



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 12-056

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

#### **Appearances:**

Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C., attorneys for petitioner, Susan T. Johns, Esq., of counsel

Getnick Livingston Atkinson & Priore, LLP attorneys for respondents, Patrick G. Radel, Esq., of counsel

### **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 determined that the educational program recommended by its Committee on Special Education (CSE) for respondents' (the parents') daughter for the 2011-12 school year was not in the least restrictive environment (LRE). The appeal must be sustained in part.

#### **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 CSE that includes, but is not limited to, parents, teachers, a school psychologist, and a school 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]; 34 CFR 300.151-300.152, 300.506, 300.511; Educ. Law § 4404[1]; 8 NYCRR 200.5[h]-[i]).

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 300.514[c]; 8 NYCRR 200.5[k][2]).

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

The student has a diagnosis of Down Syndrome (Dist. Ex. 3 at p. 1). As a young child, she received related services through the Early Intervention Program (id.). Subsequently, in July 2009, the student transitioned to the Committee on Preschool Special Education (CPSE) where she was placed in a 9:1+2 special class, integrated within a daycare class, and received speech-language therapy, occupational therapy (OT), and physical therapy (PT), along with the support of a 1:1 aide (Dist. Exs. 11 at pp. 10-12; 42 at pp. 1, 11; 43 at pp. 1, 11-13; 44 at pp. 1, 10-11; 45 at pp. 1, 10-12; 46 at pp. 1, 10-11; see Dist Exs. 7; 13-19).<sup>1</sup>

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<sup>1</sup> The hearing record shows that the 9:1+2 special class was integrated with a daycare class of six or seven "typical" children from 9:00 a.m. until 2:00 p.m. each day (Tr. pp. 220-22). The students in the daycare class had their own teacher (Tr. p. 221).

As the student aged out of preschool, she was referred to the CSE which convened on June 10, 2011, and determined that she was eligible for special education and related services as a student with a speech or language impairment (Dist. Ex. 20 at p. 1).<sup>2</sup> In developing the student's 2011-12 IEP, the CSE considered a March 2011 "Graduate Preschool Report" along with the recommendation of the student's preschool providers that the student be placed in a special class (Tr. pp. 25, 44, 46, 527-28; Dist. Ex. 18 at p. 3). The CSE also discussed the parents' desire to have the student placed in an environment with more typical peers (Tr. pp. 25, 46-49, 527-28). The CSE ultimately recommended that the student be placed in an 8:1+1 "inclusion program" in a neighboring school district (Dist. Exs. 20; 21 at p. 11; 22).<sup>3</sup>

In a June 10, 2011 letter, the district provided the parents with prior written notice and indicated that the 8:1+1 placement recommended by the June 2011 CSE was proposed as a "blend of provider recommendation of special class and parental request for inclusion" (Dist. Ex. 22 at p. 1).<sup>4</sup> The letter further indicated that a 15:1 special class located at the district's elementary school was requested by the parents, but rejected by the CSE as inappropriate because it did not meet the student's academic needs and need for support (Tr. p. 55; Dist. Ex. 22 at p. 1).<sup>5</sup>

The neighboring school district declined to accept the student's application to its 8:1+1 inclusion program; however, the CSE chairperson for the neighboring district reportedly suggested that the student might be appropriate for a 12:1+4 special class within that district (Tr. pp. 51-54, 57).<sup>6</sup> The CSE reconvened on July 22, 2011 and recommended that the student be placed in the 12:1+4 special class (Tr. pp. 57-58; Dist. Exs. 24; 25 at p. 11).<sup>7</sup> The parents agreed to review the recommendation and also consented to the placement in writing (Tr. pp. 57-58; Dist. Exs. 24; 25 at p. 11; 48). In a letter dated July 22, 2011, the district provided the parents with prior written notice that the July 2011 CSE's recommendation that the student be placed in a 12:1+4 special class was based "upon review of [the student's] records and observation by [the neighboring school

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<sup>2</sup> The student's resultant June 10, 2011 IEP lists the student's classification as "speech or language impairment," while the meeting minutes indicate that the student was eligible for special education as a student with an intellectual disability (compare Dist. Ex. 20 at p. 1, with Dist. Ex. 21 at p. 1).

