



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 24-130

**Application of the BOARD OF EDUCATION OF THE  
HEWLETT-WOODMERE UNION FREE 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:**

Volz & Vigliotta, PLLC, attorneys for petitioner, by Michael G. Vigliotta, Esq. and Sarah A. Gyimah, Esq.

Law Offices of Susan J. Deedy & Associates, attorneys for respondents, by S. Fahad Qamer, 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 a decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for a portion of their son's (the student's) tuition at the Kulanu Academy (Kulanu) for the 2022-23 school year. The parents cross-appeal from that portion of the IHO's decision which reduced the amount of tuition funding awarded. The appeal must be sustained. The cross-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 student transferred to the district in summer 2022 and on July 5, 2022 the parent and the CSE chairperson discussed the student's need for 12-month services (Tr. pp. 202-03; Dist. Exs. 11 at p. 1; 18 at p. 1). The district received an IEP from the student's previous school district, which had been developed at a March 23, 2021 CSE meeting (Dist. Ex. 12 at p. 14). The district

accepted the student's March 2021 IEP, which indicated that the student was dually enrolled for the academic school year and also eligible to receive 12-month services on an IEP developed by the previous school district for summer 2021 (Dist. Exs. 11 at p. 1; 12 at pp. 1, 9-10). The district determined the student was eligible for special education as a student with autism and generated its own IEP on July 5, 2022, which incorporated some of the present levels of performance from the March 2021 IEP (compare Dist. Ex. 11 at pp. 1-5, with Dist. Ex. 12 at pp. 1-4).<sup>1</sup> For July and August 2022, the student was recommended to attend an 8:1+1 special class for three hours per day and receive two 30-minute sessions per week of individual counseling services, one 30-minute session per week of counseling services in a small group, four 30-minute sessions per week of individual speech-language therapy, three 30-minute sessions per week of individual occupational therapy (OT), and two 30-minute sessions per week of individual physical therapy (PT) (Dist. Ex. 11 at p. 1). The district also recommended one hour of individual parent counseling and training every six weeks (id.). The student attended the district's 12-month programming (see Tr. pp. 364-65).

The district obtained parental consent to conduct a reevaluation of the student on July 13, 2022 (Dist. Ex. 19). The district conducted a psychological evaluation, an educational evaluation, a speech-language evaluation, an OT evaluation, a PT evaluation, and a social history in July 2022 (Dist. Exs. 13-18).

On August 23, 2022, a CSE convened to review the student's reevaluation and developed an IEP with an implementation date of August 31, 2022 (Dist. Ex. 9 at p. 1). The August 2022 CSE continued to find the student eligible for special education as a student with autism (id.). The CSE recommended a 12:1+1 special class in English, reading, and math, and a 15:1+1 special class in social studies and science (id. at p. 17). The student was also recommended to receive one 40-minute session on alternate days of adapted physical education, two 40-minute sessions per week of individual speech-language therapy, two 40-minute sessions per week of speech-language therapy in a small group, three 30-minute sessions per week of individual OT, two 30-minute sessions of individual PT, and full-time 1:1 aide services (id.). The CSE also recommended one hour per month of individual parent counseling and training and supports for school personnel of one 30-minute session per month of counseling consultation for the team and 10 hours per year of behavioral intervention consultation for the team (id. at pp. 17, 18). By prior written notice dated August 23, 2022, the district summarized the recommendations of the August 2022 CSE (Dist. Ex. 8 at pp. 1-2). The student attended the district's programming at the beginning of the 10-month portion of the 2022-23 school year (see Dist. Ex. 7 at pp. 1-2).

On October 20, 2022, the CSE convened for the purpose of a "[r]equested [r]eview" and developed an IEP with an implementation date of November 3, 2022 (Dist. Ex. 7 at p. 1). The October 2022 CSE reviewed progress reports, updated the student's present levels of educational performance, and also revised some of the student's annual goals (compare Dist. Ex. 7 at pp. 3, 6, 8, 10-18, with Dist. Ex. 9). The resultant IEP recommended the same program, related services and supports found in the August 2022 IEP (compare Dist. Ex. 7 at pp. 1, 18-20, with Dist. Ex. 9 at pp. 1, 17-18). By prior written notice dated October 20, 2022, the district summarized the

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<sup>1</sup> The student's eligibility for special education as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

recommendations of the CSE and stated that a "more restrictive" 8:1+2 special class had been considered during the meeting but rejected "due to the need for further data collection, parent input, current functioning levels and skills" (Dist. Ex. 6 at p. 1). The October 20, 2022 prior written notice also stated that the parents "were in agreement with the current reported levels and recommendations" and that a follow up CSE meeting would be held to review updated data and to provide the parents with further information about the 8:1+2 special class (id.).

Email correspondence between district staff dated October 31, 2022, reflected discussion that the CSE was planning to meet in November to consider an 8:1+2 special class for the student for either a full day or "hybrid" with a 12:1+1 special class (Dist. Ex. 28). According to the email exchange, the parent had requested further information and "conversation regarding [the district's] continuum of programs (e.g. opportunity to observe the 8:1[+]2 classroom, potential changes to [the student]'s daily schedule)" (id.). The email further stated that, by the time of the next meeting, the CSE would "have further IEP progress data and classroom grades/report card to inform [its] recommendations" and that the school staff was "also working with the behavior consultant on collecting specific data regarding the amount of support needed in the classroom" (id.).

By letter dated December 2, 2022, the parents provided the district with ten business day written notice (ten-day notice) of their intention to unilaterally place the student at Kulanu and seek tuition reimbursement effective on December 20, 2022 (Dist. Ex. 38 at p. 1). The December 2, 2022 ten-day notice letter further stated the parents' position that the CSE's recommendation of a 12:1+1 special class and a 15:1+1 special class was not appropriate, that the district did not offer applied behavior analysis (ABA) services, that the class sizes were too large, the academic courses were "not for his functioning levels," and the behavioral services were inappropriate and insufficient (id.).

On December 7, 2022, the parents signed an enrollment contract with Kulanu for the 2022-23 academic school year, which was countersigned by Kulanu on December 9, 2022 (Parent Ex. F at p. 7).<sup>2</sup> In email correspondence between December 12, 2022 and December 16, 2022, the parties attempted to schedule a mutually agreeable time for a CSE meeting to discuss the parents' ten-day notice letter (Dist. Ex. 26 at pp. 1-7).

On December 19, 2022, a CSE convened without the parents in attendance and developed an IEP with a projected implementation date of January 3, 2023 (Dist. Ex. 4 at p. 1). By prior written notice dated December 19, 2022, the district summarized the recommendations of the December 2022 CSE (Dist. Ex. 3 at pp. 1-2).

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

In a due process complaint notice dated July 3, 2023, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year (Dist. Ex. 1 at p. 3). The parents further alleged that the district's recommendations for the 10-month academic school year, specifically the placement of the student in a 12:1+1 special class and a 15:1+1 special class, were not appropriate and that the district should have recommended

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<sup>2</sup> Kulanu has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

the student for an 8:1+2 special class (*id.*). The parents contended that the other students in the 12:1+1 and 15:1+1 special classes were not at the same functional level as the student and that classes of that size did not provide the student with the small classroom setting that he required (*id.* at pp. 3, 4). The parents asserted that the district's placement from July through December 16, 2022 failed to provide an appropriate education to the student and that the student did not make progress in the district's program (*id.*). The parents further challenged the appropriateness of the number of pull-out sessions recommended, the present levels of educational performance, the management needs, the annual goals, the supplementary aids and services and program accommodations (*id.* at p. 4). The parents also alleged that the district failed to conduct a functional behavioral assessment (FBA) or develop a behavioral intervention plan (BIP) and failed to provide appropriate behavioral services to address the student's significant needs (*id.* at pp. 4, 5). In addition, the parents contended that the district failed to recommend assistive technology devices or services and failed to conduct an assistive technology evaluation (*id.* at p. 4). The parents also asserted that the district failed to recommend ABA services (*id.*).

