The University of the State of New York

The State Education Department
State Review Officer
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No. 11-143

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

Appearances:
Hodgson Russ LLP, attorneys for petitioner, Ryan Everhart, Esq., of counsel

Law Offices of H. Jeffrey Marcus, PC, attorneys for respondents, H. Jeffrey Marcus, Esq., of counsel

DECISION

Petitioner (the district) appeals from a decision of an impartial hearing officer which determined that the special education program recommended by its Committee on Special Education (CSE) for respondents' (the parents') son for the 2011-12 school year was not appropriate. The appeal must be sustained in part.

At the time of the impartial hearing in August 2011, the student was enrolled in a general education class in the district pursuant to an individualized education program (IEP) created for the 2010-11 school year, which offered 10-month special education and related services, including consultant teacher services five times per week for 30 minutes per session and individual occupational therapy (OT) two times per week for 30 minutes per session (Joint Ex. 33 at p. 1). The student's eligibility for special education and related services as a student with an other health-impairment is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

Background

The parties' familiarity with the facts underlying this case and the student's educational history is presumed and will not be repeated here in detail. According to a May 2009 psychoeducational evaluation report, the student attended a preschool special education class three times per week and received OT two times per week (Joint Ex. 34 at p. 1). Administration of the Stanford-Binet Intelligence Scales, Fifth Edition (SB5) yielded a verbal IQ composite score of 93 (39th percentile), a nonverbal IQ of 95 (37th percentile), and a full scale IQ of 94 (34th percentile),

placing the student's overall intelligence in the average range (id. at pp. 2-3). The student's weakest performance in cognitive testing was in the area of quantitative reasoning in which the student obtained a score in the low average range (id. at p. 2). Administration of the Young Children's Achievement Test (YCAT) yielded a general information subtest standard score (SS) of 100 (50th percentile), a reading subtest SS of 82 (12th percentile), a mathematics SS of 85 (16th percentile), a written language subtest SS of 82 (12th percentile) and a spoken language skills subtest SS of 87 (19th percentile) (id. at p. 3). According to the evaluator, the student's acquired knowledge appeared to be age appropriate; however, his other areas of achievement, particularly reading and written language, were below average for his age (id.).

With regard to the student's behavior, the school psychologist summarized the results of responses to the Conners' Teacher Rating Scales-Revised (CTRS-R), which provided information about the student's behaviors in the classroom (Joint Ex. 34 at pp. 3-4). According to the CTRS-R, the teacher's responses resulted in scores within the "markedly atypical" range for the oppositional, cognitive problems/inattention, hyperactivity, social problems, global index, restless-impulsive, DSM-IV: inattentive, and DSM-IV: hyperactive-impulsive subscales (id.). The school psychologist also described the student's behavior during the cognitive and achievement testing, noting that the student was at times unresponsive, restless, distractible, required prompting, and engaged in "silly" behavior such as pulling the skin around his eyes, making faces, and slapping his head; but that the student also became responsive with encouragement and compliant when offered the opportunity to play a game (id. at p. 1). During a classroom observation of the student, the school psychologist noted that the student fidgeted, clapped much too long during a song, and perseverated on animal sounds during a rendition of "Old MacDonald" (id. at pp. 1-2). The students next worked together in a group of three to four students using large construction blocks, during which the student engaged in both parallel play and playing with the other children (id. at p. 2). When the student removed a block from another student's creation, the three other students persuaded him to return it (id.). The school psychologist noted that the student required several reminders not to hold blocks over his head and to use a quiet voice, but that he maintained consistent interest in the blocks for more than 15 minutes (id.).

In July 2009, the CSE convened to develop an IEP for the student for the 2009-10 school year (kindergarten) (Joint Ex. 46 at p. 1). The student was described as having delays in speech and motor skills, and as having academic skills that were below expectation in the lower half of the average range (id. at p. 2). The IEP also reflected that the student interacted with his peers, but that his interactions were inappropriate at times and that he needed to increase appropriate and positive interactions with his classmates (id. at p. 3). The IEP also noted sensory issues that needed to be addressed through OT services (id.). With regard to management needs, the July 2009 IEP noted that the student needed "clear expectations and consequences" for behaviors, that activities allowing for movement throughout the day should be used, that he required eye contact while receiving directions, and that "heavy work" was helpful prior to doing seated work (id. at p. 4). After developing annual goals, the CSE recommended that the student be placed in a general education setting and be provided with the related services of OT and speech-language therapy (id. at pp. 1, 4-5).

