 19, 2021 reevaluation report, "[d]ue to a significant number of violent behaviors such as throwing furniture, kicking doors, and yelling and screaming obscenities, it was decided that [the student] participate in a shortened schedule of classes" at the day school (Dist. Ex. 40 at pp. 1, 4). The report also indicated that the student had not attended classes in the last two weeks at the parents' request to avoid continued outbursts at school (id. at p. 4). It was further noted that the student's attendance as a whole had been inconsistent as he tended to avoid certain classes and do minimal work (id.). Academic achievement assessment results yielded scores varying from significantly below average in math to below average in reading (id. at p. 5). In sum it was reported that the student would benefit from an academic program in which work-based learning was the main component with a modified academic curriculum and modified instruction (id. at p. 8).

The November 23, 2021 prior written notice stated that the November 19, 2021 reevaluation was reviewed and the CSE determined that the student was capable of obtaining a local diploma (Dist. Ex. 42 at p. 1). The CSE also discussed having the student participate in a CDOS program in conjunction with a Regents diploma (id.). The prior written notice also noted that the CSE was continuing to seek an alternate placement (id.). The November 23, 2021 IEP reflected recommendations for 12-month programming including an 8:1+1 special class at the day school with one 30-minute session of counseling per week, and a behavior consultation for the student's "team" (Dist. Ex. 41 at pp. 9, 11).

In December 2021 the parents privately obtained a standardized literacy assessment of the student that provided standardized scores in the areas of reading, spelling, and comprehension (Dist. Ex. 43 at pp. 1-6). Assessments found the student nearly two standard deviations below the mean in the areas of reading comprehension and encoding and one standard deviation below the mean in his decoding ability (id. at pp. 5-6). The examiner stated that the student would benefit from explicit instruction in spelling rules and written language instruction as well as vocabulary knowledge enhancement and instruction in the use of the computer for keyboarding and speech to text and text to speech applications (id. at p. 6).

The parent testified that beginning with the October 15, 2021 CSE meeting, where it was determined that the day school was not appropriate, her understanding "of the placement options" was that "there w[ere] just packets out at the day programs, and until the wait list opened and the program was appropriate, [the student] had no place to go" (Tr. p. 222). The parent also testified that she was "pushing at" other programs which required that the student be alternately assessed (id.).

The Greenburgh-North Castle district notified the district in a letter dated December 29, 2021, that the student had been accepted into the residential program at REACH Academy (Dist. Ex. 44 at pp. 1, 2).<sup>9</sup> The admission letter indicated that the student could begin attending in January 2022 and requested that the student's IEP be modified to recommend a 6:1+2 special class, to change the placement recommendation and the school district responsible for a coordinated set of transition activities, and to remove the behavior consultation (id.).

### **3. February 2022 IEP**

The CSE reconvened on February 11, 2022 at the request of the parents and also to recommend the student attend an approved residential school in the Greenburgh-North Castle district for the remainder of the 2021-22 school year, with an implementation date of February 28, 2022 (Dist. Ex. 45 at pp. 1, 13). The February 2022 CSE recommended the student attend a 6:1+2 special class for six hours per day, and also recommended one 30-minute session per week of individual counseling (id. at p. 9). Although the Greenburgh-North Castle district had requested additional changes to the student's IEP, the February 11, 2022 IEP continued to recommend a behavioral consultation and did not change the district responsible for transition activities (id. at pp. 11-12).

As the IHO noted, State regulation requires that, if a recommendation is that a student be placed in a school operated by an agency or school other than the school district in which the student would normally attend if the student did not have a disability or if the education of a student residing in a facility operated or supervised by a State department or agency is the responsibility of the school district, the school district must ensure that a representative of that agency or school attends the CSE meeting (8 NYCRR 200.4[d][4][i][a]; see IHO Decision at p. 15). Here, there is no dispute that a representative from the Greenburgh-North Castle district did not attend the February 2022 CSE meeting. The Greenburgh-North Castle district assistant superintendent of pupil personnel services (assistant superintendent) confirmed in her testimony that neither she nor anyone else from the Greenburgh-North Castle district participated in the CSE meeting (Tr. pp. 87, 117). She further testified that she participated in meetings when she was available but when she was not, districts used her acceptance letters to guide the changes and development of the IEP and she further noted that "many of the changes were just minor changes" (id.; see Dist. Ex. 44 at p. 1). The assistant superintendent also testified that she could not recall why no staff were available to participate in the February 2022 CSE meeting and noted that generally a representative would be present at placement meetings and reiterated that the placement letter would stand as a recommendation (Tr. p. 119). Program information included with the acceptance letter stated that

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<sup>9</sup> In an apparent typographical error, the acceptance letter included another student's name in the body; however, the student's correct name was set forth at the top of the letter (Dist. Ex. 44).