Next, the parents challenged the appropriateness of the district's recommendations for 12-month services during summer 2022 (Dist. Ex. 3 at p. 4). The parents argued that the number of pull-out sessions recommended were inappropriate for a three-hour day and would cause the student to miss academic instruction (*id.*). Further, the parents contended that the CSE meeting held on December 19, 2022 violated the parents' rights and that the district failed to provide the parents with the December 2022 IEP and with prior written notice (*id.* at p. 5).<sup>3</sup>

As relief, the parents requested findings that the district failed to offer the student a FAPE for the 2022-23 school year, that their unilateral placement of the student at Kulanu was appropriate, and that equitable considerations favored an award of tuition reimbursement and direct funding (Dist. Ex. 1 at p. 5).

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

An impartial hearing convened on November 27, 2023 and concluded on December 18, 2023 after six days of proceedings (Tr. pp. 1-194).<sup>4</sup> In a decision dated March 8, 2024, the IHO found that district did not meet its burden of demonstrating that it offered the student a FAPE for the 2022-23 school year (IHO Decision at p. 28). The IHO found that the December 2022 IEP was rendered invalid because the CSE "significantly impeded the parents' opportunity to participate in the decision-making process" by convening without them, and that there were "other significant procedural defects" with the IEP related to the development of a behavior plan for the student, goals, and obtaining a variance for the recommended class (*id.* at p. 29). Next, the IHO determined that the operative IEP was the August 2022 IEP and not the October 2022 IEP because the program remained the same between the two IEPs with the exception of modification of the student's goals in October 2022 (*id.*). The IHO determined that the August 2022 IEP was not

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<sup>3</sup> In their due process complaint notice, the parents "reserve[d] the right to challenge the appropriateness of the December 19, 2022 IEP," however the parents did not amend their due process complaint notice (*see* Dist. Ex. 1 at p. 5).

<sup>4</sup> Prehearing conferences were held on August 14, 2023 and on September 12, 2023, but not recorded. The IHO prepared summaries and orders for each prehearing conference (IHO Ex. 1 at pp. 1, 3).

appropriate because it "did not provide [the student] with the small, structured class, with instruction in socialization skills, which he required" (*id.* at p. 30). The IHO further found that the August 2022 IEP did not meet the student's academic and behavioral needs (*id.* at p. 31). As a result, the IHO determined that "the school district failed to meet its burden of proving the appropriateness of the recommendations made in the August 23, 2022, which were continued in the October 20, 2022 IEP" (*id.*). Next, the IHO found that Kulanu was an appropriate unilateral placement (*id.* at pp. 31-32). Turning to equitable considerations, the IHO determined that, due "to the contradictory and incomplete record regarding the parents' financial obligation to" Kulanu, a 25 percent reduction in the amount of tuition reimbursement awarded was warranted (*id.* at pp. 34-35). As relief, the IHO directed the district to reimburse the parents \$19,000 and to directly pay Kulanu \$32,021 for the cost of the student's attendance at Kulanu for the 2022-23 school year (*id.* at p. 35).

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

The district appeals, alleging that the IHO erred in finding that the district failed to offer the student a FAPE for the 2022-23 school year. The district argues that the IHO erred in invalidating the December 2022 IEP and asserts that the district made adequate efforts to secure the parents' attendance at the December 2022 CSE meeting. The district also contends that the IHO erred in finding that the August 2022 IEP was not appropriate. Next, the district alleges that the IHO erred in finding that Kulanu was an appropriate unilateral placement and that equitable considerations did not entitle the parents to any relief.

In an answer with cross-appeal, the parents argue that the IHO's determinations that the student was not offered a FAPE for the 2022-23 school year and that Kulanu was an appropriate unilateral placement should be upheld. In their cross-appeal, the parents allege that the IHO erred in reducing the amount of tuition awarded by 25 percent. The parents also assert that the IHO failed to rule on all issues raised in the due process complaint notice, including but not limited to procedures related to a transfer student, and whether or not an 8:1+2 special class was available at the time of the August and October 2022 CSE meetings.

In a reply and answer to the parents' cross-appeal, the district argues that the parents failed to amend their due process complaint notice to challenge the appropriateness of the December 2022 IEP and improperly raise claims relating thereto for the first time in their cross-appeal. The district generally denies the parents' claims in their cross-appeal and argues that the IHO erred in finding that it failed to offer the student a FAPE for the 2022-23 school year.

#### **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>5</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. Operative IEP**

Initially, as the CSE developed several IEPs for the 2022-23 school year, I will briefly address which IEP should be treated as the operative IEP for purposes of assessing the district's offer of a FAPE. The Second Circuit has made clear that parents are entitled to rely on an IEP "as written when they decide to [unliterally] place" their child (Bd. of Educ. of Yorktown Cent. Sch. Dist. v. C.S., 990 F.3d 152, 173 [2d Cir. 2021]; see R.E., 694 F.3d at 187-88 ["At the time the parents must decide whether to make a unilateral placement . . . [t]he appropriate inquiry is into the nature of the program actually offered"]).

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<sup>5</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).



As noted above, in December 2022, the parents contracted with Kulanu for the student's attendance for the 2022-23 school year and provided the district with notice of their intent to unilaterally place the student at Kulanu beginning on December 20, 2022 (Parent Ex. F at p. 7; Dist. Ex. 38 at p. 1). At that point, the October 2022 IEP was the operative IEP in place at the time of the parent's placement decision (Bd. of Educ. of Yorktown Cent. School Dist., 990 F.3d at 171). Accordingly, the IHO erred in assessing the August 2022 IEP to determine if the district offered the student a FAPE.<sup>6</sup>

The district presented its case beginning with the December 2022 IEP in an attempt to establish that it was an IEP that was developed after the parents' ten-day notice and before the student's removal from the district. Thus, review of the December 2022 IEP was relevant to determining the operative IEP.<sup>7</sup> According to the parents' December 2, 2022 ten-day notice letter, the student was going to be removed from the public school on December 20, 2022 (Dist. Ex. 38 at p. 1). The Second Circuit recently emphasized that "[t]he ten-day notice requirement gives school districts an opportunity to discuss with parents their objections to the IEP and to offer changes to the IEP designed to address those objections—all before the parents enroll their child in a private school and file a due process complaint" (Bd. of Educ. of Yorktown Cent. School Dist., 990 F.3d at 171; see 20 U.S.C. § 1412[a][10][C][iii][I]; 34 CFR 300.148[d][1]; Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004] [noting that the statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools"]. During the ten-day notice period, a district "may seek to