<sup>3</sup> The pupil personnel services (PPS) director testified that the 8:1+1 inclusion program consisted of eight students with disabilities supported by one teacher and one teacher assistant (Tr. pp. 113-14). She indicated that the focus of the class was on inclusion and that the students "pushed in" to the general education curriculum on a daily basis (Tr. pp. 114, 195-96). The PPS director could not specify the amount of time that an individual student in the 8:1+1 inclusion program would spend in the general education environment, but suggested that it would be based on each student's IEP (Tr. p. 114-15).

<sup>4</sup> "Prior written notice" refers to a written statement "provided to the parents of a student with a disability a reasonable time before the school district proposes to or refuses to initiate or change the identification, evaluation, or educational placement of the student or the provision of a free appropriate public education to the student" (8 NYCRR 200.1[oo]; see 34 CFR 300.503; 8 NYCRR 200.5[a]).

<sup>5</sup> The PPS director testified that the 15:1 special class consisted of students who were functioning "just below grade level" and who required some primary instruction outside of the classroom for English language arts (ELA) and math (Tr. pp. 55-56; 187-91). She opined that the class was inappropriate for the student both academically and socially (Tr. p. 55).

<sup>6</sup> In some instances in the hearing record the 12:1+4 special class was referred to as a 12:1:3+1 (see, e.g. Dist. Ex. 48).

<sup>7</sup> The student's July 22, 2011 IEP reflects a classification of "multiple disabilities" (Dist. Ex. 25 at p. 1).

district]" (Dist. Ex. 26). The district stated that the recommended 12:1+4 special class was "the most appropriate placement" for the student and that it had an "increased staff ratio" (id.). The district further noted that the student would be provided with "inclusion into specials with [a] 1:1 aide" (id. at p. 2). Lastly, it noted that a 15:1 special class located at the district's elementary school was considered by the CSE, but was rejected as being inappropriate (id. at p. 1).

Following an observation of the 12:1+4 special class in the neighboring district, the parents expressed concern with the recommended placement (Tr. pp. 67-68). Specifically, the parents wanted the student to have more interaction with typical children than were present in the observed class (id.).

The CSE reconvened on August 19, 2011 with attorneys for both parties present (Dist. Ex. 27). Minutes from the CSE meeting reflect that the parents requested a full inclusion program for the student (id.). According to the minutes, the CSE reviewed the parents' request; however, staff from the district's elementary school believed that the student would need a totally parallel curriculum and that the general education program could not be modified without the "dilution of substantial curriculum" (id.). Next, the parents requested that the student be placed in the 15:1 special class located at the district's elementary school; however, the district determined that this program was inappropriate given the student's academic and social needs, and the district's inability to modify the curriculum to the student's level (id.). According to the meeting minutes, the parents were not in agreement with the previously recommended 12:1+4 special class placement in the neighboring district, but would give no reason other than they did not like it (id.). The CSE recommended that the student be placed in a Board of Cooperative Educational Services (BOCES) 12:1+1 special class located in a nearby district and that she be "mainstreamed" with an aide for homeroom and specials, except for physical education (Dist. Exs. 27; 28 at p. 12).<sup>8</sup> The student began attending the BOCES 12:1+1 special class for the 2011-12 school year (Dist. Ex. 1).

In a letter with prior written notice dated September 19, 2011, the district indicated that with respect to the initial provision of special education to the student, the parents had proposed placement in a 15:1 special class or full inclusion, which the district rejected; that the district had proposed placement in a 12:1+4 special class, which the parents rejected; and that the district proposed placement in 12:1+1 special class which was accepted by the CSE (Dist. Ex. 29).

