



The University of the State of New York

The State Education Department

State Review Officer

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No. 13-191

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Francesca J. Perkins, Esq., of counsel

Partnership for Children's Rights, attorneys for respondents, Erin McCormack-Herbert, 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 the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to pay the costs of the student's tuition to the Cooke Center for Learning and Development (Cooke) for the 2012-13 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

On May 23, 2012, the CSE convened to conduct the student's annual review and to develop his IEP for seventh grade during the 2012-13 school year (Parent Ex. C at p. 1, 22). Finding that the student remained eligible for special education and related services as a student with a speech or language impairment, the May 2012 CSE recommended integrated co-teaching (ICT) services for instruction in mathematics and social studies, a 12:1 special class placement for instruction in all other subject areas, and related services consisting of three 40-minute sessions per week of speech-language therapy in a small group and one 40-minute session per week of counseling in a

small group (id. at pp. 1, 17-18, 22-23).^{1, 2} In addition, the May 2012 CSE developed annual goals and recommended management needs to address the student's needs (id. at pp. 3-17).

On June 15, 2012, the parents signed an enrollment contract with Cooke for the student's attendance during the 2012-13 school year beginning September 2012 (see Parent Ex. G at pp. 1-2).³

By final notice of recommendation (FNR) dated August 13, 2012, the district summarized the special education and related services recommended by the May 2012 CSE, and identified the particular public school site to which the district assigned the student to attend for the 2012-13 school year (see Parent Ex. D).

By letter dated August 21, 2012, the parents informed the district that they did not agree with the recommendations in the student's May 2012 IEP for an "ICT setting for math and social studies and a 12:1 special class setting for all other periods of instruction" (Parent Ex. L at p. 2). The parents also advised that although they had not visited the assigned public school site, it could not offer the student "any program or services that would overcome the inappropriateness of the IEP" (id.). The parents notified the district of their intentions to place the student at Cooke for the 2012-13 school year, and to seek reimbursement for the costs of the student's tuition (id.). The parents also requested that the district provide the student with transportation for the 2012-13 school year (id.). Finally, the parents noted that they would continue to communicate with the assigned public school site, and would enroll the student at the assigned public school site if it could appropriately meet his "special education needs in the least restrictive environment" (LRE) (id.).

By letter dated September 7, 2012, the parents advised the district that they had visited the assigned public school site on August 28, 2012, and based upon conversations with the principal, they concluded that the assigned public school site "would not implement" the student's May 2012 IEP as written (Parent Ex. N at pp. 1-2). As a result, the parents indicated that the assigned public school site was not "able or willing" to implement the student's May 2012 IEP, and was not an appropriate placement for the student for the 2012-13 school year (id. at p. 2). Therefore, the parents advised that the student would attend Cooke for the 2012-13 school year, and they would seek payment of the costs of the student's tuition from the district (id.).

A. Due Process Complaint Notice

By due process complaint notice dated February 25, 2013, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (see Parent Ex. A at p. 1). The parents asserted that they did not agree with the

¹ The May 2012 IEP recommended the provision of ICT services in mathematics and social studies as a direct service to the student to be provided in a general education classroom (see Parent Ex. C at pp. 17-18).

² The student's eligibility for special education programs and services as a student with a speech or language impairment is not in dispute (see 34 CFR § 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

³ The Commissioner of Education has not approved Cooke as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

recommendations in the student's May 2012 IEP for an "ICT setting for math and social studies and a 12:1 special class setting for all other periods of instruction" (id. at p. 4). The parents also asserted that the assigned public school site was not appropriate and could not implement the student's May 2012 IEP (id.). Regarding the unilateral placement at Cooke, the parents indicated that Cooke provided the student with "1:1 teaching support within a general education class setting," which met the student's special education needs in the LRE (id. at p. 5). As relief, the parents requested direct payment of the costs of the student's tuition to Cooke for the 2012-13 school year (id.).