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<sup>6</sup> After finding that the district impeded the parents' opportunity to participate in the decision making process by convening a CSE meeting on December 19, 2022 without the parents in attendance, the IHO "invalidated" the December 2022 IEP and then determined that the August 2022 IEP was the operative IEP, because only the annual goals were changed in the October 2022 IEP, and further found that the August 2022 IEP did not provide the student a FAPE because it did not recommend a small, structured class with instruction in socialization skills (IHO Decision at pp. 28-30). However, among the reasons for determining that the August 2022 IEP did not offer the student a FAPE was the IHO's finding that "[b]y all accounts, the student struggled, and did not progress in the 12:1:1 classes and the 15:1:1 classes" (id. at p. 30). Additionally, the IHO cited the parent's testimony "that the student was unable to interact socially with other students at school and regressed," and testimony from district staff who "observed an increase in the student's interfering and off[-]task behaviors" (id. at pp. 30-31). The IHO also found that "the record indicate[d] that the student relied heavily on his one-to-one aide in the larger class setting, and that such an aide was not needed when he attended smaller classes" (id. at p. 31). For those reasons, among others, the IHO found that the "district failed to meet its burden of proving the appropriateness of the recommendations made in the August 23, 2022 [IEP], which were continued in the October 20, 2022 IEP" (id. at p. 31). To the extent the IHO deemed the August 2022 IEP to be the operative IEP, it was error to rely on retrospective evidence about the student's performance under that IEP to assess the recommendations (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at \*13 [S.D.N.Y. Dec. 23, 2013] [stating that in addition to districts not being permitted to rehabilitate a defective IEP through retrospective testimony, "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]. Ultimately, however, as I find that the October 2022 IEP was operative, the student's progress under the August 2022 IEP will be discussed below as relevant.

<sup>7</sup> Although the IHO did not err in taking up this question, she did improperly go on to find various other deficiencies with the December 2022 IEP that the parent did not raise in the due process complaint notice (see IHO Decision at p. 29). Rather, as noted above, the parents largely challenged the manner in which the December 2022 CSE conducted the meeting without the parents' attendance (see Dist. Ex. 1 at p. 5).

correct the IEP" after it has been given notice of the parents' objections and "may defend against a claim for tuition reimbursement by pointing out that parents did not cooperate in the revision of the IEP, or that the corrected IEP, if accepted by the parents, would have provided the child with a FAPE" (Bd. of Educ. of Yorktown Cent. School Dist., 990 F.3d at 171).

The evidence in the hearing record demonstrates that the district attempted to schedule a CSE meeting prior to the student's removal on December 20, 2022, which explained the district's reluctance to reschedule the December 19, 2022 CSE meeting. Thus one issue presented was whether or not the December 2022 CSE appropriately convened without the parents in attendance because if it had, any changes to the IEP could be viewed as corrections that the district could use to "defend against a claim for tuition reimbursement by pointing out that the parents did not cooperate in the revision of the IEP, or that the corrected IEP, if accepted by the parents, would have provided the child with a FAPE" (Bd. of Educ. of Yorktown Cent. School Dist., 990 F.3d at 171). Ultimately, however, as I find that the October 2022 IEP offered the student a FAPE, it is unnecessary to determine whether the December 2022 CSE was thereafter appropriately convened.

While I do not find that the August 2022 IEP was operative as it was superseded by the October 2022 IEP prior to the parents' placement, the development of the August 2022 IEP and the recommendations made by the August 2022 CSE are relevant to examining the October 2022 IEP. With that said, as the parent has not sought any relief in this matter other than tuition reimbursement for the student's attendance at Kulanu for the period of December 2022 through the end of the 2022-23 school year, I need not reach the parent's claims that the July and August 2022 IEPs were deficient.

## **B. FAPE — 2022-23 School Year**

### **1. August 2022 IEP**

As noted above, while the August 2022 IEP is not the operative IEP for purposes of determining if the district offered the student a FAPE, it is necessary to review the district's actions leading to the development of and recommendations set forth in the October 2022 IEP.

In July 2022 the parent provided consent for reevaluation and the district conducted a psychological evaluation, an educational evaluation, a speech-language evaluation, an OT evaluation, a PT evaluation, and a social history update (Tr. p. 834; Dist. Exs. 13-19). The school psychologist testified that every three years the district was required to update testing for students with IEPs and noted that he believed the previous IEP from the student's prior school district indicated that the student's reevaluation date had been February 28, 2018 (Tr. pp. 206-07; see Dist. Ex. 11 at p. 1). In addition, he testified that, as the student was new to the district, the district wanted to update evaluations of the student to "understand cognitive potential and educational, language skills where that student may be receiving services" and to have further information to recommend the appropriate programs (Tr. p. 207). The parent testified that the student was never on grade level and was considered an ungraded student in his previous placement (Tr. p. 873).

According to the hearing record, the student attended the district's 2022 summer program (Tr. pp. 364-65). The student's special education teacher during summer 2022 (ESY teacher) testified that from an academic perspective they were working on basic reading comprehension

skills, reading a simple story at his instructional level, basic math skills, using his language to communicate, following directions, and getting used to a routine in a new school (Tr. pp. 364-66).

The ESY teacher testified that the student fit in "nicely" and that, while he needed the basic structure found in any small group special class and there were some challenges as a new student, it was nothing "out of the ordinary" and he did not stand out in her mind "with any significant behavior problems" (Tr. p. 366). She stated that she found the student to be compliant with the basic structure of the school day and did not recall any behavioral excesses that interfered with his ability to complete his work and earn his breaks at the end of the day (Tr. p. 368). She added that typical of many students in self-contained classes, the student required frequent redirection and prompting to stay on task but did not require one-to-one assistance (Tr. p. 369). The ESY teacher testified that they took frequent breaks including motor breaks of jumping jacks or deep breaths to address the fact that all the students in the class had an elevated level of hyperactivity and impulsive behavior (Tr. p. 371). The ESY teacher stated that while she saw noncompliance and "perhaps protesting" from the student regarding academic tasks, she did not see specific aggression toward others (Tr. p. 372; see Tr. pp. 87-88). Regarding the student's need for an FBA at that time, the ESY teacher stated that the behaviors they were seeing from the student were expected behaviors of students with cognitive delays, autism, and ADHD who were in a self-contained special education classroom and that his behaviors could be managed using a classroom behavior plan and did not warrant the need for an FBA (Tr. pp. 366-68, 373).

According to the ESY teacher, ABA discrete trial methods were not generally part of what she employed, especially in a summer class with students who were older (Tr. pp. 373-74). She stated that she used basic task analysis where she would break down the task into workable components that a student in her class would understand (Tr. p. 374). The ESY teacher further testified that she felt the student had a good summer, that they were able to "weed out" some strengths and weaknesses, and that the student was able to work on maintaining his skills, was integrated into the class, and responded well to all the activities in which they were engaged (Tr. p. 374).

