The University of the State of New York

The State Education Department
State Review Officer
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No. 17-008

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

Appearances:
Ferrara Fiorenza, PC, attorneys for respondent, Susan T. Johns, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which determined that the educational program and related services recommended by respondent's (the district's) Committee on Special Education (CSE) for their son for the 2016-17 school year were appropriate. The appeal must be sustained in part.[1]

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

[1] In September 2016, Part 279 of the Practice Regulations were amended, which became effective January 1, 2017, and are applicable to all appeals served upon an opposing party on or after January 1, 2017 (see N.Y. Reg., Sept. 28, 2016, at pp. 37-38; N.Y. Reg., June 29, 2016, at pp. 49-52; N.Y. Reg., Jan. 27, 2016, at pp. 24-26). Although the relevant events at issue in this appeal occurred before the effective date of the 2016 amendments, the new provisions of Part 279 apply, as the request for review was served upon the opposing party after January 1, 2017; therefore, citations contained in this decision, are to the amended provisions of Part 279 unless otherwise specified.

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[a]). 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

In this case, the student first received special education and related services through Early Intervention Program for approximately one month in late 2012 (see Dist. Ex. 3). The services terminated because the student moved out of the country (id.). Upon his return to the United States in February 2014, the parents referred the student to the Committee on Preschool Special

Education (CPSE) for an evaluation (id.; see Dist. Exs. 4; 6 at p. 1; 11 at p. 1).[2] After receiving the parents' consent to evaluate the student in May 2014, a CPSE convened in June 2014 for an initial eligibility determination meeting and found the student eligible for special education and related services as a preschool student with a disability (see Joint Ex. 2 at p. 1; Dist. Ex. 11 at pp. 2-4; see generally Dist. Exs. 5-9).[3] The June 2014 CPSE recommended that the student receive special education itinerant teacher (SEIT) services and occupational therapy (OT) beginning in July and August 2014, and recommended the same services for September 2014 through June 2015 (see Joint Ex. 2 at p. 1).[4] In August 2014, a CPSE convened to review the student's program (see Dist. Ex. 15 at p. 1; see generally Dist. Exs. 13-14). The August 2014 CPSE modified the student's IEP by increasing the frequency of the student's SEIT services for September 2014 through June 2015; the CPSE also recommended a speech-language evaluation of the student (compare Dist. Ex. 15 at p. 1, with Joint Ex. 2 at p. 1; see Dist. Ex. 16 at p. 1).

Following a speech-language evaluation in September 2014, the CPSE convened for a reevaluation review (see Dist. 19 at p. 1; see generally Dist. Exs. 17-18). The September 2014 CPSE discontinued the SEIT services previously recommended in the August 2014 IEP, and instead, recommended a 12:1+2 special class placement in a non-integrated setting, speech-language therapy services, special transportation, and modified the location where the student received OT services (compare Dist. Ex. 19 at p. 1, with Dist. Ex. 15 at p. 1; see generally Dist. Exs. 20-21). Pursuant to the modifications, the student was placed in a State-approved non-integrated preschool setting (preschool) on or about October 1, 2014 (see Tr. pp. 466-67; see generally Dist. Ex. 23).

In March 2015, the CPSE convened for a program review (see Dist. Ex. 24 at p. 1). At that time, the March 2015 CPSE modified the student's program from a 12:1+2 special class placement in a non-integrated setting to a recommendation that the student attend a 12:1+2 special class placement in an integrated setting beginning at the end of March 2015 (compare Dist. Ex. 24 at p.

[2] The parents indicated that when the student returned to the United States, he did not understand English and the "only language he c[ould] understand or express himself in" was his native language (Dist. Ex. 3). At that time, the parents reported that the student could not, however, "say a full sentence" (id.).

[3] According to a May 2014 psychological evaluation report, at home, one parent spoke to the student primarily in English, while the other parent spoke to the student primarily in his native language (see Dist. Ex. 6 at p. 1). In addition, the student attended a daycare facility Monday through Friday where he was "exposed solely to English" (id.).

[4] Shortly after the June 2014 CPSE convened, the student went to an appointment with a developmental pediatrician (see Dist. Exs. 11 at p. 1; 12 at p. 1). In conjunction with the appointment, the parents received "Patient Instructions," which "encouraged [the CPSE] to consider [the] diagnosis of autism spectrum disorder in planning for educational supports" for the student (Dist. Ex. 12 at p. 1). The instructions sheet further noted that "[c]onsideration for center-based programming [was] indicated in the Fall" (id.). The remainder of document included information from the American Academy of Pediatrics; common questions about autism spectrum disorders; internet website addresses; and information about a variety of intervention services available, including: applied behavior analysis (ABA); "Early Start Denver Model"; "Treatment and Education of Autistic and Related Communication Handicapped Children" (TEACCH); the "Developmental, Individual Difference, Relationship-based" (DIR) model; the "Social Communication, Emotional Regulation, and Transactional Support" (SCERTS) model; and the "Relationship Development Intervention" (RDI) model (id. at pp. 1-3).

1, with Dist. Ex. 19 at p. 1; see generally Dist. Exs. 23; 25-26).[5] In the meeting minutes, the CPSE noted that the student "had been visiting an integrated classroom" for approximately one month, and he enjoyed "interacting with other students" and "produc[ed] more language in th[at] setting" (Dist. Ex. 26 at pp. 1-2). The meeting minutes also reflected that the student would be referred to the CSE and that he would receive a 12-month school year program for summer 2015 (id. at pp. 1, 5-8; see also Dist. Ex. 25 at p. 1).

On May 19, 2015, a subcommittee of the CSE (CSE subcommittee) convened to conduct a reevaluation of the student's transition from receiving CPSE (preschool) services to receiving CSE (school-age) services and to develop an IEP for the 2015-16 school year (kindergarten) (see Dist. Ex. 28 at p. 1; see generally Dist. Ex. 27). Finding the student eligible to receive special education and related services as a student with autism, the May 2015 CSE recommended that, in addition to participating with his nondisabled kindergarten peers in the "general education setting as appropriate,"[6] the student would attend a daily 12:1+1 special class placement ("Connections") for English language arts (1.5 hours per day), mathematics (45 minutes per day), and "[a]ll [s]chool settings" (15 minutes per day) (Dist. Ex. 28 at pp. 7, 9).[7, 8] The May 2015 CSE also recommended one 90-minute session per week of direct and indirect consultant teacher services for social studies and science, as well as the following related services: six 30-minute sessions per month of speech-language therapy in a small group, three 30-minute sessions per month of individual speech-language therapy, three 30-minute sessions per month of OT in a small group, and three 30-minute sessions per month of individual OT (id. at pp. 7-8). In addition, the May 2015 CSE recommended supplementary aids and services, program modifications, and accommodations, such as a daily sensory program, modified assignments, refocusing and redirection, and the services of a shared aide (3:1, three hours per day) (id. at p. 8).[9]

In September 2015, the student began attending a morning kindergarten session and the 12:1+1 special class placement in the afternoon (see Tr. pp. 466-67; Dist. Ex. 51).[10] By October

[5] Although the meeting minutes indicated the CPSE recommended moving the student to an 8:1+1 special class placement in an integrated setting, the March 2015 IEP and the corresponding prior written notice both reflected a 12:1+2 special class placement recommendation (compare Dist. Ex. 26 at p. 1, with Dist. Ex. 24 at p. 1, and Dist. Ex. 25 at p. 1).

[6] Nondisabled students in the district's general education setting attended either a morning or afternoon kindergarten session for approximately 2 hours and 40 minutes per day (see Tr. pp. 466, 517).

[7] The student's eligibility for special education programs and related services as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

[8] In the hearing record and within the May 2015 IEP, the special class placement recommended in the May 2015 IEP was also referred to as "Connections" (Dist. Ex. 28 at p. 7; see, e.g., Tr. pp. 465-66).

[9] A 2014-15 school year progress report reflected that by June 2015, the student achieved approximately 5 out of the 9 total annual goals included on the September 2014 and March 2015 CPSE IEPs, and achieved approximately 8 out of the 10 total corresponding short-term objectives (see generally Dist. Ex. 29).

[10] At the impartial hearing, the district special education teacher of the student's 12:1+1 special class placement for the 2015-16 school year testified that the classroom was staffed with one teacher and four aides and contained a total of four students (see Tr. pp. 201, 204, 207-08, 211).

13, 2015, the parents voiced concerns about the student's placement and requested a CSE meeting (see Dist. Ex. 34 at p. 1).[11] On October 19, 2015, the parents met with district staff for a "CSE pre-meeting;" the next day, on October 20, 2015, the parents executed a due process complaint notice (see Tr. pp. 217, 219, 224-25, 228-29; Dist. Exs. 30; 31 at pp. 1-7).

On October 22, 2015, a CSE subcommittee convened pursuant to the parents' request for a meeting (see Dist. Ex. 32 at p. 1; see also Dist. Ex. 34 at p. 6). Although the CSE subcommittee ultimately rejected the parents' request to enroll the student in his preschool program because the student was "making progress in his current program," the CSE subcommittee agreed to "follow-up" with the student's preschool program and reconvene another meeting (Dist. Ex. 34 at pp. 6, 8-9, 11; see Dist. Exs. 30; 38 at pp. 1-7).[12, 13]

On or about November 10, 2015, the parents executed a second due process complaint notice—similar to the due process compliant notice executed on October 20, 2015—that documented their concerns about the student's program, and requested, as relief, that the district enroll the student at his preschool program "under the CPSE" (compare Dist. Ex. 31 at pp. 1-3, 7, with Dist. Ex. 37 at pp. 1-3, 7). On November 23, 2015, the parties met for a resolution meeting; at that time, the parties resolved the parents' claims (see Dist. Ex. 39). According to the resolution agreement, the district agreed to provide special education services to the student for the remainder of the 2015-16 school year "as a student eligible to attend kindergarten [but] who [was] withheld from kindergarten at the discretion of his parents" (Dist. Ex. 39; see Dist. Ex. 33 at p. 1). Specifically, the district agreed to provide the student with the following special education services beginning on November 30, 2015 at the student's preschool: five 30-minute sessions per week of

[11] At the impartial hearing, the district director of special education (director) testified that in September or October 2015, the parents approached her with concerns about the student's program (see Tr. pp. 463, 465-67). She testified that the parents wanted the student to have an "ABA program" and to return to the preschool program he attended during the 2014-15 school year (Tr. pp. 465-68).

[12] The CSE subcommittee also recommended that the district administer the "NYSITELL" evaluation to the student (Dist. Ex. 34 at p. 8). Although not explained in the hearing record, the acronym "NYSITELL" typically refers to the "New York State Identification Test for English Language Learners" (http://www.p12.nysed.gov/assessment/nysitell//). The NYSITELL evaluation assesses the "English language level of new students whose home or primary language is other than English," and the evaluation results determine if the student is "entitled to receive English Language Learner (ELL) services and will determine the level of English language support" (http://www.nysed.gov/bilingual-ed/parents/nysitell-and-nyseslat-parent-guides). The "New York State English as a Second Language Achievement Test" (NYSESLAT) annually assesses the "English language proficiency level of ELLs" identified through the NYSITELL (id.). Upon review of the evidence in the hearing record, it does not appear that the district followed through on the recommendation to conduct the NYSITELL (see generally Tr. pp. 1-1442; Dist. Exs. 2-9; 11-51; Parent Exs. H; JJ; M-N; IHO Exs. 3-7; Joint Exs. 1; 10).

[13] At the impartial hearing, the director testified that the district could not legally agree to recommend returning the student to his preschool program as a preschool student with a disability because, at that time, he was five years old and thus, characterized as a school-aged student (see Tr. pp. 467-68, 472-74). However, the district also could not require the student to attend kindergarten because, as a five year old student, he was not yet considered to be of compulsory school-age attendance under State law (see N.Y. Educ. Law § 3205[1][a] [requiring students aged 6 through 16 to attend "full time instruction"]; see also N.Y. Educ. Law § 3202[1] [entitling students aged 5 through 21, who have "not received a high school diploma," to attend public schools]).

resource room, two 30-minute sessions per week of speech-language therapy in a small group, one 30-minute session per week of individual speech-language therapy, one 30-minute session per week of OT in a small group, one 30-minute session per week of individual OT, and transportation services (id.).[14] Beginning in December 2015, the student returned to the preschool, where he remained for the rest of the 2015-16 school year and received special education services as agreed upon by the parties at the resolution meeting (see generally Dist. Exs. 39-44).

On April 9, 2016, in preparation for the student's upcoming annual review, the district special education teacher of the student's 12:1+1 special class placement for the 2015-16 school year conducted a classroom observation of the student at his preschool along with the "school psychologist and the speech therapist" (see Tr. pp. 238-39; Dist. Ex. 44 at p. 1).

On May 20, 2016, the parents returned to the student's developmental pediatrician to discuss "options for programming" (see Parent Ex. JJ at p. 1). The report generated as a result of that visit indicated that the student made "significant progress" in his preschool setting and that he "responded to the [ABA] approach in a strong manner and improved in socialization and language in particular" (id.). During the visit, the pediatrician discussed "general interventions for autism in the academic arena" with the parents (id.). Given the student's continued difficulties in communication and his "level of autism spectrum disorder," the report noted that "continued direct services [were] important for him," and it was "highly appropriate that the central part of his intervention should consider a comprehensive [ABA] approach," which "might include discrete trial training and other documented methods using ABA" (id.). The report also noted that in light of the student's "strong response to this approach in the past it [was] appropriate to consider this as possibly his most successful intervention in the future" (id.).

On June 7, 2016, the parents sent an e-mail to the director, which inquired about whether the director had an opportunity to review articles forwarded to her about interventions for students with autism and which further indicated that the parents decided to enroll the student at his current preschool for summer 2016 (see Joint Ex. 1 at pp. 6-7). In response, the director sent an e-mail on June 13, 2016, noting that "[a]s with every methodology, there [was] not one single methodology that me[t] the needs of every child. Each child, based on their development levels and individual goals, require[d] an individualized approach to support their learning" (id. at p. 7).