According to several May 2010 teacher and provider reports, during the 2009-10 school year, the student required redirection, needed reminders to focus, had difficulty staying on task, and did well with structured activities (Joint Exs. 17-19; 21-23). Effective strategies that alleviated some of the student's off-task behavior included over-enthusiastic encouragement, close teacher

proximity, games, physical movement, after school interventions, and working with the teacher 1:1 at the end of the day as an incentive because he sought attention from adults (Joint Exs. 18-20; 23).

On May 26, 2010, the CSE convened to conduct the student's annual review and develop his IEP for the 2010-11 school year (Joint Ex. 33 at p. 1). The academic and social development aspects of the present levels of performance in the May 2010 IEP remained unchanged from his previous IEP (compare Joint Ex. 33 at pp. 2-3, with Joint Ex. 46 at p. 3). The description of the student's management needs with respect to his behaviors also remained unchanged (compare Joint Ex. 33 at p. 4, with Joint Ex. 46 at p. 4). The May 2010 IEP noted that the student should receive focusing and redirection and a positive reinforcement plan to address his behavior in the classroom, that auditory and visual input should be paired, and that a sensory plan should be used to assist the student with frustration and his need to be "active" (Joint Ex. 33 at p. 1). The student's annual goals were revised and the CSE modified the student's IEP to add consultant teacher services five times per week for 30 minutes per session in the student's English language arts (ELA) and math classes (id. at pp. 1, 5-6).[1] The student's speech-language therapy was discontinued, but OT services were continued at the same duration and frequency (id. at p. 1).

Between November 2010 and March 2011, while the student was attending first grade, the student received several disciplinary referrals due to overflowing a toilet, being disruptive in class, and inappropriately treating computer and technological equipment; with regard to the March 2011 incidents, the student was sent home on two occasions as a result (Joint Exs. 35-41). In a third marking period progress report, the student's teacher noted that the student was making some strides, but had a hard time remaining on task or listening independently (Joint Ex. 16).[2]

In March 2011, the district conducted a functional behavioral assessment (FBA) of the student regarding his interfering behaviors (Joint Ex. 14). The behaviors targeted included making noises, crawling on the floor or on tables, going under tables, running around the room, moving supplies, knocking on other's desks, and bumping/hitting other children with an average frequency of twenty times per day for one to five minutes per incident (id. at p. 1). It was noted that the behaviors tended to occur in the classroom during the afternoon, when the student was in large groups and that the function of the behavior was avoidance, attention seeking, and stimulation (id. at p. 2). It was also noted that the student responded well to tangibles and edibles (id. at p. 3). Replacement behaviors were identified, and the district developed a behavioral intervention plan (BIP) for the student (id. at pp. 3-4; Joint Ex. 15). A goal was established to reduce the number of classroom disruptions from 20 times per day to 10 times per day (Joint Ex. 14 at p. 3).

On April 5, 2011, the CSE convened to review the student's IEP due to the "spike in behavioral concerns in the general education setting" (Joint Ex. 6). For the remainder of the 2010-11 school year, the student's IEP was modified to increase OT services to two individual 30-minute sessions per week in a separate location and one individual 30-minute session per week in the student's class (Joint Ex. 7 at p. 1). Over the objection of the student's mother, the CSE also removed the student from the general education setting and placed him in an 8:1+1 special class

[1] According to the student's mother, the student had done well in kindergarten, but the CSE believed the student needed additional supports to keep him on task (Tr. pp. 182-83). The student's mother also noted during the CSE meeting that the student's lead levels were elevated (Dist. Ex. 47).

[2] The exhibit submitted on appeal appears to be missing the second page (see Joint Ex. 16).

setting (id.). According to the April 2011 IEP, a general education setting was considered but rejected due to the student's high level of behavioral needs (id. at p. 6).

Due Process Complaint Notice

In a due process complaint notice dated April 8, 2011, the parents challenged the April 2011 IEP, requested an impartial hearing, and invoked the student's right to remain in the general education setting by virtue of pendency (stay put) (Joint Ex. 1). In an amended due process complaint notice dated May 20, 2011, the parents alleged that the present levels of performance in the April 2011 IEP were inaccurate, that the goals were inadequate and not measurable, the FBA was untimely, and that the BIP was flawed (Joint Ex. 3 at p. 2). The parents also asserted that the student had been prescribed medication and that the medication should have been given an opportunity to take effect before the district moved the student to a special class (id.). According to the parents, the district also failed to implement appropriate interventions in a less restrictive environment prior to changing the student's placement to a special class (id. at p. 3). For relief, the parents requested, among other things: (1) a finding that the April 2011 CSE deprived the student of a free appropriate public education (FAPE); (2) the development of an appropriate BIP for the student; (3) a finding that the student should remain in the general education environment with increased supports, which may include a 1:1 paraprofessional; and (4) the provision of additional services "of a type, amount, and scope to be determined by the hearing officer" to compensate for the failure of the district to provide the student with a FAPE for the 2010-11 school year (id.). In a letter dated May 27, 2011, the district denied the parents allegations (Joint Ex. 4).

