The University of the State of New York

The State Education Department
State Review Officer
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No. 17-079

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Westhampton Beach Union Free School District

Appearances:
Kevin A Seaman, Esq., attorney for respondent

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which determined that the educational program respondent's (the district's) Committee on Special Education (CSE) had recommended for his son for the 2016-17 and 2017-18 school years was appropriate. The appeal is 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

[1] In September 2016, Part 279 of the Practice Regulations was amended, which became effective January 1, 2017, and is 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 some of 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.

on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The student has been the subject of two prior administrative appeals (Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040). Accordingly, the parties' familiarity with the facts and procedural history through the prior administrative appeals is presumed and will not be repeated in detail.

Pursuant to an IHO order dated January 6, 2017, which was the subject of the appeal in Application of a Student with a Disability, Appeal No. 17-015, the district hired two inclusion consultants who were tasked with the assessment of whether supplementary aids and supports would allow the student to benefit from inclusion in classes in the district, and to make recommendations in accordance with that review, resulting in an inclusion consult summary report dated March 21, 2017 (herein referred to as the "inclusion report A"), and a report to the district dated April 3, 2017 (herein referred to as the "inclusion report B") (Joint Exs. J; L; see Joint Ex. A at p. 57).

A CSE convened on April 5, 2017 for a "requested review," during which meeting the inclusion consultants presented their reports and provided details about their findings and recommendations (Joint Ex. M, pp. 1-335; see Joint Ex. FF at pp. 8). The CSE ultimately found that the student remained eligible for special education as a student with an intellectual disability, and recommended that an 8:1+1 special class for English language arts (ELA), science, math, social studies, and physical education, as well as for a career and vocational skills class and a learning lab with related services, including: five 30-minute sessions of individual speech-language therapy per week, two 30-minute sessions of individual occupational therapy (OT) per week, and three 30-minute sessions of individual physical therapy (PT) per week (Joint Ex. O at p. 13).[2] The CSE also recommended four 90-minute sessions of home instruction per week and one hour per month of parent counseling and training (id.). In addition, the CSE recommended a number of accommodations, program modifications, and supplementary aids and services (Joint Ex. O at pp. 13-16). The CSE further recommended placement in an "Other Public School District" (id. at p. 16). At the end of the CSE meeting, the parents expressed their disagreement with the recommendation for placement outside of the district and indicated their intent to pursue their due process rights (Joint Ex. M. at pp. 283-85).

On April 17, 2017, the district sent out letters and packets to five neighboring school districts asking if they had an 8:1+1 or 12:1+1 special class available for the student for the 2016-17 school year "that focuses on functional academics and transition" (Joint Ex. DD at pp. 1-41). The letters also indicated "[i]t was discussed that the student should be able to participate in mainstream electives where appropriate with the support of supplementary aids and services" (id. at pp. 2-6).

[2] Although the April 2017 CSE recommended that the student required a 12-month program and recommended special education and related services for July and August to be provided by the sending school district, the recommended program was for summer 2016 (id. at pp. 14-15).

A. April 19, 2017 Due Process Complaint Notice and Subsequent CSE Meeting

The parents filed a due process complaint on April 19, 2017, wherein they alleged that the district denied the student a FAPE for the 2016-17 school year based upon a broad range of claims and allegations, including: the district conducted unauthorized evaluations, inclusion report A was "irreconcilably compromised" and substantively flawed, the CSE was not properly composed because it included two members who should have been removed for lack of impartiality, the district's attorney acted to impair the efficacy of the CSE recommendation, the student's educational needs warranted an in-district placement in a hybrid program, the recommendation for an out-of-district placement impaired the student's ability to obtain a FAPE in the least restrictive environment (LRE), the CSE chairperson recommended an educational placement that was inconsistent with the consensus of the other CSE members, the district is compelled to attempt to implement the student's IEP within the district, the district harbors a systematic discriminatory policy against alternately assessed special education students, and the district continues to act in bad faith (Joint Ex. C at pp. 1-2). As proposed relief, the parent asked that the district immediately implement the student's IEP within the district, in a "hybrid program," as well as "all damages deemed equitable, including compensatory damages" and legal costs (id. at p. 2).

In the beginning of May 2017, the district received responses from two neighboring districts indicating that they had available programs to meet the student's needs (Joint Ex. DD at pp. 43-44).

The CSE reconvened on May 31, 2017, to develop a program for the student for the 2017-18 school year (Joint Ex. N; P). The CSE found the student remained eligible for special education as a student with an intellectual disability, and recommended that the student be placed in a twelve-month program[3] in a 12:1+1 special class in another public school district, with related services and accommodations, program modifications and supplementary aids and services similar to those recommended in the student's April 2017 IEP (compare Joint Ex. O at pp. 13-16, with Joint Ex. P at pp. 13-18).[4]

B. Pre-Hearing Conference and Subsequent Events

The parties proceeded to a pre-hearing conference on June 1, 2017, during which the parent expressed his intention to prepare a second due process complaint to be consolidated with the first, in order to challenge the student's placement for the 2017-18 school year, in addition to the 2016-

[3] At the May 2017 CSE meeting, the CSE members discussed that during the 2015-16 school year, the student received a hybrid program which included the provision of services in the home, and that the summer services were "all over the map" because the parties were "trying to figure it out" in the preceding school year (Joint Ex. N at pp. 63-67, 69-73). Ultimately, the parties agreed to adjust the frequency and duration of the student's 12-month school year services to include the following: speech-language therapy twice weekly in a small group and twice weekly individually, OT twice weekly individually, PT twice weekly individually, a 1:1 aide, and special instruction for two hours five times per week to be provided in the student's home and community (Joint Exs. N at pp. 80-85; P at pp. 15-16). The May 2017 IEP specified that the sending school district would be responsible for the provision of summer services (Joint Ex. P at p. 16).

[4] The student was recommended for an 8:1+1 special class for adaptive physical education, contrasted with the 12:1+1 class recommended for his other special education services (Joint Ex. P at pp. 13-14).

17 school year, a request the district consented to (Tr. pp. 3-5). The parties also agreed that the parent's challenge to the 2016-17 school year was practically moot (Tr. p. 5).

The parent thereafter filed a second, consolidated due process complaint notice dated June 1, 2017, which largely mirrored the substance of the first due process complaint notice, with some minor changes to the language of the parent's claims (compare Joint Ex. E at pp. 1-2, with Joint Ex. C at pp. 1-2). The June 1, 2017 due process complaint notice also added the following claims: the CSE chairperson recommended an educational placement which she was not familiar with and that was unnecessarily restrictive, the CSE chairperson recommended that placement without exploring the possibility of implementing the student's IEP goals within the district, and the CSE was improperly composed because it failed to include a representative from the recommended placement (Joint Ex. E at pp. 1-2).[5] As proposed relief, the parent asked that the district endorse an IEP that "reflects full integration" within the district for the 2017-18 school year, and "begin the proactive steps necessary to effectuate the same immediately" for the remainder of the 2016-17 school year, as well as "all damages deemed equitable, including compensatory damages" and reimbursement for legal costs (id. at p. 2).

By letter dated June 6, 2017, the CSE chairperson notified the parents that two neighboring school districts had responded to the district's screening applications, and had reported availability in their special class placements for the 2017-18 school year that would meet the student's needs (Joint Ex. V). The CSE chairperson suggested that the parents contact the district's pupil personnel office so that the district could assist in scheduling site visits (id.).

By meeting notice dated June 12, 2017, the district notified the parent that the CSE was scheduled to reconvene on June 20, 2017, with the stated purpose of proposing a location for the 12:1+1 special class placement recommended at the May 2017 CSE meeting (Joint Ex. W at p. 1). That notice included a list of the names and titles of the anticipated CSE members, including participants from two neighboring school districts (id.).