At the impartial hearing, the director testified that an initial CSE meeting had been held in the "spring of 2016" to develop the student's IEP for the 2016-17 school year, but at that time, the CSE could not reach a "consensus" (Tr. pp. 478-79; see also Dist. Ex. 46 at p. 8). On June 14, 2016, a CSE reconvened pursuant to the parents' request and to complete the student's annual review and development of the IEP for the 2016-17 school year (kindergarten) (see Dist. Exs. 45 at pp. 1, 8; 46 at pp. 1, 6). Finding that the student remained eligible to receive special education and related services as a student with autism, the June 2016 CSE recommended a 12-month school year program, which consisted of a 12:1+1 special class placement in a non-integrated setting, along with one 30-minute session per week of speech-language therapy, for the months of July

[14] At the impartial hearing, the director testified that although the IEP entered into evidence as District Exhibit 33 indicated a meeting date of "October 22, 2015," the IEP was not generated on that date (compare Dist. Ex. 33 at p. 1, with Tr. pp. 471-73). Rather, District Exhibit 33 represented the IEP agreed upon by the parties as a result of the resolution meeting (compare Dist. Ex. 33 at p. 1, with Tr. p. 472, and Dist. Ex. 39).

and August 2016 (see Dist. Ex. 45 at pp. 1, 8-9). For September 2016 through June 2017, the CSE recommended a 12:1 special class placement ("Connections" program, two hours per day), three 30-minute sessions per month of speech-language therapy in a small group (therapy room), three 30-minute sessions per month of individual speech-language therapy (therapy room), three 30-minute sessions per month of OT in a small group (therapy room), one 30-minute session per month of individual OT (therapy room), and three 30-minute sessions per month of speech-language therapy in a small group (classroom) (id. at pp. 1, 7). The June 2016 CSE also recommended the following as supplementary aids and services, program modifications, and accommodations: positive reinforcement, a visual schedule ("in kindergarten and special education classes"), refocusing and redirection, and "parent training" (id. at pp. 7-8). In addition, the June 2016 CSE recommended the provision of an educational consultant as supports for school personnel on behalf of the student, and further noted in the IEP that "[t]raining will be provided on Autism and Applied Behavior Analysis to staff" (id. at p. 8).[15]

After the June 2016 CSE meeting, the parents continued to correspond with the director about the student's IEP and program via e-mail, including inquiries into whether the new special education teacher hired by the district would also be a Board Certified Behavior Analyst (BCBA), and if so, whether that information would be documented in the student's IEP (see Joint Ex. 1 at pp. 7-20). In addition, the parents forwarded specific language to the director for "proposed management needs," which the parents wanted to be incorporated into the student's IEP (id. at pp. 8-18). The parents also provided the director with information regarding the organization and set up of "comprehensive ABA classrooms at public schools" (id. at pp. 18-20).

A. Due Process Complaint Notice

By due process complaint notice dated August 5, 2016, the parents alleged that after the student attended the district's recommended program in fall 2015, "it became completely clear that [the student] could not take advantage of an education not grounded in the principles of [ABA] [and] more specifically it was unconditionally clear that [the student] needed a comprehensive ABA program in order to make progress" (Joint Ex. 1 at p. 2 [emphasis in original]). Next, the parents described a "number of changes" they observed in the student while he attended the district's recommended program in fall 2015, which the parents characterized as a "steady decline" in the student's communication skills, levels of engagement, and behavior (id. at pp. 2-4). According to the parents, the student only began to make steady progress after his reenrollment in preschool as a general education student in December 2015 through August 2016 (id. at p. 5).

[15] The director sent an e-mail to the parents on June 20, 2016, with an attached document that described the "Connections" program (Joint Ex. 1 at pp. 7-8; see generally Parent Ex. H). The "Connections" program was designed to provide "direct social skill instruction and academic instruction for students with Autism or social delays" (Joint Ex. 1 at p. 8). Kindergarten students received a "full kindergarten program in the mainstream setting, with reteaching, related services, and supplemental instruction in a small class in addition to the regular [half] day kindergarten program" (id.). "Connections" included a "classroom behavior program" with "[b]uilt in sensory breaks" and "[e]arned choice time"; in addition, the "Connections" program incorporated several "[b]est practices . . . in all instruction and support such as visual schedules, visual cues, reduced language demands, tasks broken down into simple step-by-step directives, [and] direct instruction of social skills" (id.). At the impartial hearing, the district entered District Exhibit 50 as a description of the "Connections K-5 Program," which differed from the document forwarded to the parents via e-mail after the June 2016 CSE meeting (compare Dist. Ex. 50, with Joint Ex. 1 at pp. 7-8).

More specifically, the parents attributed the student's progress to the "comprehensive ABA program" offered at the preschool, as well as to their own provision of discrete trial training to the student at home (id.).

Next, the parents incorporated several e-mail communications with the district to illustrate more fully the "rationale and much of the research-backed explanations for why this due process ha[d] become essential" and further, to demonstrate "how the solutions offered by the school district f[ell] short of providing a complete solution to the problem" (Joint Ex. 1 at pp. 5-20). The parents then specified what they hoped to accomplish, namely, that the district "set up a comprehensive integrated [ABA] classroom (preferably an integrated one) and that this be written in the Management Needs Section of [the student's] IEP" (id. at p. 6). Within the e-mail communications with the district, the parents set forth specific language to be included in the management needs section of the student's IEP, as well as specific instructions describing how to set up and organize a comprehensive ABA classroom at the district (id. at pp. 6-20, 23-26). The parents also indicated that despite "months of discussions and requests," the district did not agree to "include the essential elements of what [they] fe[lt] [was] necessary to put in [the student's] IEP" (id. at p. 23). The parents then identified the following as the "most important" elements to include in the student's IEP: "all people with regular (weekly) interaction with [the student] would be trained in both Discrete Trial Training and Function Based Intervention," and the district use an "established Behavioral Analysis Data Collection Platform with templates" for data analysis (id. at pp. 23-26). The parents then indicated that placing "these elements in the IEP" afforded them the opportunity to "hold [the district] [a]ccountable to deliver on [the student's] special education needs" (id. at p. 23). The parents also indicated that, generally, the district responded to their requests to incorporate particular "elements" into the student's IEP with statements that it did not put "ABA terminology into IEP[s]" (id.; see Joint Ex. 1 at p. 7). Next, the parents then included copies of several publications to further explain the "risks associated with having improperly trained staff" (Joint Ex. 1 at pp. 26-50). Moreover, the parents articulated that the student's "success at [the preschool] in an integrated ABA classroom and his success . . . in other settings that include[d] typically developing children" indicated that the district was "trying to force fit an inappropriate restrictive program . . . because [the district] d[id] not presently have an acceptable program or solution" to meet the student's "developmental and behavioral needs" (id. at p. 44).

Finally, as their first proposed solution, the parents requested the following: classify the student as "not being ready for Kindergarten," return the student to the preschool setting as a general education student receiving services for the 2016-17 school year, and provide transportation services similar to the manner they were provided to the student during the 2015-16 school year (Joint Ex. 1 at pp. 50-52). As a second proposed solution, the parents requested that the district "establish an integrated ABA classroom, as modeled after the one provided by [the preschool]," that would meet the specified requirements outlined thereafter (id. at pp. 52-53). For example, the parents indicated that the proposed ABA classroom must offer a full-day program, and that all therapists, special education teachers, and the school principal associated with the proposed classroom must be trained in function based intervention and discrete trial training (id. at p. 52). The parents also required that the "lead teacher" of the proposed ABA classroom must "at a minimum" hold BCBA credentials, and further, that all assistants and therapists receive training in ABA interventions (i.e., function based intervention, discrete trial training, ignore and redirect, data collection and entry into software platforms, and "3-Step Prompting to Achieve Compliance") (id. at pp. 52-23). The parents further proposed that the district acquire "all

necessary items necessary to set up an ABA classroom" and that the district maintain a "minimum budget" available to the classroom to acquire those items (id. at p. 53).[16]

B. Impartial Hearing Officer Decision

On October 5, 2016, the parties proceeded to an impartial hearing, which concluded on October 26, 2016 after five days of proceedings (see Tr. pp. 1-1442).[17] In a decision dated December 30, 2016, the IHO concluded that the district offered the student a FAPE for the 2016-17 school year (see IHO Decision at pp. 10-16).[18] Initially, the IHO found that the parents did not dispute either the student's eligibility category of autism or the June 2016 CSE's recommendation of a general education kindergarten class placement (see IHO Decision at p. 10). The IHO discerned, however, that the parents contested the June 2016 CSE's decision to recommend a 12:1 special class placement ("Connections"), and they preferred that the student attend a "[morning] and [afternoon] kindergarten program with special education services [ABA]" (id.). After reciting the present levels of performance describing the student in the June 2016 IEP and the applicable legal standards, the IHO found no procedural violations committed by the district (id. at pp. 10-13). The IHO noted that the parents attended all CPSE and CSE meetings, they had the opportunity to participate in the decision-making process, and they contributed to the development of the student's IEP (id. at p. 13). Additionally, the IHO indicated that the parents "influenced the CSE in adding an ABA specialist to provide training and support to the Connections program" (id.). Upon review of the information provided to the CSE to develop the June 2016 IEP, the IHO found that the recommendations of a "general education kindergarten and the Connections program" provided the student with "personalized instruction with sufficient support services to benefit educationally from that instruction," which satisfied both the "Rowley requirement" and the "least restrictive requirement [LRE] of IDEA" (id. at p. 14).

Next, the IHO determined that the June 2016 IEP was "likely to produce progress, not regression and afford[ed] the student with an opportunity for greater than trivial advancement" (IHO Decision at pp. 14-15). In particular, the IHO found that the student would receive "specialized instruction in the Connections program," and considering the student's "short attention span and distractibility," the "Connections program" would also provide the student with the "best environment for direct instruction" in mathematics, reading, and writing (id. at p. 15). In addition, the IHO indicated that the district would implement discrete trial training with the student's annual goals as the "focal point" and that "ABA techniques would be utilized in the classroom as well as strategies from the National Autism Center" (id.). The IHO also indicated that the parents'

[16] In August 2016, the district contracted with a BCBA to provide the education consult services recommended in the June 2016 IEP (see Tr. pp. 325-38; Dist. Ex. 45 at p. 8). On September 10, 2016, the BCBA visited the district's recommended placement for the student for the 2016-17 school year and drafted a "Consult Report" with detailed recommendations for the student's program (see generally Dist. Ex. 49).

[17] At the time of the impartial hearing, the student was not enrolled in either a public or nonpublic school; rather, the parents provided "home schooling" to the student for approximately five hours per day during the week and eight to nine hours per day on weekends, and the student attended "daycare" for approximately four hours per day (Tr. pp. 20-22).

[18] The cover page of the IHO's decision reflected a date of "December 30, 2016"; however, it appears that the IHO mistakenly dated the final page of the decision as "December 30, 2015" (compare IHO Decision at p. 1, with IHO Decision at p. 17).

"concerns with the use of ABA in the classroom should be alleviated by the use of an ABA specialist" with "BCBA credentials," and by the district special education teacher's certification in discrete trial training (id.). After noting that the student's "greatest gains" in preschool occurred in the areas of pragmatic speech and social skills, the IHO indicated that the annual goals in the June 2016 IEP were "'reasonably calculated' to produce progress," as they related to, and addressed, the student's needs (id.). The IHO further indicated that the student must receive "[p]ersonalized instruction . . . to address his articulation, receptive and expressive deficits," and the student would receive speech-language therapy services in both the "therapy room and in his classroom" (id.). With regard to social skills, the IHO noted that the "speech therapist" took part in the social skills training program offered to the student as part of the "Connections program" (id.). Additionally, the IHO pointed out that the social skills training focused on "feelings, coping skills and social problem solving," and the student had needs in all of these areas (id.). Finally, turning to OT, the IHO found that such services were necessary to address the student's "fine and gross motor deficits," which affected the student's "writing skills and activities involving gross motor skills" (id. at p. 16).

As for the parents' requested relief, the IHO first acknowledged that the student was "now of compulsory school age," and his parents decided to provide the student with home schooling (IHO Decision at p. 16). The IHO then recognized that, based upon the evidence in the hearing record, the preschool was "not licensed to offer a school age program"; therefore, the parents' request for the student to continue at the preschool was not an "option" to be considered (id.). With respect to the parents' second request—that is, for the district to "replicate the [preschool] program" within the public school—the IHO found that the CSE "integrated man[y] of the requests into the kindergarten and Connections program" (id.). Consequently, since the district's IEP was not required to "'maximize' the potential of students," the IHO concluded that the June 2016 IEP was appropriate and likely to produce progress (id.).

Finally, the IHO conveyed that while "much of the parents' testimony and argument focused on ABA as being the only method to instruct their son, there [was] strong judicial authority in support of the legal proposition that IDEA d[id] not guarantee a right to a particular methodology or personnel" (IHO Decision at p. 16). As such, these matters were "appropriately left within the discretion of the local school authorities provided the method selected provide[d] FAPE" (id.). Having dismissed the parents' complaint, the IHO ordered that, "should the parents choose not to appeal this decision," the district and the parents should "develop a plan with the necessary supports to allow for the [student's] smooth transition to the program as outline[d] in the IEP" (id. at p. 17).

IV. Appeal for State-Level Review

The parents appeal. Initially, the parents allege that the IHO's decision was biased, and further assert that the IHO improperly precluded evidence and limited all questioning of witnesses at the impartial hearing.[19] Turning to the IHO's decision, the parents point to inaccuracies in the "Preliminary Statement," the "Prior History," and within the "Discussion and Decision" sections, and contend that the hearing record should not have included a behavior progress chart as evidence.

[19] The parents submitted additional documentary evidence with the request for review for consideration on appeal (see generally Req. for Rev. Exs. A-Z; AA-ZZ; AAA-ZZZ; AAAA-IIII).

With respect to the findings and facts portion of the IHO's decision, the parents allege that the IHO failed to correctly identify the issues in dispute, noting specifically that they disputed the June 2016 CSE's decision to recommend a general education kindergarten classroom for the student. Next, the parents challenge the accuracy of the present levels of performance in the June 2016 IEP, the management needs identified in the IEP, and the appropriateness of the annual goals in the IEP. The parents also argue that, contrary to the IHO's decision, "many" procedural errors impeded the student's right to a FAPE, and the district declined to incorporate their request for an "all day ABA integrated environment" into the student's IEP. The parents further allege that the "Connections program and kindergarten" did not satisfy either the FAPE requirement or the LRE requirement, as the student had succeeded in an "all-day integrated setting."