The ESY teacher testified that she discussed with the school psychologist how the student was performing in her class, the structure that she implemented, and the things to which the student responded well (Tr. p. 375). With respect to whether an 8:1+2 or a 12:1+1 special class would be appropriate for the student moving forward, the ESY teacher stated that in her opinion the student had a lot of "splinter skills" in that he had some areas that were higher than others and also that he had some good language skills and so she felt "the notion of giving students the chance to try a least restrictive setting" would perhaps be a better match for the student (Tr. pp. 375-76).<sup>8</sup>

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<sup>8</sup> It appears that the district, including the ESY teacher, tended to refer to the restrictiveness of a setting refer to different special class ratios. Use of this phrasing, however, conflates the student's need for a more or less supportive classroom with the student's LRE, which means the degree to which the student could be educated with students who are not disabled (20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; see also R.B. v. New York City Dep't of Educ., 603 Fed. 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

On August 23, 2022 a CSE convened to conduct a reevaluation review and to develop the student's IEP for the 10-month 2022-23 school year (Tr. p. 216; Dist. Exs. 8 at p. 1; 9). Finding the student remained eligible for special education and related services as a student with autism the CSE recommended for the student a 12:1+1 special class placement for English, math, and reading, a 15:1+1 special class placement for social studies and science, two 40-minute sessions per week of individual speech-language therapy, two 40-minute sessions per week of speech-language therapy in a small group, three 30-minute sessions per week of individual OT, two 30-minute sessions per week of individual PT, and full-time 1:1 aide support daily (Dist. Exs. 8 at p. 1; 9 at pp. 1-2 17-18). The CSE also recommended one hour monthly of parent counseling and training, one 30-minute session per month of counseling consultation for the team, and ten hours per year of behavioral intervention consultation for the team (Dist. Exs. 8 at p. 1; 9 at pp. 1-2, 17-18).

The hearing record shows that the August 23, 2022 CSE considered parent input, a teacher progress summary, psychological, educational, speech-language, OT, and PT evaluation reports, a social history, the previous IEP, current levels of school functioning, and CSE discussion (Dist. Ex. 8 at p. 1; see Dist. Exs. 9 at pp. 2, 3, 6-10; 11; 13; 14; 15; 16; 17; 18; 31 at pp. 7-13, 35-36; see Tr. pp. 216-20). The prior written notice stated that the CSE considered a program that was "more restrictive" (8:1+2 special class) but rejected it due to updated testing, parent report, CSE discussion, and current functioning levels and skills (Dist. Ex. 8 at p. 1). In addition, the prior written notice stated that the parents were in agreement with the current reported levels and recommendations and that a CSE requested review would be held in approximately six to eight weeks from the date of the August 2022 reevaluation review (id.).

The school psychologist testified that the August 2022 CSE meeting began with an opportunity for the parents to share any questions or concerns they wanted addressed during the meeting (Tr. pp. 216-17, 220). Next the CSE reviewed the student's evaluation, teacher, and therapist reports, and provided a review and updates to the present levels of performance, again checking in to see if there were any questions from the parents or other CSE members (Tr. pp. 217-18). The CSE then discussed the student's needs based on provider and teacher reporting, discussed management needs and any supports the student may need in order to access the curriculum, reviewed/updated and/or created new annual goals, and then looked at the continuum of programs and made recommendations based on where the student would be able to meet those goals (Tr. pp. 218-19, 292). The school psychologist added that the August 2022 CSE also looked at related services and made recommendations based on the discussion and information provided at the meeting, reviewed and updated program modifications as needed, and considered assistive technology, supports for school personnel, consultation, testing accommodations, special transportation, and anything else that would help the student achieve (Tr. pp. 219-20, 292).

The August 2022 IEP included behavioral observations from the July 2022 psychological evaluation, which stated that the student transitioned from his classroom to the testing room with ease, was cooperative and polite, experienced difficulty establishing and maintaining eye contact,

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students are educated with non-disabled students, not to the size of the student-staff ratio in special classes]). For purposes of this decision, the instances where the phrasing is used will be quoted with the understanding that the district was not required to ensure the student's access to more disabled peers (i.e., by recommended a larger special class ratio) as part of its LRE obligations.

did not engage in spontaneous or reciprocal conversation, attended to and answered most all of the evaluator's direct questions with prompting, chose to take a two-minute break every 10 minutes, and with significant support successfully completed all tasks presented to him (Dist. Ex. 9 at pp. 3, 7). The IEP contained cognitive testing results which found the student functioning in the extremely low range in the areas of verbal comprehension and processing speed, in the very low range in the areas of visual spatial and fluid reasoning, and in the low average range for working memory (id. at p. 7). Additionally, the IEP included July 2022 academic testing results which found the student performing in the very low range on assessments of letter/word identification, passage comprehension, sentence reading fluency, word attack, calculation, applied problems, math facts fluency, spelling, writing samples, and sentence writing fluency (id. at pp. 6, 8).

Regarding speech-language abilities, the August 2022 IEP included testing results which found the student's attention to task was inconsistent, he put forth effort and was motivated to work to earn time on his iPad, he requested his wants and needs in complete sentences, and that assessment results indicated his performance was in the below average range on the general language ability, receptive and expressive language ability, lexical/semantic, and syntactic indices, and within the deficient range on the supralinguistic index (Dist. Ex. 9 at p. 7). The student was described as having adjusted well to the speech-language program during the summer and that he easily cooperated and engaged in tasks presented with the clear expectation that first he would complete work and then he would earn iPad time (id.). The IEP also stated that the student exhibited stimming behaviors but that given time the student was able to re-engage in the lesson, used complete sentences to express his wants and needs during spontaneous language, was able to interpret some similes in short sentences and consistently interpret the meaning of various idioms, demonstrated difficulty initiating verbal interactions with his peers and maintaining conversation initiated by others, and that his spontaneous use of correct grammar skills appeared to be higher than how he performed on standardized testing (id. at pp. 7-8). The IEP included parent concerns regarding the student's stuttering that began in summer 2022 and stated that the parent agreed with the current reported levels and did not express additional concerns (id. at p. 8).

With respect to social development, the August 2022 IEP included student reporting that he enjoyed school (particularly math and science) and that he had had a positive transition to the new school (Dist. Ex. 9 at p. 9). Per teacher responses on rating scales regarding attentional, social-emotional, and behavioral functioning the student received elevated scores in the areas of inattention, hyperactivity/impulsivity, learning problems/executive functioning, aggression, and peer relations and per parent responses the student had elevated scores in inattention, hyperactivity, learning problems, executive functioning, and peer relations (id.). The IEP stated that the student needed to improve his ability to engage in less-desired tasks and that this need would be addressed via the positive reinforcement plan, counseling consultation, and behavioral intervention consultation (id.).

Regarding physical development, the IEP included OT evaluation results which reflected the student's scores in the well below average range on fine motor precision and fine motor integration subtests, in the below average range on eye hand coordination, copying, visual figure ground and visual form constancy subtests, and in the average range on the visual closure subtest (Dist. Ex. 9 at p. 9). The IEP stated that the student had difficulty staying within boundaries of the lines when writing and coloring, that his letter formation was inconsistent and his writing was large and labored, that he had difficulty with visual tracking tasks, that he tended to "stuff his mouth"

during eating, and that the parent reported that the student had difficulty wearing and tying shoes, using a knife to cut food, and washing and drying his hands and face following eating and using the bathroom (*id.*). With respect to gross motor skills, the IEP stated that the student presented with an atypical gait although he ambulated independently, his walking and stair climbing speed were slow suggesting weakness in his lower body and limited stamina, and that he exhibited motor planning and body-in-space awareness deficits which were most noted when navigating (e.g., bumping into a person and walking through instead of around a group of people) (*id.* at pp. 9-10). The IEP included teacher reporting that the student needed supervision during fire drills and rapid evacuations, he engaged in self-stimulatory behaviors, was independent with toileting needs but may remain in the bathroom for an extended period to avoid a task, and could be self-directed and responded well to rules and "if then" contingencies (*id.* at p. 10).