REACH Academy was for students on the autism spectrum as well as those who were dually diagnosed (Dist. Ex. 44 at pp. 3, 7). In addition, the program information reflected that the program at REACH Academy included day and residential student placements, 6:1+2 class settings, vocational programs, clinical services, community-based school to work transition programs, comprehensive life skills training, and related services (id. at pp. 7-8).

According to a prior written notice dated February 15, 2022, the February 11, 2022 CSE reviewed the literacy assessment report from a private evaluator, reviewed the parents' request for alternate assessment and recommended a State-approved residential school placement in the Greenburgh-North Castle district to begin on February 28, 2022 (Dist. Ex. 46 at p. 1). The February 11, 2022 CSE also added use of a word processor as a testing accommodation, and use of a word processor for typing and speech-to-text software were added to the student's management needs to support his writing needs (Dist. Exs. 45 at pp. 7, 11; 46 at p. 1). Additionally, it was noted that the CSE again rejected the parents' request for alternate assessment and recommended a Regents diploma with the option of earning the CDOS in conjunction (Dist. Ex. 46 at p. 1; see Dist. 45 at pp. 8, 12). The prior written notice also indicated that no other placement options were considered at that time as no other school had deemed the student appropriate for their program or he was then-currently on a waitlist; home tutoring had "been taking place per parent request as they [we]re refusing [the day school]," that home tutoring was not a long term placement, and that the student "need[ed] to attend the recommended school to obtain an appropriate placement" (Dist. Ex. 46 at p. 1). It was further noted that the student was invited but did not attend the CSE meeting and that the parent disagreed with the recommendation (id.; see Tr. pp. 49-50). Notably, the parents did not challenge the program recommendations set forth in the February 11, 2022 IEP and did not dispute the student's need for residential placement (Parent Ex. T at p. 12). The parents objected to the district's recommended placement of REACH Academy in the Greenburgh-North Castle district, which is addressed below.

With respect to the February 2022 IEP, the IHO found procedural violations related to the inclusion of a different student's name in the letter of acceptance from the Greenburgh-North Castle district and the lack of a representative from the Greenburgh-North Castle district at the CSE meeting; however, the IHO did not go on to examine whether the purported procedural violations impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student or caused a deprivation of educational benefits. Contrary to the IHO's determination, here, where the parents do not materially dispute that the student required a special class in a nonpublic residential school and the evidence in the hearing record shows that the CSE identified the REACH Academy program in the Greenburgh-North Castle district and had materials available to it to inform its determination that it was an appropriate program for the student, the error in the acceptance letter and the composition of the CSE do not support a finding that the February 2022 IEP amounted to a denial of a FAPE. Further, even weighing the parents' concerns about the program based on a visit, as discussed below, the evidence in the hearing record does not support a finding that REACH Academy was inappropriate or would not have had the capacity to implement the student's IEP. It is to that issue that I now turn.

#### 4. Assigned School Site

Generally, the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see E.H. v. New York City Dep't of Educ., 2015 WL 2146092, at \*3 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 2015 WL 1244298, at \*3 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]).<sup>10</sup> However, a district's assignment of a student to a particular school site must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244 [2d Cir. 2015]; R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 419-20; see C.F., 746 F.3d at 79 [holding that while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). The Second Circuit has held that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (M.O., 793 F.3d at 245; see Y.F. v. New York City Dep't of Educ., 2016 WL 4470948, at \*2 [2d Cir. Aug. 24, 2016]; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. 2016]; B.P. v. New York City Dep't of Educ., 634 Fed. App'x 845, 847-49 [2d Cir. 2015]). Such challenges must be "tethered" to actual mandates in the student's IEP (see Y.F., 2016 WL 4470948, at \*2). Additionally, the Second Circuit indicated that such challenges are only appropriate, if they are evaluated prospectively (as of the time the parent made the placement decision) and if they were based on more than "mere speculation" that the school would not adequately adhere to the IEP despite its ability to do so (M.O., 793 F.3d at 244). In order for such challenges to be based on more than speculation, a parent must allege that the school is "factually incapable" of implementing the IEP (see Z.C. v. New York City Dep't of Educ., 2016 WL 7410783, at \*9 [S.D.N.Y. Nov. 28, 2016]; L.B. v. New York City Dept. of Educ., 2016 WL 5404654, at \*25 [S.D.N.Y. Sept. 27, 2016]; G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at \*15 [S.D.N.Y. Sept. 19, 2016]; M.T. v. New York City Dep't of Educ., 2016 WL 1267794, at \*14 [S.D.N.Y. Mar. 29, 2016]). Such challenges must be based on something more than the parent's speculative "personal belief" that the assigned public school site was not appropriate (K.F. v. New York City Dep't of Educ., 2016 WL 3981370, at \*13 [S.D.N.Y. Mar. 31,