Next, the parents fault the IHO for failing to address how the teachers in this case had the "necessary training or record of success" in order to implement a "curriculum" with the student. In addition, the parents allege that although the IHO discussed how "typical peers in the general education class would demonstrate appropriate behavior," the hearing record lacked any information about "how appropriate" those typical peers would be "for a[n] integrated class." The parents noted that the student required a "5-hour integrated school day." Finally, the parents assert that the IHO failed to address or acknowledge their request for reimbursement for providing ABA behavioral therapy and instruction to the student, equitable considerations, their request to "observe [the student] receiving education in real time," or the parents' testimony that called into question information provided to them by a teacher.

As relief, the parents seek, in part, an order directing the district to modify the management needs section of the student's IEP and to place discrete trial training and ABA group therapy—as specifically delineated in the request for review—in the student's IEP. With regard to the management needs, the parents seek an order directing that the student receive "intensive ABA" for 40 hours per week in a district elementary school and that the student continue to receive these services until he achieves a particular standard score on identified assessments. Next, the parents precisely describe the composition and size of the integrated classroom desired for the student, including the number of typically developing peers and the "specific guidelines" the typically developing peers must meet in order to be included within the proposed integrated classroom. In addition, the parents request an order to fund a budget to be used by the classroom for modifications to deliver the "integrated intensive ABA program." With respect to the proposed integrated classroom, the parents indicate that for the remainder of the 2016-17 school year, the "kindergarten classroom may have two different groups of typical peers" for the morning and afternoon sessions; however, for the 2017-18 school year, the parents seek a "single group of typical peers that meets for the entire school period" in the proposed integrated classroom. Next, the parents seek an order directing that "every teacher, aid, therapist, professional . . . assigned to work in the same classroom as [the student] or directly with [the student] . . . should be at 1 [standard deviation] above average in articulation and expressive language as estimated by a speech therapist and that they have no documented nor previously documented behavioral disorder of any kind."

The parents also seek an order finding that the annual goals in the student's IEP were not appropriate and constituted a procedural violation that impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process, and caused a deprivation of educational benefits. As further relief, the parents seek an order accepting

all of the additional evidence submitted with the request for review, removing specific district exhibits from the evidence in the hearing record, and to find that the due process complaint notice was "officially filed" on August 5, 2016. The parents also seek an order allowing them to have "access to observe" the student in class, during discrete trial training, and in group therapy sessions with other students upon request. Next, the parents request a central auditory processing evaluation of the student at "public" expense, as well as an independent educational evaluation (IEE) of the student's "present levels of performance" that includes a formal intelligence quotient (IQ) test, an adaptive behavior test, and a "present level curriculum test." As a result of these assessments, the parents also request a modification of the annual goals. The parents also request an order directing the use of "formal measures" to assess "IEP success."

With regard to the program recommended in the June 2016 IEP, the parents seek an order finding that the "Kindergarten and Connections Program" did not meet the requirements of FAPE or the LRE. In addition, the parents seek an order declaring that the district's 2 hour 40 minute school day does not constitute a FAPE, and further, that the "Connections" program is not peer-reviewed. And finally, the parents request to "approve pendency for [the parents] to deliver an ABA [] home based therapy and educational program" to the student at $32.50 per hour for 50 hours per week at district expense. Alternatively, the parents request that if the ABA therapy and educational program delivered to the student by his parents constitutes a "unilateral placement," then they seek retroactive reimbursement at the same rate described above. Additionally, the parents note that the IHO failed to issue a pendency decision, and therefore, they seek an order directing the district to reimburse them "immediately [within 72 hours of decision]" for the ABA therapy and educational program they delivered to the student since August 29, 2016 (totaling 950 hours at $32.50 per hour). The parents also seek to be reimbursed for the continued delivery of home-based ABA therapy and an educational program to the student (approximately 2300 hours) "until the ordered program is successfully in place" at the district, as well as an award of fees and expenses as the prevailing party.

In an answer, the district responds to the parents' allegations. The district asserts as an affirmative defense that the parents did not raise any issues in the due process complaint notice concerning the present levels of performance or the annual goals in the IEP, or with respect to any procedural violations, and therefore, the parents cannot now raise such allegations on appeal and the allegations must be wholly disregarded. Next, the district asserts as affirmative defenses that the parents' request for review and memorandum of law fail to conform to practice regulations, and finally, that the parents' request to submit additional documentary evidence for consideration on appeal must be rejected because the parents failed to articulate any reason for its submission. Turning to the question of the student's pendency placement, the district alleges that the special education programs and related services in District Exhibit 33—generated as a result of a resolution agreement between the parties—constitutes the student's last agreed upon IEP and pendency placement. In its memorandum of law accompanying the answer, the district generally argues to uphold the IHO's decision in its entirety.[20]

[20] The parents did not file a reply with the Office of State Review in response to the district's answer (see 8 NYCRR 279.6[a]-[b]).

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 180-83, 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]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be

"reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F. v. Douglas County Sch. Dist. RE-1, 580 U.S. __, 2017 WL 1066260, at *11-*12 [Mar. 22, 2017] [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).

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

VI. Discussion

A. Preliminary Matters

1. IHO Bias and Conduct of the Impartial Hearing

First, the parents assert that the IHO's decision was biased and "one sided in its entirety." The parents further assert that the IHO's refusal to "accept nearly all" of their proffered exhibits as evidence at the impartial hearing precluded the IHO from considering the same in the decision and similarly precluded the parents from using the exhibits to question witnesses and to inform their briefs. Additionally, the parents contend that the IHO "significantly limited all questions to witnesses to be specific to [the student] or a class [the student] was a part of," which ultimately prevented the parents from obtaining "more details regarding many different matters" during the impartial hearing. In response, the district argues that many of the parents' exhibits offered at the impartial hearing consisted primarily of "articles written for various publications not related to the [s]tudent herein," and thus, the IHO properly excluded such evidence as irrelevant, immaterial, unreliable, or unduly repetitious. Moreover, the district acknowledges that although the IHO limited questions "to some extent" at the impartial hearing, the IHO's limitations focused the questions as "relevant to the [s]tudent and the issues presented." Upon a careful and complete review of the hearing record, neither the IHO's management of the impartial due process hearing

nor his decision manifested bias or prejudice against—or in favor of—either party. Therefore, the parents' contentions must be dismissed.[21]

It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066; Application of a Student with a Disability, Appeal No. 11-144; Application of the Bd. of Educ., Appeal No. 10-097; Application of a Student with a Disability, Appeal No. 10-018). An IHO must also render a decision based on the hearing record (see Application of a Student with a Disability, Appeal No. 09-058; Application of a Student with a Disability, Appeal No. 08-036). Moreover, an IHO, like a judge, must be patient, dignified and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, and shall not, by words or conduct, manifest bias or prejudice, according each party the right to be heard (Application of a Student with a Disability, Appeal No. 12-064; Application of a Student with a Disability, Appeal No. 07-090; Application of a Student with a Disability, Appeal No. 07-075; see Y.A. v. N.Y. City Dep't of Educ., No. 2016 WL 5811843, at *19 [S.D.N.Y. Sept. 21, 2016]; J.E. & C.E. v. Chappaqua Cent. Sch. Dist., 2016 WL 3636677, at *8 [S.D.N.Y. June 28, 2016]).

Here, the parents—as the party bearing the burden to provide evidence with respect to the IHO's alleged bias—level nothing more than bald, conclusory assertions without any explanation to support those assertions. The parents do not cite to or point to any specific instances in the hearing record as evidence of how the IHO's discretion to preclude evidence constituted bias or how the IHO's actions interfered with their ability to present their case. Instead, the parents cite generally to the transcript corresponding to their proffer of exhibits at the impartial hearing (see Req. for Rev. ¶ 1). Moreover, while impartial hearing rights include the right of both a parent and a district to "[p]resent evidence and confront, cross-examine, and compel the attendance of witnesses" (34 CFR 300.512[a][2]; see 8 NYCRR 200.5[j][3][xii]), State regulation requires that an IHO "exclude evidence that he or she determines to be irrelevant, immaterial, unreliable or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]). Consistent with State regulation, a review of the transcript cited by the parents reveals that the parents presented each and every exhibit for the IHO's consideration, that in many instances the district's attorney voiced objections to the exhibits, and the IHO explained the rationale underlying his decision to ultimately sustain the district's objections to preclude the parents' evidence (see Tr. pp. 56-108). A review of the same portions of the transcript also reveals that the IHO made considerable efforts to assist the parents throughout their evidentiary submissions by explaining the role of evidence and by indicating that, subject to a proper foundation elicited from a witness, some of the parents' evidence (i.e., articles or publications) might then be entered in the hearing record as evidence (see, e.g., Tr. pp. 56-60, 64-67, 71-72, 92, 97-98).

[21] To the extent that the parents also assert inaccuracies within the IHO's decision, these contentions generally reflect a disagreement with the IHO's characterizations and do not present issues regarding the accuracy of the decision. For example, in the "Preliminary Statement" the IHO indicated that the student "benefit[ted]" from an ABA environment; the parents assert in the request for review that this statement is inaccurate because the student "significantly" benefitted from an "integrated intensive ABA environment" (compare IHO Decision at p. 2, with Req. for Rev. ¶ 2).

With regard to the IHO's decision to limit questions of witnesses, the parents do not cite to or point to any specific instances in the hearing record as evidence of how the IHO's actions constituted bias or how the IHO's actions interfered with their ability to present their case. Rather, the parents cite to nearly the entire transcript to support their assertion (see Req. for Rev. ¶ 2). Like above, State regulation specifically empowers an IHO with the discretion to "limit examination of a witness by either party whose testimony the [IHO] determines to be irrelevant, immaterial or unduly repetitious" (8 NYCRR 200.5[j][3][xii][d]). State regulation also authorizes an IHO "to ask questions of counsel or witnesses for the purpose of clarification or completeness of the record" (8 NYCRR 200.2[j][3[vii]). Consistent with State regulations, on review—and as acknowledged by the district—the impartial hearing transcript does reveal that, at times, the IHO narrowed or circumscribed questions asked by the parents during the direct or cross-examination of witnesses to focus specifically on the student or the student's program at the heart of this dispute (see, e.g., Tr. pp. 175-77, 269, 273, 286-87, 291, 294-96, 372-75, 496-97, 512-13). The impartial hearing transcript also reveals that the IHO assisted the parents throughout the questioning of witnesses, which either clarified questions posed to the witnesses or assisted in the completeness of the hearing record (see, e.g., Tr. pp. 141-43, 147-48, 150, 192-95, 292-93, 372, 387-89, 514-15).

Thus, while the parents may not be in agreement with the IHO's decision and may have the opinion that the IHO improperly precluded evidence or limited questioning of witnesses that the parents deemed to be persuasive and relevant, this, alone, does not establish that the IHO manifested a bias or improperly exercised his discretion in conducting the impartial due process hearing. Overall, an independent review of the hearing record demonstrates that the parents had the opportunity to present their case at the impartial hearing and that the impartial hearing was conducted in a manner consistent with the requirements of due process (see Educ. Law § 4404[2]; 34 CFR 300.514[b][2][i], [ii]; 8 NYCRR 200.5[j]; see generally Tr. pp. 1-1442).

2. Scope of Impartial Hearing and Review

Next, a determination must be made regarding which claims are properly before me on appeal. On appeal, the parents challenge the accuracy of the present levels of performance in the June 2016 IEP and the appropriateness of the annual goals in the IEP. The parents further allege that, contrary to the IHO's decision, "many" procedural errors impeded the student's right to a FAPE. In response, the district asserts that the parents' failure to raise these issues in the due process complaint notice precludes the parents from raising such allegations on appeal.

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (see 20 U.S.C. § 1415[b][7][A]; 34 CFR 300.507[a]-[b], 300.508[a]; 8 NYCRR 200.5[j][1]; Application of a Student with a Disability, Appeal No. 13-151; Application of a Student with a Disability, Appeal No. 09-141). However, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]; see, e.g., N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; J.C.S. v Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *8-*9

[S.D.N.Y. Aug. 5, 2013]; B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at *6 [S.D.N.Y. May 14, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *9 [S.D.N.Y. Mar. 28, 2013]; S.M. v. Taconic Hills Cent. Sch. Dist., 2013 WL 773098, at *4 [N.D.N.Y. Feb. 28, 2013]; DiRocco v. Bd. of Educ., 2013 WL 25959, at *23 [S.D.N.Y. Jan. 2, 2013]).

