The University of the State of New York

The State Education Department
State Review Officer
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No. 23-258

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

Appearances:
Ingerman Smith LLP, attorneys for respondent, by Susan M. Gibson, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which found that respondent (the district) offered her daughter an appropriate educational program for the 2022-23 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). 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 parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited in detail. The student has received diagnoses of autism, attention deficit hyperactivity disorder (ADHD), and anxiety (Parent Ex. G). The CSE convened on May 24, 2022, to formulate the student's IEP for the 2022-23 school year (sixth grade) (see generally Dist. Ex. 11). Finding that the student was eligible for special education as a student with autism, the May 2022 CSE recommended 12-month programming consisting of an 8:1+2 special class placement with related services at one of the two district middle schools (id. at pp. 1, 16, 20-21).[1] On July 28, 2022, the CSE reconvened at the request of the

[1] For purposes of this decision, the district middle schools will be referred to as middle school A and middle school B. The district recommended an 8:1+2 special class placement at middle school A, but the parent sought placement of the student at middle school B.

parent to discuss the recommended assigned school location for the 2022-23 school year and the support of a 1:1 teaching assistant (see generally Dist. Ex. 12).

In a due process complaint notice, dated September 2, 2022, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year (see Parent Ex. A). In particular, the parent disagreed with the district's recommendation to implement the student's 8:1+2 special class placement at middle school A, asserting it was inappropriate, too restrictive, and was not the student's "home school" (Parent Ex. A at pp. 5-6). As relief, the parent sought placement of the student in an 8:1+2 special class at middle school B with the support of a 1:1 aide (id. at p. 7). In response to the due process complaint notice, the district generally denied the material allegations contained therein and argued that the district offered the student a FAPE for the 2022-23 school year (see Dist. Ex. 2). On September 6, 2022 and September 26, 2022, two of the student's pediatricians requested that the student receive home instruction pending the outcome of this proceeding (Parent Exs. E; J). A prior written notice, dated December 20, 2022, indicated that the parents were "electing to home-school" the student at that time, and the district offered resource room services to "support [the student's] academics through her homeschooling" and related services to be delivered at middle school A (Parent Ex. K).

Prior to the commencement of the impartial hearing, a prehearing conference was held on October 7, 2022 and "several status conferences" were held on unspecified dates for which no transcripts were created (Tr. pp. 4-5).[2] An impartial hearing convened on February 16, 2023 and concluded on July 11, 2023 after seven days of proceedings (Tr. pp. 1-947). In a decision dated October 12, 2023, the IHO determined that the district offered the student a FAPE for the 2022-23 school year and, more specifically, that the recommended program and assigned school placement were appropriate for the student (IHO Decision at pp. 43-48).[3] The IHO did not award any relief to the parent and ordered the district to convene a CSE meeting "to review the [s]tudent's progress and recommended services" (id. at pp. 47-48).

[2] The hearing record does not include a transcript or written summary for the prehearing conference or status conferences as required by State regulation (see 8 NYCRR 200.5[j][3][xi] ["[a] transcript or a written summary of the prehearing conference shall be entered into the record by the impartial hearing officer"]).

[3] While not defined by regulation, citations to the hearing record and to applicable law and application of that law to the facts of the case are generally considered to be the norm in "appropriate standard legal practice" and should be included in any IHO decision. In drafting an appropriate decision, an IHO should cite to relevant facts in the hearing record with specificity and provide a reasoned analysis of those facts that references applicable law in support of the conclusions drawn. Although State regulations call for IHOs to draft decisions in conformity with "appropriate standard legal practice," the regulations do not require IHOs to include citations to every exhibit, a minimum number of transcript pages, or that a decision must be a certain page length in order to meet this mandate (see 8 NYCRR 200.1[x][4][v]). In this instance, the IHO decision included sufficient citations to the hearing record and applicable laws to comply with standard legal practice.