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

The parents filed a due process complaint notice dated September 28, 2011, alleging that the district denied the student a free appropriate public education (FAPE) for the 2011-12 school year (Dist. Ex. 1). The parents alleged that the student was denied a FAPE based on the district's insistence that the student be placed in a "highly restrictive" 12:1+1 special class located far from the student's home when the student could make satisfactory academic progress in a general education kindergarten class with the use of supplementary aids and services. According to the parents, the district's refusal to place the student in an environment less restrictive than the recommended 12:1+1 special class was based on the district's unwillingness to make needed modifications to the general education curriculum and/or otherwise facilitate the student's

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<sup>8</sup> The CSE recommended that the student receive adapted physical education twice weekly (Dist. Exs. 27; 28 at p. 10).

inclusion in a general education classroom. The parents also alleged that the district failed to provide the student with a placement as close to her home as possible, resulting in a lengthy bus ride during which the student has limited to no interaction with typical peers and receives no academic, social, or therapeutic benefit (*id.* at p. 4). The parents requested, among other things, that an IHO find that the district failed to offer the student a FAPE for the 2011-12 school year; find that the district failed to identify the student's unique needs and provide an appropriate placement, services, supports, and accommodations; and direct the district to convene a CSE meeting to develop an IEP that included placement in a general education classroom with necessary supplementary aids and services or, in the alternative, placement in a special education setting less restrictive than the student's current placement and within the school district (*id.* at pp. 4-5).<sup>9</sup>

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

An impartial hearing convened on December 6, 2011 and concluded on January 3, 2012, after four days of proceedings (Tr. pp. 1-641). In a decision dated February 10, 2012, the IHO determined that the district failed to offer the student a FAPE because it did not recommend a placement for the student in the LRE (IHO Decision at pp. 13-20).

The IHO found that the district did not make reasonable efforts to support the student in a general education classroom (IHO Decision at pp. 14-18). Specifically, he determined that the district never tried to place the student in a general education environment with supplementary aids and services because it had concluded that the student was too low functioning to be able to learn in a general education classroom (*id.* at p. 14). The IHO disagreed with the district's characterization that it had attempted to place the student in a general education classroom in preschool (*id.* at p. 16). He also noted that the CSE chairperson testified "without much detail" that the CSE had discussed supplementary aids and services to support the student in the general education setting, and that an occupational therapist from the student's preschool testified that the district "may have considered a 1:1 aide" for the student in the general education setting (*id.*). The IHO determined that the district did not "employ a 'creative' approach" and did not seriously consider suggestions by the parents' expert such as the use of an iPad or similar technology, explain why materials in the class could not be modified to meet the student's needs, or call an expert witness to contest the findings of the parents' expert (*id.* at pp. 16-17). The IHO further noted that the district did not seek an outside consultant to provide an opinion on whether the parents' request was viable, consider providing any sort of specialized training to its staff, engage in any meaningful discussion with the parents on those issues, consider pushing an additional special education teacher into the general education classroom for a portion of the day or the entire day, consider whether a consultant special education teacher could work with the regular education teacher to adapt or modify the curriculum, and that there was no evidence in the record that the district conducted an assistive technology evaluation despite a recommendation for one by a school psychologist (*id.* at p. 17). The IHO also noted that the student's IEP does not indicate that music was a necessary component to the student's instruction despite the district noting that the student requires music to learn, and the IHO stated it is unclear from the hearing record why a general

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<sup>9</sup> Subsequent to the parents filing the due process complaint notice, in October and November 2011, the student underwent a physical therapy (PT) evaluation, a psychoeducational evaluation, an occupational therapy (OT) evaluation, a speech language observation, an observation at her 12:1+1 placement, and an independent educational evaluation (Dist. Exs. 30-34; Parent Ex. A). The CSE met on November 18, 2011 and developed another IEP for the student (Dist. Exs. 39-41).

education kindergarten classroom could not incorporate music as a reasonable accommodation to the student (id.). The IHO further noted that the district did not recommend a functional behavioral assessment (FBA) or behavioral intervention plan (BIP) for the student despite contending that she was too distractible for the general education environment, and the IHO found that the district's assertion that the student does not interact with peers was not supported by evidence in the hearing record (id. at pp. 17-18).

Next, the IHO found that the student could benefit from general education instruction "as much or more" than she benefitted from her then-current 12:1+1 special education class instruction (IHO Decision at pp. 18-19). He found that the "best possible environment" for the student for speech and language development is the general education classroom because general education students are more apt to engage the student, which he noted was not disputed by the parties (id. at p. 18). The IHO further found that the hearing record supported a conclusion that the student could do as well in a general education classroom with supports and services as she did in her 12:1+1 special class, and that the student would have more opportunity for language development and be able to make at least the same amount of progress on her IEP goals (id. at pp. 18-19).