The August 2022 CSE determined that the student needed management strategies including specially designed instruction in a structured learning environment throughout the school day to support learning, a positive reinforcement plan, information broken down into smaller components, visual aids, a copy of class notes, access to audiobooks, preferential seating, prompting, refocusing, redirection, wait time, and checks for understanding (Dist. Ex. 9 at pp. 10, 17-18). Additionally, the CSE identified that the student needed additional time when completing academic tasks, access to activities he enjoyed to minimize the value of "escape," a visual schedule with cues when an activity would be done, allowing the student some choices in his schedule, interspersing highly and non-preferred tasks, and breaking down activities into component parts with reinforcement given after each successful step (*id.* at p. 10). The school psychologist testified that since they were recommending the "less restrictive program" which the CSE believed the student would be successful in, the CSE recognized that the student would need 1:1 aide services for those management needs (Tr. pp. 225-26; *see* Dist. Ex. 9 at pp. 10, 17-18). The IEP stated that the student needed strategies including behavioral interventions, supports, and other strategies to address behaviors that impede his learning or that of others but that he did not need a behavioral intervention plan (Dist. Ex. 9 at pp. 10-11).

Regarding the need for an FBA, the school psychologist from the district middle school who provided the student's counseling consultation services (counseling consultant) testified that prior to the August 2022 CSE meeting she observed the student in class, where he exhibited difficulty attending to the verbal lesson, and required refocusing, redirection, and steps broken down to complete his work (Tr. pp. 558, 567, 570). She testified she was familiar with the student's behavioral needs and that she did not recall the student's teacher, parent, or anyone else on behalf of the student request an FBA (Tr. p. 574). The counseling consultant further testified that in her professional opinion, the student did not require an FBA (*id.*).

The counseling consultant testified that after the observation she spoke with the student's aide that same day, sent out an email and had an in-person meeting (Tr. p. 571). The counseling consultant testified that during meetings she discussed ideas that could increase the student's engagement including providing him something to do, such as highlighting, when a verbal lesson was being introduced; providing a copy of the notes he could follow; providing controlled choices such as providing two different ways he could carry out a task; and offering if/then statements (if there was something he had to do, then it would have the opportunity to follow with something more desirable) (Tr. pp. 568-69, 572). The counseling consultant testified that she communicated

with the teachers in meetings and through email about the use of strategies and information on how to implement them in their classroom (Tr. p. 569).

To further address the student's behavioral needs, the school psychologist testified that the student had received counseling services in the ESY program and that from speaking with his ESY teacher, who was in consultation with the counselor, and based upon the student's verbal skills, his progress, and the annual goals of counseling, the August 2022 CSE felt that the student's time would be better spent in the classroom and that it would instead recommend one 30-minute session per month of counseling consultation for the team (Tr. pp. 328-29; see Dist. Ex. 9 at pp. 9, 18). In addition to the counseling consultation services, the August 2022 CSE recommended 10 hours per year of behavioral intervention consultation for the student's team and 1:1 aide services, and the IEP provided supplementary aids and services including a positive reinforcement plan, breakdown of information into smaller components, visual aids to accompany verbal information, prompting, refocusing and redirection, wait time, and check for understanding to improve the student's engagement in the classroom (Dist. Ex. 9 at pp. 17-18).

The school psychologist testified that after the August 2022 CSE meeting, through consultation among the school psychologist, the behavioral therapist, and the teachers, a positive behavior plan was developed, and strategies of the plan were discussed and developed (Tr. pp. 296-97). The counseling consultant testified that at the start of the 2022-23 school year, she talked with the social worker who had provided the student's counseling services over the summer (Tr. p. 581). The counseling consultant testified that the social worker told her that they were working on one or two things and that the student responded well to any specific plans they made to address those behaviors and shared an example of eating in a more confined space (Tr. pp. 582-83). The counseling consultant testified that she provided counseling consultation to the student's "team" (his teachers and his aides) through meeting with individuals and hearing their concerns and then consulting with them on ideas specific to the student to address those concerns (Tr. pp. 567-68).

The school psychologist testified that for the August 2022 IEP the CSE referenced annual goals from the previous IEP and updated evaluation data and present levels, and it discussed creating annual goals that were both achievable and measurable within the 2022-23 school year (Tr. p. 226). The August 2022 IEP included three new reading annual goals and accompanying objectives addressing citing text-based details when answering "wh" questions, recognizing and reading high frequency words, and reading 100 words per minute with fluency and accuracy (Dist. Ex. 9 at pp. 11-12; see Dist. Ex. 11 at p. 6). The IEP included four new writing annual goals addressing the use of upper-case letters, ending punctuation, spelling, and writing with attention to closing statement and details to describe actions, thoughts, and feelings (Dist. Ex. 9 at pp. 12-13; see Dist. Ex. 11 at pp. 7-8). The IEP included two new math annual goals targeting the use of objects, drawings and equations to represent and solve addition and subtraction problems within 100 and multiplication problems within 20 (Dist. Ex. 9 at p. 13; see Dist. Ex. 11 at p. 6). The IEP included four new speech-language annual goals addressing initiating and maintaining conversation, making inferences, identifying and interpreting figurative language, and expressing homonym meanings and using them in a sentence (Dist. Ex. 9 at pp. 13-15; see Dist. Ex. 11 at pp. 6-7). The IEP included six new motor skills annual goals addressing eating without stuffing food and choking, tying shoes, keyboarding skills, walking speed and stamina, motor planning in hallways, and holding a door for another (Dist. Ex. 9 at pp. 15-16; see Dist. Ex. 11 at pp. 7-8). The

IEP included a new daily living skill annual goal targeting the identification of common coins and bills (Dist. Ex. 9 at p. 16; see Dist. Ex. 11 at pp. 6-8).

Regarding the district's continuum of programs, the assistant superintendent for special education and student support services (assistant superintendent) testified that the 12:1+1 and the 15:1+1 special classes provided specially designed instruction at various levels, with the 15:1+1 students working more toward general education/grade level curriculum, which was not necessarily modified but with instruction delivery and supports in place to allow the students to make progress in the general education curriculum (Tr. pp. 621, 626; see Dist. Ex. 25). She testified that the 12:1+1 special class was a "more modified program," that it also provided specially designed instruction to the students and that the program focused more on skill development and access to curriculum to the greatest extent possible (Tr. p. 626). The assistant superintendent explained that the 8:1+2 special class was geared more toward functional skills and less toward access to grade level curriculum with a focus on skill development, functional skills and "the ability of students to be able to go out into . . . the world of work down the line and be able to function as independently as possible" (Tr. pp. 626-27).

The assistant superintendent testified that the students in the 12:1+1 program at the middle school level were "often on the cusp" of having the potential to obtain either a Regents or local diploma and that they were providing those students with the foundational skills to be able to maximize their success (Tr. pp. 633-34).

The assistant superintendent further testified that she participated in discussions with the assistant director of special education and the staff during summer 2022 and noted that the district always wanted to go with the "least restrictive environment" and give students the opportunity to be supported in that less restrictive program and demonstrate their abilities (Tr. pp. 635-36; see Dist. Ex. 28 at p. 1). She added that she heard that staff "really felt as though [the student] had great potential" and that the 12:1+1 and 15:1+1 hybrid program "would really be best practice" (Tr. p. 636). She further testified that she thought the CSE's obligation was to ensure that the district was providing students with the support to maximize their growth and meet their potential and therefore she opined that the 12:1+1 and the 15:1+1 special class programming "was definitely appropriate" (Tr. p. 636-37). The assistant superintendent testified that she disagreed with the statement that the district "just threw" the student into a 12:1+1 or a 15:1+1 and stated the district determined that reevaluating the student, determining his functioning levels, and getting to know him, was appropriate (Tr. pp. 646-48). She testified that the district did that and worked with him over the summer and then the CSE made the determination as to what was going to be most appropriate for him in fall 2022 (Tr. pp. 647-48).