IV. Appeal for State-Level Review

The parent appeals.[4] The parties' familiarity with the particular issues for review on appeal in the parent's amended request for review and the district's answer thereto is also presumed and, therefore, the allegations and arguments will not be recited here. The main issue presented on appeal by the parent is that the IHO erred in finding that the district offered the student a FAPE for the 2022-23 school year. More specifically, the parent argues that the IHO incorrectly found that the district did not engage in predetermination when recommending the student's program and placement for the 2022-23 school year; that the IHO demonstrated bias in favor of the district; and that the IHO discredited the evidence presented by the student's pediatricians. Lastly, the parent seeks the introduction of additional evidence (32 documents) into the hearing record.

In its answer the district generally denies the material allegations contained in the request for review, asserting that a number of the allegations mischaracterize the IHO's decision. The district also alleges that the additional evidence submitted by the parent should not be entered into evidence as it was available at the time of the impartial hearing and it is not relevant to render a decision in this matter. Additionally, the district argues that it met its burden of proof that the CSE did not engage in predetermination, and that the recommended program at middle school A was appropriate and offered the student a FAPE for the 2022-23 school year. Further, the district alleges that there was no evidence of bias on the part of the IHO. The parent filed a reply to the answer responding to the allegations as raised in the district's memorandum of law in support of the answer.

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.

[4] The parent timely served and filed a request for review. Thereafter, the parent requested leave to amend the request for review which was granted, and the parent served and filed an amended request for review.

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]).[5]

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

VI. Discussion

A. Preliminary Matters

1. IHO Bias

The parent claims that the IHO demonstrated bias toward the district "on many topics" (Req. for Rev. at p. 8). The parent contends that the IHO gave credit to the district for holding seven CSE meetings over the 2021-22 and 2022-23 school years despite the fact that four of the meetings were requested by the parent (id.). In addition, the parent asserts that the IHO blamed any lack of progress over the 2021-22 school year on the student's failure to attend school due to her anxiety (id.). Further, the parent argues that the IHO gave credibility to the district witnesses over the experience and knowledge of the student's step-father with respect to the programs offered at the district (id. at p. 9). The district asserts that there was "no evidence of actual or apparent bias on the part of [the] IHO" (Answer ¶ 15).

It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, according each party the right to be heard, and shall not, by words or conduct, manifest bias or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-064). An IHO may not be an employee of the district that is involved in the education or care of the child, may not have any personal or professional interest that conflicts with the IHO's objectivity, must be knowledgeable of the provisions of the IDEA and State and federal regulations and the legal interpretations of the IDEA and its implementing regulations, and must possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]).

In the instant matter, the hearing record does not support a finding that the IHO failed to act impartially. Initially, to the extent that the parent disagrees with the conclusion reached by the IHO, such disagreement does not provide a basis for finding actual or apparent bias by the IHO (see Chen v. Chen Qualified Settlement Fund, 552 F.3d 218, 227 [2d Cir. 2009] [finding that

[5] 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).

"[g]enerally, claims of judicial bias must be based on extrajudicial matters, and adverse rulings, without more, will rarely suffice to provide a reasonable basis for questioning a judge's impartiality"]; see also Liteky v. United States, 510 U.S. 540, 555 [1994] [identifying that "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion"]; Application of a Student with a Disability, Appeal No. 13-083).

In the present matter, upon my independent review of the hearing record, there is no indication that the IHO demonstrated any bias in his words or conduct during the proceedings. As a result, there is not a sufficient basis to find any bias on the part of the IHO in this matter.

2. Additional Evidence

The parent submits 32 documents for consideration as additional evidence.[6] The request to consider the additional documentary evidence is not referenced or attached to the parent's request for review but was provided as a separate document entitled "Request to Submit Additional Evidence," which indicated the parent is requesting the submission of additional evidence because she does not "believe that the narrative can be understood or believed without extra documentation" (SRO Ex. A).[7] The district opposes consideration of the additional evidence because many of the documents were available at the time of the impartial hearing; three of the documents dated December 5 and 6, 2023 were created "long after the hearing ended;" the letter dated October 19, 2022 was marked for identification at the hearing but not entered into evidence; and "none of the proffered additional evidence is necessary" to render a decision in this matter (Answer ¶ 8). The district further points out that although the parent is appearing pro se on appeal, she was represented by an attorney during the impartial hearing (id.).

Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068).

The factor specific to whether the additional evidence was available or could have been offered at the time of the impartial hearing serves to encourage full development of an adequate hearing record at the first tier to enable the IHO to make a correct and well supported determination and to prevent the party submitting the additional evidence from withholding relevant evidence

[6] In her original request for review, the parent submitted one document to be considered as additional evidence. Thereafter, the parent filed the amended request for review with 32 documents to be considered as additional evidence. It is these 32 documents that I will review and determine if they should be considered on appeal.

[7] The additional evidence packet submitted by the parent does not specifically label each document as a separate proposed exhibit, but rather the documents were submitted as one large document. For purposes of discussion, the entire proposed additional evidence document will be designated as SRO Exhibit A. Further, the proposed additional evidence document was not paginated. For purposes of this decision, each listed proposed additional document shall correspond to a number beginning with 1 and ending with 32 (see SRO Exs. A1-A32).

during the impartial hearing, thereby shielding the additional evidence from cross-examination and later springing it on the opposing party, effectively distorting the State-level administrative review and transforming it into a trial de novo (see M.B. v. New York City Dep't of Educ., 2015 WL 6472824, at *2-*3 [S.D.N.Y. Oct. 27, 2015]; A.W. v. Bd. of Educ. of the Wallkill Cent. Sch. Dist., 2015 WL 1579186, at *2-*4 [N.D.N.Y. Apr. 9, 2015]). However, both federal and State regulations authorize SROs to seek additional evidence if necessary, and SROs have accepted evidence available at the time of the impartial hearing when necessary (34 CFR 300.514[b][2][iii]; 8 NYCRR 279.10[b]; Application of a Student with a Disability, Appeal No. 08-030; Application of a Child with a Disability, Appeal No. 00-019 [finding it necessary to accept evidence available at the time of the impartial hearing to determine the student's pendency placement]).

In this instance, proposed additional exhibits, SRO Exhibits A1-A13 and SRO Exhibits A16-A26, were available at the time of the impartial hearing and could have been offered during the hearing, and it is not now necessary to consider them as additional evidence with respect to the issues raised on appeal. Proposed SRO Exhibit A14 is a two-page email thread with an attached letter from the student's pediatrician (SRO Ex. A14). The letter attached to the email is in evidence as Parent Exhibit J, but the email thread is not part of the hearing record (compare SRO Ex. A14, with Parent Ex. J). In my discretion, since the pediatrician letter is already in evidence and the email thread is not relevant to the issues on appeal, I decline to accept and consider SRO Ex. A14 as additional documentary evidence on appeal as it is not necessary. Next, proposed SRO Exhibit A16 is an email between the parent and her attorney. Since this type of documentation is attorney-client documentation and typically protected from disclosure by the attorney-client privilege I will not consider this as additional evidence. In connection with SRO Exhibits A27 and A30 through A32, these documents pertain to the 2023-24 school year, which is not under review in this proceeding and, accordingly, they shall not be accepted or considered as additional evidence. Lastly, SRO Exhibit A28 was already entered into the hearing record as Parent Exhibit J and SRO Exhibit A29 is in the hearing record as Parent Exhibit K, and therefore, as they are duplicative, it is unnecessary to accept them as additional evidence.

Although not raised on appeal, a brief discussion must be had with respect to Parent Exhibit H and whether it is a part of the hearing record. The IHO decision cites to Parent Exhibit H (IHO Decision at p. 16) and the IHO decision references in the parent exhibit list that Parent Exhibit H was entered into evidence (id. at p. 50); however, a review of the hearing transcripts shows that Parent Exhibit H was only marked for identification and not admitted into evidence (Tr. pp. 51-55, 74). No Parent Exhibit H was received by the Office of State Review. In response to a request for clarification regarding Parent Exhibit H, the district's attorney represented that Parent Exhibit H was only marked for identification at the impartial hearing. Here, the parent did not seek the introduction of Parent Exhibit H as additional evidence into the hearing record. Therefore, Parent Exhibit H will not be considered as part of the hearing record.