Further, the IHO considered whether the student's placement in a general education environment would have a negative effect on the other students in the classroom (IHO Decision at p. 19). The IHO found that, while the student had "minor behavioral issues," the CSE did not recommend an FBA or BIP and there was no showing that the student exhibited any negative behaviors or had conflicts with other students (id.). The IHO noted that evidence in the hearing record indicates that the student is a "joyful child who responds with prompts to peer interaction" (id.). Thus, the IHO concluded that the student's behavior would not deny her access to the LRE (id.).

In accordance with his above findings, the IHO determined that the district failed to offer the student a FAPE by not providing a placement in the LRE (IHO Decision at p. 20). He further noted that he did not find the length of the student's bus ride to her then-current placement to be a basis for relief, and that the transportation aspect of the parents' LRE argument was without merit (id.). The IHO ordered that the CSE reconvene and develop an IEP for the student that places her in a general education setting with supplementary aids and services (id.).

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

This appeal by the district ensued. The district alleges that the IHO erred in finding that the district failed to offer the student a FAPE by not providing an education in the LRE. The district alleges that the IHO erred because numerous factual findings were not supported by the hearing record (see Pet. ¶¶ 58-80). The district also alleges that the IHO erred in formulating the remedy by usurping the role of the CSE to consider whether additional supports and services could enable the student to be educated in the general education class for core subjects and ordering that the student be integrated into a general education classroom. The district requests that the IHO's decision be annulled in its entirety.

The parents responded, denying many of the substantive allegations made by the district, particularly that the IHO erred in determining that the student was not offered a FAPE based on LRE considerations. The parents request that the IHO's decision be affirmed.<sup>10</sup>

## V. Applicable Standards – Least Restrictive Environment

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 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]).

The IDEA requires that a student's recommended program must be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see P. v. Newington Bd. of Educ., 546 F.3d 111 [2d Cir. 2008]; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105 [2d Cir. 2007]; Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 132 [2d Cir. 1998]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ., 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 CFR 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 CFR 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 CFR 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and the

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<sup>10</sup> Neither party has appealed the IHO's finding that the parents' LRE argument with respect to the length of the student's bus ride to and from the 12:1+1 placement at the time of the impartial hearing was without merit and not a basis for relief (IHO Decision at p. 20). Accordingly, this determination has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

continuum makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 CFR 300.115[b]).

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 supplementary 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 supplementary 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).<sup>11</sup>

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).

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]).

## **VI. Discussion**

Initially, I note that the hearing record evidences that this is a case of two very well-intentioned parties who have made multiple attempts to afford the student with what they believe to be an appropriate education, but continue to disagree as to what type of placement would provide the student with educational benefits while meeting the requirement that the student be placed in the LRE. I recognize both the district's repeated efforts in attempting to reconcile the parents'

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<sup>11</sup> 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).

desires for the student with what it believed to be appropriate, and the student's family's genuine and earnest advocacy for what they believed to be a proper educational setting for her.

However, with regard to the first factor of the first prong of the Newington test and whether the student could be educated satisfactorily in the general education classroom with supplementary aids and services, as explained below, it is unclear from the hearing record whether the district made reasonable efforts to accommodate the student in the general education classroom with supplementary aids and services. When at issue in an impartial hearing, a district must establish that it considered the full range of supplementary aids and services that could be provided to facilitate the student's placement in the general education classroom to enable students with disabilities to be educated with nondisabled children to the maximum extent appropriate (34 CFR 300.42, 300.114, 300.116; 8 NYCRR 200.1[cc], [bbb]; Placements, 71 Fed. Reg. 46588 [August 14, 2006]). Moreover, a student with a disability must not be removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum (*see* 8 NYCRR 200.4[d][4][ii][d]). While the IDEA does not require modification of the curriculum beyond recognition (Daniel R.R., 874 F.2d at 1048), the need for modification is "not a legitimate basis upon which to justify excluding a child" from the regular classroom unless the education of other students is significantly impaired" (Oberti, 995 F.2d at 1222, quoting Oberti v. Bd. of Educ., 801 F. Supp. 1392, 1403 [D.N.J. 1992]).