The school psychologist testified that at the August 2022 CSE meeting the CSE considered the continuum of services: 8:1+2 special class, 12:1+1 special class, and a 15:1+1 special class (Tr. p. 222). He stated that there was a conversation of the appropriateness of each program and that after reviewing the evaluative information, the narrative data from the student's previous IEP, and hearing about the student's performance in the summer ESY program, the CSE began discussing the "least restrictive environment" of 12:1+1 and 15:1+1 special classes (id.). The school psychologist testified that staff had seen growth in the ESY program in terms of the student's positive learning behaviors and reduction of interfering or negative behaviors, as there was more time on task which led to increased academic progress (id.). He also testified that the



recent testing had revealed some of the student's relative strengths that correlated with what was being described in the ESY program (*id.*). The school psychologist testified that in the discussion at the August 2022 CSE meeting with the parents and the other CSE members, there was an agreement that they would consider the "less restrictive environment" of the 12:1+1 and 15:1+1 special classes, with the caveat that they would return to the CSE within six to eight weeks to review updated performance data from the classrooms (Tr. pp. 222-23). He recalled a teacher and the parents saying to "believe in [the student], give him a chance, he has skills that you may not see" (Tr. p. 223).

The special education teacher, who also participated in the August CSE meeting, testified that at the August 2022 CSE meeting, regarding the combination 12:1+1 and 15:1+1 special class program, that the parents wanted the student to try that type of class as they said that he was smart and intelligent and "he c[ould] do so much, give him a chance" (Tr. pp. 421, 423-25, 551-52).

## **2. October 2022 IEP**

Turning to the operative October 2022 IEP, which was the IEP in place at the time of the parents' placement decision, the hearing record indicates that, on October 20, 2022, a CSE convened to conduct a requested review (Dist. Exs. 6 at p. 1; 7 at pp. 1-2). The October 2022 CSE had available for review the following reports and summaries all dated October 20, 2022: an adapted physical education summary, an OT progress summary, parent report and observations, a PT progress summary, a quarterly progress report, a speech-language progress summary, and a teacher progress summary (Dist. Exs. 6 at p. 1; 7 at p. 3). Although as described below the October 2022 CSE made changes to the some of the student's present levels of performance and annual goals, the CSE recommended the same program, related services and supports found in the August 2022 IEP (compare Dist. Ex. 7 at pp. 1-20, with Dist. Ex. 9 at pp. 1-18).

### **a. Present Levels of Performance and Annual Goals**

The parents argue that the present levels of performance included in the October 2022 IEP were "outdated." In addition, the parents contend that the annual goals included in the October 2022 IEP were inappropriate because goals discussed as too ambitious during the meeting remained in the IEP and amended goals removed achievement criteria. Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

Next, an IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's

disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

As summarized above, in August 2022, less than two months prior to the October 2022 CSE meeting, the CSE set forth the student's present levels of performance based on several sources of information including the district evaluations of the student, teacher and parent input, and the student's prior IEP from the other school district (Dist. Exs. 8-9; 11; 13-19; 31). The student's present levels of educational performance were thereafter updated in the October 2022 IEP (Dist. Ex. 7 at pp. 6-11). Regarding reading, the student's present levels of performance stated that he read independently at level "G," on that level he read 14 words per minute, was able to answer five out of six questions correctly, required lots of prompting to read and complete questions, needed some questions rephrased, and required a lot of wait time (id. at p. 6). The student did not have the stamina to sit with a book for more than five minutes, required constant support of an adult to stay focused on task, and mostly offered one to two word responses and so it was difficult to ascertain how much he was understanding (id.). In the area of writing, the IEP stated that the student had been able to identify the type of punctuation used in four of five sentences, had not been able to write a closing statement, had only been able to correct one spelling error, required constant support of an adult to get through all of his tasks, had a challenging time with far point copy, and was encouraged to verbalize his idea so a sentence could be modeled for him which he could copy (id. at p. 8). In the area of math, the IEP stated that the student was easily distracted in class, was compliant when copying notes, did not like to participate in class, usually gave one to two word answers so it was not always clear if he understood the lesson, required constant refocusing, required significant wait time, could become frustrated with challenging assignments and on occasion would say "I hate school. I want to go home" or he would throw his papers on the floor (id. at pp. 6-7). Additionally, the IEP indicated that the student did not know his multiplication or division facts, had difficulty with word problems, had difficulty subtracting two- by two-digit numbers with and without regrouping, and could add two- by two-digit numbers without regrouping but had difficulty with regrouping (id. at pp. 6-7). An OT update reflected in the IEP stated that the student was able to complete a "take a bite, and chew" sequence with verbal cues, did his best with tactile prompts to his neck to swallow, was able to tie his shoes with verbal prompts, and was making progress in keyboarding skills (id. at p. 10). A PT update included in the IEP stated that the student struggled to stay to the right in the hallways, did not bump into anyone and was seen to walk around other students stopped in the hall, although it was also noted that he may not understand the social rule to not bump into people or walk through groups of students, so he did sometimes exhibit those behaviors (id. at pp. 10-11). The IEP further stated that the student could open doors throughout the school but needed verbal reminders to hold the door open for others, and descended stairs carrying his backpack with good balance (id.).

The special education teacher testified that at the October 2022 CSE meeting she discussed the need to change a couple of the student's reading annual goals as they were not appropriate and that the student would not be able to attain them by the end of the year (Tr. pp. 442-43, 471; see Dist. Ex. 7 at pp. 12-18). She stated that she changed the annual goal regarding reading 100 words per minute and said that, since the student began the year reading about 14 words per minute, a realistic goal would be about 35 words per minute, which was what she changed it to (Tr. p. 444).

She further testified that she also changed a writing annual goal (Tr. pp. 472-73). The special education teacher testified that there may have been a clerical error on the October 2022 IEP as it appeared that some of the annual goals she spoke of were not changed on the IEP; however, it was stated that the need for changes was noted in the November 2022 progress report (Tr. pp. 444-46, 473-74, 525-27; see Dist. Ex. 20 at pp. 3, 5, 9).<sup>9</sup>

Given the foregoing evidence showing that the student's present levels of performance were specifically updated, the evidence in the hearing record does not support the parents' contention that the IEP was outdated in this respect. In addition, although some of the student's annual goals were not changed as discussed and, therefore, were perhaps too ambitious for the student as stated, the annual goals did align with the student's areas of need and were reasonably specific and measurable. Moreover, even if the IEP included goals that were too ambitious and therefore "not a perfect math," it is not a sufficient flaw in the substance of the IEP to constitute a denial of a FAPE (see Phillips v. Banks, 2024 WL 1208954, at \*2 [2d Cir. Mar. 21, 2024] [upholding a finding that annual goals were appropriate even though two goals were somewhat below the student's instructional level and one was likely too ambitious]).