Through a series of identical letters dated June 13, 2017, the parents wrote to each CSE participant on the attendance list for the June 20, 2017 CSE meeting, including the student's special education teacher, school psychologist, and representatives of the neighboring school districts (Joint Exs. X; Z; AA; see Tr. pp. 389-90). In those letters, the parent informed the CSE participants that they had received notice of the upcoming CSE meeting, stated that it was not requested by the parents and that they would not be attending (Joint Exs. X; Z; AA). The letter further alleged that the June 2017 CSE meeting was an illegally convened CSE meeting, and warned the participants that if they attended or participated in that meeting they would become entangled in State and federal litigation (id.).

[5] The second due process complaint notice did not allege that the district conducted unauthorized evaluations, as was alleged in the initial due process complaint (compare Joint Ex. C at p. 2, with Joint Ex. E at pp. 1-2).

C. Impartial Hearing Officer Decision

Following the June 1, 2017 pre-hearing conference, and consolidated due process complaint notice, the matter proceeded to an impartial hearing, which began on June 15, 2017, and concluded on June 22, 2017 after three days of proceedings (see Tr. pp. 1-1133).[6] During the hearing, the CSE convened a meeting on June 20, 2017, to attempt to finalize the IEP draft which was created at the May 2017 CSE meeting, but was ultimately unable to come to a final recommendation (IHO Decision at p. 11; See Joint Ex. EE at pp. 1-112).[7]

In a decision dated August 15, 2017, the IHO concluded that the district provided the student with a FAPE for the 2016-17 and 2017-18 school years (IHO Decision at pp. 14-17). As a preliminary matter, the IHO noted that the parent raised a number of allegations of discrimination, and that he was asked to rule on punitive damages (IHO Decision at p. 10). The IHO held that all references to discrimination were "beyond the scope of this decision" and that punitive damages were unavailable in this forum (id.).

The IHO noted that the parent agreed with the evaluative information and goals included in both IEPs at issue, had no issue with the discussion of the evaluations, goals, and objectives, and was adamant that he had no issue apart from geographic placement of the student (IHO Decision at p. 10). The IHO further noted that there was no real dispute about the type of program the student needed, noting that the parties agreed that the student required a life skills curriculum to develop activities of daily living skills, and agreed, in part, that the number of students in the class didn't matter, but that what mattered was the type of program (id.). The IHO held that because the parties did not disagree on the size or structure of the program for the student, that there was ultimately no disagreement about what constituted the LRE for the student (id. at p. 11).[8] [9] The IHO held that the parent's claim was focused solely on the importance of location and community above all other factor's in the student's success, and was based largely on general information about children with Down Syndrome and on speculative claims about how the student would react

[6] The district submitted combined answers and motions to dismiss both of the parent's due process complaint notices (see Joint Exs. D; F), which were opposed by the parent (see Joint Exs. G; H). The IHO issued an interim ruling, declining to dismiss the parent's complaint, on June 8, 2017 (Interim IHO Decision at pp. 1-2).

[7] The IHO noted that the parent's termination of the June 2017 CSE meeting without the district's objection was a "unique and perplexing factor" that was taken into consideration in making his final decision (IHO Decision at p. 11).

[8] The IHO noted that the parent argued that the definition of what constitutes an LRE required a "Comprehensive definition" of inclusion and community integration, and held that this resulted in a false assumption by the parent that the student was automatically entitled to placement within the district (IHO Decision at p. 11). The IHO further found that placement within the district has been previously held to be a concern that is beyond an inquiry into educational benefits under the IDEA (id. at p. 15).

[9] The IHO noted that the parties expressed a willingness to accept placement in either a 12:1+1 or 8:1+1 setting, but the parent only agreed if it was offered in-district (IHO Decision at p. 11).

negatively if placed in another school district (id.).[10] The IHO found that the student's IEP, as it was then structured, could not be implemented within the district as requested by the parents (id. at p. 11). The IHO held that the parent's preferred in-district placement for the student was not the appropriate LRE for the student, and did not meet any established criteria for the LRE (id. at p. 16).

The IHO found that the record demonstrated that the programs and services the student required could not be implemented within a general education classroom for the student (IHO Decision at p. 15). The IHO concluded that the district's recommended program and placement for the 2016-17 and 2017-18 school years offered the student a FAPE in the LRE (id. at pp. 16-17).[11] The IHO found that the district did not have a 12:1+1 or an 8:1+1 program, nor did it have a 15:1 program other than a Regent's track program, and did not have a life skills program (id. at p. 11). The IHO found that the record did not demonstrate that any reasonable accommodation could be made for the student that would adequately meet his needs in an in-district placement (id. at p. 16).

Regarding the parent's June 13, 2017 letter, the IHO found that the parent's warning to the CSE participants prior to the CSE convening on July 20, 2017, resulted in key participants refusing to attend (IHO Decision at p. 7). The IHO held that this was not in the student's best interests, and prevented the CSE from finalizing the student's placement for the 2017-18 school year (id.). The IHO further noted that there was nothing offered by the parent that indicated that he had a sincere interest in exploring options offered by the CSE, and that it can be inferred from the actions of both parents before and after each CSE meeting that they had no intention to accept a CSE recommendation that did not include an in-district placement (id. at p. 15). The IHO held that the parent's claims were not supported by equitable considerations (id.).

The IHO ordered the parties to complete the placement process for the student's 2017-18 school year immediately, and accordingly ordered the CSE to canvas out-of-district programs and offer an appropriate program that fulfilled the requirements of the May 2017 IEP (IHO Decision at p. 17). The IHO held that the parent's insistence on an in-district program and placement was not a viable alternative for the 2017-18 school year, and should not be a consideration for placement by the CSE (id.).

[10] The IHO also listed a number of the parent's claims without addressing them directly, including the parent's claims that the district CSE chairperson recommended an educational placement inconsistent with the CSE member consensus, the district CSE chairperson recommended an educational placement within a more restrictive setting than necessary, the district CSE chairperson recommended an educational placement without exploring the possibility of implementing the student's goals within the district, the CSE chairperson recommended an educational placement she was not familiar with, the CSE chairperson recommended an educational placement that was not attended by a representative from such location, and that the CSE was improperly composed because it included the attendance of two members who should have been removed (IHO Decision at p. 6).

[11] The IHO also found that the parent fell short in proving that the district's recommended educational placement denied the student a FAPE, and concluded that nothing offered by the parents substantiated his allegations that the district denied the student a FAPE (IHO Decision at pp. 14-15).

IV. Appeal for State-Level Review

The parent appeals, and alleges that the IHO misconstrued both his arguments and the applicable legal standard. The parent asserts that he has never demanded a specific program, but rather requested that the district undertake a meaningful analysis and good faith attempt to implement the student's IEP goals through reasonable modification of the district's existing special education resources. The parent alleges that the district has a duty to meaningfully analyze and make a good faith attempt to implement the student's educational goals within the district before placing the student in an out of district placement, and that the district failed to do so.[12]

In an answer, the district generally denies the parent's allegations, and requests an order affirming the IHO's decision in its entirety. The district asserts as an affirmative defense that the parent failed to serve a notice of intention to seek review that complies with the dictates of the Commissioner's Regulations. The district further asserts as an affirmative defense that the parent's request for review fails to comply with sections 279.4(a) and (c) of the Commissioner's Regulations, specifically that the parent fails to adequately identify the issues on review, the challenged portions of the IHO decision, the relief sought that can be granted, and provide citations to the record on appeal.

In a reply, the parent refutes the district's characterization of his claims, and largely reiterates the positions articulated in his request for review. The parent also asserts that the student's case should not have been remanded to another round of due process following the issuance of Application of a Student with a Disability, Appeal No. 17-015.