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<sup>10</sup> The Second Circuit has held that a district's assignment of a student to a particular public school site is an administrative decision that must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 419-20; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014] [holding that while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). The district is required to implement the IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan (20 U.S.C. §§ 1401[9][D]; 1414[d][2]; 34 CFR 300.17[d]; 300.323; 8 NYCRR 200.4[e]).

2016]; Q.W.H. v. New York City Dep't of Educ., 2016 WL 916422, at \*9 [S.D.N.Y. Mar. 7, 2016]; N.K. v. New York City Dep't of Educ., 2016 WL 590234, at \*7 [S.D.N.Y. Feb. 11, 2016]).

The Greenburgh-North Castle assistant superintendent testified that the student's October 15, 2021 IEP came with the original referral and that it was reviewed in terms of evaluating whether or not the student was appropriate for the program, along with the other documents that were in the "entire packet" (Tr. p. 99; see Tr. pp. 108, 110-11). The assistant superintendent explained that the acceptance letter requested removal of the behavioral consultation because it was built into the program, so it did not need to be a standalone support or service (Tr. p. 100). She further testified that the annual goals included in the October 15, 2021 IEP could be implemented in the REACH Academy and that they were similar to the goals of other students in the program (Tr. pp. 100-01).

The assistant superintendent testified that REACH Academy accepted students in grades 7 through 12 that were on the autism spectrum, classified with autism, or presented with psychiatrically complex features that warranted a higher level of intervention and noted that some of these students were obtaining a Regents diploma, some would get skills credentials, and others would "get some diploma type along with the CDOS certification" (Tr. p. 90). She stated that students were grouped based on functioning level, grade level, and social/emotional functioning noting that it was a multi-faceted approach to placement (id.). She also reported that REACH Academy provided individual and group counseling, parent counseling, and had an occupational therapist, a speech-language pathologist, and a licensed behavior analyst on staff (Tr. p. 91). The students at REACH Academy had opportunities to work on vocational skills and the assistant superintendent noted that many of their students were going out into the community working in food pantries, Footlocker, and that oftentimes they would cultivate an internship for a student who had a particular area of interest that was appropriate for that student (Tr. pp. 91-92).

The assistant superintendent also noted that they offered a lot of professional development and that they had professional development teams that worked with staff to be able to differentiate instruction and work with students at all levels (Tr. p. 93). The assistant superintendent explained that regarding social/emotional skills they trained all the staff in the tenets of dialectical behavioral therapy (DBT) strategies which afforded students the opportunity to learn a variety of coping skills and in addition, used zones of regulation and cognitive behavior therapy or "whatever work[ed] for our students in terms of facilitating their social[/]emotional development" (Tr. pp. 93-94). She added that staff have had training in social stories, which she noted they used "a lot" and had an "LCBA" who worked with clinicians and teachers to design programs to address students' executive functioning needs (Tr. p. 94). She detailed that they had experience working with students who refuse to do work starting with their school-wide positive behavioral intervention (PBIS) system and if needed they would address it through a classroom management protocol, individualized plans, or they would secure consent to conduct an FBA and develop a BIP (Tr. pp. 94-95). She stated that the students were grouped according to their academic levels, while being mindful of special education law regarding "three-year spans" so they adhere to grade level, age level and the needs of the student (Tr. pp. 95-96).

The assistant superintendent explained that the principal and assistant principal from REACH Academy met weekly with the program director and clinical director from the residential program and the clinician from the school met with the clinician from the agency (Tr. pp. 96-98).