B. Impartial Hearing Officer Decision

On April 15, 2013, the IHO conducted a prehearing conference with the parties, and on April 22, 2013 the matter proceeded to an impartial hearing, which concluded on June 18, 2013 after four days of proceedings (see Tr. pp. 1-549). In a decision dated September 3, 2013, the IHO found that the district failed to offer the student a FAPE in the LRE for the 2012-13 school year, that Cooke was an appropriate placement, and that equitable considerations weighed in favor of the parents' request for direct funding of the student's tuition (see IHO decision at pp. 29-38).

To support the conclusion that the district failed to offer the student a FAPE in the LRE, the IHO found that the May 2012 CSE failed to consider the "full range of services that could be provided" to the student in a general education setting (IHO Decision at pp. 31-32). However, the IHO also noted that the May 2012 CSE based its recommendation for ICT services for the student's mathematics and social studies classes upon the student's "successful inclusion in Cooke for math for the 2011-12 school year and his ability to be mainstreamed with appropriate support" (id. at p. 32). In addition, the IHO determined that the assigned public school site was not appropriate, and could not implement the student's May 2012 IEP based upon the testimony presented at the impartial hearing (id.). Consequently, the IHO found that the district failed to offer the student a FAPE for the 2012-13 school year (id. at p. 33).

Turning to the parents' unilateral placement, the IHO found that since the student was transitioning from an "ungraded self contained classroom," Cooke determined that a "sixth grade class would be appropriate for [the student] since his skills with support were basically on a fifth grade level" (IHO Decision at p. 34). The IHO also found that student's 1:1 assistant accompanied the student to all of his core classes, provided 20-minute "tutoring sessions" to him each morning, provided 40-minute to 50-minute "tutoring sessions" to the student three days per week, and otherwise assisted the student with academics, previously taught material, note taking skills, test taking skills, and study skills (id.). The IHO also noted, however, that the 1:1 assistant's "primary goal" was to teach the student to be an independent learner and that he demonstrated progress in this area (id. at pp. 34-35). While not dispositive, the IHO indicated that the student demonstrated "significant progress" at Cooke (id. at pp. 35-36). Based upon the evidence, the IHO concluded that Cooke provided the student with educational instruction specially designed to meet his unique needs, the student benefitted from the instruction, and the student received educational benefit (id. at p. 36).

With respect to equitable considerations, the IHO concluded that the parents participated in the May 2012 CSE meeting, provided all "necessary reports and evaluations," communicated objections about the student's program and placement to the district, and provided appropriate

notice of the student's unilateral placement at Cooke for the 2012-13 school year (see IHO decision at p. 36). The IHO also concluded that the parents were entitled to an award of direct tuition payment, and directed the district to pay Cooke directly upon proof of the student's attendance (id. at pp. 37-38).

IV. Appeal for State-Level Review

The district appeals, and contends that the IHO erred in finding that the ICT services and 12:1 special class placement recommendations in the student's May 2012 IEP were not appropriate, the May 2012 CSE did not consider the full range of services that could be provided in the general education setting, and the assigned public school site was not appropriate. The district also argues that the IHO erred in finding that Cooke was an appropriate placement because the student attended a parochial school selected by Cooke, and further, the IHO erred in finding that equitable considerations weighed in favor of the parents' requested relief because the parents had no intention of removing the student from Cooke to attend a public school site. Finally, the district asserts that the parents were not entitled to direct payment of the costs of the student's tuition at Cooke because they failed to demonstrate that they were legally obligated to pay Cooke's tuition.

In an answer, the parents respond to the district's allegations, and assert additional arguments to uphold the IHO's findings that the district failed to offer the student a FAPE in the LRE for the 2012-13 school year, that Cooke was an appropriate placement, equitable considerations weighed in favor of their requested relief, and the parents were entitled to direct payment of the costs of the student's tuition at Cooke.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 557 U.S. 230, 239 [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; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]).

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, 111 [2d Cir. 2008]; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 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. Clementon Sch. Dist., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. N. 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 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 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 N. 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]).⁴ 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 N. 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).