With regard to the June 2011 CSE meeting, the PPS director testified that she was called into the meeting by the CSE chairperson because the committee was having a difficult time coming to an agreement between what the student's preschool team was recommending, that being placement in a special class, and the parents' interest in inclusion with typical (nondisabled) children (Tr. p. 46). The PPS director reported that while she was present, the CSE discussed the 8:1+1 inclusion program in the neighboring school district, as well as "further options in the future" and the idea that special education was a fluid process (Tr. p. 47). She indicated that the CSE talked about the special education process in general and "if we tried a program that was not appropriate we would come back to the [CSE] and talk about concerns" (*id.*). The PPS director testified that the June 2011 CSE discussed the LRE for the student and that the nature of that discussion was that "the parents were interested in the most social -- typical social environment possible for [the student] to further her social abilities" and that from the perspective of the district and the student's preschool providers, that the student required a special class "to advance her cognitively to address her severe delay in the cognition area" (Tr. pp. 47-48). The PPS director testified that she did not believe the student could be provided the services she required in a general education kindergarten class because she required one-on-one instruction, much of it presented verbally by the teacher (Tr. pp. 48-49). She explained that modifying the program would not be a matter of working with the student on a different sound card or giving her a different worksheet, rather that the student required more verbal instruction, noting that when instructing the student "[y]ou have to speak in a louder tone of voice in a more direct manner, changing the instructions entirely" (*id.* at pp. 48-49).

The student's grandmother, who was present at the June 2011 CSE meeting, testified that the CSE's recommendation was based on the preschool graduate report and that the CSE did not discuss whether the student could be educated in a general education kindergarten with supports and services; rather it was she who raised the topic (Tr. pp. 526, 527-28). The student's grandmother stated that she was a proponent of inclusion for children with special needs and that she presented the members of the CSE with a summary of research she had done regarding the

benefits of inclusion (Tr. p. 528). She testified that other than thanking her, the other CSE members did not comment on her research summary (Tr. p. 528). To the extent that the June 2011 CSE discussed placing the student in a general education setting with supplementary aids and services, such consideration was not reflected in the CSE meeting minutes (Tr. pp. 124-25; see Dist. Ex. 20).<sup>12</sup> Likewise, the district's June 10, 2011 prior written notice to the parents indicated that a 15:1 special class placement at the district's elementary school was considered and rejected by the CSE as inappropriate, but did not indicate that placement in a general education setting was considered as an option by the CSE (Tr. p. 120; Dist. Ex. 22).<sup>13</sup>

The CSE convened for a second meeting in July 2011 with the PPS director serving as the CSE chairperson (Tr. p. 130). The PPS director testified that the student's mother and grandmother had visited the district's general education kindergarten class prior to the CSE meeting and that during the meeting there was a discussion regarding their observations (Tr. pp. 62-63). According to the PPS director, the student's mother agreed with the assessment of the elementary school principal that the pace of the general education kindergarten class would be too fast and too frustrating for the student (Tr. pp. 62-63, 157-58; see Tr. pp. 32, 295-96).<sup>14</sup> The PPS director stated that at the time of the meeting she perceived that the parents wanted the student to be able to socialize with typical kindergarten children and to be exposed to their socially appropriate behavior (Tr. p. 63). She further stated that it was her understanding that the parents did not think the academic part for the program would be appropriate for the student (Tr. p. 63). According to the PPS director, the CSE discussed whether it would be possible to have the student in a general education class with modifications and the nature of the conversation was that even with modifications a general education setting would not be appropriate for the student (Tr. pp. 158-59). She noted that the student's preschool special education teacher did not recommend any specific modifications to be tried in the general education setting because that was not her recommendation (Tr. pp. 159-60). The student's grandmother testified that she raised the topic of whether the student could be educated in a general education kindergarten class with supplementary aids and supports during the July 2011 CSE meeting and that, other than members stating that a general education kindergarten class would not be a good placement for the student, the CSE did not further discuss the issue (Tr. p. 531). As with the prior CSE meeting, any discussion during the July 2011 CSE's regarding placing the student in the district's general education kindergarten class was not memorialized in the CSE meeting minutes, nor was it