B. FAPE

Upon careful review, the hearing record reflects that the IHO, in a well-reasoned and well-supported decision, correctly reached the conclusion that the district offered the student a FAPE for the 2022-23 school year (IHO Decision at pp. 43-47). The IHO accurately recounted the facts of the case (id. at pp. 9-41), identified the issues to be resolved (id. at p. 43), set forth the proper legal standard to determine whether the district offered the student a FAPE for the 2022-23 school

year (id. at pp. 41-43), and applied that standard to the facts at hand (id. at pp. 43-47). The decision shows that the IHO carefully considered the testimonial and documentary evidence presented by both parties and, further, that he weighed the evidence and properly supported his conclusions. Furthermore, an independent review of the hearing record reveals that the impartial hearing was conducted in a manner consistent with the requirements of due process and that there is not a sufficient basis presented on appeal to modify the determinations of the IHO (see 20 U.S.C. § 1415[g][2]; 34 CFR 300.514[b][2]). Thus, while I will briefly discuss some the parent's allegations on appeal, particularly where the parent asserts IHO error related to over reliance on certain evidence or a failure to consider specific evidence, the conclusions of the IHO are hereby adopted.

Of note, for the 2022-23 school year the CSE developed an IEP dated May 24, 2022, an IEP dated July 28, 2022, and an individualized education services program (IESP) with an implementation date of January 12, 2023 (see Parent Ex. K; see Dist. Exs. 11-12).[8] The May 2022 CSE convened for the student's annual review and recommended the following 12-month program at middle school A: an 8:1+2 special class with four 30-minute sessions per week of individual speech-language therapy; one 30-minute session per week of group (2:1) speech-language therapy; two 30-minute sessions per week of individual physical therapy (PT); one 30-minute session per week of individual occupational therapy (OT); and five 60-minute sessions per year of parent counseling and training (Dist. Ex. 11 at pp. 1, 16-17, 21). At the request of the parent, the CSE reconvened in July 2022 to discuss the location of the recommended program (Dist. Ex. 12 at p. 2). The July 2022 CSE did not make any changes to the recommended program and related services and continued to recommend placement at middle school A (compare Dist. Ex. 11 at pp. 1, 16-17, 21, with Dist. Ex. 12 at pp. 16-17, 21). Therefore, the student's July 2022 IEP is the operative IEP for purposes of discussion.

1. July 28, 2022 IEP

a. Student's Needs

Although the student's needs are not in dispute, a brief description is necessary to resolve the issue on appeal regarding the programming offered to the student within the recommended 8:1+2 special class placement. The July 2022 CSE determined that the student remained eligible to receive special education services as a student with autism, as it was noted that she continued to exhibit significant weaknesses in the areas of reading comprehension, written expression, math calculation, math concepts, motor skills, language skills, and social skills, which adversely affected her academic functioning and performance (Dist. Ex. 12 at pp. 1-2, 6-7, 10, 20-21).[9] The IEP indicated that the student's cognitive ability, academic skills, and adaptive behaviors fell

[8] Although referenced, the IESP will not be further discussed as it is not relevant to the issues raised on appeal, which are focused on the parent's disagreement with the public school the district assigned the student to attend for the 2022-23 school year.

[9] The July 2022 CSE considered a July 2022 classroom teacher report, and the July 2022 IEP indicated that the CSE had previously considered a May 2022 extended school day progress report, a May 2022 psychoeducational evaluation, a May 2022 speech and language evaluation, a May 2022 classroom observation, a May 2022 OT evaluation, a May 2022 home behavior intervention services report, a May 2022 PT evaluation, a May 2022 physical examination, a May 2022 social history, a March 2022 parent training progress summary, and a January 2019 applied behavioral analysis progress summary (Dist. Ex. 12 at pp. 6, 20-21).