In fashioning a test to assess a student's placement in the LRE, the Court acknowledged that the IDEA's "strong preference" for educating students with disabilities alongside their nondisabled peers "must be weighed against the importance of providing an appropriate education" to students with disabilities (Newington, 546 F.3d at 119, citing Walczak, 142 F.3d at

⁴ 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).

122, and Briggs v. Bd. of Educ. of Conn., 882 F.2d 688, 692 [2d Cir. 1989]; see Lachman v. Ill. State Bd. of Educ., 852 F.2d 290, 295 [7th Cir. 1988]).⁵ In recognizing the tension created between the IDEA's goal of "providing an education suited to a student's particular needs and its goal of educating that student with his non-disabled peers as much as circumstances allow," the Court explained that the inquiry must be fact specific, individualized, and on a case-by-case analysis regarding whether both goals have been "optimally accommodated under particular circumstances" (Newington, 546 F.3d at 119-20, citing Daniel R.R., 874 F.2d at 1044).⁶

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

A. ICT Services, 12:1 Special Class Placement, and LRE

In this case, the crux of the parents' dispute with the student's May 2012 IEP rests solely on the recommendation for a placement consisting of a combination of ICT services and a 12:1 special class for the 2012-13 school year in contravention of the parents' request at the May 2012 CSE meeting that the student be placed in a general education setting with full-time, 1:1 support (see Parent Ex. A at pp. 3-4). The IHO found that the district failed to offer the student a FAPE, in part, because the May 2012 CSE failed to consider the "full range of services that could be provided" to the student in a general education setting, which violated LRE principles (IHO Decision at pp. 31-32).⁷

However, prior to the IHO's decision in this case the Second Circuit noted that the two-prong test adopted in Newington did not adequately address the LRE question involving a student's recommended placement in a "general education environment with [ICT] services," which the Court described as a placement "somewhere in between a regular classroom and a segregated, special education classroom" (M.W. v. New York City Dep't of Educ., 2013 WL 3868594, at *9-*10 [2d Cir. July 29, 2013]). Declining in that instance to analyze an ICT classroom placement as

⁵ In 1994, the Office of Special Education (OSEP) for the United States Department of Education issued a policy memorandum to provide guidance regarding the IDEA's LRE requirement, which opined that the "overriding rule in placement [was] that each student's placement must be individually-determined based on the individual student's abilities and needs" (OSEP Memorandum 95-9, 21 IDELR 1152 [Nov. 23, 1994]; see Letter to Vergason, 17 IDELR 471 [OSERS 1991] [emphasizing that a student's "educational placement . . . must be determined by the contents of that child's IEP"]; Letter to Lott, 16 IDELR 84 [OSEP 1989] [same]).

⁶ 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).

⁷ By addressing the issue of whether the May 2012 CSE "considered" the full range of services that could be provided to the student in a general education setting, the IHO exceeded her jurisdiction by sua sponte raising and addressing a procedural violation related to the CSE process that the parents did not allege in the due process complaint notice (see Parent Ex. A at pp. 1-6). On this basis, alone, the IHO's finding must be reversed. However, in this instance, alternative findings regarding the substantive issue that was disputed by the parties will be issued out of an abundance of caution.

a placement in a "special class," the Court determined that the appropriate question focused on whether the "ICT services were appropriate supports for [the student] within a general education environment" (M.W., 2013 WL 3868594, at *11-*12).⁸ Therefore, as discussed more fully below, a review of the hearing record within this context does not support the IHO's decision.

