The University of the State of New York

The State Education Department
State Review Officer
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No. 18-061

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

Appearances:
Law Offices of Carolyn Nugent Gorczynski, attorney for petitioners, by Carolyn Nugent Gorczynski, Esq.

Osborn, Reed & Burke, LLP, attorneys for respondent, by Jennifer M. Schwartzott, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which determined that the educational program and related services respondent's (the district's) Committee on Special Education (CSE) recommended for their son for the 2017-18 school year was appropriate. The appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local CSE that includes, but is not limited to, parents, teachers, a school psychologist, and a 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[a]). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

In this case, the student began receiving special education and related services through the Early Intervention Program beginning in or around fall 2012 and continuing until the 2015-16 school year when the student transitioned to receiving services through the Committee on Preschool Special Education (CPSE) (see Tr. pp. 703-04; see also Tr. pp. 647-48; see generally Parent Exs. L-M; CC-DD; Dist. Exs. 13-17; 27).

For the 2016-17 school year, the student—who remained eligible to receive special education and related services as a preschool student with a disability—attended the district's integrated, universal prekindergarten (UPK) program for 2.5 hours per day, 3 days per week (Monday, Wednesday, and Friday) beginning in September 2016 (see Tr. pp. 122, 708; Parent Exs.

G at p. 3; K at pp. 1, 19-22; V at p. 1; see generally Parent Exs. B-D; N; O; S; Y; AA; GG; Dist. Ex. 29).[1] While at the UPK, the student received school-based related services consisting of speech-language therapy, occupational therapy (OT), physical therapy (PT), music therapy, and vision therapy (see Parent Ex. B at pp. 8-9; see generally Parent Exs. C-D; Q-R; T; W-Z; AA). The UPK class consisted of a total of 15 students, one teacher, and one "classroom aide" (Tr. pp. 417-21). Since the student received many of his school-based related services pushed into—or delivered to him—in the UPK classroom, the therapists would act as individual support for the student while he attended the UPK classroom (see Tr. pp. 420-23). However, due to the therapists' absences or other reasons, the district eventually provided the student with the services of a full-time, individual aide within the classroom (see Tr. pp. 421, 423, 709-10).

In addition to the school-based special education program, the student also received a home-based special education program during the 2016-17 school year, which consisted of daily, individual, special education itinerant teacher (SEIT) services for 3 hours per day, as well as the following home-based related services: speech-language therapy, OT, PT, music therapy, vision therapy, and parent counseling and training (see Parent Exs. B at pp. 8-9; K at pp. 19-21; V-Z; AA).[2] On the three days the student attended the UPK program, he also received his home-based special education program (see Tr. pp. 708-09).

[1] Based upon State regulation, the purpose of this program is to "provide four-year-old children with universal opportunity to access prekindergarten programs" (8 NYCRR 151-1.1). State regulation also requires that the "environment and learning activities of the prekindergarten program shall be designed to promote and increase inclusion and integration of preschool children with disabilities" (8 NYCRR 151-1.4[e]). Generally, students in the district's UPK program attended 5 days per week for 2.5 hours per day, during either a morning or an afternoon session (see Tr. pp. 121-22, 463; see 8 NYCRR 151-1.4[a]). According to the evidence in the hearing record, the district's superintendent and principal made the decision that the student would only attend the UPK program for three days per week instead of five days per week (see Tr. p. 122). If "there are more eligible children than can be served in a given school year," State regulation requires a school district to "establish a process to select eligible children to receive universal prekindergarten services on a random selection basis" (8 NYCRR 151-1.4[d]). The student generally attended the UPK program from 12:45 p.m. through 3:15 p.m. (see Tr. pp. 708-09). Finally, State regulation requires that school districts "shall establish a process for assessing the developmental baseline and progress of all children participating in the program" and this "process must at a minimum provide for on-going assessment of the development of language, [and] cognitive and social skills" (8 NYCRR 151-1.3[b][1]). "School districts shall use the results of such assessments to annually monitor and track prekindergarten program effectiveness" (8 NYCRR 151-1.3[b][2]). "A program shall be considered effective if the enrolled children demonstrate significant gains, as determined by the commissioner, in language, cognitive and social skills" (id.). It appears that, in partial compliance with this State regulation, the district assessed the student upon entering the UPK program in September 2016 (compare Dist. Ex. 29, with 8 NYCRR 151-1.3[b][2]). According to the "Fall 2016 UPK Screening Results," the student would be reassessed "in the spring, to help determine progress in the UPK program," and the "spring results w[ould] also be used for kindergarten screening" (Dist. Ex. 29). The district did not, however, reassess the student in spring 2017 at the direction of the CPSE/CSE chairperson (see Tr. p. 337).