In this instance, the parents—as the party requesting the impartial hearing—had the first opportunity to identify the range of issues to be addressed at the impartial hearing. Upon review, I find that the parents' due process complaint notice cannot reasonably be read to include the accuracy of the present levels of performance or whether the district committed any procedural violations as issues to be resolved at the impartial hearing (see generally Joint Ex. 1). Moreover, a review of the hearing record shows that the district did not agree to expand the scope of the impartial hearing, and the parents did not amend the due process complaint notice or seek permission from the IHO to amend the due process complaint notice prior to the impartial hearing to include the accuracy of the present levels of performance or whether the district committed any procedural violations as issues to be resolved at the impartial hearing (see Tr. pp. 1-1442; Dist. Exs. 2-9; 11-51; Parent Exs. H; JJ; M-N; IHO Exs. 3-7; Joint Exs. 1; 10). In contrast, however, I find that the due process complaint notice can reasonably be read to include an issue regarding the annual goals in the June 2016 IEP (see Joint Ex. 1 at pp. 12-13).[22]

Turning to the issues addressed in the IHO's decision, the IHO initially included brief descriptions of the present levels of performance, the management needs, and the annual goals from the June 2016 IEP within the "Findings and Facts" section of the decision (compare IHO Decision at pp. 10-11, with Dist. Ex. 45 at pp. 3-6). However, those portions of the decision were contextual only and the IHO did not actually make any findings or conclusions about the accuracy of the present levels of performance anywhere within the decision (compare IHO Decision at pp. 10-11, with IHO Decision at pp. 10-16). Therefore, since the parents did not raise any issue about the present levels of performance in the due process complaint notice and the IHO did not make any findings related to the present levels of performance in the June 2016 IEP, the parents cannot now raise this as an issue to be resolved in the request for review for the first time on appeal (compare Req. for Rev. ¶¶ 11-12, 14, 21, with Joint Ex. 1 at pp. 1-54, and IHO Decision at pp. 1-17). Where, as here, the parents did not seek the district's agreement to expand the scope of the impartial hearing to include this issue or seek to include this issue in an amended due process complaint notice, the issue is not properly subject to review. To hold otherwise would inhibit the development of the hearing record for the IHO's consideration, and render the IDEA's statutory and regulatory provisions meaningless (see 20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]; see also B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012] [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]]"); M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563,

[22] With respect to the annual goals, the parents can and do point to a specific portion of the due process complaint notice as a basis for concluding that they raised annual goals as an issue to be resolved at the impartial hearing (see Parent Mem. of Law at p. 24 [citing Joint Ex. 1 at p. 12]; see also Req. for Rev. ¶¶ 16). However, the parents do not (and a reasonable person cannot) point to any specific portions of the due process complaint notice as a basis for concluding that the parents raised either the present levels of performance or procedural violations as issues to be resolved at the impartial hearing in either the request for review or within the memorandum of law (see generally Req. for Rev.; Parent Mem. of Law).

at *13 [S.D.N.Y. Dec. 16, 2011]). "By requiring parties to raise all issues at the lowest administrative level, IDEA affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children" (R.B. v. Dep't of Educ., 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011] [internal quotations omitted]; see C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011] [holding that a transportation issue was not properly preserved for review by the SRO because it was not raised in the party's due process complaint notice]). Consequently, the allegations pertaining to the present levels of performance in the June 2016 IEP raised now, for the first time by the parents on appeal, are outside the scope of my review, and therefore, these allegations will not be considered (see N.K., 961 F. Supp. 2d at 584-86; B.M., 2013 WL 1972144, at *6; C.H., 2013 WL 1285387, at *9; Snyder v. Montgomery County Pub. Schs., 2009 WL 3246579, at *7 [D. Md. Sept. 29, 2009]).[23]

With respect to the annual goals, as noted above, I find that the parents did raise this as an issue in the due process complaint notice, which the IHO addressed (see Joint Ex. 1 at p. 12; IHO Decision at p. 15). In the decision, the IHO concluded that the annual goals were "related to [the student's] needs and address[ed] them specifically" and that the annual goals were "'reasonably calculated' to produce progress" (IHO Decision at pp. 11, 15). The parents' challenge to the IHO's finding about the annual goals will, therefore, be addressed, and this will necessitate some discussion of the procedures by which the goals were developed.

Finally, in addition to rendering a determination about the annual goals, the IHO also found that the district did not commit any procedural violations and that the parents had "ongoing 'opportunities to participate in the decision making process regarding the provision of a FAPE' for their child" (IHO Decision at p. 13). Since the IHO drew conclusions on these issues notwithstanding the fact that the parents' due process complaint notice cannot reasonably be read to include these issues, the next inquiry focuses on whether the IHO properly reached determinations on the issues because the district "open[ed] the door" under the holding of M.H. v. New York City Dep't of Educ. (685 F.3d 217, 250-51 [2d Cir. 2012]; see also D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 327-28 [S.D.N.Y. 2013]; N.K., 961 F. Supp. 2d at 584-86; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S., 2013 WL 3975942, *9; B.M., 2013 WL 1972144, at *5-*6).

Scrutinizing the hearing record, it does not appear that the IHO conducted a prehearing conference, but on the first day of the impartial hearing the IHO inquired about the basis for the parents' due process complaint notice (see Tr. p. 5).[24] During this colloquy, neither party identified

[23] To be clear, any additional arguments the parents asserted in the memorandum of law about the present levels of performance will also not be considered, including the argument that the student requires a central auditory processing disorder assessment at district expense (i.e., an independent educational evaluation or IEE) in order to determine the student's present levels of performance upon which to develop appropriate annual goals (see Parent Mem. of Law at pp. 24-28).

[24] While not mandatory, State regulation authorizes an IHO to conduct a prehearing conference with the parties for, in pertinent part, the purpose of "simplifying or clarifying the issues" to be resolved (8 NYCRR 200.5[j][3][xi]).

any procedural issues to be resolved at the impartial hearing; similarly, neither party identified any procedural issues in their respective opening statements, other than a general statement made by the district's attorney indicating that the "IEP was developed in conjunction with the parents" (see Tr. pp. 5, 15-20).

In their list of issues on appeal, the parents do not specify in their request for review what procedural violations occurred that they allege impeded the student's right to a FAPE (see Req. for Rev. ¶ 17).[25] Instead, the parents allege in the memorandum of law a list of factors that they characterize as "procedural violations" impeding the student's right to a FAPE, and in support of each factor, the parents primarily cite to testimonial evidence elicited either through cross-examination of district witnesses or direct examination of their own witnesses at the impartial hearing (see Parent Mem. of Law at p. 28). Such testimonial evidence elicited by the parents in no way constitutes the district "open[ing] the door" to these issues under M.H. Consequently, however correct or incorrect the IHO's findings may have been, the only conclusion that may be permissibly drawn is that the IHO exceeded his jurisdiction by sua sponte raising and concluding that the district did not commit any procedural violations in the development of the June 2016 IEP, and accordingly, the IHO's finding must be annulled.[26]

3. Additional Evidence

Tethered closely to the argument pertaining to IHO's refusal to enter evidence in the hearing record, the parents submit additional documentary evidence for consideration on appeal (see generally Req. for Rev. Exs. A-Z; AA-ZZ; AAA-ZZZ; AAAA-IIII). The district objects to the consideration of the parents' additional documentary evidence, arguing, as above, that the IHO properly excluded such evidence at the impartial hearing as irrelevant, immaterial, unreliable, or unduly repetitious. The district further argues that the parents do not now assert any reason for its consideration on appeal.

Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). In this case, the parents have resubmitted all of the documentary evidence the IHO declined to enter into the hearing record as

[25] As noted above, however, some discussion of the goal development procedures is necessary due to the parents' challenges to the adequacy of the annual goals.

[26] It is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on those issues (see Dep't of Educ. v. C.B., 2012 WL 220517, at *7-*8 [D. Haw. Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

evidence, as well as copies of documents the IHO already entered into the hearing record as evidence or that were otherwise withdrawn at the impartial hearing (compare Req. for Rev. Exs. A-Z; AA-WW, with Tr. pp. 56-108, 264). As these documents were available at the time of the impartial hearing, the parents had the opportunity to present the documents for the IHO's consideration at that time, and as the IHO—as noted above—did not abuse his discretion in declining to enter such documents as evidence in the hearing record, I decline to exercise my discretion to now admit such documents as evidence as they are also not necessary to render a decision in this matter. Next, some of the parents' additional documentary evidence is already part of the administrative hearing record, such as the "Parents' Brief" submitted to the IHO, the "Parents' Reply Brief," and the "Parents' Memorandum of Law" submitted to the SRO; consequently, I decline to exercise my discretion to now admit the parents' duplicative documents as evidence in the hearing record (see Req. for Rev. Exs. YY; RRR; IIII).

With regard to the remaining additional documentary evidence, approximately 19 of the documents are copies of court cases or SRO decisions, all of which were available at the time of the impartial hearing but not offered for the IHO's consideration (see Req. for Rev. Exs. ZZ; AAA-III; TTT; WWW-ZZZ; AAAA; FFFF-HHHH). Legal authority, whether binding or persuasive, is not evidence and need not be included in a hearing record to establish facts in an evidentiary record.[27] Next, the parents' additional documentary evidence includes a copy of a letter from a physician (dated September 28, 2016), a 2015-16 preschool update report, and copies of various publications, which based upon the respective dates of publication, were available at the time of the impartial hearing but not offered for the IHO's consideration (see Req. for Rev. Exs. XX; VVV; BBBB-EEEE). In addition, the parents submit approximately six documents that are compilations of documents that the parents submitted separately for consideration on appeal, which the IHO already declined to enter as evidence in the hearing record and which I have also declined to enter as evidence in the hearing record (see Req. for Rev. Exs. KKK-PPP). Therefore, I decline to exercise my discretion to admit the court cases, SRO cases, the physician's letter, the 2015-16 preschool update report, the publications, and the compilations of publications as evidence in the hearing record.

Finally, the parents offer two documents that, based upon the reported dates, were not available at the time of the impartial hearing (or the June 2016 CSE meeting for that matter), as well as an undated document describing the "Scerts Model" that is not at issue in this proceeding, and an undated "Calendar" (the probative value and context of which is unclear) for consideration on appeal (see Req. for Rev. Exs. JJJ; QQQ; SSS; UUU).[28] Although these proffered documents may not have been available at the time of the impartial hearing, the parents offer no rationale as to why the documents are now necessary to consider to render a decision in this matter;

[27] This distinction does not preclude an IHO, when necessary, from directing parties to submit copies of cases that they are relying on to the IHO. Such directives stem from an IHO's need for hearing efficiency and compliance with strict timelines.

[28] The progress during a period post-dating both the June 2016 CSE meeting and the filing of the due process complaint notice is irrelevant to a prospective determination of whether the goals were appropriate to meet the student's needs as of the time they were developed.

consequently, I decline to exercise my discretion to enter these documents as evidence in the hearing record or consider the same on appeal.

B. June 2016 IEP

1. Annual Goals

The parents argue that the annual goals in the June 2016 IEP were not appropriate because the student had "substantially surpassed" all of the annual goals listed in the IEP before they were written. In addition, the parents contend that the June 2016 CSE ignored their request to include annual goals "more consistent" with their own observations of the student's present levels, which the parents describe as "more similar to that of a typically developing kindergarten student." The parents also argue that although the student "significantly surpassed all of the goals set [forth] in the IEP" at home, the annual goals in the IEP were not reasonably calculated to enable the student to receive educational benefit. Additionally, the parents argue that the annual goals in the June 2016 IEP did not reflect the student's abilities in June 2016.

In response, the district initially asserts that the parents did not dispute the annual goals in the due process complaint notice, and therefore, the parents are now precluded from raising the annual goals as an issue in dispute on appeal. Alternatively, the district contends that the student's then-current preschool providers generated the annual goals in the June 2016 IEP, which the CSE then reviewed and revised with the parents' input.

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

As noted briefly above, the CSE convened on two dates to develop the June 2016 IEP; the first CSE meeting, which occurred sometime in spring 2016, included, among others, three staff members from the student's then-current preschool: the executive director, the student's speech-language pathologist, and the director of ABA services (see Tr. pp. 244, 478-79, 498-99, 660, 685-86, 773-79, 1017, 1151-52, 1192-93; Dist. Ex. 46 at p. 8).[29] When the CSE reconvened in June 2016 to finalize the IEP, it did not include any preschool staff as CSE members (see Tr. pp. 478-79; Dist. Ex. 45 at p. 1). Overall, several witnesses at the impartial hearing testified that preschool

[29] At the impartial hearing, the director of ABA services described her present role at the preschool at "one of the directors" (Tr. p. 1017). She testified that upon the student's return to the preschool in November or December 2015 and through June 2016, she and two other staff members provided the student with five 30 minute sessions per week of discrete trial training (see Tr. pp. 1023-24, 1079-81, 1183-85; see generally Dist. Ex. 40). The witness also believed that the student received the same frequency and duration of discrete trial training during the 2014-15 school year (see Tr. pp. 1079-80); however, the student's mother testified that the student did not begin receiving discrete trial training at the preschool until summer 2015 (see Tr. pp. 1369, 1376-77).

staff (although not necessarily those who attended the initial CSE meeting) created a draft IEP—or at a minimum, input the student's present levels of performance into a draft through "IEP Direct"—which both CSEs reviewed and revised to ultimately become the student's finalized June 2016 IEP (see Tr. pp. 238, 246, 478-79, 492, 498-502, 677-80, 779; compare Dist. Ex. 46 at pp. 8-16, with Dist. Ex. 45 at pp. 1-10).

However, contrary to the district's assertion, some confusion exists in the hearing record as to whether the student's preschool providers created the annual goals in the IEP—for example, the district's director of special education (director) testified that the student's then-current preschool providers drafted the annual goals in the June 2016 IEP, which the CSE "reviewed as a committee twice subsequent to them drafting it" (Tr. pp. 478-79). Yet a district speech-language pathologist who provided speech-language therapy services to the student during the 2015-16 school year and who attended the June 2016 CSE meeting testified that she wrote a "few [annual] goals" for the student and that the CSE "did some revisions on the goals" (Tr. p. 609; see Tr. pp. 597-609; Dist. Ex. 35 at p. 4). Next, the student's preschool speech-language pathologist who attended the initial CSE meeting testified that although the preschool staff assisted in the preparation of the present levels of performance in the student's IEP, neither she nor the preschool staff assisted in the development of the annual goals in the student's IEP (see Tr. pp. 675-86, 688-89, 691; see generally Dist. Ex. 41). The preschool director of ABA services also testified that the preschool staff did not "write the goals for kindergarten" (Tr. pp. 1197-98). Finally, the preschool executive director testified that at the initial CSE meeting, the preschool staff in attendance provided "input into goals," but did not submit "something in writing" (Tr. pp. 775-76).[30]

Regardless of this confusion, the hearing record contains sufficient evidence to conclude that, contrary to the parents' assertions, the CSEs considered the parents' input into the formulation of the annual goals, including their request to include annual goals "more consistent" with their own observations of the student's present levels. Furthermore, the hearing record contains sufficient evidence to conclude that the CSEs discussed, reviewed, and revised the annual goals ultimately incorporated into the June 2016 IEP. On these points, the district special education teacher who attended the June 2016 CSE meeting testified that when the CSE "started going through the goals," the parents would indicate that the student could "already do these things" (Tr. pp. 244-45). In consideration of the parents' input, the CSE then rewrote some of the annual goals to be more consistent with what the parents indicated that the student "was capable of doing" (Tr. p. 245; see Dist. Ex. 46 at pp. 1, 6). Similarly, the director recalled reviewing and discussing the annual goals at the June 2016 CSE meeting—as well as the student's present levels of performance—because "some disagreement" arose concerning "what [the student] could do at

[30] The hearing record included a document drafted by the parents, which included a list of what appears to be annual goals for the student (see Dist. Ex 46 at pp. 17-21; see also Joint Ex. 1 at pp. 10-14). At the impartial hearing, the director testified that she did not recall when the parents provided this document to the district, that is, whether it was before or after the June 2016 CSE meeting (see Tr. pp. 487-88; Dist. Ex. 46 at pp. 17-21). In the due process complaint notice, it appears that the parents forwarded a copy of this same document to the director attached to an e-mail dated June 29, 2016, after the June 2016 CSE meeting (see Joint Ex. 1 at pp. 8-14). However, when reviewing the annual goals in the June 2016 IEP, it does appear that some of the annual goals reflect concepts or language derived from the list of annual goals in this document, which suggests that the district or the June 2016 CSE may have had a copy of the document at the time the IEP was developed (compare Dist. Ex. 46 at p. 19, with Dist. Ex. 46 at pp. 12-13, and Dist. Ex. 45 at pp. 5-6).

school and what was observed at home" (Tr. pp. 479-80). The director testified that the June 2016 CSE modified the present levels of performance to "include strategies that the parents believed to be effective" for the student, and the CSE also reviewed the annual goals (Tr. p. 480; see Dist. Ex. 46 at pp. 1, 6).[31] Finally, the preschool executive director confirmed in testimony that the CSE "did talk about the goals" and the preschool staff "did make comments about the goals" (Tr. p. 776).