Regarding coordination of how the residential component helped the students at REACH Academy make progress toward their goals, the assistant superintendent stated that while it was beyond her purview, residential staff supported students with homework assignments, were aware of the social/emotional goals on which that students were working, and that oftentimes there was collaboration between clinicians so that everyone was working on a similar set of goals for the student (Tr. p. 98).

The parent testified that she visited the assigned school site in the Greenburgh-North Castle district in January 2022, which consisted of REACH Academy where the student, had he attended, would have received instruction and the residential facility where the student would have lived, which was operated by St. Christopher's Inc. (St. Christopher's) (Tr. p. 224; see Tr. pp. 89, 90, 97). The parent further testified that she "saw the school, the classrooms, and then drove over and saw the . . . residential housing" (Tr. pp. 226-27). The parent was asked by her attorney if during her visit "to Greenburgh St. Christopher's" did she "learn of any specially designed program for autism" to which she responded that "they talked about having autistic kids there, and just like (the prior day school), they said they could meet his needs" (Tr. p. 228). The IHO asked the parent if it was REACH Academy or St. Christopher's which said it could meet the student's needs and the parent replied, "[b]oth of them, because they're kind of conjoined but separate, but together" (*id.*). The parent further testified that she was informed the assigned school site could meet the student's needs and "had training, they had sensory rooms" (Tr. pp. 229-30). The parent also testified that her understanding of the student population at the assigned school site conflicted with the recommendation of the private evaluator who conducted the June 2020 evaluation (Tr. p. 232; see Dist. Ex. 27). In the July 15, 2020 evaluation report, the private evaluator recommended that the student "not be placed in a classroom with children who are experiencing more severe mental health difficulties (i.e. psychotic-spectrum; physical aggression)" (Dist. Ex. 27 at p. 7). In her testimony, the parent stated that based on that recommendation, she did not think the assigned school site "would fit" and that students "ha[d], from [her] knowledge, severe mental issues at Greenburgh St. Christopher's that [the student] would not be appropriate for him to be with" (Tr. pp. 231-32). The parent further testified that she learned this information during her visit, that she was told "they handle severe cases . . . they talked about how they would restrain kids if need be" (Tr. pp. 233, 241).

The parents' objections to the district's recommended assigned school site as described in the parent's testimony are impermissibly speculative as the parent testified that she was told unequivocally that both REACH Academy and St. Christopher's could meet the student's needs and implement the IEP (Tr. p. 228; see, e.g., N.M. v. New York City Dep't of Educ., 2016 WL 796857, at \*8 [S.D.N.Y. Feb. 24, 2016] ["[A] claim based on what a school 'would not have' done—as opposed to a claim based on what the school could not do—is speculative and barred under R.E. and M.O."]). Further, to the extent the parent's testimony can be construed as a claim that the student would not be educated with a suitable or functional peer group, the information gleaned by the parent during her visit to the assigned school does not overcome the speculative nature of such a claim where the student never attended the proposed school placement (M.C. v. New York City Dep't of Educ., 2015 WL 4464102, at \*7 [S.D.N.Y. July 15, 2015]; R.B. v. New York City Dep't of Educ., 15 F. Supp. 3d 421, 436 [S.D.N.Y. 2014], aff'd, 603 Fed. App'x 36 [2d Cir. Mar. 19, 2015]; B.K., 12 F. Supp. 3d at 371; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 590 [S.D.N.Y. 2013]; see J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at \*11 [S.D.N.Y. Feb. 20, 2013] [noting that the "IDEA affords the parents no right to participate in

the selection of . . . their child's classmates"])). Even assuming that the parents' understanding of the school's student body was accurate, there is no basis in the hearing record to find that the student would not have been grouped with other students consistent with State regulations, which require students to be grouped by similarity of needs, or that such a violation would impede the student's ability to receive a FAPE (8 NYCRR 200.6[a][3][h][2]). In addition, to the extent the June 2020 private evaluation recommended a different peer group for the student over and above the requirements of State regulation, the CSE did not incorporate this recommendation into the IEP,<sup>11</sup> and, therefore, any allegation that the school did not embody the private evaluator's recommendation represents an impermissible challenge to the appropriateness of the February 2022 IEP because such claim would not be sufficiently tethered to an actual recommendation contained in the IEP (see N.K. v. New York City Dep't of Educ., 2016 WL 590234, at \*6 [S.D.N.Y. Feb. 11, 2016] [noting that "[t]o be a cognizable claim, i.e., one that triggers the school district's burden of proof, the 'problem' with the placement cannot be a disguised attack on the IEP; in other words, if the student ought to be placed in a school with particular characteristics, programs or services, then they should be set forth in the IEP and may not be raised as a challenge to the school placement"])).