[2] The evidence in the hearing record revealed that the home-based SEIT provider used applied behavior analysis (ABA) during her daily sessions with the student (see Tr. pp. 500-04; 507-11; 545; see also Tr. pp. 199-200, 222-23; see generally Parent Ex. V). For clarity, this individual will be referred to in this decision as the SEIT/ABA provider.

In a letter dated January 6, 2017, the district advised the parents that the student's "Annual Review Meeting" would be "move[d] up" to March 1, 2017 in order to accommodate the chairperson's upcoming personal leave in or around April 2017 (Parent Ex. LL; compare Parent Ex. LL, with Parent Ex. E at pp. 1-2, and Dist. Ex. 20 at p. 1). In the January 2017 letter, the district requested a response from the parents concerning the March 1, 2017 date as soon as possible so the district could "contact the agencies that provide[d] services" to the student (Parent Ex. LL).[3]

After sending the January 2017 letter to the parents, district staff—including the chairperson, the elementary school principal, and the UPK classroom teacher—met with the parents to review the "continuum of services and what could possibly be discussed on that day," as well as to inform the parents about the "options and to give them some time to think about what was available" (Tr. pp. 134-36).[4]

In a letter dated February 15, 2017, the district invited the parents to attend the student's "CPSE Annual Review [meeting] followed by a CSE Transition Meeting" scheduled for March 1, 2017 (Dist. Ex. 24 at p. 1). The notice separately identified the individuals anticipated to attend either the CPSE meeting or the CSE meeting (id.).

On March 1, 2017, a CPSE convened to conduct the student's annual review and to develop an IEP to be implemented beginning on March 30, 2017 (see Parent Ex. E at pp. 1-2; see generally Dist. Ex. 20).[5] Shortly after the conclusion of the March 2017 CPSE meeting, a CSE convened to conduct a reevaluation of the student's program in preparation for his transition from receiving CPSE (preschool) services to receiving CSE (school-age) services and to develop an IEP for kindergarten during the 2017-18 school year (see Parent Ex. G at pp. 1-2; compare Dist. Ex. 20 at p. 2, with Dist. Ex. 35 at p. 1).[6] Finding the student eligible to receive special education and related services as a student with multiple disabilities, the March 2017 CSE recommended a 6:1+1 special class placement (4.25 hours per day)[7] with related services consisting of three 30-minute sessions per week of individual OT (delivered in the "Therapy Room"), one 30-minute session per week of

[3] The district staff person identified in the January 2017 letter acted as both the district CPSE and CSE chairperson (compare Parent Ex. LL, with Parent Ex. G at pp. 1-2, and Tr. pp. 99-101). Throughout this decision, this individual will be referred to as the chairperson.

[4] The student's mother attended this meeting with district staff, and after speaking with the student's father, she notified the district the next day that "they still really wanted [the student] in the general education setting" (Tr. pp. 136-37). In response, the chairperson told the parents that "it was a committee decision for the CSE" (Tr. p. 137).

[5] The March 2017 CPSE meeting lasted approximately 1.5 hours (see Dist. Ex. 20 at p. 2).

[6] The March 2017 CSE meeting lasted approximately 1.75 hours (see Dist. Ex. 35 at p. 1).

[7] According to the evidence in the hearing record, the 4.25 hours per day—out of the typical 6 hour school day for a kindergarten student—in the 6:1+1 special class placement constituted approximately 70 percent of the student's instructional time away from his nondisabled peers (see Parent Ex. G at p. 15; see also Tr. pp. 170, 334-35).

individual OT (delivered in the "Classroom"), four 30-minute sessions per week of individual PT (delivered in the "Therapy Room"), five 30-minute sessions per week of individual speech-language therapy (delivered in the "Therapy Room"), and two 30-minute sessions per week of vision therapy services (delivered in the "Therapy Room") (Parent Ex. G at p. 15).[8] The March 2017 CSE also recommended the services of a full-time, individual aide to be implemented across all settings with the student (id.). In addition, the March 2017 CSE recommended various supplementary aids and services, program modifications and accommodations; assistive technology devices and services; and supports for school personnel on behalf of the student, including six hours per week of "[d]irect and [i]ndirect services" in ABA to be delivered in the student's "[c]lassroom" (id. at pp. 15-17).[9] The March 2017 IEP included annual goals targeting the student's needs in the areas of speech-language skills, social/emotional and behavior skills, motor skills, daily living skills, and vision (id. at pp. 13-15).[10] Finally, with respect to the student's access to his nondisabled peers, the March 2017 IEP indicated that he would "not participate in the general education setting while in the special class for academics and during speech, [OT], [PT], vision services, and adapted physical education" (id. at p. 18).[11, 12]

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

[9] The March 2017 CSE's description of the student's present levels of academic achievement, functional performance and learning characteristics—as well as his management needs—in the March 2017 CSE IEP repeated, nearly verbatim, the March 2017 CPSE's description of the student's present levels of academic achievement, functional performance and learning characteristics and management needs set forth in the March 2017 CPSE IEP (compare Parent Ex. G at pp. 1-13, with Parent Ex. E at pp. 1-12).