Turning to the parents' argument that the annual goals were not appropriate because the student had "substantially surpassed" them at the time of development, the evidence in the hearing record does not support this assertion, especially upon review of the student's present levels of performance as reflected in the June 2016 IEP. Here, the IEP generally indicated that the student exhibited delays in the areas of speech-language, pragmatic language, academic skills, cognitive skills, social skills, and fine motor skills (see Dist. Ex. 45 at pp. 2-5). Specifically, the June 2016 IEP reflected that the student continued to exhibit "significantly delayed" receptive and expressive language skills, "delayed" articulation skills in connected speech, "below age level" pragmatic language skills, and his spontaneous speech continued to be a "combination of English and [his native language]" (id. at p. 3). According to the IEP, the student could "identify pictures of a variety of nouns and actions in a structured activity," and he could produce "verb [and] noun phrases more consistently to describe a picture" (id.). At that time, the student could answer "basic 'yes and no' factual questions in discrete trials," and produced one to four word "phrases to comment" (id.). It was also noted in the IEP that the student "spontaneously greet[ed] familiar adults and peers with 'hi' and 'bye'" (id.). With respect to the parents' concerns, the June 2016 CSE denoted in the IEP that the student needed to improve his "articulation skills in connected speech," his ability to "respond to a variety of questions," and his pragmatic skills for a "variety of pragmatic functions (requesting, commenting, verbal discourse, etc.)," and he needed to "expand vocabulary skills to label" (id. at p. 4). To address the student's speech-language needs, the June 2016 IEP included annual goals that targeted his ability to "describe actions in presented pictures with no more than [three] cues" and to repeat a three-word to four-word sentence "using both intelligible speech and appropriate voice level with no more than [one] model" (id. at p. 6).

In the present levels of performance section of the IEP, the June 2016 CSE described the student's cognitive skills as "significantly below average" (Dist. Ex. 45 at p. 3). In addition, the IEP reflected that the student could "count and identify numbers 1 [through] 10" and demonstrated the ability to "write his first name when given a model" (id.). As of November 2015, the student could "identify 18/26 letters" of the alphabet, and the IEP further noted that the student was "now able to recognize the letters in his first name, identify parts of a book, answer social question and sit and attend with a quiet body (including hands), when assessed in a 1:1 discrete trial format, 1:1, with food reinforcers and no distractions" (id.). With respect to the parents' concerns, the June 2016 CSE identified in the IEP that the student needed to improve his ability to "[c]ount objects to [up to] 20 using 1:1 correspondence" (id. at p. 4). To address the student's academic needs, the June 2016 IEP contained an annual goal designed to improve the student's ability to "follow a one-step direction in the classroom," and specific to the area of mathematics, the IEP included an

[31] The director also explained in testimony the general process used in writing annual goals and what factors a CSE considered when writing annual goals for school-aged students as opposed to annual goals written for preschool students (see Tr. pp. 500-03).

annual goal for the student to improve his ability to "identify numbers 1 [through] 20 presented in any order" (id. at p. 6).

With regard to adaptive and daily living skills, the June 2016 IEP indicated that when the student arrived at school he "complete[d] the morning routine independently" (Dist. Ex. 45 at p. 3). The June 2016 CSE further noted, however, that the student exhibited "difficulty attending during small and large group activities" and "requir[ed] continuous modeling and prompts" (id.). As described in the IEP, the student followed one-step directions, and he "respond[ed] to a 3-step compliance routine (request-model-assist.)" (id.). However, the student continued to require "adult support, modeling, and verbal prompts to follow multiple directions" (id.). The IEP further reflected that the student was toilet trained and that he ate snack and lunch "independently" (id.). While not directly targeted with annual goals, the June 2016 CSE included several strategies to address the student's needs described above within the management needs section of the IEP (i.e., recommending the use of a "3-step compliance approach (REQUEST-MODEL-ASSIST)") and through recommendations for supplemental aids and services, program modifications, and accommodations, including the use of a visual schedule and refocusing and redirection throughout the school day (id. at pp. 5, 7-8).

In describing the student's present levels of social development, the June 2016 IEP reflected the student's "interest [in] interacting with peers and adults"; however, the student continued "to require adult support and modeling to initiate social interactions appropriately other than saying hi" (see Dist. Ex. 45 at p. 4). Additionally, the June 2016 IEP indicated that the student demonstrated "difficulty sharing with peers," explaining that while he "often expect[ed] [peers] to share," he did not always "reciprocate[] without support" (id.). The June 2016 IEP also reported that, "[i]n the past, [the student] showed frustration by yelling or hitting"; however, at that time, the student was "now spontaneously using his words to express distress when asked to comply with demands," and furthermore, the student was beginning to independently stop himself when he would start to exhibit aggression (id.). The IEP noted that the student "continue[d] to work on social skills goals" during discrete trial teaching and that he was "making slow progress with initiating appropriate interactions with peers, inviting a peer to play and identifying facial expressions" (id.). With respect to the parents' concerns, the June 2016 IEP indicated that the student needed to "[i]nitiate appropriate verbal and social exchanges with peers" (id. at p. 4). To address the student's social/emotional and behavior needs, the June 2016 IEP contained annual goals designed to improve his ability to identify "12 different emotions" when shown photographs of the same and to "engage in cooperative play skills (e.g., sharing, initiate and maintain play with peers, demonstrate turn-taking, display appropriate response to winning/losing) for 10 minutes" (id. at p. 6).[32]

In the area of physical development, the June 2016 IEP indicated that the student "present[ed] with delayed fine motor skills" and noted that "[j]oint hypermobility within the hands interfere[d] with his ability to use stable grasp postures on writing tools" (Dist. Ex. 45 at p. 4).

[32] In addition to annual goals to address the student's social/emotional and behavior needs, the June 2016 CSE included strategies to further address the student's needs within the management needs section of the IEP (i.e., recommending the use of "[m]odeling of appropriate social interaction," the use of "[p]ositive reinforcement for compliance and prosocial behaviors," and "ignor[ing] and redirect[ing] undesired behaviors") (Dist. Ex. 45 at p. 5).

However, the IEP also noted that the student could "form most of the letters of his name," but he continued to "need repetition and a multisensory approach to write these letters in correct order" (id.). Furthermore, the June 2016 IEP described the student as "often distracted," and noted that as a result, he would "miss salient features of a task" (id.). The June 2016 IEP also noted that the student needed "additional cues [or] supports to use visual demonstrations," and he "often use[d] inefficient movement patterns which result[ed] in him needing additional time to complete fine motor tasks" (id.). Finally, the IEP reflected that the student "enjoy[ed] a variety of movement experiences as well as opportunities to learn using a sensory motor approach" (id.). With respect to the parents' concerns, the IEP indicated that the student needed to "correctly form letters and numbers" (id. at p. 5). Here, the student's needs in the area of fine motor skills were addressed with annual goals designed to improve his ability to "legibly form 20/26 alphabet letters with use of a visual model" and to complete a "simple [three-]step fine motor activity with a visual model with no more than [two] cues" (id. at p. 6).

As the discussion above demonstrates, the evidence in the hearing record leads me to the overall conclusion that the annual goals in the June 2016 aligned with and targeted the student's needs identified in the present levels of performance, appropriately addressed the student's needs, and were sufficiently specific and measurable to guide instruction and to evaluate the student's progress over the course of the school year (see D.A.B. v. New York City Dep't of Educ., 973 F. Supp. 2d 344, 359-61 [S.D.N.Y. 2013]; E.F. v. New York City Dept. of Educ., 2013 WL 4495676, at *18-*19 [E.D.N.Y. Aug. 19, 2013]; D.B., 966 F. Supp. 2d at 334-35; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *8 [S.D.N.Y. Dec. 8, 2011]; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 288-89 [S.D.N.Y. 2010]; Tarlowe, 2008 WL 2736027, at *9; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *11 [S.D.N.Y. Sept. 29, 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 146-47 [S.D.N.Y. 2006]; Application of the Dep't of Educ., Appeal No. 12-108 [finding annual goals appropriate where the goals addressed the student's areas of need reflected in the present levels of performance]).[33]

2. Educational Placement and LRE

Turning now to the crux of the parties' dispute, the parents allege that the "Connections program and kindergarten" did not satisfy either the FAPE requirement or the LRE requirement, as the student had succeeded in an "all-day integrated setting." The parents also argue that the student required a "5-hour integrated school day." In response, the district asserts that the June 2016 IEP provided the student with the opportunity to attend a full-time, general education kindergarten class with his nondisabled peers, together with the opportunity to receive special education services in a special education classroom when the student's "nondisabled classmates would not be in school."

[33] A comparison of the draft IEP with the finalized June 2016 IEP reveals that the draft IEP originally included at least two annual goals addressing the student's speech-language needs, which appeared to target specific needs identified by the parents as concerns in the present levels of performance (i.e., needs to "improve ability to respond to a variety of questions" and to "expand vocabulary skills to label") but did not appear in the finalized IEP (compare Dist. Ex. 46 at pp. 11, 13, with Dist. Ex. 45 at pp. 4, 6). The draft IEP also included a third annual goal related to the student's articulation skills, which appeared as a modified version in the June 2016 IEP (compare Dist. Ex. 46 at p. 13, with Dist. Ex. 45 at p. 6).

Before reaching an analysis of the LRE question, it is helpful to briefly review the special education program recommended for the student in the June 2016 IEP. Initially, and using only the June 2016 IEP as a reference, the CSE recommended that the student attend a 12-month school year program (see Dist. Ex. 45 at pp. 1, 8-9). For the summer (July and August) portion of the school year, the CSE recommended that the student attend a 12:1+1 special class placement in a non-integrated setting (five days per week, five hours and 30 minutes per day), together with one 30-minute session per week of speech-language therapy in a small group in a non-integrated setting (id.). According to the IEP, for September through June 2016, the CSE recommended that the student attend a 12:1 special class placement ("Connections") in a "[s]pecial [c]lasses" setting (five days per week, two hours per day), together with related services of speech-language therapy and OT provided to the student either in a therapy room or in the classroom (id. at pp. 1, 7). In that portion of the IEP used to describe the student's "Participation with Students without Disabilities," the June 2016 CSE inserted "Not Applicable" (id. at pp. 9-10).[34] At no point in the administrative does either party seriously appear to contemplate that the student would not have attended the morning kindergarten session in the general education setting, consequently this is probably little more than a ministerial error to the extent that the IEP did not note that the student would attend the general education environment.[35]

While not necessarily reflected in the June 2016 IEP, the evidence in the hearing record demonstrates that the student's special education program consisted not only of the 12:1 special class placement—or the "Connections" classroom—but also the "regular [half] day kindergarten program" in the "mainstreamed setting" for five days per week, 2 hours 40 minutes per day

[34] Significantly, although the June 2016 CSE recommended essentially the same "Connections" program for the 2016-17 school year as in the previous school year, for the 2015-16 school year the May 2015 CSE included the following language in the IEP to describe the student's "Participation with Students without Disabilities": "Core academic instruction will be provided in special education setting. Student will participate with Kindergarten peers in the general education setting as appropriate" (compare Dist. Ex. 28 at pp. 9-10, with Dist. Ex. 45 at pp. 9-10). In fact, the only reference to the student attending a classroom setting other than the 12:1 special class placement in the June 2016 IEP is found within the recommendation for the use of a visual schedule in the "kindergarten and special education classes" (Dist. Ex. 45 at p. 7).

[35] To be clear, certain additional instructional or supportive services may be available to special education students and non-disabled students alike (e.g., academic intervention services (AIS) or "building level services"); however, according to the State Education Department, such services should not be listed on a student's IEP (see "Academic Intervention Services: Questions and Answers," at pp. 5, 20, Office of P-12 Mem. [Jan. 2000], available at http://www.p12.nysed.gov/part100/pages/AISQAweb.pdf). On the other hand, services that clearly fall into the realm of special education services are required to be listed on an IEP, at least according to United States Department of Education guidance, which states that "[t]he IEP Team is responsible for determining what special education and related services are needed to address the unique needs of the individual child with a disability. The fact that some of those services may also be considered 'best teaching practices' or 'part of the district's regular education program' does not preclude those services from meeting the definition of 'special education' or 'related services' and being included in the child's IEP" (Letter to Chambers, 59 IDELR 170 [OSEP 2012]). In this case, the only thing that should have been on the IEP is the extent to which any of the student's programing included participation with his non-disabled peers.

(compare Dist. Ex. 45, with Joint Ex. 1 at pp. 7-8, and Dist. Ex. 50, and Tr. pp. 113-14, 466).[36] At the impartial hearing, the district special education teacher assigned to the 12:1 "Kindergarten Connections" special class described the implementation of this particular program during the 2016-17 school year (see Tr. pp. 113-22). First, if the student had attended the district's recommended program, he would have attended an integrated kindergarten classroom for the morning portion of his school day (see Tr. pp. 113-15). The district special education teacher testified that the "Connections" students attended the "regular mainstream kindergarten" in the morning until the "mainstream kindergarten students[']" dismissal time at approximately 10:40 a.m. (Tr. pp. 113-14).[37] After dismissal, the "Connections" students went to lunch and recess (Tr. p. 114). Following lunch and recess, the "Connections" students attended the 12:1 special class placement for the remainder of the school day where they received "skill building and instruction" for English language arts (ELA), mathematics, writing, and social skills (Tr. p. 113). At times, the students in the "Connections" class received "one-on-one" instruction with the teacher or participated in "small group" instruction (Tr. p. 114). For the 2016-17 school year, the "Connections" special class placement had a total of four students in the class (id.). All four students in the "Connections" special class placement attended the same "general education kindergarten class" in the morning (Tr. pp. 114-15). During the afternoon, the "Connections" students also attended "specials" together, which the district special education teacher described as "library, art, music," "computer class," and "gym" (Tr. pp. 120-21).