In a response to the parent's reply, the district asks that the parent's reply be rejected because there were no claims raised for review within the district's answer that were not broached within the parent's request for review.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

[12] The parent frames portions of his argument as a request for a decision as to whether the district complied with the January 6, 2017 IHO Order, which directed the district to hire an inclusion consultant (Req. for Rev. ¶¶7-9). To the extent the parent requests that the district's compliance with the IHO's order be assessed by this office, IHOs and SROs have no authority to enforce prior decisions rendered by administrative hearing officers (see Educ. Law §§ 4404[1][a], [2]; see, e.g., A.R. v. New York City Dep't of Educ., 407 F.3d 65, 76, 78 n.13 [2d Cir. 2005][noting that IHOs do not retain jurisdiction to enforce their orders and that a party who receives a favorable administrative determination may enforce it in court]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). 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., 137 S. Ct. at 1001 [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]).[13] 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. Compliance with Practice Regulations

Initially, the district contends that the parents' request for review must be dismissed because it did not include the proper notice. The district further asserts that the request for review must be dismissed because it does not clearly indicate the reasons for challenging the IHO's decision or specify the relief requested, and generally fails to comply with the requirements set forth in 8 NYCRR 279.8(c).

Each request for review filed with the Office of State Review must contain a "Notice of Request for Review," the content of which is set forth in State regulation and generally notifies a responding party of the requirements with respect to preparing, serving, and filing an answer to the request for review (8 NYCRR 279.3). State regulations further provide that a request for review "shall clearly specify the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and order to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate what relief should be granted by the [SRO] to the petitioner" (8 NYCRR 279.4[a]).

[13] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

Additionally, the request for review "must conform to the form requirements in section 279.8 of this Part" (8 NYCRR 279.4[a]). State regulation requires, in relevant part, that a request for review shall set forth:

> (1) the specific relief sought in the underlying action or proceeding;
>
> (2) a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review; and
>
> (3) citations to the record on appeal, and identification of the relevant page number(s) in the hearing decision, hearing transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number.

(8 NYCRR 279.8[c][1]-[3]).

In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the dismissal of a petition by an SRO (8 NYCRR 279.8[a]; 279.13; see T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015], quoting Foman v. Davis, 371 U.S. 178 [1962]).

Before turning to an analysis of the district's arguments, the district previously asserted similar allegations regarding the form and content of the parent's pleadings in both Application of a Student with a Disability, Appeal No. 17-015 and Application of a Student with a Disability, Appeal No. 16-040. In the previous appeals, the SRO declined to dismiss the parent's appeals based solely upon the failure to comply to the practice regulations; however, the parent was cautioned that, while a singular failure to comply with the practice requirements of Part 279 may not warrant an SRO exercising his or her discretion to dismiss a request for review, an SRO may be more inclined to do so after a party's repeated failure to comply with the practice requirements (see Application of a Student with a Disability, Appeal No. 17-015).

Turning to the district's contentions, while the parent had not filed a notice of request for review in the prior proceedings, a notice of request for review was attached to the parent's request for review in this matter. Additionally, although the notice of request for review is not in compliance with the exact language contained in the practice regulations (8 NYCRR 279.3), it contained sufficient information for the district to timely prepare, serve, and file an answer, which it did. With regard to the district's contentions relative to the form and content of the request for review, I decline to dismiss the parent's request for review on these grounds, given that the district was able to respond to the allegations raised in the request for review in an answer and there is no

indication that it suffered any prejudice as a result (see Application of a Student with a Disability, Appeal No. 15-069; Application of a Student with a Disability, Appeal No. 15-058).

2. Scope of Review

As a preliminary matter, there are a number of issues which have not been raised on appeal that were previously asserted in the due process complaint notice. These issues include claims that inclusion consultant A's report was irreconcilably compromised and substantively flawed, that the CSE was improperly compromised, that district counsel acted to impair the efficacy of the CSE, that the CSE chairperson's recommendation was inconsistent with the CSE consensus, that the CSE chairperson recommended a placement she was not familiar with, that CSE lacked a district representative from a district that could implement it, that the district harbored a systematic discriminatory policy (Joint Exs. C at pp. 1-2; E at pp. 1-2). To the extent the parent does not raise these arguments on appeal regarding claims which were alleged in the due process complaint notice and were not reached by the IHO, these claims are deemed abandoned and will not be further addressed (8 NYCRR 279.8[c][2], [4]).

Furthermore, the parent does not appeal a number of findings of the IHO, including the IHO's finding that the parent agreed with the evaluations and goals on the district IEPs, that the parties agreed on the size and structure of the program for the student, and that the parent's warning to the CSE members prior to the June 2017 CSE meeting resulted in participants refusing to attend and prevented the CSE from finalizing the student's IEP for the 2017-18 school year (IHO Decision at pp. 7, 10, 14-17). Therefore, these determinations have become final and binding on the parties and will not be reviewed on appeal, except to the extent that these issues may be related the main issue on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

The sole issue presented on review is the parent's allegation that the district has a duty to meaningfully analyze and make a good faith attempt to implement the student's educational goals within the district before placing the student in an out of district placement, and that the district failed to do so. However, before reaching that issue, it must be noted that as of August 15, 2017, the date the IHO's decision was issued, the CSE was unable to finalize the student's May 2017 IEP for his 12-month school year, which was due to be implemented on September 5, 2017 (IHO Decision at p. 11; Joint Ex. P at p. 1). The district is required to have finalized and put the student's IEP in place by the student's first day of school (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *13 [S.D.N.Y. Aug. 23, 2012], aff'd, 530 Fed. App'x 81; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 614 [E.D.N.Y. 2012]). Failure to provide a finalized IEP before the beginning of the school year is a procedural violation that may result in a finding that the district failed to offer the student a FAPE (see Application of a Student with a Disability, Appeal No. 15-099 [district's failure to finalize an IEP until after start of school year contributed to a denial of FAPE despite evidence of the parties' extensive efforts to locate an appropriate placement). However, the parent does not allege that the district denied the student a FAPE by not finalizing the student's IEP for the 2017-18 school year, and does not appeal from the IHO's finding that the parent prevented the IEP from being finalized by warning the CSE members and neighboring school district representatives not

to attend the June 2017 CSE meeting (IHO Decision at pp. 7, 15).[14] In light of the above, the IEPs are assessed based on the recommendations contained therein, and the parent's arguments related to location are limited to an assessment of whether the district's recommendation for an out of district placement was appropriate. However, the district is reminded that it is the district's responsibility to offer the student a completed IEP and to locate and identify a placement by the beginning of each school year.

B. Least Restrictive Environment

1. Placement on the Continuum

The parent alleges that the district failed to undertake a "meaningful analysis" and good faith attempt to implement the student's IEP within a general education class in the district. In so arguing, the parent relies upon the recent case Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017], and asserts that Endrew F. requires a district "to measure not whether an alternately assessed student could keep pace with the general education class, but rather whether the student's unique and individualized education goals could be satisfied through the provision of special education, related services and supplementary aids within the mainstream setting" (Parent's Mem. of Law at pp. 4-5 [internal quotations and emphasis removed]). Indeed, the parent construes Endrew F. to "raise the bar" with respect to the district's decision to place his son, an alternately assessed student, outside of the general education options available in the district. Although I am sympathetic to the parent's desire to have his son educated in the district and his frustration that more educational alternatives for students with similar needs don't currently exist in the district, his reliance on Endrew F. is nonetheless misplaced.

In Endrew F., the Supreme Court held that in order "[t]o meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances" (Endrew F., 137 S. Ct. at 999). In applying this general standard to a child who was precluded from progressing through the regular curriculum and achieving grade-level advancement due to the nature of his disabilities, the court opined that "his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (id. at p. 1000). Accordingly, Endrew F. does not support the parent's position that the district must attempt to educate the student in a general education classroom with sufficient

[14]The parent's actions with regard to his proactive choice to discourage CSE members from participating in a CSE meeting would pose a significant barrier to any claim for equitable relief, as they directly inhibited the district's ability to provide the student with an educational placement that could offer the student a FAPE (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]). However, in light of the limited claims on appeal, and the disposition of the case, further discussion of equitable considerations is not necessary.

supports before recommending an out of district placement, but rather that his educational program should be specifically tailored to meet his individual needs, provide him with challenging objectives, and enable him to make progress in light of his circumstances (id. at 999-1001).