#### **b. Special Factors: Interfering Behaviors and Assistive Technology**

Next, the parents contend that the October 2022 CSE again failed to assess and address the student's behavioral needs and assistive technology needs.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ. of Shenendehowa Cent. Sch. Dist., 361 Fed. App'x 156, 160 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider developing a BIP for a student that is based upon an FBA (8 NYCRR 200.4[d][3][i], 200.22[a]-[b]). Additionally, a district is required to conduct an FBA in an initial evaluation for students who engage in behaviors that impede their learning or that of other students (8 NYCRR 200.4[b][1][v]).

Another special factor that a CSE must consider is whether the student "requires assistive technology devices and services, including whether the use of school-purchased assistive technology devices is required to be used in the student's home or in other settings in order for the student to receive a [FAPE]" (8 NYCRR 200.4[d][3][v]; see 20 U.S.C. § 1414[d][3][B][v]; 34 CFR 300.324[a][2][v]; see also Educ. Law § 4401[2][a]).

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<sup>9</sup> Specifically, the special education teacher stated that on the October 2022 IEP, annual goal number five was to be replaced with annual goal number two and that annual goal number one was changed to annual goal number three, and she noted that the original annual goals should have been deleted but were not (Tr. pp. 530-32; see Dist. Ex. 7 at pp. 12-13).

Regarding the student's behavior, as summarized above, at the time of the August 2022 CSE meeting, the student exhibited difficulty attending but an FBA was not requested or determined necessary in light of other supports available (Tr. pp. 558, 567-72, 574).

The school psychologist testified that, in the time between the August and October 2022 CSE meetings, the student exhibited an increase in off-task behavior related to use of his Chromebook and the size and pace of the 15:1+1 special class, and the parent expressed that the student reported feeling overwhelmed by the classwork and navigating the hallways (Tr. pp. 237-40). The counseling consultant testified that in her professional opinion she did not believe that the student needed an FBA as that was a very restrictive assessment for significant behaviors interfering with learning (Tr. p. 574). She added that their concern and belief was that the content was causing the student's behaviors of noncompliance and that he was struggling to learn the information in the educational environment, and so they felt that they needed to "reduce that factor and take a close look at that factor" (Tr. pp. 574-75).

The school psychologist testified that he did not recall an FBA being considered formally at the October 2022 CSE meeting and that a CSE would discuss an FBA if a student had significant interfering behaviors (Tr. p. 250). He added that the CSE hypothesized at the meeting that due to the size and ratio and pacing of the current setting (12:1+1 and 15:1+1 special classes) they saw more off-task behaviors and so they wanted to consider the program before considering an FBA (Tr. pp. 250-51).

The counseling consultant testified that, while the October 2022 IEP did not include social/emotional annual goals or direct counseling services, the student's social and pragmatic skills were being addressed through his speech-language needs and goals and through the counseling consultation services (Tr. pp. 613, 617). She added that in terms of anything more socially, emotionally, and behaviorally within the classroom, staff had the behavioral consultation to "really dig in on the scene" and try to help the teachers deliver what the student needed (Tr. p. 617; see Dist. Ex. 7 at pp. 1, 15-16, 20). Also, the counseling consultant testified that there was a positive reinforcement plan being implemented by all the teachers in the elective or exploratory classes (Tr. pp. 595-96).

The school psychologist acknowledged that the CSE did not recommend direct behavioral intervention services in August or October 2022 and testified that he did not believe the student needed direct services as the October 2022 CSE hypothesized that the increase in negative behaviors at that time were due to the size and ratio of the classroom, and that the CSE wanted to discuss the program first before considering further interventions on top of the counseling behavior consultations (Tr. pp. 298-99). The school psychologist testified that he believed that the behavioral services listed on the student's October 2022 IEP were sufficient to address his behavioral concerns (Tr. p. 327; see Dist. Ex. 7 at pp. 8-10).

The special education teacher testified that the behavioral intervention consultation included on the October 2022 IEP involved the behaviorist observing the student, attending team meetings where they would discuss student behavior and ways to support the student, and having conversations with teachers to provide them with some extra ideas and supports to help them be successful (Tr. pp. 536-37; see Dist. Ex. 7 at p. 20). The special education teacher stated that some of the ideas discussed to use with the student included the positive reinforcement plan, providing

concrete choices/control choices/transition awareness, the parent communication form, and his Chromebook reward (Tr. pp. 537-38). The special education teacher testified that the counseling consultation included on the October 2022 IEP would happen at a team meeting (Tr. p. 536; see Dist. Ex. 7 at p. 20).

Regarding assistive technology, the special education teacher testified that following the consultations they saw changes in the student's performance and noted specifically that the Chromebook reward was "hugely motivating" for the student and that they were able to get the student to do some of the work which was improvement (Tr. p. 554). She added that the work he completed was still only about one-third the amount of work other students in the class were completing and noted that while there was improvement, it was not enough as he struggled to keep up with the pace of the class (Tr. pp. 554-56).

The October 2022 IEP stated that the student did not need assistive technology devices or services (Dist. Ex. 7 at p. 12). In terms of assistive technology, the school psychologist testified that the district had a one-to-one student Chromebook initiative with Google platform and so the students had access to assistive technology supports that were used programmatically in their special education classes and in the building (Tr. p. 251). According to the school psychologist, because the student was "off-task with the Chromebook," staff wanted to minimize introducing new assistive technology before the interfering behaviors could be decreased (id.). He further stated that, as with the FBA and assistive technology, they had growing concerns about the student's program and that before introducing further interventions they wanted to look at the foundation of the program again (id.).<sup>10</sup>

The parent testified that at the back-to-school night in September, the student's teachers reported that they were trying and getting to know him, and that sometimes he used the Chromebook inappropriately and didn't respond when they asked, therefore, they did not know if he was following along (Tr. pp. 839-40). They also reported to the parent that the student got out of his seat at times, and that his aide was helping him a lot and was very useful for him (Tr. pp. 840-41).

Although State regulations call for the procedure of using an FBA when developing a BIP, the Second Circuit has explained that, when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F.3d at 190). The Court also noted that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE," but that in such instances particular care must be taken to determine whether the IEP addresses the student's problem behaviors (id.). Likewise, the district's failure to develop a BIP in conformity with State regulations does not, in and of itself, automatically render the IEP deficient, as the IEP must be closely examined to determine whether it otherwise addressed the student's interfering behaviors (see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 80 [2d Cir. 2014]; F.L. v. New York City Dep't of Educ., 553

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<sup>10</sup> Although this testimony was in response to a question about the December 2022 CSE meeting and resultant IEP, it nonetheless appeared to be representative of the student's needs in general. In addition, the assistant director of special education testified that if at any point they felt the student needed assistive technology devices or services they would have completed an assistive technology evaluation (Tr. pp. 54-55).

Fed. App'x 2, 6-7 [2d Cir. Jan. 8, 2014]; M.W. v. New York City Dep't of Educ., 725 F.3d 131, 139-41 [2d Cir. 2013]; R.E., 694 F.3d at 190).

The failure to recommend specific assistive technology devices and services rises to the level of a denial of a FAPE only if such devices and services are required for the student to access his educational program (see, e.g., Application of the Bd. of Educ., Appeal No. 13-214; Application of a Student with a Disability, Appeal No. 11-121).