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<sup>12</sup> The PPS director correctly stated that there is no legal requirement that CSE meeting minutes set forth the details of every conversation at a CSE meeting (Tr. p. 161); however, at the impartial hearing, the district should present evidence in some form regarding which supplementary aids and services in a general education setting were considered and rejected by the district, rather than reiterating the ultimate conclusion that the student should not be in a general education setting. The resolution session is an example of one opportunity for the parties to clarify such points while the issue remains fresh in the parties' minds.

<sup>13</sup> As noted earlier, the PPS director testified that the amount of time individual students in the 8:1+1 inclusion program pushed in to the general education class was determined by each of their IEPs (Tr. pp. 114-15). In this case, the student's IEP did not indicate when she would be pushed in to the general education environment and the section of the IEP titled "Participation With Students Without Disabilities" was left blank (Dist. Ex. 21 at p. 3).

<sup>14</sup> The student's grandmother testified that she visited the district's general education kindergarten class in June 2011, along with the student's mother (Tr. p. 529). She was asked whether during the observation she or the student's mother had expressed concern that the general education class would be too difficult for the student (Tr. p. 529). She stated that neither of them had, but indicated that the elementary school principal had used words to that effect (Tr. pp. 529-30).

reflected in the prior written notice as an option considered and rejected by the CSE (Tr. pp. 119-20; Dist. Exs. 24; 26).<sup>15</sup>

In addition, the PPS director testified that she concluded during the July 2011 CSE meeting that the student would not make satisfactory progress in a general education kindergarten with supports and services (Tr. pp. 129-30). She further testified that personally, and not as a CSE chairperson, she concluded when she observed the student in June 2011 that the student's skill level was too low for a kindergarten classroom with supports and services (Tr. pp. 130-32). When asked if she had considered what "supports and services" might be provided to the student in a general education setting, the PPS director responded that she had engaged in conversations with the student's preschool teacher and that placement in a kindergarten class with "supports and services" was "not even a recommendation by the teacher" (Tr. pp. 132-33). Further, based on conversations with the elementary school principal, the PPS director testified that modifying the curriculum for the student would "water it down so much so that it would be a completely parallel program" (Tr. p. 134). The director also testified that modifications to the curriculum, hand-over-hand instruction, and a "lifting chair"<sup>16</sup> would not enable the student to benefit from instruction in a general education classroom, nor did she know of any modifications or supplementary aids or services that would allow her to derive a meaningful educational benefit from a general education class (Tr. pp. 199-200).

Regarding the August 2011 CSE meeting, the PPS director, who served as the CSE chairperson, perceived the discussion about placing the student in a general education kindergarten class in the context of modifying a 15:1 special education program at the district's elementary school with a "push-in into a regular education environment," like a typical kindergarten classroom (Tr. p. 73). However, she reported that the student's preschool providers and district personnel, after reviewing the student's records and working with the student, did not feel that the combination would provide an appropriate level of "cognition and instruction" for her (*id.*). The PPS director specified that the general education discussion was focused more on the 15:1 special class as the student's core curriculum with pushing into general education for specials (Tr. p. 75).

The district's concerns with the extent to which the teacher must modify the curriculum for the student is understandable (see Daniel R.R., 874 F.2d at 1048). However, unlike other cases, it is not clear that the student would be required to miss a substantial portion of the instructional time in a general education setting or that that she would be required to work on entirely different skill sets than her nondisabled peers (c.f. Beth B. v. Van Clay, 211 F. Supp. 2d 1020, 1032 [N.D.Ill.