In addition to the FAPE standard elucidated in Endrew F., the parent also cites to a number of cases from courts not located in the Second Circuit as persuasive authority that the student's LRE lies within the district.[15] However, in determining any issue concerning the student's LRE, I am bound to apply the well-established Second Circuit standard enunciated in in P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 (2d Cir. 2008). Moreover, as the parent does not object to the substantive program offered by the district in the IEP, but instead limits his arguments on appeal almost exclusively to the district's recommendation that the student be placed in a special class located outside of the district, Newington, rather than Endrew F. or the LRE cases cited by the parent, is the authority most relevant to a determination of the parent's LRE claims.

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]).

[15] The parent specifically alleges that "the jurisprudence curtailing a school district's legal ability to outsource now remains firmly established" (Parent Mem. of Law at p. 5).

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).[16]

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).

Although the student's needs are not at issue in this appeal, in order to determine whether the district fulfilled the first prong of Newington—whether the student can be educated satisfactorily in a general education class with supplemental aids and services—it is first necessary to review the student's present levels of performance. According to the student's IEP, the April 2017 CSE reviewed available documentation of the student's then-current educational performance including a June 2014 assistive technology evaluation report, October 2015 medical health records, a January 2016 psychoeducational evaluation report, a January 2016 speech-language evaluation report, a May 2016 PT report, a May 2016 OT report, a June 2016 progress report, and a July 2016

[16] 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).

psychological evaluation report (Joint Ex. O at p. 1; see generally Joint Exs. T; U). The April 2017 IEP included results from the January 2016 psychoeducational evaluation report and the July 2016 psychological evaluation report, which found the student's cognitive ability and adaptive skills to primarily be at or below the first percentile (Joint Exs. O at pp. 1-2; T at pp. 4-8; U at pp. 4-6). The student's academic achievement was reported to be below the first percentile in the areas of reading comprehension, spelling, listening comprehension, and mathematics; however, the student performed in the low range in single-word reading and in the low average range in pseudo-word decoding (Joint Exs. O at p. 2; T at pp. 4-5, 7). The student was reported to communicate verbally, typically using one to two-word utterances to communicate his basic needs, and results from the January 2016 speech-language evaluation report reflected that the student's speech-language skills were below the first percentile (Joint Ex. O at pp. 2-3). The student required prompts to regulate food intake, and chew and swallow in a safe and socially appropriate manner (id. at p. 3). Physically, the student presented with decreased postural and upper extremity tone, strength and endurance, ocular motor weakness, and decreased fine and gross motor skills (id. at p. 4). The student also presented with decreased ability to attend to gross motor activities in a large group setting (id. at p. 5).

Socially, the April 2017 IEP indicated that the student was compliant, enjoyed social interaction and demonstrated affection toward others (Joint Ex. O at p. 4). The IEP stated that the student sat in the company of others during assemblies and class specials and needed to be prompted to pay attention to a teacher during a lesson (id. at p. 4). The student reportedly enjoyed joining in with peers and adults by laughing at humorous situations even if he did not understand the context of the situation (id.). The IEP noted that the student frequently interrupted groups of adults and children by trying to hug them or stand in front of one person (id.).

Regarding the student's learning style and management needs, the April 2017 IEP indicated that the student required an established and predictable routine and structured environment, with individualized attention to focus on tasks (Joint Ex. O at p. 5). The student required intensive supervision to function in the educational setting, and due to his significant delays, he required a program with a low student-to-teacher ratio with minimal distractions in order to make academic progress (id. at p. 5). The student required rote practice and/or written scripts to follow directions and complete routines (id. at p. 3). Use of kinesthetic, visual, and physical prompts were needed for the student to respond to spoken language and routines (id. at p. 3).

Pursuant to the January 6, 2017 IHO order from the prior proceeding between the parties, the district hired two inclusion consultants who were directed to "assess whether supplementary aids and supports would allow [the student] to benefit from inclusion in any classes in the district, and to make recommendations in accordance with the results of the review" and were also authorized to “examine instructional programs in other districts…to assess whether supplementary aids and supports would allow [the student] to benefit from inclusion in available classes, and to make recommendations in accordance with the results" (Joint Ex. A at p. 57; see Tr. at pp. 110, 144, 193, 346-50, 355, 533, 551-53). Those two consultants, inclusion consultant A and inclusion consultant B, generated two reports, inclusion report A and inclusion report B, and presented their findings to the April 2017 CSE (Joint Exs. J; L; M at pp. 15-138).

Inclusion consultant A holds a masters degree in special education, is certified in special education, elementary education, reading, and school district administration, and was previously employed as a director of special services, a regional associate for the State education department, and a special education teacher (Tr. pp. 106-09). Inclusion consultant A reviewed the student's records, observed the student during home instruction and in the district during related services sessions, reviewed district middle school and high school class profiles and curricula materials, observed special classes and general education classes at the district middle school and high school, and visited four neighboring school districts to observe classes and review class profiles and curricula content (Joint Exs. J at p. 1; M at pp. 15-16, 18; Tr. pp. 110-12).

Inclusion consultant A summarized previous evaluation reports, noting that the student's comprehension and expression of oral language was extremely limited in all areas, intellectual functioning was well below average (below the first percentile), and academic skills were below the first percentile, except for decoding skills which were an area of strength (Joint Ex. J. at p. 2; see Joint Ex. T at p. 7). Consultant A indicated that the student was cooperative during all observations; however, she noted that the student was distracted at times, and required repeated directions and verbal prompts to carry out directions (Joint Exs. J at p. 2; M at pp. 22-24).

Inclusion consultant A stated that she met with the middle school building principal and reviewed all of the special education classes and available services in the district, and considered the continuum of services, including the less restrictive settings of general education and integrated co-teaching (ICT) (Joint Ex. J at p. 1; M at pp. 30-32, 39; see Tr. pp. 123-24). The consultant indicated that all of the students in the ICT classes were recommended for Regents diplomas and she opined that the content of the ICT classes was too complex and did not match the student's needs (Joint Exs. J at p. 3; M at pp. 39-42). The consultant indicated that she referred to a State Education guidance memo regarding criteria for placement in an ICT program and determined that the student's goals were very different from what was happening in the ICT classes (Joint Ex. M at p. 40-43; see generally Joint Ex. K). The consultant stated that she considered a broad array of supplementary aides and services to enable the student to access, participate, and progress in the general education curriculum, such as including breaks, modifying materials, visual cues, shortened assignments, and providing a 1:1 teaching assistant (Joint Exs. J at p. 3; M at pp. 43-44). The consultant also considered consultant teacher services to support the student in general education or ICT classes, even though that was not something that was currently offered in the district (Joint Ex. M at pp. 43-44). The consultant opined that the general education curriculum could not be modified to meet the student's needs even with the support of a consultant teacher as the student would not be able to participate with typical peers in class activities because the content was well above his functioning level and he would be working on something completely different from the rest of the class (Joint Exs. J at pp. 3-4; M at pp. 42-46, 49-50).

Inclusion consultant A observed a sample of technical and career general education classes at the district middle school and determined that the student may be able to be included in certain types of activities with modification and support from a teaching assistant; however, other activities would be extremely challenging for the student due to factors such as class size, motor demands, and the student's difficulty following directions (Joint Exs. J at p. 4; M at pp. 59-62). The consultant indicated that including the student in these classes would require adding consultant

teacher services to the IEP, a significant modification of materials, and 1:1 assistance with all classroom learning activities (Joint Exs. J at p. 4; M at pp. 59-62).