In finding that the district offered the student a FAPE in the LRE for the 2016-17 school year, the IHO first noted that the student's kindergarten class consisted of both disabled and nondisabled peers and support from "teacher aides" who would assist the student's ability to "generalize the academic and social skills taught in the Connection Program" (IHO Decision at p. 14). Relying solely on the student's placement within this integrated kindergarten class—which, as noted by the IHO, provided the student "with exposure to peers who demonstrate[d] appropriate behavior"—but without undertaking an analysis of the two-prong test set forth in Newington to determine whether the June 2016 IEP placed the student in the LRE, the IHO concluded that the placement satisfied the LRE requirement (id.). Similarly, the evidence in the hearing record reveals that not only did the June 2016 CSE suffer from the same fatal flaw, but also that the June 2016 CSE, in making its placement recommendation for the 2016-17 school year, only considered program options the district already had available rather than making its recommendations based upon the student's needs, a consideration of the full continuum of alternative placements, and then

[36] In support of its assertion that the student's recommended placement in a "general education kindergarten class, with supports form the Connections special class" constituted the student's LRE, the district argues that the "special education class, therefore, [was] a special education support to enable the [s]tudent to continue to fully participate in and to progress within the general education setting" (Dist. Mem. of Law at p. 9). A plain reading of the June 2016 IEP does not support this assertion; instead, the June 2016 IEP indicates that the student would attend a 12:1 special class placement five days per week for two hours per day (see generally Dist. Ex. 45).

[37] The district special education teacher explained that within the kindergarten setting, the "Connections" students received the support of "two special education aides," who assisted the students with "packing and unpacking their belongings," helping the students "use their visual schedules and their 'first then' cards, and any sensory breaks that [were] needed" (Tr. p. 115). She also testified that the two special education aides provided "small group instruction along with the classroom teacher" (id.). The June 2016 IEP did not include any recommendations for the services of an aide during any portion of the student's school day during the 2016-17 school year (see generally Dist. Ex. 45).

offering the student the least restrictive placement from that continuum that was appropriate for his needs in contravention of T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 165-67 (2d Cir. 2014). Consequently, the IHO's conclusion must be reversed.

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. 107, 300.114[a][2][i], 300.116[a][2], 300.117; 8 NYCRR 200.1[cc], 200.6[a][1]; see T.M., 752 F.3d at 161-67; Newington, 546 F.3d at 111; Gagliardo, 489 F.3d at 105; Walczak, 142 F.3d at 132; 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. 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. Sobol, 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; the continuum also 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 (T.M., 752 F.3d at 161-67 [applying Newington two-prong test]; 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]). 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). 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 nondisabled 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).[38]

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).

Overall, I infer from the hearing record before me and the development of the parties' positions that the district and parents were undoubtedly aware of the global nature of the "Connections" program for all of the students therein and its relationship to the general education setting at the time of the June 2016 CSE meeting; however, the hearing record contains little, if any, evidence to establish that the district engaged in any meaningful LRE considerations that were individualized to this student when making its recommendation to remove the student from his non-disabled peers for approximately half of the instructional time envisioned under this student's plan for the 2016-17 school year. For example, unlike every other CPSE or CSE subcommittee or CSE meeting held for the student since 2014, the hearing record does not include any CSE meeting minutes or a prior written notice for the initial CSE meeting held in spring 2016 that would indicate what, if any, discussions took place about the recommended placement or the student's placement in the LRE (see Dist. Exs. 11 at pp. 1-2, 4; 16 at p. 1; 20 at pp. 1-2; 21 at p. 1; 25 at p. 1; 26 at pp. 1-2, 4-8; 27 at p. 4; 34 at pp. 6-9; 46 at pp. 1, 6). At a minimum, the evidence in the hearing record indicates that the spring 2016 CSE meeting was "very contentious," and a "great deal of disagreement" existed about the "direction of the IEP" between the parents and a district representative at the meeting (Tr. pp. 776-79). In addition, one witness testified that this initial CSE meeting ended with a "disagreement" with the management needs section of the IEP, which had been "discussed at length" (Tr. pp. 780-82). Next, while the hearing record included a copy of the June 2016 CSE meeting minutes, the minutes do not reflect any discussions about the student's placement or, more specifically, the two-prong Newington test: (1) whether education in the general classroom, with the use of supplemental aids and services, could be achieved satisfactorily for this student, and, if not, (2) whether the spring 2016 CSE or the June 2016 CSE mainstreamed the student to the maximum extent appropriate (see Dist. Ex. 46 at p. 6). Moreover, the July 2016 prior written notice related to the June 2016 CSE meeting indicated that, with regard

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

to a description of "any other options considered and the reason why those options were rejected," the district inserted the following as a response: "There were no other options considered at this time" (id. at p. 1). Finally, the June 2016 IEP, itself, failed to include any notations that would document a discussion regarding the student's placement and LRE considerations (see generally Dist. Ex. 45).

Testimonial evidence elicited at the impartial hearing, while providing some insight into the CSEs' decision-making process when selecting the student's placement in the LRE, was also insufficient to establish that the district appropriately considered or applied the two-prong Newington test. For instance, the district's director of special education (director) initially testified that the CSE believed the "Connections" program was appropriate for the student because he had a "diagnosis of autism, and given his cognitive and language abilities, the team felt that a half-day kindergarten program alone would not be sufficient to meet his educational needs" (Tr. pp. 487-88). When directly questioned if the CSE considered less restrictive placements such as a "co-teaching or consultant teacher model within a kindergarten class," the director offered two rather nonresponsive answers (Tr. p. 488). First, the director testified that "[w]e always consider the [LRE], and so that was certainly considered by the team who went to observe [the student] in preschool, and then the team ma[de] a recommendation based on their observation and based on their consultation with parents and staff" (id.). Next, when pressed about why the CSE recommended "something that was more intensive in terms of services . . . instead of co-teaching or consultant teacher," the director essentially repeated her previous response: the student's "language and cognitive profile plan demonstrate[d] that he struggle[d] greatly with language processing and cognition; therefore, if he were solely in a two-and-a-half-hour day, the team believe[d] that he would not get sufficient reteaching and repetition so that he could learn and have access to the kindergarten curriculum" (id.).

Thus, to the extent that the director's testimony suggests that the CSEs recognized that the student's needs required more supports and services than could be offered during the district's half-day integrated kindergarten classroom, this same testimony does not answer the question of why, when providing additional supports to the student in the latter portion of the school day, did the CSE believe that the student had to be removed from his non-disabled peers in order to receive sufficient additional support. This is essentially the question that is always posed by the first prong of the Newington test with respect to whether education in the general classroom, with the use of supplemental aids and services, could be achieved satisfactorily for this student. Had the district and IHO applied the Newington test more systematically throughout the administrative process, they would have discovered that the facts in this case closely parallel those considered by the Second Circuit in T.M. (752 F.3d at 154-55, 161-63). Notably, this student, as a preschool student with a disability—similar to the student at issue in T.M.—attended "'mainstream' general education classrooms with non-disabled students" (i.e., an integrated setting) for preschool from approximately March 2015 through August 2015 as recommended in his March 2015 IEP, and then again, from approximately December 2015 through August 2016 per agreement by the parties (T.M., 752 F.3d at 153-54; see Tr. pp. 697-98, 710-11, 810-12, 836-37, 1065-68; Dist. Exs. 24 at p. 1; 25 at p. 1; 26 at pp. 1-2; 27 at pp. 6, 13-14; 33 at p. 1; 39; see generally Dist. Exs. 23; 40-43). In addition, it is undisputed that the student attended a full-day integrated preschool classroom, meaning approximately four hours per day during the 2014-15 school year and approximately five hours per day during the 2015-16 school year (see Tr. pp. 711, 761-62). Also, similar to the facts weighed and considered by the Court in T.M., the evidence in the hearing record reflects that the

student made progress and "was able to achieve a satisfactory education" while attending the integrated preschool classroom (T.M., 752 F.3d at 162-63; see generally Tr. p. 847; Dist. Exs. 29-30; 40-43; 47). Therefore, as the Court concluded in T.M., the facts in this case "clearly demonstrate[] that [the student] could succeed" in a full-day integrated setting (T.M., 752 F.3d at 162). In addition and also consistent with T.M., the hearing record does not contain evidence—nor does the district point to any evidence—indicating that the student would "obtain greater educational benefits from a more restrictive setting" (T.M., 752 F.3d at 162).[39] In light of these facts, it is reasonable to conclude from the first prong of the Newington test that a full-day integrated setting should have been considered first as the least restrictive placement that could address the student's needs (see T.M., 752 F.3d at 162), rather than immediately deciding to remove the student from the general education setting and his non-disabled peers upon the conclusion of the morning kindergarten session.[40]

Instead, while the district recognized that the student required more support than a half-day general education setting and proceeded to consider a full-day program, the hearing record thereafter lacks any evidence that the district considered the student's placement in a full-day integrated setting for the 2016-17 school year. It appears that the reason for not considering such a full-day integrated program was that essentially, such a program did not exist at the district. The same reasoning, the nonexistence of an in-district integrated summer program, was advanced by Cornwall before the Second Circuit and the Court resoundingly rejected that reasoning (T.M., 752 F.3d at 166). The Court instructed that if the Cornwall did not wish to create an integrated program, it was not required to, but that it was required to place the student in an integrated public program elsewhere (id.).[41] Similarly, the evidence in the hearing record in this case demonstrates that the district recommended the only full-day program it had already created: namely, a half-day

[39] I have presided over many cases in which a party or an IHO equates the term "additional support" with "more restrictive" as if the two phrases are synonymous and, for some disabled students, the type of additional supports available in non-integrated settings are very clearly necessary to provide the student with educational benefits or avoid unduly impinging upon the educational experience of other students in the general education setting. However, it does not follow that "additional support" always means "more restrictive."

[40] To be clear, in light of these facts, if the parents had specifically challenged the district's decision to recommend a 12:1+1 special class placement in a non-integrated setting for summer 2016, the Court's holding in T.M. would appear to require a finding, on this basis alone, that the district failed to offer the student a FAPE in the LRE for the 2016-17 school year (see T.M., 752 F.3d at 162-65).

[41] The Court held that "[w]e therefore agree with both parties that the IDEA does not require a school district to create a new mainstream summer program from scratch just to serve the needs of one disabled child. * * * Instead, the school district may choose to place the child in a private mainstream summer program, or a mainstream summer program operated by another public entity" (T.M. 752 F.3d, at 166). Assuming that the parents are correct and that the district should have offered the student a full-day integrated setting with appropriate supports (a contention that the district has not refuted in this case under a Newington analysis), it does not follow that the district must be the entity that creates such a program or that it be created exactly as the parents wish. But the district may be called on to find such an all-day integrated program. The Second Circuit went on to reject several of Cornwall's additional arguments: "Cornwall responds that it had no way to offer T.M. a placement in a mainstream ESY program operated by another entity, because (1) no public mainstream ESY programs existed in the area and (2) New York law prohibited it from offering T.M. a placement in a private mainstream ESY program. But even assuming those facts are true, they do not change Cornwall's obligation under the IDEA to consider a full continuum of alternative placements and then offer T.M. the least restrictive placement from that continuum that is appropriate for his needs" (T.M. 752 F.3d, at 166).

integrated kindergarten setting for the student, together with a 12:1 special class placement ("Connections") in a non-integrated setting for the remainder of his school day. During cross-examination, the parents continued to press the director about potential or even hypothetical program options and LRE considerations for the student. Upon questioning, the director confirmed that the district offered both a morning kindergarten and an afternoon kindergarten program (see Tr. p. 517). When asked if the district or if the CSE considered an "integrated . . . all day" program for the student, the director testified that the district did not "have an integrated all-day program," noting, again, that the district "only" had a "half-day kindergarten" program (Tr. pp. 517-18). The director offered the same response when asked if a CSE had "ever considered providing" an integrated all-day program for autistic students (Tr. pp. 518-19). The IHO also asked the director whether the CSE considered the "possibility of a full day program in general" for the student, that is, placing the student in both a morning kindergarten and in an afternoon kindergarten program during the same day—and the director responded, "[n]o" (Tr. p. 519). Seeking further clarification of the CSE's placement in the LRE determination, the parents asked the director: "Are you saying that the reason you don't provide a full-day integrated environment for an autistic student is because one . . . just simply doesn't exist right now?" (Tr. pp. 519-20). The director responded, again, that the district had a "half-day kindergarten," and if a student functioned "at grade level academically" and therefore did not need "any self-containment," the student would only attend the "integrated portion of the day" (Tr. pp. 520-21). The director continued to explain, however, that if a student needed "additional instruction, we have created essentially a full-day program" for such students, adding that to have students "repeat the same exact content twice in a day . . . d[id] not allow for specialized instruction" and students with a disability that "impacts their ability to learn, . . . require specialized instruction" (Tr. p. 521).

Having created a full-day program that provided the student with access to his nondisabled peers for half of his school day, it is understandable that both the district—and the IHO—believed that the district's recommended placement satisfied its LRE obligation. But according to the Court in T.M., the pervasiveness of the LRE requirement required the application of the two-prong Newington test to the "entire proposed educational program" (see T.M., 752 F.3d at 162-65 [finding specifically that the LRE requirement applies to the summer component of the student's recommended 12-month school year program]; see also 34 CFR 300.107; 300.114; 300.117; 8 NYCRR 200.4[d][2][v][a][1]-[3]). In T.M., the Court rejected the district's assertion that the "LRE requirement [was] necessarily limited, in the ESY context, by what programs the school district already offer[ed]" (T.M., 752 F.3d at 163). Significantly, the Court explained that a "disabled child should not be forced into a special classroom if he or she can be appropriately educated in a mainstream classroom" (T.M., 752 F.3d at 163).