Impartial Hearing Officer Decision

An impartial hearing convened on August 2, 2011, and concluded after two days of testimony (Tr. pp. 1-240). The hearing record was closed after the receipt of post hearing submissions by the parties (IHO Decision at pp. 1-2). In a decision dated September 30, 2011, the impartial hearing officer determined that the April 2011 IEP did not accurately describe the student's needs and lacked goals to address the student's behavior (id. at pp. 10-11). The impartial hearing officer further concluded that the district did not use a sensory plan as required in the May 2010 IEP, that the district should have implemented the use of a 1:1 aide with the student, and that district staff was not properly trained in dealing with the student's behaviors (id. at pp. 5, 10, 11). Additionally, the impartial hearing officer concluded that the district did not conduct social skills training for the student or obtain an outside consultant to address the student's interfering behaviors (id. at p. 10). Among other things, the impartial hearing officer also determined that the circumstances did not warrant placing the student in a self-contained setting, that the district should have attempted to use appropriate services and supports in a general education setting, that the district did not timely develop or revise the student's FBA and BIP, and that the CSE failed to properly place the student in the least restrictive environment (LRE) (id. at pp. 11-15).[3]

Appeal for State Level Review

The district appeals, asserting that the impartial hearing officer erred in determining that the district failed to use a sensory diet with the student. The district also contends that the impartial

[3] The impartial hearing officer also faulted the district for failing to consider placement in a special class with a less restrictive student to teacher ratio, such as a 12:1+1 (IHO Decision at p. 15).

hearing officer should not have reached the issue of appropriate staff training or an outside consultant because the parents made no allegations to this effect in their due process complaint notice. With regard to a 1:1 aide, the district argues a part-time aide that was assigned to the student's general education classroom worked almost exclusively with the student and these efforts had proven unsuccessful. According to the district, the 8:1+1 special class placement was appropriate in light of the student's difficulties in the general education setting and the impartial hearing officer failed to consider the disruptions experienced by other students in his general education classroom. For relief, the district requests that the impartial hearing officer's decision be reversed and a determination be made that an 8:1+1 special class setting is appropriate for the student.

In an answer, the parents contend that a number of findings made by the impartial hearing officer were not appealed and otherwise deny the district's allegations of error on the part of the impartial hearing officer. The parents request that the district's petition be dismissed.

Applicable Standards

Two purposes of the Individuals with Disabilities Education Act (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 v. T.A., 129 S. Ct. 2484, 2491 [2009]; Bd. of Educ. 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; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is 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 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer'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 v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). 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 P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). 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 Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 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; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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 M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

Discussion

Scope of Review

I will first address the district's claim that the impartial hearing officer improperly reached the issue of staff training and the use of an outside behavioral consultant. A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 C.F.R. §§ 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint is amended prior to the impartial hearing per permission given by the impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 C.F.R. § 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]; see M.R. v. South Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL

4914722, at *13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at *6 [S.D.N.Y. Sept. 16, 2011]; W.M. v. Lakeland Cent. Sch. Dist., 2011 WL 1044269, at *8 [S.D.N.Y. Mar. 10, 2011]; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *8 [S.D.N.Y. Aug. 27, 2010]; Application of the Bd. of Educ., Appeal No. 11-111; Application of a Student with a Disability, Appeal No. 11-100; Application of a Student with a Disability, Appeal No. 11-042; Application of the Bd. of Educ., Appeal No. 11-038; Application of a Student with a Disability, Appeal No. 11-008). In this case, I find that the parents' amended due process complaint notice may not be reasonably read as asserting a claim that the district's staff was unqualified or that the district should have sought outside services (see Joint Ex. 3). Additionally, there is no indication in the hearing record that the district agreed to expand the scope of the impartial hearing or requested that the impartial hearing officer add such claims to the list of issues to be decided. Accordingly, the impartial hearing officer should not have raised and decided matters related to staff training or the need for external behavioral consultants.