significantly below age expectations, and that the student needed to improve her receptive, expressive and pragmatic language skills, as well as her reading comprehension skills, writing skills, mathematical skills, and ability to focus in the absence of self-stimulatory behaviors (id. at pp. 8-9). Socially, according to the July 2022 IEP, the student preferred to play alone, needed to improve her awareness of peers and initiate play with others (id. at p. 9). With respect to her physical development, the July 2022 IEP stated that the student needed to improve her motor planning and gait in order to safely negotiate the school building and to improve her postural stability to maintain an upright posture during fine motor activities (id. at p. 10). In addition, the July 2022 IEP indicated that the student needed to increase her lower extremity and core strength, balance, coordination, ball skills, and body awareness to increase her safety, independence, and efficiency navigating the school environment (id.). The July 2022 IEP noted that the student needed to work on the development of her fine and visual motor skills to improve classroom performance (id.). The July 2022 CSE identified management needs of the student including a structured environment with a predictable, established routing; small group instruction; structure and supervision to stay on task; individualized instruction with repetition; sensory input through a sensory diet; and use of a weighted pencil, felt pen, slant board, flexible seating, and first/then and visual schedules (id.).

The student's fifth grade special education teacher (teacher) for the 2021-22 school year testified that the student had a high level of need as she was extremely distractible, and required "a lot of support academically," because she could be "internally distracted and reinforced by self-stimulatory behavior" (Tr. pp. 422-24). The teacher stated that the student's cognitive level as well as her academic functioning were extremely low, and her language deficits included expressive language that was often scripted from a show or a song (Tr. p. 424). In addition, the teacher noted that the student had a deficit in conversational language, and her adaptive functioning was in the low range (id.). The teacher indicated that the student required the support of staff to "bring her back" from her internal distraction, such as when she got up and wandered around the classroom (Tr. pp. 424-25). Additionally, the teacher testified that the student required the support of staff in close proximity during all academic tasks (Tr. pp. 425). The student was described by the teacher as sensory seeking, and the student required prompting to make eye contact when speaking with a person (id.). Further, the teacher testified that even though the student was becoming a "little bit aware of peers in the room," she required all language to be facilitated by an adult (id.). According to the teacher's testimony, the student only engaged in spontaneous interactions with adults, and learned new concepts through 1:1 instruction and discrete trials, which, the teacher explained was when a skill was reviewed "frequently, repetitively" (Tr. pp. 425-26). With respect to how the student dealt with transitions, the teacher reported that the student required staff with her throughout the building, and that it took her time to "acclimate back into the next room" when she arrived there (Tr. p. 426).

To address the student's academic, functional performance, physical, and social needs for the 2022-23 school year, the July 2022 CSE developed approximately 17 annual goals with corresponding short-term objectives, and recommended a 12-month 8:1+2 special class placement in a district public school with four one-hour extended school day sessions per week in the home/community provided by a teaching assistant (Dist. Ex. 12 at pp. 11-17). Further, the July 2022 CSE recommended related services including four 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of group speech-language therapy in a small group, and two 30-minute sessions per week of individual PT, one 30-minute session per

week of individual OT (id. at p. 16). The July 2022 CSE also recommended supplementary aids and services/program modifications/accommodations, including ongoing and daily refocusing and redirection, a structured setting, and during academic instruction, repetition of concepts more than the standard number of times, use of a slant board, flexible seating, access to adaptive writing medium, and bold lined paper (id. at pp. 16-17). The July 2022 CSE recommended supports for school personnel on behalf of the student including ongoing review of new IEP content information, and two 41-minute OT consultations per week in the classroom (id. at p. 17).

In addition, with respect to the student's participation with nondisabled peers, the July 2022 IEP noted the extent to which the student would not participate in regular class, extracurricular and other nonacademic activities, by noting that the student would not participate in "[a]ll [a]cademic [a]reas" and "[r]elated [s]ervices" (Dist. Ex. 12 at p. 19). The July 2022 CSE further recommended that the student participate in a specially designed physical education program with a "mainstream" physical education teacher and a small group of students with special needs (id.).

b. 8:1+2 Special Class

Turning now to the recommended placement, I note that the parent does not dispute the appropriateness of an 8:1+2 special class placement recommendation for the student, including the level of support and opportunities for individual and small group instruction that an 8:1+2 would offer the student.