B. Relevant Educational History

According to the evidence, the student has been eligible for special education programs and related services as a student with a speech or language impairment since kindergarten in September 2005 (see Parent Ex. A at pp. 1-2; see also Tr. pp. 452-53). For first and second grade, the student reportedly attended a general education setting with speech-language therapy services; for third grade (2008-09 school year), the general education setting with related services was no longer adequate to meet the student's needs, and the district modified the student's IEP to recommend ICT services and speech-language therapy (see Parent Ex. A at p. 2; see also Tr. pp. 452-53). The student completed third grade with ICT services at the district public school, however due to his experiences, the parents decided to remove the student from the public school and place him in a parochial school for fourth grade beginning in September 2009 (id.). At the parochial school, the student's school performance deteriorated, and the parents sought a reevaluation by the district to "identify an appropriate placement" for the student (see Parent Ex. A at p. 2; see also Tr. pp. 453-55). As a result of the 2009 evaluations, a December 2009 CSE reviewed the student's IEP and recommended a 12:1 special class placement in a community school, which the student attended for the remainder of fourth grade between January 2010 and June 2010 (see Parent Ex. A at pp. 2-3; see also Tr. pp. 453-56).

In September 2010 for fifth grade, the student began attending a 12:1 special class (see Parent Ex. A at p. 3; see also Tr. pp. 455-57). The student complained to his parents about the other students in the classroom, and with the district's assistance and the parents' consent, the student was transferred from the 12:1 special class placement into a classroom with ICT services for approximately two weeks (see Parent Ex. A at p. 3; see also Tr. pp. 458-61). Because the student was not able to "keep up with the lessons and was lost," the student returned to the 12:1 special class placement (see Parent Ex. A at p. 3; see also Tr. pp. 460-64).

In October 2010, the parents unilaterally removed the student from his fifth grade, 12:1 special class placement at a district public school and placed him at Cooke (see Parent Ex. A at p. 3; see also Tr. pp. 463-65). During the 2010-11 and 2011-12 school years, the student attended ungraded, self-contained classes for all subjects at Cooke (see Tr. pp. 195-96, 242, 265). During the 2010-11 school year, the student attended a "partial inclusion" classes for mathematics and social studies; for the 2011-12 school year, the student received instruction in the fifth grade

⁸ In describing how LRE related to the continuum of service options, State guidance in 2008 indicated that ICT services were "directly designed to support the student in his/her general education class" ("Continuum of Special Education Services for School-Age Students with Disabilities," at pp. 3-4, Office of Vocational and Educational Services for Individuals with Disabilities (VESID) [Apr. 2008], available at <http://www.p12.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf>).

curriculum at Cooke, and attended a "partial inclusion class . . . just for math" (Tr. pp. 195-96, 201-04, 244-45).⁹

According to the Cooke progress reports for the 2011-12 school year, the student received reading instruction in a small group of four students (Dist. Ex. 1 at p. 2). Between September 2011 and March 2012, the student focused on skills associated with "late 3rd grade" (id. at pp. 2-3). In writing, the Cooke progress reports indicated that the student received instruction in a 10:1+2 classroom setting, and between September 2011 and March 2012, the student focused on skills associated with "late 3rd/early 4th grade" (id. at pp. 4-5). In mathematics, the student received instruction focusing on skills associated with "grade 5" in an "inclusion class of 20 students" supported by a "teacher assistant" between September 2011 and November 2011 (first trimester) (id. at pp. 6-7). For the second trimester in mathematics, the student returned to a 9:1+1 classroom setting, with the additional support of two paraprofessionals, due to a "scheduling conflict" (id. at p. 7). He continued to work on mathematics skills associated with "grade 5" (id.). In social studies, the student received instruction in a 10:1+2 classroom setting, and in science, the student received instruction in a 13:1+2 classroom setting with the additional support of two paraprofessionals (id. at pp. 9-11).