Turning next to the parents' assertion that the district failed to appeal several aspects of the impartial hearing officer's decision, a party seeking review must "clearly indicate the reasons for challenging the impartial hearing officer's decision, identifying the findings, conclusions and orders to which exceptions are taken" (8 NYCRR 279.4), and an impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]; see Application of a Student Suspected of Having a Disability, Appeal No. 09-063; Application of the Dep't of Educ., Appeal No. 09-051; see also Parochial Bus Sys. Inc. v. Bd. of Educ., 60 N.Y.2d 539, 545 [1983]). The parents correctly note that the district has not challenged the impartial hearing officer's determinations that the present levels of performance in the April 2011 IEP were insufficient and outdated or her findings regarding the FBA and BIP. I also note that the district does not challenge the impartial hearing officer's determination that the goals in the April 2011 IEP were incomplete and failed to address the student's behavioral issues.[4] Consequently, the impartial hearing officer's findings on these issues have become final and binding upon the district and will not be reviewed in this decision.

With respect to the district's petition, I also note that the district failed to conform its petition to the form requirements insofar as it contains no citations to the hearing record or the impartial hearing officer's decision whatsoever in violation of State regulations (8 NYCRR 279.8[b]); however, in this instance I decline to reject the petition as a matter within my discretion (8 NYCRR 279.8[a]). However, counsel for the district is reminded to comply with the form requirements in the future.

Special Class Placement and LRE

As to the remaining matters in dispute, I note that the there has been little if any dispute over whether an 8:1+1 special class setting can provide the student with educational benefits; however, the parties' viewpoints diverge primarily over whether the special class placement offered in the April 2011 IEP constituted the LRE for the student. The IDEA requires that a student's recommended program must be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546

[4] With the exception of the determinations regarding the present levels of performance, annual goals, FBA and BIP, I find that contrary to the parents' assertions, the district sufficiently challenged the remainder of the impartial hearing officer's adverse determinations in its petition for review.

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

To apply the principles described above, the Second Circuit adopted a two-pronged test for determining whether an IEP places a student in the LRE, considering (1) whether education in the general classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given student, and, if not, (2) whether the school has mainstreamed the student to the maximum extent appropriate (Newington, 546 F.3d at 119-20; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048-50 [5th Cir. 1989]). A determination regarding the first prong, (whether a student with a disability can be educated satisfactorily in a general education class with supplemental aids and services), is made through an examination of a non-exhaustive list of factors, including, but not limited to "(1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class" (Newington, 546 F.3d at 120; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50). The Court recognized the tension that occurs at times between the objective of having a district provide an education suited to a student's particular needs and the objective of educating that student with non-disabled peers as much as circumstances allow (Newington, 546 F.3d at 119, citing Daniel R.R., 874 F.2d at 1044). The Court explained that the

inquiry is individualized and fact specific, taking into account the nature of the student's condition and the school's particular efforts to accommodate it (Newington, 546 F.3d at 120).[5]

If, after examining the factors under the first prong, it is determined that the district was justified in removing the student from the general education classroom and placing the student in a special class, the second prong requires consideration of whether the district has included the student in school programs with nondisabled students to the maximum extent appropriate (Newington, 546 F.3d at 120).

In this case, during the second half of the 2010-11 school year, when the student was attending the general education class, the student's progress report for the third marking period indicated that while the student had difficulty remaining on task, he was making some progress, was working on reading and spelling pattern words, and his teacher noted that he should require only "little assistance" when working on math homework (Joint Ex. 16 at p. 4). With regard to the student's interfering behaviors, the hearing record contains numerous specific examples of these behaviors and the particular circumstances surrounding the district staff's response of removing him from the classroom and, at times, sending him home (Joint Exs. 26; 27 at p. 5; see Tr. pp. 109-10).[6] A district e-mail dated April 4, 2011, listed types of pre-removal interventions that had been attempted with the student, such as using a bean bag chair, disco seat, weighted vest, bouncing ball, and choice of desk or rug, and noted his teachers' indication that such interventions had been largely unsuccessful (Joint Exs. 30-32; see Tr. pp. 110-11). I note that with regard to some of the interventions used with the student during the period leading up to the April 2011 CSE meeting such as a bean bag chair, disco seat, and weighted vest, the student's records show that similar interventions were used in prior school years and were listed as unsuccessful strategies (compare Joint Ex. 32, with Joint Ex. 44).[7]

The evidence regarding how the student's March 2011 BIP was implemented in the general education classroom is not persuasive when considering whether the student should have been removed from the general education setting. The hearing record also contains conflicting evidence from district staff that the use of the interventions in the student's BIP were successful for two out of the three weeks that the BIP was utilized (Tr. pp. 38-39, 44, 78, 92).