Inclusion consultant A observed a variety of district middle school 15:1+1 special classes at different grade levels and she observed varied learning strategies, and supplementary aids and services, such as explicit instruction, visual cues for directions, cooperative learning, and use of teacher aides for individual support, being utilized in the special classes (Joint Exs. J at p. 5; M at p. 78). However, the consultant noted that currently none of the other students in the special classes were recommended to take the New York State Alternate Assessment (Joint Ex. J. at p. 5). The consultant opined that even with the provision of an individual teaching assistant, supplemental supports and services, and program modifications, the student would not be able to participate (i.e. having text read to address his poor reading comprehension skills would not help because the textual material was too complex; the student's reading ability was significantly discrepant from the other students in the class which may preclude him from being partnered with other students; even with added supports the student would have limited benefit from cooperative learning experiences because his skill levels differed significantly from other students in the class) (Joint Exs. J at p. 5; M at pp. 78-80). The consultant opined that even if the student was sitting in the same classroom with supports and modifications, his learning 'group' and experience would be singular in nature in those settings and he would require learning activities that isolated him from the group (Joint Ex. J at pp. 5-6). In addition, the consultant stated that any planned inclusion of the student in the district's available special classes would require modifications to such a degree that materials would no longer reflect class content and the student would have a great deal of difficulty following any of the class routines and activities observed because the directions were complex and multi-step (id. at p. 6). The consultant noted that the student had difficulty attending to task, worked at a much slower rate, and his needs in skill areas varied significantly from students in the available district 15:1+1 special classes, surmising that the student's instructional needs may not be met, or if so only at a marginal level, in this setting (id. at p. 7; M at p. 89).

In concluding that inclusion in the district middle school special classes would have limited benefit for the student, Inclusion consultant A referred to the January 2016 psychological report, which stated, in relevant part, that "[the student] is easily overwhelmed and reverts to self-stimulatory behavior. He needs to be with similar peers so that he can be more included in skill-appropriate behavior" (Joint Exs. J at p. 7; M at pp. 89-90). In addition, the consultant discussed the desire to reduce prompt levels as a means to having the student become more independent and she explained that if the student was placed in a classroom where the other students were functioning on a much higher level, it would reduce his chances to work independently and necessitate always having an assistant next to him (Joint Ex. M at pp. 92-93).

Inclusion consultant A also looked at supplementary services available in the district middle school, including the resource room program and a 15:1+1 multi-sensory special reading class (Joint Ex. J at p. 7). The consultant noted that the resource room and special reading class were not "stand alone programs" and the students who participated in these programs also participated in general education, ICT, or special classes, and the groupings in the programs should be based on similarity of need (id. at pp. 7-8). The consultant determined that the learning activities the student required were not observed in these programs because the student's needs differed significantly from the instructional groupings in these programs (id.).

Inclusion consultant A also observed special classes at the district high school (Joint Ex. J at p. 8). The consultant stated that the academic special classes at the district high school had a 15:1 student to staff ratio and the content of the classes was Regents preparatory (id.). The consultant concluded that the current configuration of district high school special classes did not have a life skills program that incorporated experiences built into the program that would allow the student to develop adaptive skills that would be salient to his everyday life (id.).

Inclusion consultant A contacted four neighboring school districts to examine their instructional programs; however, one of the districts was not accepting applications from outside of the district at that time, so she did not visit that district (Joint Ex. J at p. 1). Of the three districts that the consultant visited, each district had 8:1+1 and/or 12:1+1 special classes with a life skills curriculum at the middle school and/or high school level that focused on functional academics and transitional community activities (id. at pp. 8-10).[17] The district that the consultant determined would best meet the student's needs had an 8:1+1 special class at the middle school and 8:1+2 and 12:1+1 special classes at the high school (Joint Exs. J at pp. 8-9; M at pp. 94, 105, 108). The students in the middle school program were verbal and had similar reading levels as the student (Joint Ex. J at p. 8). While the math levels of the special class middle school students were generally a grade level higher than the student's, the consultant opined that with manipulatives and repetition, the student may have some success at that grade level (id.). The consultant observed a social studies lesson on map skills in the 8:1+1 special class that used a leveled learning system which provided varying levels of support, such as picture responses or selecting responses from a word bank (id.). The consultant indicated that with the additional support of his aide, repetitive instructions, visual supports, and a reduced amount of questions, the student may be able to participate in this activity (id.). The consultant also noted that a reinforcement system was embedded into the program to reward on task performance which could be beneficial to the student to increase his attending skills (id.). At the high school level, the consultant observed students in adapted physical education being integrated into a general education physical education class (Joint Ex. M at p. 95). The consultant noted that reading in the 12:1+1 special class included guided reading of real life situational texts, and although the student may still require additional visual cues and fewer questions to be successfully included in the class, she opined that the texts used in the special class may offer the student the greatest chance of building his reading comprehension skills (Joint Ex. J at p. 9). The consultant reported that students in the high school 12:1+1 special class were placed at various job sites in the community in later years of their high school careers and a teacher from the special class informed the consultant that she would try to find a job site for the student in his home district (id.).

Inclusion consultant A concluded that, absent a change in special education classes and educational groupings currently available in the district, the CSE should consider placing the student in a neighboring district that has a life skills program with a smaller class size, allowing the student to be in a building with typical students and an instructional grouping with peers of similar needs (Joint Exs. J at pp. 10-11; M at p. 101-03).

Inclusion consultant B holds a masters degree in literacy instruction and a doctoral degree in educational psychology and had been employed as a teacher, a clinical supervisor in early

[17] In addition, one district also had an 8:1+2 special class at the high school level (Joint Ex. J at p. 8).

intervention programs, and a college professor (Tr. pp. 515-20). In conducting her review, inclusion consultant B spoke with parents and district personnel, reviewed the student's records, observed the student during home instruction and in the district during related services, observed a variety of special classes and general education classes at the district middle school, and visited one neighboring school district to observe special classes (Joint Exs. L at pp. 1-5; M at pp. 534-35). Consultant B also attached various documents to her report including an article on inclusive education and a State Education field advisory on LRE (Joint Exs. L at pp. 6-7, Attachment 1, 2; M at pp. 537-540).

Based on a review of records, inclusion consultant B included a description of the student in her report, noting that the student required practice and textual scripts to follow directions and complete routines, typically used utterances of one to two words to communicate, and enjoyed being in the company of peers and adults (Joint Ex. L at pp. 2-3). Consultant B noted that, according to the student's IEP, the student had access to an iPad with select apps to enhance his communication (id. at p. 3). The student was able to decode words up to three syllables, identify coins, and add problems up to 20 with some guidance (id.). The consultant indicated that the student followed directions and familiar routines during observations of therapy sessions and home instruction (id. at pp. 3-4).

Inclusion consultant B observed a variety of special classes and general education classes at the district middle school and provided brief descriptions of what was happening in each of the classes; however, the consultant did not specify how the student's needs could or could not be met in these classes (Joint Exs. L at pp. 4-5; M at p. 129, 139-140). Consultant B stated that with curriculum modifications, "clearly he could be included in every single class that I saw," referring both to general education and 15:1+1 special classes (Joint Ex. M at p. 139-40). Consultant B discussed including the student in classes where he had strengths, "Does he eat well? Okay, great, that's good. He's in for lunch… Is he strong? Phys. ed? Great. He's in phys. ed…I'm just assuming. [he can do gym everyday] Why not? So kids with intellectual disabilities have gym every day…Because their physical needs are such that having an opportunity to move around and having that class every day behooves them" (id. at pp. 141-42). Consultant B stated that after looking at the student's goals, she determined that his physical motor goals were conducive to a physical education class, and his adapted physical education goals could be implemented in a physical education class (id. at p.143).

Consultant B's written report and her report to the April 2017 CSE included a great deal of general information regarding reasons to include students with disabilities in general education classes, how New York state compares to other states with respect to including students with disabilities in general education classes, LRE, and the behavioral phenotype of students diagnosed with Down syndrome; however, the consultant did not always explain how this information related to the student's individual needs as reflected in evaluations and observations of the student and described on his IEP (Joint Exs. L at pp. 6-12; M at pp. 123, 129-137, 144-55, 165, 171-72, 177-78, 181-82).