C. May 2012 IEP

As noted in the May 2012 IEP, the following individuals attended the May 2012 CSE meeting: a district special education teacher (who also acted as the district representative) and a school psychologist, a translator, an additional parent member, both parents, a Cooke representative, the Cooke "[f]ull [i]nclusion" supervisor (Cooke supervisor), and the student's Cooke classroom teacher for mathematics and science (via telephone) (Parent Ex. C at p. 25).¹⁰ The district special education teacher testified that prior to the meeting and in the development of the May 2012 IEP, he reviewed—and the May 2012 CSE relied upon—the student's prior IEP, progress reports from Cooke for the 2011-12 school year, the student's most recent psychological evaluation report, and the student's most recent speech-language evaluation report, as well as information provided to the May 2012 CSE by the Cooke participants and the parents (see Tr. pp. 35, 40-49, 51-53, 55-78; Dist. Ex. 1; Parent Exs. E-F).

Based upon the available information, the May 2012 CSE developed the student's 2012-13 IEP for seventh grade beginning September 2012 (see Parent Ex. C at p. 1; see also Tr. pp. 98). As reported in the May 2012 IEP evaluation results, the student demonstrated verbal and nonverbal reasoning abilities in the low average range, processing speed in the average range, working memory in the low average range, and a full-scale IQ in the low average range (Parent Ex. C at p. 1; see Parent Ex. E at p. 4). Consistent with these results, the student exhibited academic skills in

⁹ Testimony at the hearing record inconsistently describes the student's participation in a partial inclusion program at Cooke for social studies as either the 2010-11 school year or the 2011-12 school year (Tr. pp. 244-45, 527-35). However, other than the ambiguous testimony, the hearing record does not contain information with respect to the student receiving instruction in social studies in an inclusion setting.

¹⁰ Cooke's full inclusion program provided its special education students with the opportunity to attend a general education setting—with full-time, individual support—at a parochial school affiliated with Cooke (see Tr. pp. 186-90, 193). The regular education teacher at the parochial school provided the classroom instruction to the special education students who attended the full inclusion program (Tr. pp. 190-91).

reading comprehension, computation, and math fluency within the low average range, and within the average range in decoding and spelling (compare Parent Ex. C at p. 1, with Parent Ex. E at pp. 3-5). In addition, a speech-language evaluation revealed the student's receptive language skills as within the moderately delayed range for his age, as well as expressive language skills that fell within the very low range of performance for his age (compare Parent Ex. C at p. 1, with Parent Ex. F at pp. 3-4).

Relying primarily upon the 2011-12 Cooke progress reports, the May 2012 CSE generated statement of the present levels of performance and individual needs section of the May 2012 IEP (compare Dist. Ex. 1 at pp. 1-7, 12-15, with Parent Ex. C at pp. 1-3). As a result, the May 2012 IEP reflected that the student's reading skills were "estimated at an early 5 grade level," he struggled with monitoring his reading comprehension, he had difficulties with receptive and expressive language, and he benefitted from slowing down and summarizing to facilitate comprehension of reading material (Parent Ex. C at p. 1).¹¹ At that time, the student needed to improve his ability to make "text to text, and text to world connections;" to improve his character analysis, implied information, identifying themes, and extracting information from content area reading (id.). In writing, the May 2012 IEP indicated that the student worked on skills associated with the "3 to 4 grade level" in writing, but exhibited strengths in his ability to write about feelings and opinions, organizing non-fiction writing, effectively organizing information into paragraphs, and using description and details (id. at pp. 1-2). He continued to need guidance in editing and revising his work for punctuation, spelling and grammar; he needed support using transitional phrases; he needed to improve his note-taking ability; and he benefitted from the use of graphic organizers and outlines (id. at p. 2).

In mathematics, the May 2012 IEP reflected that the student worked on skills associated with a "5th grade level," and he has "mastered the "3rd and 4th grade math vocabulary" (Parent Ex. C at p. 2). While noting his strengths in this area, the May 2012 IEP also indicated that he struggled with following steps for long division and needed to practice; in addition, the student required prompts while solving multi-step problems and needed to work on estimating amounts (id.).