[10] The annual goals created by the March 2017 CSE were very similar to the annual goals and short-term objectives created by the March 2017 CPSE (compare Parent Ex. G at pp. 13-15, with Parent Ex. E at pp. 13-15). In addition, while both the March 2017 CPSE and March 2017 CSE indicated that the student required "strategies, including positive behavioral interventions, supports and other strategies to address behaviors that impede[d] the student's learning or that of others," neither committee determined that the student required a behavioral intervention plan (BIP) (compare Parent Ex. G at p. 13, with Parent Ex. E at p. 13).

[11] In a prior written notice dated March 8, 2017, the district explained that the student would attend the 6:1+1 special class placement for "5 x 255 minutes per week—with a push-in to general education for calendar, playtime, specials, and lunch" (Parent Ex. II at p. 1). In addition, the prior written notice indicated that the student would "push-in to the general education setting . . . so that he [was] getting socialization with typical peers," noting further that the 6:1+1 special class placement offered the student a "setting where he would make the most progress toward his goals" (id. at p. 2).

[12] According to the March 2017 CSE meeting minutes, the parents "walked out" of the meeting (Dist. Ex. 35 at p. 5). At the impartial hearing, although the chairperson initially testified that the parents "left the meeting upset," she acknowledged that the parents expressed concerns about "getting [the student] off the bus" at home (Tr. pp. 177-79). She also testified that the parents were "upset that the decision had to be made and it wasn't the decision that they wanted and they got up and left the meeting" (Tr. p. 157). The chairperson further testified that the meeting continued after the parents left and "the placement was recommended" (Tr. p. 158). During cross-examination, the chairperson testified that "[w]hen the program was being discussed they asked if they could have a day to think about it [but] the decision had to be made" (Tr. p. 208). The student's father testified that they "walked out" at the "end of the meeting" and not prior to the end of the meeting, as suggested by the location of that statement within the CSE meeting minutes (Tr. pp. 914-19).

In a letter dated March 8, 2017, the chairperson wrote to the parents to "summarize the phone conversation" she had with them on March 3, 2017 (Dist. Ex. 7 at p. 1).[13] According to the letter, the parents left a message requesting a meeting to "make changes to [the student's] IEP for the remainder of the 2016-17 school year and for summer programming," and "to finish the re-evaluation of the CPSE to CSE transition meeting" held on March 1, 2017 (id.). In response, the chairperson explained that a program review meeting could be held at "any point to review recommendations," and she encouraged the parents to contact the office to arrange a program review at any time (id.). With respect to holding another meeting to "finish the Re-evaluation CPSE to CSE Transition meeting," the chairperson indicated that this meeting "was completed on March 1, 2017 and recommendations were made for [the student] for the 2017-18 school year" (id.). In addition, the chairperson indicated that while "committee decisions c[ould] always be reviewed through a program review at any point, . . . a decision had to be reached at the conclusion of the Re-evaluation CPSE to CSE Transition meeting" (id.).[14] The chairperson further noted in the letter that the CSE "decided that the goals [the student] currently ha[d] as a preschool student would be the goals the therapists would work on next year until they got to know [the student] better" and that the goals could be "updated at a program review four weeks" into the school year (id.).

Next, the chairperson noted that, during their telephone conversation, the parents also expressed that the "number of hours for ABA" was not appropriate for the student and that they "were not happy with the reports that were used during the review of records conducted to make recommendations" (Dist. Ex. 7 at pp. 1-2). Again, the chairperson reminded the parents that the ABA services' recommendation could be reviewed at any time and, with regard to the "review of records as part of the re-evaluation," the parents "signed consent" for this process on February 15, 2017 (id. at p. 2; see generally Dist. Ex. 28).[15] The chairperson also indicated, however, that the district could "proceed with updated testing if [the parents felt] that more updated information [was] needed" and she enclosed a consent for "academic, psychological, and related services testing" if the parents chose to update these evaluations (Dist. Ex. 7 at p. 2; see generally Parent Ex. JJ). The chairperson further acknowledged that the parents, on March 2, 2017, had "revoked consent" for a functional behavior assessment (FBA) of the student (Dist. Ex. 7 at p. 2; see generally Dist. Exs. 18-19).[16] Before concluding the letter, the chairperson indicated that the CSE would "reconvene for a meeting for a program review [of] recommendations made at [the]

[13] The district superintendent also signed the March 8, 2017 letter to the parents (see Dist. Ex. 7 at p. 2).