Inclusion consultant B recommended placing the student in existing classes at the district middle school for the 2017-18 school year with a modified curriculum, accommodations, and supplemental supports and services (Joint Exs. L at p. 8; M at pp. 137-38). Consultant B provided

a sample schedule for the student that included two periods per day of intensive/explicit 1:1 instruction for ELA and mathematics, which she opined could be provided in a variety of ways (i.e. itinerant teacher, teaching assistant, instructional aide, resource room teacher, related services) (Joint Exs. L at pp. 12-13; M at p. 183). Consultant B stated that curriculum in science and social studies could "be modified in such a way that it's incredibly conducive" to having the student in either a general education or 15:1+1 special class, "either one doesn't really matter…I would go to the teacher. Say you're a science teacher and say how do you feel about having (the student) in your class?" (Joint Ex. M at pp. 210-12). Consultant B indicated that it would be fine to have the student attend either a 15:1+1 special class for science or an earth science Regents class at the middle school class (id. at pp. 211-12). When asked how, and to what extent, the student would be included in general education classes, consultant B told the April CSE, "I think that's a function of your staff, if your staff are well trained" (id. at pp. 228-29).

Consultant B recommended teaching life skills through naturalistic instruction, such as teaching dressing skills while the student prepared for physical education class, working on self-care skills (i.e. washing his face and hands, combing his hair) after physical education class or lunch, practicing exchanging money at lunch or at the school store, as well as having the student participate in technology and home and consumer science classes that were conducive to life skills instruction (Joint Exs. L at pp. 10-11; M at pp. 160-65). Consultant B also stated that general education classrooms provided opportunities for the student to practice career development skills (i.e. arriving to class on time, following multi-step directions, attending to a task, working cooperatively with peers, waiting his turn before speaking or using materials) and reiterated a statement that because the student had Down syndrome and a strong propensity to imitate others, it was important to educate him alongside nondisabled peers so that he could acquire the skills that would lead to successful employment (Joint Exs. L at pp. 11-12; M at pp. 168-72).

Inclusion consultant B opined that the district had a qualified and experienced staff with the expertise to develop educational opportunities to meet the student's needs in the district for the 2017-18 school year through curriculum modifications and accommodations (Joint Exs. L at pp. 8, 12; M at pp. 137-38). Inclusion consultant B recommended a hybrid program including general education classes and intensive instruction, stating "so you could probably hammer away at all of his IEP goals in those two periods of intensive instruction, and then everything else is just gravy because it's more instruction on those IEP goals." (Joint Ex. M at p. 273). When asked about pre-teaching, consultant B suggested creating videos for pre-teaching, which could happen in the resource room or at home, and further suggested that the materials for pre-teaching could be created by a teacher, consultant teacher, resource room teacher, aide, parent, or the student (id. at pp. 276-78).

Inclusion consultant B also emphasized the importance of "natural supports; those supports that are in place that do not require[] a person being paid" (Joint Exs. L at p. 10). With respect to the student, inclusion consultant B identified these natural supports as "siblings and neighbors who spend time with the student when he is not in school. These are individuals who know [the student], understand his needs and his strengths and can have enormous influence on the success of the programming" (id.). She noted that if the student were placed in district with access to these "natural supports," there would be increased opportunities for the student to become more independent and a decreased need for paid supports over time (id.). Inclusion consultant B's

identification of natural supports as a programmatic consideration dovetails with the parent's observation that "the typical kids, for them to include [the student] and want him to be included for them to go over and assist him and be fighting over to assist him, I couldn't pay for it if I had a bazillion dollars" and "[t]hese peers . . . know him. They want to help him. They want him to be included. . . [t]hey're proud for [the student] to be included" (Exhibit EE at p. 68-69). However, Inclusion consultant B did not identify how such "natural supports" could be formally utilized in an educational program, integrated into an IEP, or considered by a CSE in determining the student's needs and available district resources. Moreover, inclusion consultant B did not address the role of natural supports in a program utilizing significant one-to-one instruction and individual modification as recommended in her report (Joint Exs. L at pp. 12-13).

After hearing from the two consultants at the April 2017 CSE meeting, the CSE chairperson opened the discussion to consider a program that would best meet the needs of the student (Joint Ex. M at pp. 215-16). A discussion ensued regarding how and where the student's instruction would take place, and possible program options included consultant teacher services, resource room, 1:1 instruction, special classes, and general education classes (id. at pp. 220-25).

Given the extensive review of the district's available services as presented by the inclusion consultants, the CSE participants had ample information about the district's resources to determine the student's LRE and whether the district could provide the student with a FAPE in a general education setting. The hearing record reflects that the CSE participants grappled with the parent's preference to include the student in an in-district setting and inclusion consultant B's recommendations at length. For instance, the special education teacher asked questions that addressed naturalistic opportunities to learn skills, and the student's need for explicit instruction (Joint Ex. M at p. 204-05). The school psychologist inquired about the student to teacher ratio for instruction in inclusion consultant B's recommended in-district schedule (id. at 207-08). The school psychologist further inquired as to the program model for science and social studies being recommended by Consultant B (id. at pp. 210-12). Another special education teacher discussed the student's level of functioning, and the benefits he would receive from consultant teacher and resource room services (id. at pp. 217-21). The CSE chairperson, agreeing with the parent regarding the difficulty of specifying what a program would consist of if provided in-district, noted that the CSE was tasked with establishing a specific program, not just a location (id. at pp. 222-23). Several participants discussed the purpose of resource room, and how it is intended to provide support for direct instruction happening in the classroom, not providing initial instruction, and attempted to establish where direct instruction would be provided (id. at pp. 224-25).

The April 2017 CSE discussed the degree to which the student would be included with nondisabled peers versus being in the same room as his peers but doing completely different work, and therefore not able to participate in the class (Joint Ex. M at pp. 225-34). The student's physical therapist expressed hesitation and concern regarding the isolating effects of 1:1 instruction, as suggested by the parent, within a general education classroom (id. at pp. 225-28, 243). She also expressed that she would consider a specific program, but that the mainstreaming recommended by the parent and inclusion consultant B did not provide "enough for me on paper" (id. at pp. 228-29). The physical therapist and inclusion consultant A agreed that even if placed in a general education setting, being provided with a separate direct consultant teacher would increasingly sequester the student, and inclusion consultant A attempted to explain that a special class with a

smaller number of students would allow the student to participate with the class (id. at pp. 229-31). The CSE chairperson further pointed out that providing an extensively modified curriculum to one special education student in a mainstream setting eventually modifies the program "so much that it changes the integrity of what the work is" (id. at p. 234). However, many of the district participants in the CSE meeting were in support of consultant B's recommendations (Tr. pp. 443-45; Joint Ex. M at pp. 241-42, 249-50).

The parents were open to the student being placed in general education or 15:1+1 special classes in the district (Joint Ex. M at pp. 240, 256). The April 2017 CSE discussed a "hybrid program" which included a combination of consultant teacher and resource room services, related services, and a 1:1 aide in the general education setting (id. at pp. 238-42). The parents' educational consultant, who participated in the April 2017 CSE meeting, stated, "With really good planning and training, it is the hope that sooner or later he can become more integral." (Joint Ex. M at p. 235). The student's physical therapist implied that this recommendation was vague and could not be implemented right away (id. at pp. 246-49). The CSE chair expressed concern that the student would be lost in a general education setting and recommended a small class for core academics (i.e. 8:1+1 or 12:1+1) and an opportunity to be mainstreamed for elective classes (id. at pp. 260, 262-63). A school psychologist asked inclusion consultant B if the 15:1+1 special class the district already had in place could meet the student's needs (id. at p. 272). Consultant B admitted that the program could not meet his needs for the full day, and would require separate intensive instruction for a portion of the day (id. at p. 273). Consultant B was also asked, as an example, if the student's goals could be met in science class (id. at p. 274). Consultant B acknowledged that not all of the student's goals could be met in that setting, but that basic communication, memory, and sequencing skills could be addressed (id.). When asked where pre-teaching and reteaching would take place, what role the consultant teacher would have in it, and who would make that curriculum, Consultant B largely discussed how it varies from district to district, without providing a specific plan or recommendation for implementation within the district (id. at pp. 276-78). The CSE participants discussed possible conflicts between the use of the resource room for pre-teaching and reteaching versus providing the intensive and explicit instruction recommended by Consultant B, and a special education teacher discussed her previous successes with a more flexible structure (id. at pp. 278-81). However, as much as the special education teacher admitted that a "cross-curriculum" approach was theoretically compelling, she opined that the training and changes to the educational thought process that such a program would require would be "overwhelming" and different than the programs the district was then doing—a point acknowledged by Consultant B, who stated that the district would need professional development (id. at p. 282). Ultimately, having considered the parent's preference for placement in a general education or 15:1+1 special class in the district, the CSE chairperson recommended a small class placement for the student, with either eight or twelve students in the class, that focused on alternate assessment with mainstreaming opportunities for electives, at which point the parents left the CSE meeting (id. at pp. 284-85).