Therefore, assuming for the sake of argument that the half-day integrated kindergarten classroom component of the student's recommended placement met this inquiry, the hearing record fails to contain any evidence to establish that either the spring 2016 CSE or the June 2016 CSE undertook any analysis of the Newington factors to determine whether the 12:1 special class placement (or the "Connections" program) recommended in the June 2016 IEP met these same LRE requirements. It is undisputed that the district's recommended "Connections" classroom was a 12:1 special class placement—a special education program "open only to students with disabilities" (see T.M., 752 F.3d at 164; 8 NYCRR 200.6[h]). If the district did not have a less restrictive placement available for the student in the latter portion of the school day, the district was not required, as the parents suggest, to create a "new" program "just to serve the needs of one

disabled child" (T.M., 752 F.3d at 165-66). However, this does not absolve the district from complying with the need to comply with the IDEA's LRE requirement, which the Court indicates may be satisfied if the district "choose[s] to place the child in a private . . . program, or a . . . program operated by another public entity" (T.M., 752 F.3d at 166).[42]

3. Management Needs and Methodology

The gravamen of the parties' dispute focuses on whether the June 2016 CSE's failure to include a recommendation for ABA as a methodology in the management needs section of the student's IEP resulted in a failure to offer the student a FAPE. The parents argue that the student required a full-day, integrated intensive ABA program, modeled on the preschool program, and that provided the student with 40 hours per week of intensive ABA. The parents also assert that the management needs in the June 2016 IEP included only "trivial elements of a comprehensive program requiring no training of staff." In response, the district admits that the June 2016 IEP did not recommend a placement that utilized ABA methodology, but further responds that the district hired a BCBA with "training and experience in the application of ABA."

State regulation and guidance documents define management needs as the "nature and degree to which environmental modifications and human or material resources are required to enable the student to benefit from instruction" (8 NYCRR 200.1[ww][3][i][d]; see "Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 20, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf [providing examples of environmental modifications (i.e., consistency in routine, limited visual or auditory distractions, adaptive furniture), human resources (i.e., assistance in locating classes, following schedules, and note

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

taking), and material resources (i.e., instructional materials in alternative formats)]).[43] A student's management needs must be developed in accordance with the factors identified in the areas of academic or educational achievement and learning characteristics, social development, and physical development, and reported in the student's IEP (see 8 NYCRR 200.1[ww][3][i][d], 200.4[d][2][i]).

A review of the evidence in the hearing record establishes that the initial spring 2016 CSE—described as a "very contentious meeting"—ended with a "disagreement" about the management needs section of the IEP, which had been "discussed at length" (Tr. pp. 780-82; see Tr. pp. 776-79). According to the CSE meeting minutes and the prior written notice, the June 2016 CSE reconvened per the parents' request and, in particular, to discuss the parents' request for "ABA" (Dist. Ex. 46 at pp. 1, 6).[44] At the impartial hearing, the district special education teacher who attended the June 2016 CSE meeting testified that the parents raised concerns at the meeting, and their "big concern" focused on the use of a "three-step approach" with the student (Tr. pp. 244-45). It was also "very important" to the parents that the district use "ignoring and redirecting" with the student as well (Tr. p. 245). The district special education teacher further testified that the June 2016 CSE discussed the parents' desire to put "ABA" and "discrete trials" in the IEP (id.).[45] She explained that although the director told the parents that the district "could not do that," the director also told the parents that the district would "take some of the terminology used in conjunction with discrete trials and kind of reword [it], [and] put that in the IEP so that those things could happen for [the student]" (Tr. pp. 245-46).

In testimony, the director acknowledged that the June 2016 CSE did not agree to the parents' request to specify ABA in the IEP (see Tr. p. 480). In reviewing the draft IEP used at the meeting, the director confirmed that the "handwriting" represented the "parents' input" (Tr. p. 481). She explained that "we had a lot of discussion about management needs" and "we were trying to come up with language that could agree to put in [the student's] IEP"—and the handwritten

[43] Additional examples of management needs can be found in the general directions for the use of the State's model IEP form (see "General Directions to Use the State's Model Individualized Education Program (IEP) Form," Office of Special Educ. Mem. [Revised Mar. 2010], available at http://www.p12.nysed.gov/specialed/formsnotices/IEP/directions.htm).

[44] The meeting minutes and prior written notice reflected that the CSE was "not in agreement with adding ABA to [the student's] IEP," but the CSE did review and modify the "language" in the present levels of performance to "include strategies that [the] parents believe[d] [were] effective" (Dist. Ex. 46 at pp. 1, 6, 10, 12-15, 17-21). In both the CSE meeting minutes and the prior written notice, the district indicated that the "CSE d[id] not specify methodologies or programs in the IEP" as the reason the CSE declined to include ABA methodology in the June 2016 IEP (id. at pp. 1, 6). In addition, the district noted in the prior written notice that the student's preschool program "provided no specific information regarding [his] progress in his current program" as another rationale for rejecting the parents' request for ABA to be included in the IEP (id.).

[45] In an e-mail to the parents on June 13, 2016—the day before the June 2016 CSE meeting—the director explained to the parents that "[a]s with every methodology, there [was] not one single methodology that me[t] the needs of every child. Each child, based on their development levels and individual goals, require[d] an individualized approach to support their learning" (Joint Ex. 1 at p. 7). After the June 2016 CSE meeting, in an e-mail dated July 5, 2016, the director noted that "[a]s I previously stated, the CSE will not specify and [sic] methodology or program in the management needs section. I do not have any clear data or evidence from [the preschool] about [the student's] progress, therefore I don't have much to support specific management needs other than what our school staff knows about [the student]" (Joint Ex. 1 at p. 15).

notations on the draft IEP was the language that she and the parents agreed upon at that time to include in the management needs (id.; see Dist. Ex. 46 at p. 12). To address the parents' concern about the student receiving "components of ABA," the June 2016 CSE agreed to provide a "specialist who had experience with autism and ABA to support the staff in implementing" the student's IEP and therefore, recommended an "Educational Consult" as a support for school personnel (Tr. p. 485; Dist. Ex. 45 at p. 8). The director testified that she "agreed to that because [she] thought it was a good compromise to not listing methodology on an IEP" and the "consultant" would support the "team in carrying out the basic components of ABA" (Tr. p. 485). She also testified that other than the parents, the "CSE did not believe that ABA was necessary for [the student] to make progress" (Tr. p. 486). However, the June 2016 CSE agreed to add the educational consult "because it was very important to the parents and [she] thought that it was a fair compromise" (id.).

In addition, the director testified that the management needs section of the June 2016 IEP included other language that addressed the "provision of instruction consistent with an ABA model," such as "[m]odeling," the use of "simple direct language until generalization into a naturalistic setting [was] established for a given task," "[t]asks need[ed] to be broken down into sufficiently small steps," "[c]omplex tasks need[ed] to be separated into individual simplistic steps that c[ould] be learned separately and later recombined," "[p]ositive reinforcement for compliance and for social behaviors," "[i]gnore and redirect undesired behaviors," "[o]pportunities for individual instruction when learning basic rote facts or behaviors," "[a]void negative feedback," and the use of "three-step compliance approach" (Tr. pp. 486-87; Dist. Ex. 45 at p. 5).[46]

During cross-examination, the parents asked the director whether the items she included within the management needs section of the IEP were "more or less cherry-picking the things that [she] wanted to put in and avoiding other things that [the parents] requested" (Tr. pp. 504-05). The director responded that she "selected the items because those were general items that related to [ABA] that were appropriate to implement in a school-aged program" (Tr. p. 505). She also testified that the particular items selected to include in the management needs section of the IEP had "nothing" to do with whether teachers would require further training in order to implement the strategies recommended in the management needs (Tr. pp. 505-08).

Turning specifically to the question of methodology, the director initially stated that "[w]e do not include methodology in the IEP" (Tr. p. 508). She explained that it was not included for a "number of reasons," most significantly because when hiring "professionals to teach and provide services to students, we rely on their expertise and their ability to carry out an IEP" (id.). The director also testified that placing a methodology on an IEP "pigeonhole[d] a staff member into only utilizing one very specific tool that may or may not work for the student" and it provides the teacher with "no flexibility to access their professional knowledge" (Tr. pp. 508-09).

[46] The hearing record included a document drafted by the parents, which included proposed language to include in the management needs section of the IEP (see Dist. Ex 46 at pp. 17-19; see also Joint Ex. 1 at pp. 10-12). As noted previously, the director testified that she did not recall when the parents provided this document to the district, that is, whether it was before or after the June 2014 CSE meeting (see Tr. pp. 487-88; Dist. Ex. 46 at pp. 17-21).

Generally, a CSE is not required to specify methodology on an IEP, and the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher's discretion—absent evidence that a specific methodology is necessary (Rowley, 458 U.S. at 204; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 575-76 [2d Cir. Oct. 29, 2014]; A.S. v. New York City Dep't of Educ., 573 Fed. App'x 63, 66 [2d Cir. July 29, 2014], aff'g 2011 WL 12882793, at *16 [E.D.N.Y. May 26, 2011] [noting the "broad methodological latitude" conferred by the IDEA]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 86 [2d Cir. July 24, 2013]; R.E., 694 F.3d at 192-94; M.H., 685 F.3d at 257 [indicating the district's "broad discretion to adopt programs that, in its educational judgment, are most pedagogically effective"]; see M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *12 [S.D.N.Y. Mar. 31, 2014] [finding in favor of a district where the hearing record did not "demonstrate[] that [the student] would not be responsive to a different methodology"]; but see A.M. v. New York City Dep't of Educ., 845 F.3d 523, 541-45 [2d Cir. 2017] [holding that "when the reports and evaluative materials present at the CSE meeting yield a clear consensus" regarding methodology, absent evidence to the contrary a program that does not recommend the use of that methodology will not be reasonably calculated to enable the student to receive educational benefits]).

Here, the hearing record fails to contains evidence to support the parents' contention that the student required—in other words be exclusively limited to—an intensive ABA program; instead, the evidence in the hearing record, as described more fully below, shows that the student received instruction using both ABA and non-ABA methodologies, and he made progress in individual and small group settings, as well as in larger group settings with adult support. Therefore, the evidence in the hearing record does not support a conclusion that the student required an intensive ABA program and that the IEP should be limited in that fashion in order to provide the student with a FAPE.

Specifically, the hearing record indicated that from September 2015 through November 2015, the student attended the district's half-day integrated kindergarten classroom, and, for the remainder of the school day, he attended a 12:1+1 special class placement ("Connections") (see Tr. pp. 207-08, 211, 466; Dist. Ex. 28 at pp. 1, 7; see generally Dist. Exs. 30-38). At the impartial hearing, the district special education teacher of the 12:1+1 special class placement for the 2015-16 school year (teacher) testified that the student attended her classroom, and he received direct instruction for ELA and mathematics (see Tr. pp. 201, 207).

At the impartial hearing, the teacher testified that upon entering the 12:1+1 special class placement in September 2015, the student was "very quiet " and "needed a lot of visual supports" (Tr. pp. 207-08, 214). She used a "visual schedule" with the student, and she also testified that the student "needed a lot of support and props [sic] to sit and attend in the kindergarten mainstream classroom" (Tr. pp. 208, 211). The teacher noted that an aide would "modify any work for him by highlighting it" and the student "was beginning to trace letters and complete the morning work" (Tr. p. 211).

The evidence in the hearing record demonstrates that by mid-October 2015, the student began performing his morning routine more independently, such as walking down the hall, unpacking his bag with no prompts, going to the table to begin seat work, beginning to write his name (whereas he did not write any letters independently in September 2015), getting his own snack and requesting "'open please,'" sitting at the table and waiting for directions, waiting to be

called for lunch with no prompts, following the calendar routine, and counting to five on the calendar and with popsicle sticks (Dist. Ex. 30; see Tr. pp. 211-12). In addition, the evidence further indicated that the student made "slow progress in completing tasks independently" and had shown "growth since September in a structured environment" (Dist. Ex. 30). The district special education teacher who drafted the document also noted that the student's "language barrier [was] slowing him down from making more progress" (id.).

In addition, the evidence in the hearing record included updates recorded in the present levels of performance within the student's October 2015 IEP (compare Dist. Ex. 32 at pp. 3-4, with Dist. Ex. 33 at pp. 3-4). According to a November 2015 speech-language update, the student made "steady progress" since services began in September 2015, and specified that he was now "using his words more to express himself" and had increased his "use of English words" throughout the school day (Dist. Ex. 33 at p. 3). Additionally, as of November 2015, the student exhibited "some progress with labeling school items, a variety of animals, action words and body parts, as well as answering questions," with decreased echolalic or responses in his native language (id.).[47]

Next, a November 2015 adaptive skills update indicated that the student had "shown progress since September adjusting to a new school and new routine" (Dist. Ex. 33 at p. 4). More specifically, the update revealed that the student could "independently hang up his backpack, unpack his binder, folder, [and] snack, and hang up his coat" (id.). Furthermore, the student was "independently plac[ing] his binder into his bin and [went] to his Kindergarten room to begin his day" (id.).

Finally, a November 2015 cognitive skills update reflected that the student had difficulty "maintaining attention for more than a few minutes on any one specific task unless he [was] being guided 1:1 with teacher prompts" (Dist. Ex. 33 at p. 4). It was also noted that the student exhibited a "high level of distraction during . . . reading group time and require[d] 1:1 teacher assistance to complete tasks during class lessons" (id.). Additionally, the update indicated that the student participated in calendar time by "counting the days of the month, dressing the weather frog appropriately, and choosing the correct pictures to identify the weather" (id.).

Regarding behavior, the teacher testified at the impartial hearing that she disagreed with the assertion in the parents' due process complaint notice, which stated that the student "demonstrated extremely poor behavior in a number of public places" (Tr. p. 236; Joint Ex. 1 at p. 3). Instead, the teacher clarified that the student's behavior was "slightly improving" from September to November (Tr. p. 236; see generally Dist. Ex. 38). In addition, the district speech-language pathologist who provided therapy services to the student in fall 2015 testified that, by November 2015, the student was sitting and attending more, and he improved his attention and listening skills and in his ability to follow more of the routines (Tr. pp. 591, 597, 603, 605). She further testified that the student was making "some really nice progress" on his annual goal identifying pictures, objects, and items, and the student was "really picking up on labels, vocabulary, the names for items, [and] the names for animals" (Tr. pp. 606-07; see Dist. Ex. 35 at p. 4). The speech-language pathologist also reported that the student made "slow" and "steady"

[47] The hearing record also included a 2015-16 progress report about the student's annual goals, which indicated that the student was "progressing satisfactorily" on all of his annual goals (study skills, reading, mathematics, speech-language, and motor skills) (Dist. Ex. 35 at pp. 1-5).

progress on his annual goal answering "'yes, no, and what," questions, and his echolalia decreased (Tr. p. 607; see Dist. Ex. 35 at p. 4).