[14] At the impartial hearing, the chairperson testified that "[w]hen you call the Regional Associates Office . . . that is what they tell you, that you are not allowed to table a meeting," and therefore, as she understood the "law," a "meeting could not be tabled or discontinued without a decision" about the student's "placement" (Tr. pp. 158-59, 180).

[15] During summer 2017, the district recommended an increase to 10 hours per week of ABA services based on provider availability (Dist. Exs. 39; 41 at p. 2).

[16] At the impartial hearing, the student's mother testified that, upon speaking with the Board Certified Behavior Analyst (BCBA) who provided parent counseling and training to them, the data for an FBA already existed and, thus, there was no reason to go forward with the FBA (Tr. pp. 594-95, 600, 761-62).

previous meeting," scheduled for March 21, 2017 (Dist. Ex. 7 at p. 2; see generally Parent Ex. HH).[17]

In a letter dated March 22, 2017, the chairperson wrote to the parents, in part, to acknowledge that they "left a message cancelling" the March 21, 2017 program review (Dist. Ex. 12). She indicated that the parents could contact the district if they wished to reschedule this meeting (id.).[18]

A. Due Process Complaint Notice

By due process complaint notice dated August 4, 2017, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2016-17 and 2017-18 school years (see Parent Ex. H at p. 1). Generally, the parents asserted that, upon transitioning to the district's "programming," the district failed to offer the student a FAPE in the least restrictive environment (LRE) and failed to conduct "any updated evaluation and/or testing to justify its entire overhaul" of the student's "placement, program and services" (id. at p. 2). In addition, the parents asserted that the district failed to "consistently and/or appropriately implement" the student's IEP "as written," pointing specifically to the 2016-17 school year and the district's alleged failure to provide the student with OT services as mandated in the IEP, as well as the district's alleged failure to provide the student with OT and speech-language therapy services during summer 2017 (id. at pp. 1, 6-7). Additionally, the parents contended that, notwithstanding the student's "documented success in response to being provided the opportunity to be educated in the LRE with his non-disabled peers, along with the receipt of intensive specialized instruction" to meet the student's needs in his UPK setting, the student's recommended placement for the 2017-18 school year—to wit, a 6:1+1 special class—violated the LRE requirement (id. at pp. 2-3). The parents further contended that the district recommended the 6:1+1 special class placement without conducting the "legally required and/or appropriate assessments," and instead, "only conducted a records review" and failed to adequately consider the "immense progress and skill growth" the student demonstrated in preschool (id. at pp. 3-5).

Next, the parents alleged that the district failed to consider whether the student could "benefit from, and could be appropriately educated in a less restrictive environment along the legally mandated continuum of educational services"—namely, a "general education environment with consultant teacher and/or resource room services, or an integrated co-teaching environment, or less restrictive self-contained special education classroom environment (such as a 15:1 or 12:1:1

[17] At the impartial hearing, the student's mother testified that she "never wanted a review" but instead, they "just wanted to back off any decisions being made" (Tr. pp. 820-21).

[18] At the impartial hearing, the student's mother testified that they cancelled the March 21, 2017 program review because the "key people were not on the program review" (Tr. p. 782). She also testified that at the "March 21st meeting [they] would have been going over the same things, no new testing" (Tr. pp. 759-60). Significantly, the same individuals who attended the March 1, 2017 CSE meeting were invited to attend the March 21, 2017 program review (compare Dist. Ex. 36, with Parent Ex. HH at p. 1). The chairperson testified that as a "program review," no further assessments would have been discussed (Tr. pp. 206-07). She also testified that even though the March 21, 2017 meeting would provide an opportunity to discuss the parents' concerns—such as the recommended ABA services—no one was invited to the program review "who would provide th[at] service to [the student]" (Tr. pp. 205-06).

model)" (Parent Ex. H at p. 4). The parents also alleged that the district failed to recommend sufficient ABA services by reducing this instruction from 15 hours per week to "only 6 hours of 'direct or indirect' services" per week (id.). The parents asserted that the district reduced the student's ABA services without "any updated and/or appropriate assessments justifying the change in service level delivery" (id.). Moreover, the parents contended that the district's recommendation for "'direct or indirect'" services was "inappropriate and unlawful" because it allowed the district to "revise the [s]tudent's service provision at its own convenience and discretion outside of a legally constituted CSE meeting without appropriate and sufficient legal notice" to them (id.). Next, the parents asserted that the student's 2017-18 IEP failed to include any measurable annual goals for academics and study skills, and the district failed to recommend music therapy for the student (id.).