As a final matter, the IHO faulted the district for not presenting evidence that the residential setting could meet the student needs; however, no one disputed the student's need for a residential placement or, for that matter, the REACH Academy's capacity to implement the residential aspect of the program. Based on the foregoing, I find the IHO erred in determining that the district failed to offer a FAPE to the student for the 2021-22 school year.

## **5. February 2022 IESP and Subsequent Events**

At the outset I note that the February 28, 2022 CSE meeting was the student's annual review. However, the parents did not challenge the February 28, 2022 CSE meeting or resultant IESP in their amended due process complaint notice (Parent Ex. T at pp. 8, 13).<sup>12</sup> As noted above, the IHO nullified the actions of the district rather than address the parents' substantive claims related to the April 2021 IEP and May 2022 IESP (both documents relating to services

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<sup>11</sup> So long as it considers a private evaluation, a CSE is not obligated to adopt the recommendations of the private evaluator (J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at \*11 [S.D.N.Y. Aug. 5, 2013] [holding that "the law does not require an IEP to adopt the particular recommendation of an expert; it only requires that that recommendation be considered in developing the IEP"]; Watson v. Kingston Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [holding that a CSE's recommendation is not necessarily rendered inappropriate by "[t]he mere fact that a separately hired expert has recommended different programming"])).

<sup>12</sup> When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programming for students with disabilities under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482), namely 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]).

recommended for the 2021-22 school year) and the parents did not cross-appeal the IHO's failures to rule (see Dist. Exs. 33 at p. 1; 49 at p. 1). Although there were no substantive or procedural challenges to the February 28, 2022 CSE meeting and resultant IESP, the recommendations will be generally reviewed in order to assess the appropriateness of the equitable services recommended for the 2022-23 school year.

For the 2022-23 school year the student was entering twelfth grade (Dist. Ex. 47 at p. 1). According to the parent's testimony, shortly after the student's October 14, 2021 suspension, the parents declined to send the student back to the day school while the district sought a residential placement for the remainder of the 2021-22 school year (Tr. pp. 216-18). The February 28, 2022 CSE developed an IESP for the 2022-23 school year which indicated that the student was then-currently parentally placed in a nonpublic school, homeschooled and registered for State assessment (Dist. Ex. 47 at p. 1).<sup>13</sup> The February 2022 IESP recommended 12-month services to be implemented on July 4, 2022 and 10-month services to be implemented on September 7, 2022 (id. at pp. 1, 9, 11). For summer 2022, the February 2022 CSE recommended an 8:1+1 special class and one 30-minute session per week of individual counseling (id. at pp. 1, 11). For the academic school year, the February 2022 CSE recommended an 8:1+1 special class for all academic classes and one 30-minute session per week of individual counseling (id. at pp. 1, 9).

Within the February 28, 2022 IESP's present levels of performance it was stated that the student had participated to a minimal extent in his academic classes that year and that when he was present in class he did not participate in a manner consistent with expectations as he would often sit or lay down on the floor and refuse to take part or attend to class activities (Dist. Ex. 47 at p. 6). According to the IESP, while the student completed some written work at home it had not yet been received by the school and that it was not possible from his level of participation to ascertain an accurate accounting of his skills in his academic classes (id.). Socially, the IESP noted that the student struggled to build relationships with staff and peers and struggled with appropriate social cues and interactions (id.). Further, the IESP indicated that when in session he could identify positive alternatives to his actions but struggled to follow through in the moment (id.). Additionally, the IESP reflected reports that at times the student expressed himself through actions that included disrespectful language, epithets and insults, unsafe and destructive behavior, and verbal threatening of others, and that in those times he required extensive management by safety personnel and others to prevent danger to himself and others (id. at p. 7). Next, the IESP stated that the student's diagnoses of autism and ADHD were consistent with observed delays in attentional skills and social skills which interfered with participation in age-appropriate activities and consistent acquisition of the skills required for successful participation in grade level curriculum and therefore impacted the rate at which the student acquired new academic skills (id.). The IESP indicated the student's need for a BIP and that he was pursuing a Regents or local diploma through special education programming (id. at pp. 7-8). The IESP also included annual