With regard to the April 2011 CSE meeting, I note that there is scant, if any evidence that the CSE actually reviewed the BIP or considered revising it after it had been implemented for three weeks (8 NYCRR 200.22[b][2]). I also note that none of the data collection required in the BIP for progress monitoring was actually included in the hearing record (see Joint Ex. 15). In view of

[5] The Second Circuit left open the question of whether costs should be taken into account as one of the relevant factors in the first prong of the LRE analysis (Newington, 546 F.3d at 120 n.4).

[6] Unlike what was reflected in his progress report, the descriptions of his behavior also include notations suggesting that the student refuses or does not do work (see, e.g., Joint Ex. 26 at pp. 6-7, 9).

[7] I also note that there were conflicting views over the effectiveness of 1:1 adult attention as a negative behavior intervention strategy with the student, and there is some evidence from a time period when the student's behaviors were addressed successfully that this strategy should be avoided because it contributed to increases in the student's interfering behaviors when he returned to group settings (Joint Ex. 44; see Tr. 37, 160-161). I am not persuaded that the district was required to employ the specific service of a 1:1 aide on a full-time basis with the student as a strategy prior to considering other placements on the continuum, especially when an aide had been tried informally with the student on a part-time basis.

the foregoing, the evidence in the hearing record does not support the conclusion that the April 2011 CSE adequately considered the use of supplementary aids and services for the student in these circumstances prior to recommending removal from the general education setting (Newington, 546 F.3d at 112, 120-21). Even if removal for some portion of the day was appropriate, there is no indication in the hearing record that the CSE considered how the student would otherwise be included in school programs to the maximum extent appropriate (id. at p. 120). Consequently, in light of my findings above, and the unappealed determinations of the impartial hearing officer, I decline to disturb the impartial hearing officer's determination that the district did not establish that placement in a special class was the LRE for the student.

One last issue warrants brief discussion insofar as the impartial hearing officer, as part of her LRE analysis, faulted the district for failing to consider a 12:1+1 special class placement (IHO Decision at p. 15). The purpose of an LRE analysis is to assess the extent to which a student will have access to nondisabled peers or whether the student can be educated in a school that he or she would otherwise attend if not disabled (34 C.F.R. § 300.116[c]; 8 NYCRR 200.4[d][4][ii][b]; Newington, 546 F.3d at 112, 120-21). There is no indication in the hearing record in this case that a 12:1+1 special class placement would have been any more or less restrictive than an 8:1+1 special class placement. Accordingly, the evidence in this case regarding a 12:1+1 special class placement is not relevant to an LRE determination.

Conclusion

In view of the impartial hearing officer's unappealed determination that the present levels of performance in the student's April 2011 IEP were outdated and the lack of evidence showing that the CSE reviewed the student's BIP prior to recommending a special class setting, I will direct the district to reconvene the CSE to develop a new IEP for the student to consider these deficiencies. The CSE should also consider how the student has performed in the general education setting since these proceedings were commenced.[8]

[8] It was disappointing to see that the parties elected not to allow the members of the CSE to review the student's continuing progress simply because this matter had been litigated, and there does not appear to be any stipulation in the hearing record regarding how the outcome of this case will affect future school years—only an acknowledgement to dispense with the planning and maintain their disagreement (Joint Ex. 48). It appears that the student's mother was unwilling to provide consent for additional testing in March 2011, but was willing to do so in August 2011 (Tr. pp. 193-95). As stated by the First Circuit,

> pending review of an earlier IEP, local educational agencies should continue to review and revise IEPs in accordance with applicable law, at least in the absence of a stipulation between the parties providing for how the outcome of the suit will affect later years. Without an IEP as a starting point, the court is faced with a mere hypothesis of what the Town would have proposed and effectuated during the subsequent years, a hypothesis which at the time of trial would have the unfair benefit of hindsight. Such a rear view proposal could not comply with the statutory requirements for drafting IEPs, could not have been submitted in a timely fashion to the parents, and cannot constitute evidence at trial. . . . The continuation of the IEP process during the pendency of litigation may assist in promoting settlements

(Town of Burlington v. Dep't of Educ., 736 F.2d 773, 794 [1st Cir. Mass. 1984]).

I have considered the parties' remaining contentions and find that it is not necessary to address them in light of my determinations herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the portions of the impartial hearing officer's decision dated September 30, 2011 that addressed staff training, an outside consultant and a 12:1+1 special class setting are annulled; and

IT IS FURTHER ORDERED that the CSE shall reconvene to develop an IEP for the student within 30 days of this decision.

Dated: **Albany, New York**
December 30, 2011

JUSTYN P. BATES
STATE REVIEW OFFICER