A CSE convened in May 2017 for the student's annual review and discussed the student's present levels of performance, goals, related services, supplementary aids and services, and extended school year services (Joint Exs. N at pp. 150-51, 162; P). The May 2017 CSE discussed various options for the student's program for the 2017-18 school year, including general education and 15:1+1 special classes (id. at pp. 169-182). The CSE chairperson agreed that it was important for the student to have access to general education elective opportunities; however, due to the

extensive and explicit instruction that would be required to meet his needs, she opined that the student would need separate instruction if he were placed in a group setting in the district, and therefore she recommended small class instruction with students who were working on similar goals (Joint Ex. N at p. 182-87). The CSE chairperson stated that a public school setting with opportunities for mainstreaming was more appropriate for the student than a BOCES setting (id. at p. 220). The CSE chairperson stated that, given the student's needs and goals, the LRE for the student would be either an 8:1 or a 12:1 special class that focused on functional academics with a vocational or transitional component, and with mainstreaming for electives such as consumer science, physical education, music, and art (id. at pp. 192-93, 204, 220, 234-35). Another member of the May 2017 CSE expressed concerns about the student being isolated if he was placed in a general education Regents level class, the student not fitting the profile of the current 15:1+1 special classes, and the amount of time the student would be out of classes for 1:1 instruction (id. at pp. 226-34).[18] This CSE member opined that current programs available in the district were not appropriate to meet the student's needs, and, also recommended a program with a career development component and academics that were directed towards the student's goals (id. at pp. 221, 225-26). The CSE chairperson indicated that two neighboring school districts had 12:1+1 special classes that could meet the student's needs (id. at pp. 235-38).

When a CSE convened in June 2017, the CSE chairperson offered to look at inclusion consultant B's report again and consider the continuum of services, along with supplementary aids and services, to determine if a program could be developed to meet the student's needs and IEP goals in the district (Joint Ex. EE at pp. 4, 20, 28, 29, 31, 71). In a good faith attempt, the district revisited and analyzed the recommendations made by consultant B and the parents' preference for including the student in the district; however, even after the discussion, the CSE chairperson was unable to determine how the student's needs could be met within the district (id. at pp. 56-57). For example, the CSE chairperson indicated that consultant B's report "did not speak of specifics except a very small handful of specifics", and she asked, "what would the program look like throughout the day?" (id. at pp. 33, 38). The CSE chairperson looked at the recommended schedule and tried to ascertain when the student would be receiving instruction in reading, writing, and mathematics (id. at p. 57). The parents' consultant and the parent indicated that these areas would be "generalized throughout the day" and his goals in those areas could be met easily throughout the day (id.). The parent's educational consultant stated that consultant B's report provided a clear schedule, and mentioned assistive technology, visual support, social relationships, and career development; however, provided few specifics that would assist the district in implementing such a schedule within a district public school setting (id. at pp. 39-45). In addressing the student's career development skills, the parent's consultant referred to inclusion consultant B's report, noting that "general education classes are abound with opportunities to practice those very skills needed within the workplace" and "[consultant B]'s basically saying having Downs Syndrome and a strong propensity to imitate others, it is of utmost importance that [the student] be educated along his nondisabled peers so he can continue to acquire the skills that will lead him to successful

[18] The transcript of the May 2017 CSE meeting identifies this member as "unknown speaker" (see Joint Ex. N).

employment" (id. at pp. 45-46).[19]

The CSE chairperson expressed concern about where the student's academic instruction would take place and how the student's academic and social needs would be met (Joint Ex. EE at p. 48). The parent's educational consultant responded by pointing out consultant B's recommendation for two periods of intensive and explicit instruction and stated that this could be done in a resource room possibly in a 1:1 setting (id. at pp. 48-49). However, the CSE chairperson indicated that resource room services are designed to support students in the general education setting (id. at p. 51).[20] The CSE chairperson stated that "one-on-one instruction is not inclusive", "one on one is not a class", and "one-to-one instruction is extremely isolating" (id. at pp. 49-50, 86). The department coordinator asked about the student's ability to work independently or his need for a modified assignment in a general education consumer science class and the special education teacher responded that his 1:1 assistant could work with him (id. at p. 59). The department coordinator expressed concern regarding the student being isolated in 1:1 instruction in a hybrid program (id. at p. 83). The speech therapist asked questions about scheduling related services and pointed out the realities of not being available to push-in to group activities in different classes that may be conducive to speech therapy due to lack of flexibility with scheduling (id. at pp. 63-67). While the parent indicated that she could appreciate the speech therapist's scheduling dilemma, the parent's consultant indicated that the IEP could indicate push-in or pull-out services to allow for flexibility; however, the speech therapist stated that the service would still have to be at the same time every day for scheduling purposes—a point the student's mother acknowledged (id. at pp. 64-65).

Despite the CSE members' best efforts in assessing the district's ability to meet the student's needs in a district school setting, the CSE determined, after meaningful and comprehensive analysis conducted over the course of several IEP meetings, that they could not implement the student's IEP in a general education setting (or in the 15:1 Regents-track special class available in the district) with the limited specificity provided by inclusion consultant B's report and the supports and related services currently available in the district (Joint Exs. M at pp. 284-85; N at pp. 234-38, EE at p. 89).

On appeal, the parent alleges not only that the district has a duty to "meaningfully analyze," but also that it must make a good faith attempt to implement the student's educational goals within the district before placing the student in an out of district placement. "While including students in the regular classroom as much as is practicable is undoubtedly a central goal of the IDEA, schools must attempt to achieve that goal in light of the equally important objective of providing an

[19] Although the parent reported that the student benefited greatly from interacting with typical peers by appropriately modeling their behavior in sports and play, the student's teacher reported that, although he showed interest in his peers and attempted to make social contact, he required adult support to share, follow rules, and take turns in games, and, when overwhelmed, he reverted to self-stimulatory behavior (Joint Exs. T at p. 5; U at p. 3).

[20] A resource room program is intended to provide "supplementary instruction in an individual or small group setting for a portion of the school day" (8 NYCRR 200.1[rr]).

education appropriately tailored to each student's particular needs," Newington, 546.3d at 122 [citation omitted]).