In addition, the May 2012 IEP described the student as cooperative, motivated, and enthusiastic for learning, noting further that he was responsible, organized, participated in class, and completed his homework (Parent Ex. C at p. 2). Socially, the student demonstrated age appropriate skills; he interacted well with his peers, and was receptive to feedback from adults (id. at p. 3). The May 2012 IEP also described the student as mature and trustworthy and that he displayed good self-esteem "in his current environment," but needed to develop his "self-confidence and self-advocacy skills when in the inclusion environment" (id.).

¹¹ Notwithstanding the information presented in the 2011-12 Cooke progress reports, the May 2012 IEP indicated that the student's reading skills were "estimated at an early 5 grade level" (Parent Ex. C at p. 1). Although it is unclear how the May 2012 CSE learned about this estimated reading level, the hearing record suggests that the Cooke supervisor may have contributed this information at the May 2012 CSE meeting (see Tr. p. 197 [indicating that to ensure that the student could "understand the fifth grade materials," the Cooke supervisor had the student "read" a passage from a book that the "fifth grade classroom" used, and asked him questions based upon the book]).

With respect to parents' concerns, the May 2012 IEP included notations that the student needed to "continue working on developing his academic skills," he needed to develop his "self-advocacy skills and self-confidence to transition to an inclusion setting," and the student wore glasses" (Parent Ex. C at pp. 2-3). In addition, the parents expressed concerns about the student needing to "change classes too often when attending a small class while being mainstreamed in an ICT for his strongest subjects" (id. at p. 23).

In relevant part, the Cooke supervisor attended the May 2012 CSE meeting because she was familiar with the student's academic needs and she, upon discussions with his teachers and related services providers at Cooke, believed that the student was "ready for a general ed[ucation] program, with support" in a full inclusion program (Tr. p. 197). The Cooke supervisor testified that the May 2012 CSE discussed the ICT services and 12:1 special class placement recommendations (Tr. p. 198). In particular, she testified that she expressed her concern that the 12:1 special class placement was "too restrictive" for the student because he was currently attending that type of class, his teachers believed he "needed a more challenging environment," and the student "could do a general ed[ucation] curriculum, with support" (id.).¹² The Cooke supervisor further testified that socially, the student was age appropriate, and could be with typically developing peers (id.). She also testified that in September 2012, the student began attending a sixth grade full inclusion program at Cooke (Tr. pp. 193-94, 196-97).¹³

In reaching the decision to recommend ICT services and a 12:1 special class placement, the May 2012 CSE rejected ICT services only for all of the student's major subjects as "not supportive enough," and similarly, the May 2012 CSE rejected 12:1+1 and 12:1 special class settings in a community school only as "too restrictive" for all of the student's major subjects (Parent Ex. C at p. 23). In particular, the district special education teacher testified that in reaching its conclusion district focused on the student's academic strengths in mathematics and social studies, as well as information provided by the Cooke participants about the student's ability to be "mainstreamed . . . into a general education class" with a "one to one paraprofessional" (Tr. pp. 78-81). Given the student's confidence in these particular areas, the district balanced the options for providing appropriate services on the "continuum" while simultaneously making an effort to "keep him mainstreamed" (Tr. pp. 80-81). However, the district special education teacher also noted that the May 2012 CSE did not think it was "necessary" for the student to have a one-to-one paraprofessional because the "presence of a special education teacher would be sufficient to offer

¹² As noted above, to ensure that the student could "understand the fifth grade materials," the Cooke supervisor had the student "read" a passage from a book that the "fifth grade classroom" used, and asked him questions based upon the book (Tr. p. 197).

¹³ The student's full-time inclusion assistant who provided services during the 2012-13 school year testified that at the beginning of the school year, the student was "upset to be in a sixth grade class" because he knew was "age appropriate for seventh grade" (Tr. pp. 318, 334-35). The inclusion assistant also testified that the student would be "lost if he did not have the additional support" in the sixth grade inclusion program (see Tr. pp. 336-37). She attended all of the student's classes with him, except for art, music, gym, Spanish, lunch, and his related services sessions (Tr. p. 319). In addition to accompanying the student to his classes, the inclusion assistant also worked with the student in a "one to one setting" during "tutoring" sessions in a room near the computer lab (Tr. pp. 320-24). Generally, the inclusion assistant described the student as socially on the same level as the other students in his classes, but academically, he was a "little behind" (Tr. p. 349). She further testified that for the 2012-13 school year, the student had been "held back" and placed in a sixth grade inclusion program because he was in the process of transitioning from the Cooke self-contained classes into the inclusion program (Tr. pp. 362-64).