State regulations provide that a special class placement with a maximum class size not to exceed 8 students, staffed with one or more supplementary school personnel, is designed for "students whose management needs are determined to be intensive, and requiring a significant degree of individualized attention and intervention" (8 NYCRR 200.6 [h][4][ii][b]).[10]

The dispute in this matter arose due to the parent's desire for the student to attend the 8:1+2 special class placement at middle school B, whereas the CSE assigned the student to attend middle school A (see Tr. pp. 182-83, 195, 212, 304, 362, 541, 545). The parent argues that the 8:1+2 special class at middle school A was not appropriate for the student due to the expected size of the class. For the 2022-23 school year, only four students were "slated" to be in the special class at middle school A due to lower student enrollment and less students transitioning from elementary school to middle school (Tr. pp. 128-30, 530, 692, 694). At the outset, this argument cannot relate to restrictiveness, as that would conflate the student's need for additional adult support within a classroom compared to the student's placement in the LRE, the latter of which relates to a disabled student's opportunities to interact with nondisabled peers and not a student's opportunity to interact

[10] Supplementary school personnel "means a teacher aide or a teaching assistant" (8 NYCRR 200.1 [hh]). A teaching assistant may provide "direct instructional services to students" while under the supervision of a certified teacher (8 NYCRR 80-5.6 [b], [c]; see also 34 CFR 200.58 [a][2][i] [defining paraprofessional as "an individual who provides instructional support"]). A "teacher aide" is defined as an individual assigned to "assist teachers" in nonteaching duties, including but not limited to "supervising students and performing such other services as support teaching duties when such services are determined and supervised by [the] teacher" (8 NYCRR 80-5.6 [b]). State guidance further indicates that a teacher aide may perform duties such as assisting students with behavioral/management needs ("Continuum of Special Education Services for School-Age Students with Disabilities," at p. 20, Office of Special Educ. [Nov. 2013], available at http://www.p12.nysed.gov/specialed/publications/policy/continuum-schoolage-revNov13.pdf).

with a specific number of other disabled peers in a special class (see R.B. v. New York City Dep't of Educ., 603 F. App'x 36, 40 [2d Cir. 2015] [explaining that the requirement that students be educated in the LRE applies to the type of classroom setting, not the level of additional support a student receives within a placement, with the goal of integrating children with disabilities into the same classrooms as children without disabilities]; T.C. v. New York City Dep't of Educ., 2016 WL 1261137, at *7 [S.D.N.Y. Mar. 30, 2016] [noting that "restrictiveness" pertains to the extent to which disabled students are educated with non-disabled students, not to the size of the student-staff ratio in special classes]). As both of the 8:1+2 classrooms at issue in this matter were self-contained special education classrooms within a public school setting, one classroom was no more restrictive than the other, and I find the parents' argument regarding restrictiveness is without merit (see Tr. pp. 467-68).

Another of the parent's arguments about the July 2022 CSE recommendation was that it was predetermined; however, the testimony of the district's assistant director of special education (assistant director) and school psychologist was that the elementary school team made a recommendation for placement at middle school A prior to the CSE meeting but not a final determination (Tr. pp. 277, 460). The assistant director, along with the student's fifth grade special education teacher, testified that the CSE made the final recommendation (Tr. p. 277; Tr. pp. 369, 477, 510). As such, the hearing record supports the IHO's determination that the CSE did not predetermine the student's placement recommendation (IHO Decision at pp. 45-46).

The parent also asserts that the profiles of the students in the 8:1+2 special class at middle school A "raised concerns" because the "group of children that would be with [the student] required much more assistance" with daily living activities and communication and had lower cognitive skills (Tr. pp. 691-92). However, the hearing record shows that the July 2022 CSE recommended the 8:1+2 special class placement at middle school A for the student, due to the intensive level of support provided, 1:1 or dyad instruction, limited transitions, use of discrete trial instruction for learning new skills, and that the classroom functioned based on the principles of applied behavior analysis (ABA), which met the student's needs (see Tr. pp. 195-96, 198, 463-64; Dist. Exs. 12 at p. 21; 42 at p. 1).