At the impartial hearing, the speech-language pathologist who provided therapy services to the student at preschool from December 2015 through June 2016 testified that she used both "ABA and non-ABA" approaches with the student, and noted that the student "made progress in both therapy strategies" (see Tr. pp. 660-63; see generally Dist. Ex. 41). She testified that the ABA was "more structured" in a 1:1 setting with the student and while the student made progress, "it was limited" (Tr. p. 661). The speech-language pathologist also testified that the student made the "most progress" during group sessions of therapy (group of 2 students total), when the student worked on his "pragmatic or social language skills" and had the "opportunity to generalize" the skills he was learning (Tr. pp. 661-62).

In addition to the foregoing, the parents questioned the director about the "comprehensive" ABA program the parents wanted for the student (see Tr. pp. 527-529). As part of this line of questioning, the parents referred the director to a report from the student's developmental pediatrician, dated May 2016 (see Tr. pp. 529-32; Parent Ex. JJ at p. 1; Joint Ex. 1 at p. 21). In particular, the parents asked the director if she had seen the "statement" in the report from the pediatrician "that a comprehensive [ABA] program [was] a highly, highly appropriate program for [the student]" (Tr. p. 529; Parent Ex. JJ at p. 1; Joint Ex. 1 at p. 21). The director confirmed that she recalled seeing the May 2016 report, but later clarified that she did not know whether the June 2016 CSE had the May 2016 report (see Tr. pp. 529-30, 572; Parent Ex. JJ at p. 1; Joint Ex. 1 at p. 21). Returning to the May 2016 report, the parents read the sentence directly into the hearing record: "It is highly appropriate that the central part of his intervention should consider a comprehensive [ABA] approach," and then asked the director whether a "doctor might feel uncomfortable about overstepping the boundary in saying that this [was] the program that has to be provided . . . even though that's the appropriate course of action" for a student (Tr. p. 530; Parent Ex. JJ at p. 1; Joint Ex. 1 at p. 21). The director responded "[a]bsolutely"—the parents agreed, noting that this was "exactly the case, that the doctor feels that" and therefore, "he might not write" it in the report, but then further indicated that the pediatrician had "already stated that to [them]" (Tr. pp. 531-32).

However, although the parents believe that the pediatrician withheld a direct recommendation that the student receive a comprehensive ABA program in the report because he felt "uncomfortable," the pediatrician did not testify at the impartial hearing and no further points of clarification were submitted into the hearing record, thus leaving their beliefs regarding the pediatrician's motivations in the category of mere speculation. A review of the May 2016 report reveals that, in addition to the statement reported above, the pediatrician suggested that "continued direct services [were] important" for the student (Parent Ex. JJ at p. 1). In addition, the report indicated that a "comprehensive [ABA] approach . . . might include discrete trial training and other documented methods using ABA" (id.).

Based upon the foregoing, the hearing record does not support the parents' contention that the student needed either a comprehensive ABA program or that ABA should have been the specified methodology for the student in the management section of the June 2016 IEP.

Finally, the parents assert that the district's recommended "Connections" placement—which they characterized as an "eclectic program"—was not appropriate because it was not based upon peer-reviewed research and relied on "IEP progress" to measure gains. State and federal regulations require, in part, that an IEP must include a "statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child" (34 CFR 300.320[a][4]; see 8 NYCRR 200.4[d][2][v][b]). According to the Official Analysis of Comments to the federal regulations, the IDEA

> requires special education and related services, and supplementary aids and services, to be based on peer-reviewed research to the extent practicable. States, school districts, and school personnel must, therefore, select and use methods that research has shown to be effective, to the extent that methods based on peer-reviewed research are available. This does not mean that the service with the greatest body of research is the service necessarily required for a child to receive FAPE. Likewise, there is nothing in the Act to suggest that the failure of a public agency to provide services based on peer-reviewed research would automatically result in a denial of FAPE. The final decision about the special education and related services, and supplementary aids and services that are to be provided to a child must be made by the child's IEP Team based on the child's individual needs.

(Statement of Special Education and Related Services, 71 Fed. Reg. 46664-65 [Aug. 14, 2006]; see 20 U.S.C. § 1414[d][1][A][i][IV]).

During the impartial hearing, the "Connections" program was, at times, referred to as an "eclectic" program (Tr. pp. 457-58, 488-89, 528, 565-66). The director testified, however, that the program "utilize[d] research-based strategies pulled from documents that indicate[d] these [were] the best practices instructionally and socially to support students with autism in a school setting" (Tr. p. 489). In particular, the director referenced the "Quality Indicators of Programming for Students with Autism" and documents from the "National Center for Autism" (id.). The director also testified that the district hired teachers with "training and knowledge in working with student with autism" and that those teachers brought their "own expertise in working with those students" to the program (Tr. pp. 489-90). Similarly, the district school psychologist testified that the "Connections" program was developed based upon "best practice" and meta-analysis research from the "National Autism Center" (Tr. pp. 956-65; see Dist. Ex. 50).

While recognizing the IDEA's requirements regarding peer-reviewed research, courts have generally declined to find an IEP or a recommended program was not appropriate on the sole basis that it violated this provision of the IDEA (see Ridley Sch. Dist. v. M.R., 680 F.3d 260, 275-79 [3d Cir. 2012]; Joshua A. v. Rocklin Unified Sch. Dist., 319 Fed. App'x 692, 695 [9th Cir. Mar. 19, 2009] [finding that "[t]his eclectic approach, while not itself peer-reviewed, was based on 'peer-reviewed research to the extent practicable'"]; see also Pitchford v. Salem-Keizer Sch. Dist. No. 24J, 155 F. Supp. 2d 1213, 1230-32 [D. Or. 2001] [rejecting an argument that a district's proposed IEP was not appropriate because it provided for an eclectic program and holding that the district's

offer of FAPE was appropriate notwithstanding its refusal to offer an ABA approach]). I also find that any lack of peer-reviewed research supporting the approaches used in the "Connections" program is not a sufficient basis for finding a violation of the IDEA or attendant State regulations. Consequently, the parents' argument must be dismissed.

C. Pendency

In conjunction with their request for relief, the parents point out that the IHO failed to issue a pendency determination. To justify an award of tuition reimbursement, the parents argue that the 50 to 60 hours per week of home-based ABA services the student received from August 29, 2016 through February 4, 2017—and where the parents, themselves, acted as the ABA providers—constituted the student's pendency placement. As such, the parents seek a determination that the home-based ABA services constituted the student's pendency placement and to be reimbursed for providing those services to the student. In its answer, the district argued that the special education services in District Exhibit 33 represented the student's pendency placement.

The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4], 4410[7][c]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. Jan. 18, 2005]). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; see Wagner v. Bd. of Educ., 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987]; Evans v. Bd. of Educ., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). The pendency provision does not mean that a student must remain in a particular site or location (Concerned Parents and Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751 [2d Cir. 1980]; Application of a Student with a Disability, Appeal No. 08-107; Application of the Bd. of Educ., Appeal No. 07-125; Application of a Child with a Disability, Appeal No. 07-076; Application of the Bd. of Educ., Appeal No. 05-006; Application of the Bd. of Educ., Appeal No. 99-90), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then-current educational placement (Mackey v. Bd. of Educ., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean the last agreed upon placement at the moment when the due process proceeding is commenced (Murphy v. Bd. of Educ., 86 F. Supp. 2d 354, 359 [S.D.N.Y. 2000] aff'd, 297 F.3d 195 [2002]; Application of a Student with a Disability, Appeal No. 08-107; Application of a Child with a Disability, Appeal No. 01-013; Application of the Bd. of Educ., Appeal No. 00-073). The

United States Department of Education has opined that a student's then current placement would "generally be taken to mean current special education and related services provided in accordance with a child's most recent [IEP]" (Letter to Baugh, 211 IDELR 481 [OSERS 1987]; see Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]). However, if there is an agreement between the parties on placement during the proceedings, it need not be reduced to a new IEP, and it can supersede the prior unchallenged IEP as the then-current placement (Evans, 921 F. Supp. at 1189 n.3; see Bd. of Educ. v. Schutz, 137 F. Supp. 2d 83 [N.D.N.Y. 2001] aff'd, 290 F.3d 476, 484 [2d Cir. 2002]; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Moreover, a prior unappealed IHO's decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440 at *23; Letter to Hampden, 49 IDELR 197; Application of a Student with a Disability, Appeal No. 08-107; Application of a Student with a Disability, Appeal No. 08-050; Application of the Dep't of Educ., Appeal No. 08-009; Application of the Dep't of Educ., Appeal No. 07-140; Application of the Dep't of Educ., Appeal No. 07-134).

On the penultimate date of the impartial hearing, the IHO asked the parties to present their respective positions with respect to the student's pendency placement (see Tr. pp. 857, 859). The district asserted that District Exhibit 33—which arose from a resolution agreement between the parties—was the last-agreed upon IEP (see Tr. p. 859; Dist. Exs. 33; 39). The parents essentially agreed, but further asserted that the "last-agreed upon IEP was a placement at [the preschool]," and pointed to the contents of the resolution agreement to support their assertion (Tr. pp. 860-63; see Dist. Ex. 39). The district's attorney noted, however, that the last-agreed upon IEP did not "specify [the preschool]"; instead, the IEP "specified specialized services" (Tr. pp. 862-63).

As noted above; however, the parents now argue that the student's home-based ABA services, which began on August 29, 2016, constitute the student's pendency placement. In this case, focusing the inquiry on the last agreed upon placement at the moment when the due process proceeding was commenced—here, August 5, 2016—leads to the conclusion that the student's home-based ABA services, which began on August 29, 2016, cannot be the student's pendency placement (see Murphy, 86 F. Supp. 2d at 359), and therefore, the parents are not entitled to reimbursement for the ABA services they provided to the student on this basis. Instead, it appears that the special education services set forth in the resolution agreement—and thereafter, reduced to the IEP entered into the hearing record as District Exhibit 33—represents the student's last agreed upon placement at the time the parents commenced the due process proceeding. Consequently, the parents' request to be reimbursed for providing the student's home-based ABA services must be dismissed.

D. Relief

Next, the parents argue that they are entitled to reimbursement for providing the student's home-based ABA services because the ABA therapy and educational program delivered to the student was a unilateral placement. In addition, the parents seek an order directing the district to design and create a classroom with, not only specific teacher and provider qualifications, but also with specific quality control measures for the classroom and for the other students expected to populate the classroom. The district generally argues that there is no basis or authority for the relief requested by the parents.

Initially, I decline to find on this record that the parents provided the student's home-based ABA therapy and educational program as a unilateral placement for which they can receive reimbursement. Rather, the evidence in the hearing record reveals that, at the time of the impartial hearing, the parents elected to homeschool the student for approximately five hours per day during the week and eight to nine hours per day on weekends, and the student was not enrolled in either a public or nonpublic school (Tr. pp. 20-22). In addition, the parents had enrolled the student in a "daycare" for approximately four hours per day (id.). When the parents stated that they were homeschooling the student, the district's attorney specifically asked whether parents had filed an individualized home instruction plan (IHIP), and at that time, the parents responded that they had not yet done so (see Tr. pp. 21-22). Upon learning that the parents were home schooling the student and had failed to file an IHIP, the district's attorney told the parents that they needed to "do that immediately" (Tr. p. 22).[48] Moreover, the evidence in the hearing record does not include any notification by the parents that they intended to withdraw the student from the district and seek reimbursement for services, such as the 10-day notice of unilateral placement called for by the IDEA (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). Thus, other than the parents now requesting reimbursement for delivering the home-based ABA therapy and educational program as a unilateral placement, the hearing record contains no evidence that I find is an appropriate basis upon which to predicate an award of tuition reimbursement as envisioned under Burlington/Carter.[49]

Next, the hearing record does not contain evidence to support the parents' request for an order directing the district to design and create a classroom for the student with the requirements proposed by the parents. Simply stated, as noted above, the Court in T.M. noted, the IDEA does not require a district to create a "new" program "just to serve the needs of one disabled child" (T.M., 752 F.3d at 165-66 [internal citations omitted]). Instead, a district "may choose to place the child in a private . . . program, or a . . . program operated by another public entity" (T.M., 752 F.3d at 166). However, because the district failed to consider the extent to which the Connections program was a removal from the general education setting that was inconsistent with the requirement to place the student in the LRE, I will direct the CSE to reconvene to ensure that the IEP programing offered to the student from this point forward is consistent with the LRE requirements as set forth in Newington and Cornwall.[50]

[48] Shortly after the parents filed this appeal with the Office of State Review, correspondence directed to this office indicated that the parents were directed to enroll the student at the district's elementary school through a Family Court order. Subsequent correspondence revealed that the parents opted to enroll the student in a nonpublic school program.

[49] To the extent that the parents point to authority outside this circuit to support their argument, it is not persuasive under these facts (see Bucks County Dep't of Mental Health/Mental Retardation v. Pennsylvania, 379 F.3d 61, 66-75 [3d Cir. 2004] [holding that a parent was entitled to reimbursement for providing services to her disabled daughter after the county refused to provide the therapy]).

[50] Even if the student must be removed from the general education setting for some portion of the school day in order to receive sufficient educational benefits, the second factor of Newington requires the district to be able to explain how it has ensured that the student is otherwise mainstreamed to the maximum extent appropriate.

VII. Conclusion

In summary, the evidence in the hearing record establishes that, contrary to the IHO's determination, the district failed to offer the student a FAPE in the LRE for the 2016-17 school year.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated December 30, 2016, is modified by reversing those portions which 1) ruled on the procedural adequacy for developing the IEP and 2) substantively determined that the district's programing offered the student a FAPE in the LRE for the 2016-17 school year; and

IT IS FURTHER ORDERED that the district shall reconvene the CSE within 30 days from the date of this decision to consider the extent to which a Newington/Cornwall analysis requires that the student be placed with non-disabled peers when receiving his special education services in order to satisfy the IDEA's requirement for placement in the LRE.

Dated: **Albany, New York**
April 3, 2017

JUSTYN P. BATES
STATE REVIEW OFFICER