Given the foregoing, including the CSE's discussion of possible causes for the increases in behaviors, the behavioral supports in place that were continued in the October 2022 IEP such as the 1:1 aide and the behavior intervention and counseling consultations, the access to assistive technology, which the district was considering in terms of its effectiveness and relationship to the student's behaviors, the evidence in the hearing record does not support a finding that the district committed a procedural violation by failing to conduct an FBA and develop a BIP or recommend assistive technology at that point.

### **c. 12:1+1 and 15:1+1 Special Classes**

The crux of the parents' concern with the October 2022 IEP was the special class recommendations.

As summarized above, at the time of the August 2022 CSE meeting, the CSE determined that, given information garnered about the student's potential, including his performance in the district over summer 2022, he could make appropriate progress in the 12:1+1 and the 15:1+1 special classes (see Tr. pp. 222, 421, 423-25, 551-52, 636-37, 647-48). The committee agreed to meet in six to eight weeks to review the student's progress (Tr. pp. 222-23). Between August and October 2022, there is indication that the student struggled in the 12:1+1 and 15:1+1 special classes and, accordingly, the October 2022 CSE grappled with whether to modify the student's program recommendation, weighing views about the student's potential with information about the student's struggles thus far.

The special education teacher, who was the student's teacher for English language arts (ELA) and reading during fall 2022, testified that it was a struggle for the student to keep up with the pace of the class (Tr. p. 556). The assistant superintendent acknowledged that the 15:1+1 program did not turn out to be the best program for the student (Tr. p. 646).

The school psychologist testified that at the October 2022 CSE meeting the CSE reviewed updates to the present levels from teachers, service providers, and heard concerns from the parent (Tr. p. 239). He testified that it was reported at the meeting that particularly in the 15:1+1, the size of the classroom and the pacing was overwhelming for the student and that staff saw an increase in some of the interfering behaviors, which were more "off-task in nature" (id.).

The counseling consultant testified that she participated at the October 2022 CSE meeting and stated that the CSE discussed that the student was having a difficult time performing tasks that were less desirable (schoolwork) and wanted to do something more desirable (accessing YouTube on the Chromebook) (Tr. pp. 561-63). The counseling consultant testified that the October 2022 CSE discussed the student's placement and the recommendation of classes, and that the student was having great difficulty with the content in the classes (Tr. p. 563). She further testified that

the CSE discussed a more restrictive setting—the 8:1+2 special class—and the parent's concern that she had seen the student exhibit higher academic skills, in math specifically and in being able to expand more expressively about his day; therefore, she had reservations about the student going into a smaller class where life skills and prevocational skills were being taught (Tr. p. 564). The counseling consultant stated that to address the parent's concerns the CSE discussed what the 8:1+2 class "looked like," explained that they could individualize the student's instruction and work within a framework of providing more flexible behavioral support toward those behavioral goals and invited the parent to see the program (Tr. pp. 564-65). The counseling consultant testified that she remembered that the parent had a general concern that "there was going to be also vocational and life skills taught and not just academics" (Tr. p. 565). She also testified that she did not recall the number of students in the classroom coming up in the discussion, just what the program would look like in terms of curriculum, and that the parent believed that the student was capable of doing more than just functional academics (Tr. p. 597).

The special education teacher testified that at the October 2022 CSE meeting they explained to the parent that the student was struggling in his classes and that the 8:1+2 special class would better support his needs (Tr. pp. 446-47). The special education teacher added that the parent was upset by the district staff's recommendation and stated that the student was "not a vocational kid" and that she wanted him to stay in the existing program (Tr. pp. 447, 487-88, 553).

The school psychologist testified that the CSE began discussing the full day 8:1+2 special class placement and that he recalled that, though the parent had concerns about the student, she also had concerns about the 8:1+2 program and wanted more information (Tr. p. 240). The school psychologist testified that, at the October 2022 CSE meeting, the parent's concern with the 8:1+2 program led the CSE to a discussion of a hybrid program, as they were considering the full continuum of the other programs (Tr. pp. 304-05). The school psychologist testified that, if considered, the hybrid program would include a 12:1+1 special class for ELA, reading and math and the 8:1+2 special class for social studies and science (Tr. p. 304).

The school psychologist testified that, while the CSE discussed the hybrid program of an 8:1+2 and 12:1+1 special classes, in the end there was not agreement and so it was decided that district staff would provide the parent with further information through a tour, class profiles, extended conversations with other members not present, and an opportunity for the parent to consult with her husband who was not present at the October 2022 CSE meeting, and then hold another CSE meeting after that (Tr. pp. 241, 330).

The parent testified that at the October 2022 CSE meeting district staff spoke about how the student was struggling in the class and was having a difficult time, discussed how he was doing in class and were rethinking his abilities, and discussed the 8:1+2 special class (Tr. pp. 847-48). The parent testified that at the October 2022 CSE meeting she was not ready to make a decision regarding the discussed changes to the student's program as she wanted to know more about the program and that the CSE agreed to end the meeting and give the parent an opportunity to view the program (Tr. pp. 877-78). The parent testified that she did not like that the student "was going to go into a functional class, into a vocational functional class" (Tr. p. 849). The parent testified that she understood that, as of the October 2022 CSE meeting, the CSE intended to reconvene after it provided the parent with an opportunity to obtain additional information and conduct a tour (Tr. p. 881).

Within the October 2022 prior written notice, the district stated that a "more restrictive" 8:1+2 special class placement had been considered during the CSE meeting but was rejected "due to the need for further data collection, parent input, current functioning levels and skills, and Subcommittee discussion" (Dist. Ex. 6 at p. 1). The October 20, 2022 prior written notice also stated that the parents were in agreement with the current reported levels and recommendations and that a follow up CSE requested review would be held to review updated data (e.g., IEP progress data, work samples) and to provide the parents with further information regarding the 8:1+2 special class (id.).

The hearing record supports a finding that both the August 2022 and October 2022 IEPs were reasonably calculated to confer educational benefit at the time they were written. Particularly persuasive in this matter was the district's ongoing plan to reconvene for program reviews every six to eight weeks as the student was new to the district and the staff considered themselves to be "getting to know" the student. The period of time that the student attended the district between July 2022 through December 2022, was a relatively short period of time in school days. It was not unreasonable for the district to make slight changes to the student's IEP to support him in the 12:1+1 and 15:1+1 special classes while gathering more information with a plan to reconvene the CSE thereafter. This was not a case where a student was left to languish in an inappropriate program for an extended period of time. Here, the district adjusted the recommendations to meet the student's needs while maintaining him in an appropriately ambitious program and providing the parent the opportunity to learn more about potential alternative recommendations. Given the district's responsiveness and monitoring while the student transferred into the district, the hearing record does not support the IHO's determination that the district denied the student a FAPE. In light of the above, I find that the district offered the student a FAPE for the 2022-23 school year and the IHO's finding to the contrary must be reversed.

## **VII. Conclusion**

Having determined that the evidence in the hearing record supports a determination 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 parties' remaining contentions and find it is unnecessary to address them in light of my determinations above.

**THE APPEAL IS SUSTAINED.**

**THE CROSS-APPEAL IS DISMISSED.**

**IT IS ORDERED** that the IHO's decision dated March 8, 2024 is modified by reversing those portions which determined that the district failed to offer the student a FAPE for the 2022-23 school year and ordered the district to reimburse and directly fund 75 percent of the cost of the student's attendance at Kulanu for a portion of the 2022-23 school year.

**Dated: Albany, New York  
June 13, 2024**

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**SARAH L. HARRINGTON  
STATE REVIEW OFFICER**