The school psychologist, who was also a behavior specialist at the student's elementary school, stated that the program at middle school A with one-to-one discrete trial instruction was what the student required, that it had the supports that she needed to help her through transitions, and that she required the individualized 1:1 instruction that was offered at middle school A (Tr. pp. 316-17, 319, 370, 373, 395). The assistant director also testified that the student learned "best in a one-to-one setting, individually" with discrete trial instruction and that the student was unable to function independently in a group setting (Tr. pp. 116-17, 124-25, 203, 263, 286-87; see Tr. p. 361). She further testified that the student had difficulty with transitions and the program at middle school A had less transitions (Tr. pp. 125, 268, 273). The student's fifth grade special education teacher testified that, at the middle school A program, students worked on playing games and social interactions with general education students pushing into the groups for those activities (Tr. pp. 420, 475). The student's fifth grade special education teacher testified that the middle school A program was what the student needed to "academically grow" (Tr. p. 476).

The assistant director stated that the management needs of the students in the 8:1+2 special class at middle school A were more intense and that the July 2022 CSE believed that the student

required the more individualized instruction that the middle school A program provided, and that the nature and the setup of the middle school A program was more appropriate to meet the student's needs (Tr. pp. 182, 196, 198, 202). She testified that the students recommended for the middle school A program exhibited more frequent and intense behaviors which "require[d] more structure within their classroom in order to prevent those behaviors from occurring" (Tr. pp. 202-03). The assistant director further testified that the teachers at middle school A "use[d] the discrete trial methodology of delivering new instruction" and it was "highly individualized, one-to-one" (Tr. pp. 203, 205-06). The assistant director noted that the student had a lot of difficulty with change and transitions between classes and at the middle school A program, only two specific classrooms next door to each other were used to maintain some continuity for the students, with only two teachers (Tr. p. 204). She went on to further state that the groupings of the students stayed the same and that the student "really require[d] that discrete trial instruction to learn new material" (Tr. pp. 204-05). In addition, she testified that the related services at middle school A were delivered individually or in a dyad (2:1) to "gradually increase [students'] ability to tolerate working with a peer" (Tr. p. 206). Furthermore, she testified that at middle school A there was a "community-based outing" once per month for the students (Tr. p. 207). She testified that each student had their own individual workspace (Tr. pp. 214-15, 274).

The sixth grade special education teacher at middle school A testified about the 8:1+2 special class that was recommended for the student (Tr. pp. 526, 532-33). She testified that the students in the class had "severe deficits" in all academic areas and required academic instruction in a 1:1 or 2:1 setting (id.). Students in her program struggled with whole group instruction and needed more adult support to learn new academic information (Tr. p. 533). According to the sixth grade special education teacher at middle school A, the program was based on ABA principles such as prompting techniques and hierarchy, and classroom behavior management and individual student behavior plans applied ABA principles as well (Tr. pp. 533-34). The sixth grade special education teacher testified that the students in her class interacted with "neurotypical peers" to practice social skills and there was community-based instruction at least once per month (Tr. pp. 537, 539-41). She also testified that she reviewed information pertaining to the student and participated in the May 2022 CSE meeting, at which she agreed that the 8:1+2 special class at middle school A was appropriate for the student (Tr. pp. 544-48).

The assistant director testified that most of the students who attended the student's fifth grade special class also attended middle school A because the students "still require the discrete trial instruction, the highly individualized instruction, significant behavior management, structure in their day, minimal transitions throughout their school day" (Tr. pp. 127-28, 199, 268; see Tr. pp. 363, 367). She testified that the student's skill set was similar to the other students in the special class at middle school A and they all were within the same age range (Tr. pp. 207-08, 211). Ultimately, the assistant director and school psychologist both testified that the special class at middle school A was appropriate to meet the student's needs as it was her LRE (Tr. pp. 308-10, 364).