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<sup>13</sup> On direct examination it was noted that the February 28, 2022 CSE developed an IESP and when asked whether the district was providing special education services for the student while he was parentally placed in homeschool, the academic administrator replied in the negative (Tr. pp. 50-51). While the record does not include any additional discussion on why the district created an IESP, it appears that the student's nonattendance resulted in the district identifying the student as "Parentally Placed" and "Home Schooled" and therefore the CSE believed that developing an IESP was the appropriate action at the time of the student's annual review (see Dist. Ex. 47 at pp. 1, 13).

goals in the areas of study skills (maintaining attention and assignment completion), reading (answering comprehension questions from a variety of texts), writing (summarizing grade level informational text), and math (solving word problems of cost and sales tax) (id. at pp. 8-9). The IESP further indicated that the student's 12-month services were to be provided by the Greenburgh-North Castle district (id. at p. 11).

By email dated March 8, 2022, the district's academic administrator reiterated to the parents that the CSE recommended that the student be placed in a residential program in the Greenburgh-North Castle district and that "[Greenburgh-North Castle] . . . was the CSE recommendation from both the 2/11/2022 Program Review m[ee]t[in]g and the 2/28/22 Annual Review meeting" (Dist. Ex. 52). The academic administrator further wrote that "[t]utoring was a temporary accommodation while we were awaiting a placement to support [m]ath. Home tutoring is not an educational placement and was not recommended by the CSE" (id.). She also stated that "[s]ince placement was found effective 2/28/2022, the tutoring was to end that date as well . . . [Greenburgh-North Castle] was the CSE recommendation from both the 2/11/2022 Program Review m[ee]t[in]g and the 2/28/22 Annual Review meeting" (id.). On March 10, 2022, the parents provided consent to the district to conduct an assistive technology evaluation of the student (Parent Ex. O).

In a letter dated April 4, 2022, the parents were notified that the student had been accepted at Chamberlain (Parent Ex. P). In an April 8, 2022 email the parents informed the district that the student had been accepted at Chamberlain, and requested a placement meeting to review and approve the placement (Dist. Ex. 51; see Parent Ex. P). In an April 11, 2022 reply, the district director of special education stated that the CSE recommended the student attend REACH Academy, and she further noted that the district did not send students to out-of-State schools unless they could not find an appropriate in-State school (Dist. Ex. 51).

By prior written notice dated April 28, 2022, the district advised the parents that the February 28, 2022 CSE continued to recommend a residential placement in the Greenburgh-North Castle district, at which the student was eligible to commence attending as of February 28, 2022 (Dist. Ex. 48 at p. 1). The prior written notice also stated that the recommendation for residential placement in the Greenburgh-North Castle district was to continue for the 2022-23 school year (id.). The prior written notice further reflected that the parents disagreed with the recommendation, that home tutoring was not a long term placement, and that the student needed to attend the recommended school to obtain an appropriate placement (id.).

A CSE convened on May 17, 2022 to conduct a program review and a Manifestation Determination Review (Parent Ex. Z at pp. 4; Dist. Exs. 49 at p. 1; 50 at p. 1). The May 2022 CSE discussed the student's nonattendance, which had occurred as a result of the parents' disagreement with the district's recommendations (Parent Ex. Z at pp. 4-5, 8, 13-15). The parents also requested that the district consider placing the student at Chamberlain (id. at pp. 8, 12-13). According to the transcript of the May 17, 2022 CSE meeting, the academic administrator stated that the CSE had a placement for the student at REACH Academy in the Greenburgh-North Castle district, that placement was the CSE's ongoing recommendation, the student was enrolled in the district, and had failed to attend for more than 20 consecutive days (Parent Ex. Z at p. 13). The academic administrator further stated that the reason for nonattendance was "parent choice" based on their disagreement with the CSE's recommendation and not a manifestation of the student's disability

(id.). The academic administrator then stated that she would "let our enrollment officer know and [the student] will be disenrolled" and that the parents could reenroll the student at the district "at any point" (id.).

In the prior written notice dated May 17, 2022, the district stated that the CSE had been asked to consider placement in a residential setting in Massachusetts and that the option was rejected because an appropriate placement in-State had already been found (Dist. Ex. 50 at p. 1). The May 17, 2022 prior written notice further stated that "North Greenburgh [sic] w[ould] continue to be the CSE recommended placement for [the student]" (id.).