. . . any additional support he might need, in his mainstream class" with the general education population (Tr. p. 81). In addition, the district special education teacher testified that the district was also focused on appropriately addressing the student's areas of academic weakness—such as English language arts (ELA) and the "minors" (science), in addition to his receptive and expressive language deficits—and determined that he required the "more intense direct instruction" offered in a 12:1 special class (Tr. pp. 81-82, 120-21). The district special education teacher further testified that an ICT program was a "general education program, with two teachers in it" (Tr. pp. 131-32).¹⁴

With regard to the ICT services, the Cooke supervisor testified that it would not provide the student with sufficient support, but indicated that the student could be placed in a general education setting, with support, because the student was ready to move on to the "next grade curriculum" (Tr. pp. 198-99). The Cooke supervisor testified that the parents objected to the ICT services and 12:1 special class placement based upon their own conversations with the student's teachers and related services' providers and based upon their own belief that the student required "something more challenging" (Tr. p. 200). Given that the student had previously experienced difficulty in an ICT classroom in a public school, the parents did not believe that the student could attend an ICT for mathematics and social studies "without any one on one support, that could help him with the academic piece of it, because he would need help with the academics" (Tr. pp. 200-01). In response to the parents' concerns, the Cooke supervisor testified that the district CSE members indicated that the district did not have a "program where they had a trained assistant that could help him with the academics" (Tr. p. 201; see Tr. pp. 80-81, 94 [relating district special education teacher's testimony that the district did not offer a program that replicated the inclusion model offered through Cooke]; but see Tr. pp. 94-96 [reflecting testimony that the district "could" recommend a "one to one paraprofessional" if the student required it, even in an inclusion setting]).¹⁵

When asked why the May 2012 CSE did not recommend one-to-one support in addition to the ICT services recommended for the student in mathematics and social studies, the district special education teacher testified that one-to-one was the "most restrictive environment" on the continuum and such support did not allow the student to "learn how to function in a mainstream

¹⁴ With respect to the promotion criteria in the May 2012 IEP, the district special education testified that the student was not expected to "meet 65% of the sixth grade criteria" (Tr. pp. 123-25). Rather, the district special education teacher explained that "three dimensions of promotion" existed within the district's schools: (1) students must achieve "at least a two on the ELA and math tests," (2) attendance, and (3) class performance (Tr. pp. 125-26). He further testified that while the ELA and math test scores were "non-negotiable," both the attendance and class performance could be modified (Tr. p. 126). For the student in question, the May 2012 CSE discussed and decided to modify the class performance, i.e., the student's promotion would be measured by him achieving 65 percent of sixth grade "in class ELA performance, and in class math performance" (id.).

¹⁵ In testimony, the parents acknowledged that they asked for a "regular class with a . . . paraprofessional" at the May 2012 CSE meeting (Tr. pp. 480-85). In addition, the parents acknowledged that if the student had attended a public school for the 2012-13 school year, he would attend seventh grade (Tr. p. 474). However, the parents further testified that the student had not been enrolled in a seventh grade class for the 2012-13 school year because "according to his academic level . . . , [he was] not prepared to participate in a seventh-grade class, in a regular class" (Tr. pp. 522-23).

class" (Tr. p. 83).¹⁶ In addition, he testified that the special education teacher for the ICT services would provide the support the student required, and the special education teacher would "adapt and modify the curriculum so it [was] accessible" to the student (*id.*; *see* Tr. pp. 86-87, 131). In addition, based upon the student's abilities, the district special education teacher testified that the student did not need one-to-one assistance (Tr. p. 83; *see* Tr. pp. 86-87). During cross-examination, the district special education teacher testified that providing one-to-one support within an ICT or a general education setting was "more restrictive" than a 12:1 special class placement (*see* Tr. pp. 104-05).