Based on the above, the district made reasonable efforts to consider accommodations for the child in a general education classroom, as well as the benefits and drawbacks of placing him in that setting, and therefore appropriately determined that the student could not be satisfactorily educated in a general classroom with the use of supplemental aids and services (Newington, 546 F.3d at 119-20; see J.S., 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also M.W., 725 F.3d at 144; Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50). The April 2017 and May 2017 CSEs therefore recommended 8:1+1 and 12:1+1 special class placements with related services and a 1:1 aide, consistent with the student's needs as identified in recent evaluation reports and detailed in the present levels of performance on the respective IEPs (Joint Exs. O at pp. 1-6, 13-15; P at pp. 1-6, 13-15; see generally Joint Exs. T; U). Furthermore, the May 2017 draft IEP for the 2017-18 school year was the product of extensive cooperation between the parties in updating and determining the student's present levels of performance, goals, related services, and supplementary aids and services, program modifications/accommodations, and need for twelve-month services (Joint Ex. N at pp. 4-169). The April 2017 IEP and the May 2017 IEP also contemplated a special class placement for the student within a general education school so that he could attend elective classes, lunch, and extracurricular activities with his general education peers (Joint Exs. M at p. 284; N at pp. 182, 235; O at p. 16; P at p. 17; EE at p. 58), a program which is consistent with Newington's mandate that special education students must have access to nondisabled peers to the maximum extent appropriate (Newington, 546 F.3d at 120). Accordingly, the recommendations made by the April, May, and June 2017 CSEs not only provided the student with a FAPE, but for the reasons described above, also constituted the student's LRE.

2. Attempted Out-of-District Placement

Having determined that the recommendations of the student's April 2017 IEP and May 2017 draft IEP offered the student a FAPE in the LRE, I now turn to the district's attempts to place the student at an out-of-district school. Although the parent alleges on appeal that he has never requested a specific placement, a cursory review of the record makes it abundantly clear that both of the student's parents have expressed a strong preference (if not an absolute insistence) that the student be educated within the district (Joint Exs. M at pp. 187-91, 284-85; N at pp. 171-78; EE at pp. 4-7, 54, 84, 86-90).

Initially, while a school district "must provide a continuum of alternative placements that meet the needs of the disabled children that it serves," the Second Circuit has held that "a school district need not itself operate all of the different educational programs on this continuum of alternative placements. The continuum may instead include free public placements at educational programs operated by other entities, including other public agencies or private schools." (T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 165 [2d Cir. 2014]). This is consistent with State law, which allows districts to "[c]ontract[] with other districts for special services or programs" (Educ. Law § 4401[2][b]).

However, with respect to LRE, 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]). In weighing this provision, 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]).

Here, the evidence in the hearing record demonstrates that the district attempted to provide the parent with two options for out-of-district placements because the other districts indicated they were capable of implementing the special class placement recommended on the student's IEP for the 2017-18 school year and the district had determined that it was not possible to implement the student's IEP at a school located in the district (Tr. pp. 246, 370, 375-76, 449; Joint Exs. V; W at p. 1). The hearing record demonstrates that the district did not have an 8:1+1 or 12:1+1 special class program in place at the time of the CSE meetings at issue (Tr. pp. 366, 358-59). Thus, the student's IEPs required the "other arrangement" of a special class placement at a school other than a school located within the district (R.L., 757 F.3d at 1191 n.10; White, 343 F.3d at 380 [finding that "it was not possible for [the student] to be placed in his neighborhood school because the services he required are provided only at the centralized location, and his IEP thus requires another arrangement"]); Lebron, 769 F. Supp. 2d at 801; (see, e.g., Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006] [noting that districts need not place students in the closest public school to the student's home if "the services identified in the child's IEP require a different location"]; Letter to Trigg, 50 IDELR 48).

The record further reflects that the district utilized a reasonable procedure to locate an appropriate educational setting for the student in a neighboring district. In order to implement the student's IEP, the district canvassed a number of neighboring districts to determine whether they had an appropriate placement for the student that could meet his needs (Joint Ex. DD at pp. 2-6). Having received responses from two districts that had such programs, the district notified the parents of their availability by letter dated June 6, 2017, and offered to facilitate site visits (Joint Ex. V; see Joint Ex. DD at pp. 43-44). The district received no response to this letter (Tr. p. 376).

Although the parent disputed that he received this letter at the time of sending, he did not dispute that the letter was sent, and acknowledged that he learned of it later, possibly at the time of the June 2017 CSE meeting notice (Tr. pp. 376-77, 380; see Joint Ex. W). That meeting notice, dated June 12, 2017, listed four CSE participants from two neighboring school districts in a list of names and titles of the persons who would be attending the meeting (Joint Ex. W at p. 1).

Rather than investigate the out of district options, the parent sent a letter to each CSE participant warning them not to attend a meeting he considered to be illegally convened, specifically warning each participant that if they attended, they would "undoubtedly become entangled in outstanding State and Federal litigation" (Joint Exs. X; Z; AA; see Tr. pp. 389-90). As a result of the letter, several invited CSE participants declined to attend the June 2017 CSE meeting, including the school psychologist and all representatives from neighboring school districts (Tr. pp. 382-92; Joint Exs. Y; EE at pp. 2-4, 15-16). The CSE chairperson testified that the school psychologist reported feeling threatened by the letter, and did not wish to be involved in State and federal litigation (Tr. pp. 387-88). Although the CSE chairperson advised the school psychologist that a complete CSE meeting required the presence of a school psychologist, the school psychologist ultimately did not attend the June 2017 CSE meeting (Tr. p. 388; Joint Ex. EE at p. 2). The CSE chairperson also testified that one neighboring district representative verbally indicated to her that they would not be attending the meeting because their attorney advised them not to, and would be formally writing a letter indicating their intent to not attend (Tr. p. 391; Joint Ex. Y).[21]

Despite the parent's actions, which prevented the June 2017 CSE from being properly constituted and thereby prevented the district from finalizing the student's educational placement for the 2017-18 school year, the CSE chairperson proceeded with the June 2017 meeting to, once again, consider the parent's preferred placement within the district and review whether it was in any way feasible to adopt the recommendations of inclusion consultant B (Joint Ex. EE at pp. 3-4, 20-21. Accordingly, the hearing record reflects that the CSE undertook a comprehensive and rigorous review of all available evaluations, educational records, consultant reports and the input of meeting participants to determine whether the student's needs could be met within a district setting and, after careful consideration and a good faith analysis of the student's needs and the district's resources, ultimately determined that the student required a special class, which was not currently available in the district, and therefore an "other arrangement" was required (R.L., 757 F.3d at 1191 n.10; White, 343 F.3d at 380; Lebron, 769 F. Supp. 2d at 801). Accordingly, the district did not deny the student a FAPE by recommending a special class placement and attempting to locate one in a neighboring school district.

While I can appreciate the parent's apprehension that the district's decision to place the student outside of the district was made for an improper purpose, the district's reasoning behind its decision is not an appropriate subject for a due process proceeding and does not impact the decision as to whether the ultimate recommendation was appropriate to meet the student's needs and within the student's LRE. However, the district is not absolved of its obligation to continue to attempt to

[21] The hearing record includes a letter dated June 20, 2017, from one of the neighboring school districts which had originally indicated it had an appropriate program available for the student, informing the district that it did not have a program available for the student for the 2017-18 school year (Joint Ex. DD at p. 45).

educate the student in the school he would have attended if not disabled unless the student's IEP requires some other arrangement (see 8 NYCRR 200.4[d][c][4][ii][b]). While at the time of the hearing in this matter, placement in the district was not a viable option, this may not always be the case, thus, a directive that required placement of the student outside of the district schools would impede the important statutory purpose of attempting, whenever possible, to have disabled students access the public school system through placement in a public school with their nondisabled peers (see Walczak, 142 F.3d at 132 [noting that the preference for educating students in the least restrictive environment applies even when no mainstreaming with nondisabled peers is possible]). Accordingly, the IHO's order directing that when the CSE reconvenes to recommend an appropriate placement for the student, the CSE should not consider placement of the student in the district is overturned.

VII. Conclusion

A review of the record demonstrates that the district reviewed the inclusion consultant reports and all available evaluative data meaningfully and in good faith, conducted a thorough and comprehensive analysis of whether it could provide an appropriate education for the student within the district and, upon determining that it could not, permissibly recommended a small class placement in a public general education school in a neighboring school district, which offered the student a FAPE in the LRE.

I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated August 15, 2017, is modified, by reversing the portion of the decision directing that the CSE should not consider placement of the student in the district.

Dated: **Albany, New York**
October 18, 2017

STEVEN KROLAK
STATE REVIEW OFFICER