According to the academic administrator, the CSE met on May 17, 2022 because the student was not attending school and he was above compulsory school age (Tr. p. 51). She further testified that the CSE determined there was no history of school refusal or not attending school and that as the reason for him not attending was not a "significant and substantial manifestation of disability," the district "disenrolled" the student after that meeting due to lack of attendance (Tr. p. 51; Dist. Exs. 49; 50 at pp. 1-2).<sup>14</sup> The administrator confirmed that the student did not receive any instruction from the school between February until the meeting in May (Tr. p. 51). At the May 2022 CSE meeting, the parents' attorney acknowledged that the student was not going to school and stated the reason was that the parents never agreed to the recommended placement (Parent Ex. Z at pp. 4-5). The parents' attorney argued at the May 2022 CSE meeting that the student could not be enrolled in a school other than the home district without the parents' agreement with the placement (id. at p. 6). The district's attorney explained that since the CSE made the recommendation, the assigned school was effectively an extension of the district for the purpose of placement and therefore the student should be attending (id. at pp. 6, 9-10). The district identified "parent choice" as the reason the student was not attending (id. at pp. 4-6, 13-15).

By prior written notice dated May 17, 2022, the district advised the parents that the CSE had met to review the student's attendance and determined that the nonattendance was not a direct and substantial manifestation of the student's disability (Dist. Ex. 50 at p. 1). The prior written notice further indicated that the student had not attended school for more than 20 consecutive days and that the parents disagreed with the CSE placement recommendation and would not send the student to school (id.). The CSE was asked to consider a residential placement located in a neighboring state, but the CSE rejected this option as an appropriate placement in-State had already been found (Dist. Exs. 49; 50 at pp. 1-2).

The parent testified that she was not sure what parentally placed nonpublic school the May 2022 IESP referred to but that at the time of the May 17, 2022 CSE meeting when the district "unenrolled [the student] in school," the CSE considered the student to be homeschooled (Tr. p. 242; Dist. Ex. 49 at p. 1). The parent also testified that the student had been accepted at Chamberlain and the parents had asked the CSE to recommend placement at Chamberlain and were told "we could not go to Massachusetts because they had an appropriate placement in New York already" (Tr. p. 245). The parent further stated that "with that, they told us it was [Greenburgh-North Castle], or they were - - if we chose not to send [the student] there they were

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<sup>14</sup> It appears that the parents, in their amended due process complaint notice challenge the May 2022 IESP as the "2022-23 IEP," however, the February 28, 2022 IESP is the only recommended program and placement in the hearing record which was developed for the 2022-23 school year (Parent Ex. T at pp. 10, 12; see Dist. Exs. 45; 47; 49).



taking [hi]m out of school" and that "[t]he only thing we refused [wa]s to send him to St. Christopher's" (Tr. pp. 246, 247-48).

The academic administrator testified that she visited REACH Academy in October 2022 (Tr. pp. 46-47). Specific to the student, the academic administrator stated that she learned that they had a specific program for students who were on the spectrum and "an ASD program" for students who were also struggling with mental health needs (Tr. p. 47). She further testified that REACH Academy "had the smaller classroom environment, the smaller school environment, self-contained setting, and lots of opportunities for one-on-one support for both academics and social-emotional needs" (*id.*). To address the student's behaviors, the academic administrator noted the smaller school environment and class sizes and also therapeutic supports such as counseling and a "bounce back" space where students could go and deescalate (Tr. pp. 52-53). She also explained that REACH Academy had a program to provide students with work-based experiences both on and off campus for students to explore career and functional skill development at a nursing home, at restaurants and at automotive facilities as well as on-campus opportunities at a community garden (Tr. pp. 51-52). The academic administrator acknowledged that she did not visit any of the residential cottages, but in sum the administrator stated that based on her conversations with the principal and the director of special education as well as from her own observations she felt that Greenburgh-North Castle district was an appropriate placement for the student and it could implement the student's IEP (Tr. pp. 47-49).<sup>15</sup>