Based upon the foregoing, the hearing record supports a finding that the May 2012 CSE properly weighed the importance of offering the student an educational program tailored to his individual needs against the IDEA's strong preference for educating students with disabilities alongside their nondisabled peers when arriving at the decision to recommend ICT services within the general education environment and a 12:1 special class placement. Under *M.W.*, the evidence supports a finding that the recommended ICT services within a general education setting were properly designed to support the student's academics strengths in the areas of mathematics and social studies, especially in light of the student's anticipated participation in seventh grade, and that the special education teacher in the ICT classrooms would appropriately support the student's needs. The hearing record also supports a finding that the recommended ICT services in the general education setting for mathematics and social studies were appropriate and reasonable when considering the student's current academic levels at the time of the May 2012 CSE meeting.

In addition, the hearing record also supports a finding that prior to removing the student from the general education setting and recommending that the student receive instruction in all other subject areas in a 12:1 special class placement, the district was attending to the student's areas of academic weakness—in light of his anticipated participation in seventh grade—and determined that he could not be adequately supported in a less restrictive setting with supplementary aids and services because the student required more intensive, direct instruction in order to receive a FAPE. Although the parents may have preferred that the May 2012 CSE recommend a general education setting with 1:1 support, and the hearing record reveals that the student—during the 2012-13 school year—appeared to achieve success within this environment through the full inclusion program at Cooke, the hearing record also indicates that due to the

¹⁶ State guidance issued in January 2012 describes the considerations for determining if a student requires a one-to-one aide, as well as the roles and responsibilities of a one-to-one aide (*see* "Guidelines for Determining a Student with a Disability's Need for a One-to-One Aide," at pp. 1-5, Office of Special Educ. Mem. [Jan. 2012], available at <http://www.p12.nysed.gov/specialed/publications/1-1aide-jan2012.pdf>). In pertinent part, the memorandum indicates that the "assignment of a one-to-one aide may be unnecessarily and inappropriately restrictive," noting that a goal for all students with disabilities was to "promote and maximize independence" (*id.* at p. 1). "One-to-one aides may not be used as a substitute for certified, qualified teachers for an individual student or as a substitute for an appropriately developed and implemented behavioral intervention plan or as the primary staff member responsible for implementation of a behavioral intervention plan" (*id.*). In addition, while a "teaching assistant may assist in related instructional work, primary instruction must be provided to the student by a certified teacher(s)" (*id.*). A "teacher aide may assist in the implementation of a behavioral intervention plan, but may not provide instructional services to a student" (*id.*; *see also* "Teaching Assistants and Teacher Aides Compared," Office of Teaching Initiatives [Aug. 31, 2009], available at <http://www.highered.nysed.gov/tcert/career/tavsta.html>).

student's academic levels, he was placed in a sixth grade classroom for the 2012-13 school year.¹⁷ In this case, the May 2012 CSE acted reasonably in offering the student a combined program of ICT services and a 12:1 special class placement given his then-current academic levels and his relatively recent success in a partial inclusion program at Cooke.

VII. Conclusion

Having determined that the evidence in the hearing record demonstrates that the district sustained its burden to establish that it offered the student a FAPE in the LRE for the 2012-13 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether the student's unilateral placement at Cooke was an appropriate placement (Burlington, 471 U.S. at 370).

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated September 3, 2013, is modified by reversing those portions which found that the district failed to offer the student a FAPE in the LRE for the 2012-13 school year, and which ordered the district to directly pay the costs of the student's tuition to Cooke.

Dated: **Albany, New York**
 November 12, 2013

JUSTYN P. BATES
STATE REVIEW OFFICER

¹⁷ State regulation requires that 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]).