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<sup>15</sup> The parties acknowledge that there was a meeting between the parents and the district's superintendent on August 4, 2011, with the parents' attorney in attendance (Tr. p. 71; Dist. Ex. 1 at p. 3). The student's grandmother, who attended the meeting, testified that it was obvious to her, based on the superintendent's comments, that the superintendent "didn't have any idea of who [the student] was or what her disabilities were" (Tr. pp. 532-33). According to the student's grandmother, the student's parents expressed their desire to have the student placed in a general education kindergarten class with supplementary aids and services (Tr. p. 533). The superintendent reportedly indicated that she would need time to train staff, train other personnel, and hire an aide, which was not possible for her to do (*id.*). The student's grandmother testified that she interpreted the superintendent's refusal as being based on administrative convenience (*id.*). The PPS director testified that the role of the superintendent was not to recommend programming for the CSE, rather that she advised the PPS director if she had questions of a legal nature, and that she could not change a CSE recommendation (Tr. pp. 71-72).

<sup>16</sup> There appears to be a transcription error—the student's IEP indicates that a Rifton chair was recommended as an assistive technology device (Dist. Ex. 28 at p. 10).

2001], aff'd 282 F.3d 493 [7th Cir. 2002]; see generally Hudson v. Bloomfield Hills Public Schs., 910 F. Supp. 1291, 1294 [E.D.Mich. 1995] [describing parallel instruction and various attempts to include a student in a general education setting]). There was little evidence in the hearing record regarding consideration of what type of supplementary aids and services might be attempted in a general education classroom to support the student in making progress toward the goals in her IEP (c.f. Application of a Child with a Disability, Appeal No. 03-093 [noting little to no benefit to a sixth grade student with interfering behaviors even when supplementary services and a modified curriculum were provided]).

Based on the foregoing, there is insufficient evidence in the hearing record to conclude whether the district considered including the student in a general education classroom with supplementary aids and services and whether the district could modify the general education curriculum to accommodate the student.

As to the second factor set forth in the first prong of Newington, the educational benefits available to the student in a general education class compared to the benefits provided in a special education class, the parties' disagree on the respective benefits of a special class placement versus a general education class. As further described below I find that there is some evidence that supports the IHO's conclusion that it appears that the student would receive benefits in terms of development of her social needs and communication skills by inclusion in a general education setting (IHO Decision at pp. 18-19; see Daniel R.R., 874 F.2d at 1049 ["a child may be able to absorb only a minimal amount of the regular education program, but may benefit enormously from the language models that his nonhandicapped peers provide"]), yet other evidence suggests that the student might not receive much benefit from placement in a general education class and that she required intense services in order to benefit from instruction.

With respect to the potential benefits the student might receive from a general education placement, the PPS director testified that socially, the student would be exposed to peers functioning at grade level (Tr. pp. 153-54). However, as stated previously, the PPS director also testified that she did not know of any modifications or supplementary aids or services that would allow the student to derive meaningful educational benefits from a general education class (Tr. pp. 199-200).<sup>17</sup>

The student's preschool speech language pathologist opined that in a general education kindergarten class the student "would be able to do whatever her aide would guide her through" and that she would be able to physically follow along, but that academically the instruction would be too fast-paced for her to keep up and that it would be difficult for her to effectively participate language-wise (Tr. pp. 255-56). Regarding whether there would be communication benefits as a result of placing the student with nondisabled peers, the speech-language pathologist testified that there was a benefit to being around other people "no matter where you are" because you hear language all the time (Tr. p. 256).

The student's preschool occupational therapist opined that she did not think a general education setting was the best place for the student because she requires maximum to intensive

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<sup>17</sup> While I appreciate the candor of the PPS director's statements that she did not know of any modifications or supplementary aids or services that would help the student function in a general education setting, it might have been more helpful if she had discussed which supplementary aids and services she had considered and rejected and why she believed they would not allow the student to make progress toward the goals in the IEP.

assistance to get her to engage in an activity (Tr. p. 294). The occupational therapist further testified that she believed the student would be best served in a small setting and that a general education kindergarten class may be too fast for the student (*id.*). However, the occupational therapist also stated that she could not say how the student would benefit or react to being in a general education kindergarten class with supports and services (Tr. p. 296).

The student's special education teacher during the 2011-12 school year at the 12:1+1 BOCES special class placement testified that the student was making minimal progress in her class, but that she was unsure whether the student could make satisfactory progress in a general education kindergarten class (Tr. p. 488). The student's speech therapist at the BOCES placement testified that she did not know if the student would be able to benefit from being in a full-time kindergarten class and that "[i]t would have to be seen" (Tr. p. 392).<sup>18</sup> With regard to the second factor of the first prong, I find that the evidence above shows that the district personnel and providers were confident that the student would receive educational benefits in a special class setting, but they were either unsure or unaware of the extent to which the student could also make progress on her IEP goals in a general education classroom with supplementary aids and services.