Regarding the CSE's refusal to recommend Chamberlain, an out-of-State residential nonpublic school, State law and regulation provide that the determination that an out-of-State residential placement is the LRE for a student first requires a district to determine whether an appropriate in-State residential facility is available to meet the student's needs (Educ. Law § 4407[1][a]; 8 NYCRR 200.6[j][1][iii][e]). Consistent with LRE principals, State regulations and guidance require that, when a district intends to place a student in an approved residential school, the district first refer the student to in-State approved residential schools that may be appropriate (8 NYCRR 200.6[j][1][iii][e]; "Placements of Students with Disabilities in Approved Out-of-State Residential Schools," Office of Special Educ., at pp. 4-5 [Apr. 2022], [available at https://www.nysed.gov/sites/default/files/programs/special-education/2022-23-out-of-state-residential-placement-memorandum-and-attachments.pdf](https://www.nysed.gov/sites/default/files/programs/special-education/2022-23-out-of-state-residential-placement-memorandum-and-attachments.pdf)). While the concerns of parents must be considered, "a parent's disagreement with a placement or preference for another school is not, in and of itself, justification for the CSE" to not recommend an appropriate approved in-State program that has accepted the student ("Placements of Students with Disabilities in Approved Out-of-State Residential Schools," Office of Special Educ., at p. 5). Accordingly, in this matter, the CSE acted in accordance with State law, regulation, and guidance when it declined to recommend the student attend Chamberlain and maintained its recommendation for the REACH program in the Greenburgh-North Castle district.

In his decision, the IHO found that the district's attempt to disenroll the student was a pretext "so as to be relieved from providing educational services to him during the 2022-2023 school year" and that the [d]istrict ha[d] offered no proof that it offered any educational [s]ervices

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<sup>15</sup> As noted above, the parents did not challenge the February 2022 IESP, nor did they allege that Greenburgh-North Castle district could not implement the recommended program for the 2022-23 school year (see Parent Ex. T).

to [the s]tudent during the 2022-2023 school year" (IHO Decision at p. 18). The IHO's findings are not supported by the hearing record and must be reversed. While the transcript of the May 2022 CSE meeting included language that the student was to be "disenrolled" there is no documentary evidence to support that the student was ever "disenrolled" (Tr. p. 51; Parent Ex. Z at p. 13; Dist. Ex. 50 at p. 1). Rather, the evidence in the hearing record shows that the district continued to recommend a program and placement at REACH Academy for the 2022-23 school year alongside any disciplinary determinations it made with respect to the student's failure to attend school or general statements about a reversible "disenrollment" of the student from the district based on his failure to attend the district's recommended placement (see Parent Ex. Z at p.13; Dist. Ex. 50 at p. 1). Moreover, even if student came to be "disenrolled" from a particular school, courts have recognized that a district's duty to offer the student a FAPE is triggered by the student's residency in the district, not the student's enrollment status or the parent's intent (see E.T. v. Bd. of Educ., 2012 WL 5936537, at \*14-\*15 [S.D.N.Y. Nov. 26, 2012] [noting that "residency, rather than enrollment, triggers a district's FAPE obligations" and "the issue of parental intent vis-à[-]vis the child's enrollment is not dispositive of whether a school district has a FAPE obligation to a disabled child"] [internal quotations omitted]). Accordingly, despite the use of the word "disenrolled" to describe the student's status after the parents continued to not send the student to school, the district continued to have an obligation to offer the student a FAPE and it met that obligation by continuing to recommend the student's placement at the REACH Academy. In addition to recommending REACH Academy in order to offer a FAPE, the district additionally offered equitable services to the student in the event the parent chose to decline the recommended program and placement.

In summary, a review of the hearing record as explained above in detail indicates that when the student's day school was no longer appropriate for the student in fall 2021, the CSE recommended changes to the student's program in order to support him at the day school while the district searched for a residential placement. The parents refused to allow the student to continue attending the day school despite the recommended changes to the program. The district located an appropriate residential placement for the student and recommended that he begin attending on February 28, 2022. The parents rejected the district's recommendations and chose to keep the student from attending school. The hearing record also reflects that the CSE convened multiple times to consider the parents' requests; however, it ultimately continued to recommend REACH Academy as the student's program and placement. Given its willingness to reconvene and address the parents' concerns and to make changes to the recommended program, the hearing record does not support the IHO's determinations.

## **VII. Conclusion**

Having determined that the evidence in the hearing record supports determinations that the district offered the student a FAPE for the 2021-22 and 2022-23 school years, the necessary inquiry is at an end and there is no need to reach the issues of whether Chamberlain was an appropriate unilateral placement or whether equitable considerations weighed in favor of the parents' request for relief.

**THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the IHO's decision dated October 26, 2023 is modified by reversing those portions which determined that the district failed to offer the student a FAPE for the 2021-22 and 2022-23 school years and ordered the district to reimburse the parents for the costs of the student's attendance at the Chamberlain International School for a portion of the 2022-23 school year.

**Dated:**           **Albany, New York**  
                      **January 4, 2024**

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