While noting that the student made "tremendous progress in most areas of development" during the 2016-17 school year, the parents alleged that the present levels of performance section of the 2017-18 IEP failed to provide a "full and accurate picture" of the student's needs in all areas of development (Parent Ex. H at pp. 5-6). The parents noted that district failed to "focus on the [s]tudent's documented abilities and successes, and rather ha[d] remained focused on what the [s]tudent c[ould not] do or d[id] not do well" (id. at p. 6). According to the parents, the student's 2017-18 IEP failed to "satisfy the mandated requirements" of State regulations because the district did not recommend parent counseling and training (id. at p. 7). Finally, the parents alleged that the district failed to "treat" them as "equal members of the CSE," noting that at the March 2017 CSE meeting, the district "interrupt[ed] their discussions with the CSE"; "fail[ed] and refus[ed] to address their questions and concerns"; and "even dismiss[ed], disparage[ed] and discount[ed]" their input (id.).

As relief for the alleged procedural and substantive violations, the parents proposed several solutions, including that the district provide the student with an "appropriate placement in the LRE, with the necessary supplementary aides, services, and/or program accommodations/modification for the 2017-18 school year" (Parent Ex. H at p. 8). The parents requested that the district revise the student's IEP to: "accurately reflect" the student's present levels of performance and needs, and relatedly, to develop "appropriate measurable annual goals"; "accurately reflect" the student's autism spectrum disorder (ASD) diagnosis and ensure the IEP meets all the requirements of State regulations pertaining to students with autism, including parent counseling and training; and "amend" the student's IEP to "provide for appropriate home-school communication" to facilitate the "carryover of daily lessons" and to report information about the student's "engagement in instruction and support of behavioral and emotional needs," his ability to "demonstrate understanding an on task attention to instruction," and to provide information about the student's "issues related to his ASD and other medical needs" (id. at pp. 8-9). In addition, the parents requested that the district provide the student with OT services to address his "motor and sensory" needs, as well as music therapy (id. at p. 9). The parents further requested the following evaluations of the student, at public expense or as reimbursement to them for independent educational evaluations (IEEs): a neuropsychological evaluation, an FBA, an OT evaluation "(including a sensory profile)," a speech-language evaluation, and a PT evaluation (id.). After completing these evaluations, the parents requested that the district convene a CSE meeting and "make appropriate modifications to the [s]tudent's IEP and implement appropriate services consistent with the results of said evaluations" (id.). Next, the parents requested that the district treat them as "equal members of [the] CSE" (id.).

B. Impartial Hearing Officer Decision

On October 23, 2017, the IHO held a prehearing conference during which the IHO received documentary evidence and the parties' arguments related to the student's pendency (stay-put) placement (see IHO Decision at p. 5; Oct. 23, 2017 Tr. pp. 1-17; Parent Exs. I; J).[19] Shortly thereafter, the IHO issued an interim decision, dated November 3, 2017, which ordered the district to provide the following as the student's pendency services: 1:1 SEIT services (three hours per day, five days per week); 1:1 music therapy (two 30-minute sessions per week, home-based and school-based); 1:1 OT (four 30-minute sessions per week, home-based and school-based); 1:1 PT (two 60-minute sessions per week, home-based and school-based); 1:1 speech-language therapy (two 30-minute sessions per week of home-based services and three 60-minute sessions per week of school-based services); 1:1 vision therapy (two 30-minute sessions per week, home-based and school-based); 1:1 parent counseling and training services (four 60-minute sessions per month of home-based services); a 1:1 aide (2.5 hours per day "across all settings," three days per "three day cycle"); and "all other services as indicated in the April 25, 2017 IEP" (Parent Ex. NN at pp. 6-7).[20] The IHO also indicated that although the student had "aged out of pre-school, he [was] still entitled to the services in the pre-school IEP but in the recommended general education kindergarten setting" (id. at p. 5).

On December 7, 2017, the parties returned to the impartial hearing, which concluded on January 10, 2018, after four more days of proceedings (see Tr. pp. 1-930).[21] In a decision dated April 25, 2018, the IHO found that the district provided the student with the "recommended services" during the 2016-17 school year and, for the 2017-18 school year, the district offered the student a FAPE in the LRE (IHO Decision at pp. 21-28). Turning first to the parents' allegations that the district failed to provide the student with all of the recommended OT services during the 2016-17 school year, the IHO determined that "those missed services" did not "rise to the level of denying the [s]tudent [a] FAPE" (id. at p. 24). The IHO noted the difficulty encountered by the district when attempting to locate another OT provider for the student's school-based services, which the district ultimately resolved by certifying a district OT provider to deliver those services to the student (id.). However, with regard to the home-based OT services the student missed during the 2016-17 school year, the IHO found that the district resolved the "scheduling conflicts" the parents had alleged as the rationale for dismissing the home-based OT provider (id.). In light of the foregoing, the IHO determined that an award of additional OT services was not warranted to

[19] The IHO noted that she was appointed on October 6, 2017 as the "second hearing officer assigned" to this case (IHO Decision at p. 5; see generally Parent Ex. J). At the time of the prehearing conference, the student was not receiving "any services" (Oct. 23, 2017 Tr. p. 4). For clarity, only citations to the prehearing conference transcript, dated October 23, 2017, will include the date of that transcript within the parenthetical citation.