In considering the third factor set forth in the first prong of Newington, the possible negative effects of the inclusion of the student on the education of the other students in the class, I concur with the IHO's finding that it does not appear that the student's behavioral problems would disrupt the other students in a kindergarten class in any significant way. While the hearing record shows that the student did engage in some self-stimulatory behavior and at times threw objects, the CSE also determined that the student did not need strategies, including positive behavioral intervention, supports and other strategies to address behaviors that impeded her learning or that of others (Tr. pp. 124, 175; Dist. Exs. 18 at pp. 2, 6, 9; 20; 28 at p. 5). I also note the district's concerns with the amount of time the regular education teacher would need to devote exclusively to the student (Beth B., 211 F. Supp. 2d at 1033), but it is difficult to establish the validity of this concern in the absence of evidence regarding supplementary aids and services that was discussed previously.

## VII. Conclusion

I have conducted an independent review of the hearing record and reached the same conclusion that as the IHO, although I may have ascribed slightly different weight to some of the evidence.<sup>19</sup> Based on the above, I find that the district did not establish under the first prong of

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<sup>18</sup> The school psychologist at the student's then-current 12:1+1 BOCES placement and the parents' privately obtained independent educational evaluator, both of whom evaluated the student after the CSE meetings in question had been conducted and after the parents filed the due process complaint notice, also testified as to whether the student would benefit from a general education setting. The BOCES school psychologist testified that he did not think the student would benefit socially from being with students in a general education class for the full day given her other needs and her overall level of development (Tr. pp. 342-43). He also testified that the student needs a specific language program that is specifically developed for her, and that she does not have the cognitive ability to access a kindergarten curriculum (Tr. pp. 343, 356). The parents' private evaluator testified that the student could make satisfactory gains in an inclusive classroom, and that she is not too distractible to make progress in a general education kindergarten class (Tr. pp. 555, 582). The district's experts may or may not disagree with the private evaluator's viewpoints on strategies for inclusion to make progress toward the student's annual goals, but that discussion should occur within the context of a CSE meeting.

<sup>19</sup> I note that the IHO applied the appropriate legal standards and that his review was both thorough and careful.

the Newington test that the student could not be educated satisfactorily in the general education classroom with supplementary aids and services since there is very little discussion of the effect that particular supplementary aids and services would likely have upon the student (Newington, 546 F.3d at 120). However, I differ in one respect from the IHO's view of the appropriate remedy inasmuch as I am not persuaded that immediately placing the student in the general education classroom is the solution.<sup>20</sup> Since I am not persuaded that the district has established that the student should have been removed from the general education setting, I decline to address Newington's second prong, whether the student has been mainstreamed to the maximum extent appropriate.

Accordingly, I will remand this matter to the CSE to discuss whether placement in a general education class could be satisfactorily achieved with the use of supplementary aids and services, and to consider whether the general education curriculum can be modified to accommodate the student. I will also modify the IHO's decision to the extent that he directed the district to place the student in a general education class, as this opinion should not be read as requiring that the student's future education take place in a general education setting.

I have considered the parties' remaining contentions and find them unnecessary to address in light of my determinations herein.

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that the IHO decision dated February 10, 2012, is modified to direct the CSE to reconvene to discuss whether placement in a general education class could be satisfactorily achieved and allow for progress toward the student's annual goals with the use of supplementary aids and services, and to consider whether the general education curriculum can be modified to accommodate the student.

**IT IS FURTHER ORDERED** that, unless the parties agree otherwise, the CSE shall reconvene within 30 days of this decision.

**Dated:** Albany, New York  
April 26, 2012

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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**

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<sup>20</sup> The IHO was facing a different circumstance at the time he rendered his decision and at this juncture I note that projected June 2012 date for the student's annual review is rapidly approaching in which it is likely that the parties must consider once more the degree to which the student would be able to access the first grade curriculum.