Another argument put forth by the parent was that middle school A was not the student's "home" school. The parent argues that it was important for the student to attend middle school B, her "home" school, so she could be with "members of her neighborhood" which was "important for her future in the community" (Req. for Rev. at p. 4). In determining a student's educational placement, State and federal regulations provide that a district must "ensure" that a student attend

a placement "as close as possible to the [student's] home" and "[u]nless the IEP of a [student] with a disability requires some other arrangement, the [student] is educated in the school that he or she would attend if nondisabled" (34 CFR 300.116[b][3], [c] [emphasis added]; see 8 NYCRR 200.1[cc], 200.4[d][4][ii]). Numerous courts have held that, while a district remains obligated to consider distance from home as one factor in determining the school in which a student's IEP will be implemented, this provision does not confer an absolute right or impose a presumption that a student's IEP will be implemented in the school closest to his or her home or in his or her neighborhood school (see White v. Ascension Parish Sch. Bd., 343 F.3d 373, 380-82 [5th Cir. 2003]; Lebron v. N. Penn Sch. Dist., 769 F. Supp. 2d 788, 801 [E.D. Pa. 2011] [finding that "though educational agencies should consider implementing a child's IEP at his or her neighborhood school when possible, [the] IDEA does not create a right for a child to be educated there"]; Letter to Trigg, 50 IDELR 48 [OSEP 2007]; see also R.L. v. Miami-Dade Cnty. Sch. Bd., 757 F.3d 1173, 1191 n.10 [11th Cir. 2014]; A.W. v. Fairfax Cnty. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; McLaughlin v. Holt Pub. Sch. Bd. of Educ., 320 F.3d 663, 672 [6th Cir. 2003]; Kevin G. v. Cranston Sch. Comm., 130 F.3d 481, 482 [1st Cir. 1997]; Flour Bluff Ind. Sch. Dist. v. Katherine M., 91 F.3d 689, 693-95 [5th Cir. 1996]; Urban v. Jefferson Cnty. Sch. Dist. R–1, 89 F.3d 720, 727 [10th Cir. 1996]; Poolaw v. Bishop, 67 F.3d 830, 837 [9th Cir. 1995]; Murray v. Montrose Cnty. Sch. Dist. RE-1J, 51 F.3d 921, 929 [10th Cir. 1995]; Schuldt v. Mankato Indep. Sch. Dist. No. 77, 937 F.2d 1357, 1361–63 [8th Cir. 1991]; Barnett v. Fairfax Cnty. Sch. Bd., 927 F.2d 146, 152-53 [4th Cir. 1991] [holding that a district must "take into account, as one factor, the geographical proximity of the placement in making these decisions"]; H.D. v. Cent. Bucks Sch. Dist., 902 F. Supp. 2d 614, 626 [E.D. Pa. 2012]; Straube v. Florida Union Free Sch. Dist., 801 F. Supp. 1164, 1177-79 [S.D.N.Y. 1992]).

It is understandable that the parent would have concerns with respect to whether the student would be placed at her home school and express a preference for that placement. However, the hearing record shows that although the CSE considered the parent's request that the student attend her home school for the 2022-23 school year, it determined that the appropriate program for the student was the 8:1+2 special class at middle school A, because the type of individualized instruction it offered to the student met her special education needs and would enable her to make progress (Tr. pp. 679-81, 684-85; Dist. Exs. 11 at pp. 1-2; 12 at pp. 1-2; see Endrew F., 580 U.S. at 403). That middle school A was not the student's home school does not compel a different conclusion, especially in light of the evidence noted above showing that the CSE, based on its assessment of the student's needs after consideration of the evaluative information available to it and after consideration of the parent's concerns, determined that middle school A was the appropriate school for the implementation of the student's educational programming.

After considering the student's needs included in the July 2022 IEP as well as the testimony of the district staff familiar with the 8:1+2 special classes at middle school A and middle school B and their familiarity with the student's school performance, I find no reason to disturb the IHO's determination that the July 2022 CSE's recommendation for the 8:1+2 classroom at middle school A offered the student a FAPE in the LRE.

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determinations that the district offered the student a FAPE for the 2022-23 school year, the necessary inquiry is at an end.

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

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
February 23, 2024

CAROL H. HAUGE
STATE REVIEW OFFICER