[20] On April 25, 2017, the student's March 2017 CPSE IEP was amended without convening a meeting to reflect a change in OT services beginning in May 2017 (see Tr. pp. 833-34; compare Parent Ex. A at pp. 1-2, 16, with Parent Ex. E at pp. 1-2, 16).

[21] At the conclusion of the last date of the impartial hearing, the IHO directed the parties to "submit briefs" on February 28, 2018 and noted that the decision would be issued by March 23, 2018 (Tr. p. 928). It is unclear why the IHO then issued the decision on April 25, 2018 (compare Tr. p. 928, with IHO Decision at p. 29).

make up for the missed OT services during the 2016-17 school year because equitable considerations weighed in favor of the district (id.).

Next, the IHO addressed the district's alleged failure to provide the student with services during summer 2017, consisting of OT and speech-language therapy (see IHO Decision at p. 25). Here, the IHO found that "some true scheduling issues" prevented the student from receiving these related services (id.). As the district did not dispute the "missing summer services," the IHO found that the student was entitled to an award of "make up services for the [s]peech[-language therapy] and OT he missed during the summer"; however, the IHO did not find that "these missed services w[as] a denial of [a] FAPE" (id.).

Turning next to the 2017-18 school year, the IHO found the district's "IEP to be procedurally and substantially appropriate and adequate" (IHO Decision at pp. 25-26). Initially, the IHO indicated that the parents participated in "two back-to-back meetings, totaling approximately four hours, to discuss and review the [s]tudent's progress and continued needs in all areas of deficit" (id. at p. 25). The IHO also indicated that the parents were "properly notified" about the meeting, and the "meeting was duly constituted by the appropriate members of the CSE" (id.). According to the IHO, the CSE reviewed the student's "most recent evaluations, updated reports from each of the providers including the school psychologist, OT, PT, Speech, ABA, music and teachers" in considering the student's needs (id.). The IHO further noted that the student's "strengths as well as his continued management needs in all areas of concern including related services were reviewed and noted in detail in the March 2017 IEP" (id.).

With respect to the 6:1+1 special class placement recommendation, the IHO indicated that "[a]ll members of the CSE, except for the [p]arent, agreed" that this program would "meet the [s]tudent's severe global delays" (IHO Decision at p. 25). According to the IHO, the hearing record was "flooded with testimony" indicating that the student "required [a] high level of 1:1 instruction, constant repetition, adult prompting, was unsafe to navigate the classroom and hallways by himself, that he was not generalizing his skills from one area to another, and needed continued assistance with dressing, toileting, [and] feeding" (id. at pp. 25-26). The IHO also indicated that district witnesses testified that the "best program to provide that level of intervention was in the self-contained, 6:1:1 program" (id. at p. 26). Moreover, the IHO noted that to address the parents' "concerns regarding peer modeling and socialization, the CSE also recommended that the [s]tudent push out into the general education kindergarten classroom, with 1:1 aide support, for calendar, play time, lunch, recess and specials" (id.). Based upon "a lot of testimony," the IHO also noted that the student was not "engaging with other students yet"; he did not "engage or even acknowledge other peers without prompting"; and while the student "watche[d] other children," he did not show an "interest in interacting with other children without encouragement from an adult and require[d] a high level of support for interactions" (id.). Based upon the foregoing, the IHO concluded that "this program was in [the] [LRE] for this [s]tudent and his needs" (id.). In addition, the IHO determined that the district was "ready" for the student to attend the program in September 2017 and "continue[d] to be ready"—noting further that the district "developed a program and hired a certified special education teacher with experience, hired a new teaching assistant versus an aide because the assistant would have more education, modified the technology in the classroom and updated it, chose a location for the classroom that would provide additional quiet space and added furniture that would fit the needs of the [s]tudent" (id.).

Next, the IHO concluded that the annual goals were appropriate, and further, that the "omission of music therapy, and parent counseling and training from the IEP, d[id] not rise to the level of a denial of [a] FAPE" (IHO Decision at p. 27). Instead, the IHO indicated that the omission of music therapy and parent counseling and training constituted procedural violations, which, in this case, did not deprive the parents of the opportunity to participate in the development of the IEP or deprive the student of educational benefits because the student did not attend school during the 2017-18 school year (id.). Finally, the IHO added that she "found the testimony of both [p]arents to be disingenuous" (IHO Decision at pp. 27-28).[22]

In light of the evidence in the hearing record, the IHO summarized that although the student was not entitled to "missed OT services" during the 2016-17 school year, he was, however, entitled to the "missed" speech-language therapy and OT services during summer 2017 (IHO Decision at p. 28). The IHO also noted that the district offered the student a FAPE for the 2017-18 school year, and the district was entitled to "conduct updated evaluations of the [s]tudent" (id.). The IHO then indicated that she considered, and denied the parents' "other requests for relief" in the due process complaint notice due to a lack of evidence in the hearing record to support such relief (id. at pp. 28-29). As a result, the IHO ordered the district to provide the student with the speech-language therapy and OT services missed during summer 2017 (to be "held in a bank of hours for the [p]arent to use at their convenience") (id. at p. 29). The IHO ordered the parents to consent to allow the district to conduct updated evaluations of the student (a psychoeducational evaluation, an OT evaluation, a PT evaluation, a speech-language evaluation, a music therapy evaluation, a vision evaluation, and an FBA) (id.). Upon receipt of the parents' consent, the IHO ordered the district to conduct the evaluations (id.). Finally, the IHO ordered the district to "update the [s]tudent's IEP to include the music therapy and parent counseling and training left off of the IEP" (id.).

IV. Appeal for State-Level Review

The parents appeal, and primarily argue that, in reaching the conclusion that the district offered the student a FAPE in the LRE for the 2017-18 school year, the IHO did not apply the correct legal analysis required under the two-prong test established by the Second Circuit. In support of this contention, the parents argue that the IHO ignored evidence establishing the following: the CSE failed to make reasonable efforts to support and accommodate the student in a regular education classroom, the progress the student made in the district's UPK program, the educational benefits available to the student in a regular classroom compared to a special classroom setting, that any possible negative effects of inclusion on the education of other students was extremely minimal or nonexistent, and that the district failed to integrate the student to the

[22] The IHO appeared "via telephone" on the last day of the impartial hearing when the student's father testified (see Tr. pp. 851, 917-18). Thus, to the extent that the IHO's characterization of his testimony as "disingenuous" suggests that his testimony was not credible, it is altogether unclear how the IHO could make this assessment given that she was not present to assess his demeanor during cross-examination (see Scott v. New York City Dep't of Educ., 6 F. Supp. 3d 424, 444 [S.D.N.Y. Mar. 25, 2014]; see generally Application of a Student with a Disability, Appeal No. 16-001). In addition, while characterizing the student's mother's testimony as "disingenuous" based upon certain "contradictions," the IHO failed to note that none of these alleged "contradictions" related to the crux of the parties' dispute in this case, to wit, whether the district sustained its burden to establish that it offered the student a FAPE in the LRE for the 2017-18 school year (see IHO Decision at pp. 27-28).

maximum extent appropriate. Next, the parents argue that the IHO erred in referencing the parents' decision to enforce the student's pendency rights as a basis for concluding that the March 2017 IEP was appropriate. The parents further argue that the IHO erred in finding that the district provided the student with the "recommended services" during the 2016-17 school year, and relatedly, the failure to provide the student with related services during summer 2017 did not result in finding that the district failed to offer the student a FAPE. The parents challenge the IHO's finding that the March 2017 IEP was both "procedurally and substantially appropriate and adequate," noting that the March 2017 CSE was not properly composed; the CSE failed to update the student's annual goals; the CSE did not rely upon sufficient evaluative information and improperly denied the parents' request for IEEs; and the CSE failed to recommend music therapy, an appropriate level of ABA services, and parent counseling and training services. Finally, the parents argue that the IHO improperly found the parents' testimony was "disingenuous." As relief, the parents request the relief sought in the due process complaint notice.

In an answer, the district responds to the parents' allegations and generally argues to uphold the IHO's decision in its entirety.

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]).

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]).[23]

[23] 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).

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. 2016-17 School Year and Implementation of OT Services

The parents contend that, contrary to the IHO's finding, the district's failure to provide the student with the "recommended services"—school-based and home-based OT services—during the 2016-17 school year should have resulted in a finding that the district failed to offer the student a FAPE for that school year (see Req. for Rev. ¶ 26; Parent Mem. of Law at pp. 8-10, 28).

Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). However, a district's failure to implement these services will constitute a denial of FAPE only if the district failed to implement substantial or significant provisions of the IEP (Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]; see also Fisher v. Stafford Township Bd. of Educ., 289 Fed. App'x 520, 524 [3d Cir. Aug. 14, 2008]; Couture v. Bd. of Educ., 535 F.3d 1243, 1252 [10th Cir. 2008]; Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 [8th Cir. 2003]; T.M. v. Dist. of Columbia, 75 F. Supp. 3d 233, 242 [D.D.C. 2014]; V.M. v. N. Colonie Cent. School Dist., 954 F Supp. 2d 102, 118-19 [N.D.N.Y. 2013]). Accordingly, in reviewing failure to implement claims under the IDEA, courts have held that it must be ascertained whether the aspects of the IEP that were not followed were substantial or "material" (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007] [holding that a material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled student and the services required by the student's IEP]; see also Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73, 75-76 [D.D.C. 2007] [holding that where a student missed a 'handful' of speech-language therapy sessions as a result of the therapist's absence or due to the student's fatigue, the student nevertheless received consistent speech-language therapy in accordance with his IEP, and the district's failure to follow the IEP was excusable under the circumstances and did not amount to a failure to implement the student's program]).

Here, the evidence in the hearing record reveals that, consistent with the parents' contentions, the student did not receive home-based or school-based OT services for approximately six weeks (i.e., March 2017 through May 2017) during the 2016-17 school year (see Parent Ex. QQ at pp. 3-8; Dist. Ex. 9 at p. 2; see generally Dist. Ex. 34). Based upon the student's IEP, the student was recommended to receive a total of two hours per week of OT services (combined home-based and school-based OT), and therefore, missed approximately 12 hours total of OT services (see Parent Ex. E at pp. 1, 16). On appeal, the parents do not assert how the district's failure to provide the student with 12 hours of OT services constituted a failure to offer the student a FAPE for the 2016-17 school year, other than making a bald and conclusory assertion. Upon review and applying the legal standard set forth above, the hearing record does not contain sufficient evidence to conclude that the district failed to implement substantial or significant provisions of the IEP or that the district's failure to provide the student with 12 hours of OT services

were deviations from substantial or "material" aspects of the IEP. Therefore, under the facts and circumstances of this case, the parents' arguments are not supported by the evidence in the hearing record and the IHO's finding will not be disturbed.

B. March 2017 IEP: Educational Placement and LRE

Consistent with the parents' arguments on appeal and as explained more fully below, the IHO erred in finding that the district offered the student a FAPE in the LRE for the 2017-18 school year. Significantly, the IHO—contrary to the district's assertions on appeal, without undertaking an analysis of the two-prong test established by the Second Circuit in Newington to determine whether the March 2017 IEP placed the student in the LRE—concluded that the placement satisfied the LRE requirement (see IHO Decision at pp. 25-26).[24] Consequently, the IHO's conclusion must be reversed.

The IDEA requires that a student's recommended program must be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300. 107, 300.114[a][2][i], 300.116[a][2], 300.117; 8 NYCRR 200.1[cc], 200.6[a][1]; see T.M., 752 F.3d at 161-67; Newington, 546 F.3d at 111; Gagliardo, 489 F.3d at 105; Walczak, 142 F.3d at 132; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. N. Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobol, 839 F. Supp. 968, 982

[24] The IHO's analysis of whether the district offered the student a FAPE in the LRE for the 2017-18 school year initially focused on the district's failure to provide the student with speech-language therapy and OT services during summer 2017 (see IHO Decision at p. 25). While the parents continue on appeal to seek a finding that the district's failure to provide these services during summer 2017 denied the student a FAPE for the 2017-18 school year, the IHO already awarded relief—consisting of a bank of hours equivalent to the missed speech-language therapy and OT services for the parents to use at their convenience—for this alleged violation (compare Req. for Rev. ¶ 26, with IHO Decision at pp. 25, 29). Given that the IHO already provided the parents with relief for this violation—without deciding that the absence of these summer services denied the student a FAPE—the parents' request on appeal for what essentially constitutes declaratory relief is dismissed. Similarly, there is no need to address issues raised by the parents regarding whether certain alleged procedural violations—i.e. the March 2017 CSE composition; the appropriateness of the annual goals; and the failure to recommend music therapy, parent counseling and training, and sufficient ABA services—individually or cumulatively resulted in a determination that the district failed to offer the student a FAPE in the LRE (see Req. for Rev. ¶¶ 10, 27; Parent Mem. of Law at pp. 26-27). Specifically, the hearing record reveals that the district, during summer 2017, increased the recommended ABA services from 6 hours per week to 10 hours per week (see Tr. pp. 237-40). The IHO also directed the district to amend the student's 2017-18 IEP to include music therapy and parent counseling and training (see IHO Decision at p. 29). Finally, even assuming that the March 2017 CSE was not properly composed and the annual goals were not sufficient, it is unclear what relief would be appropriate to remedy such violations when the March 2017 IEP will have expired before the issuance of this decision, and the parties were expected to convene a CSE meeting on June 19, 2018 to develop an IEP for the upcoming school year.

[N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 CFR 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 CFR 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 CFR 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; the continuum also makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 CFR 300.115[b]).

To apply the principles described above, the Second Circuit adopted a two-pronged test for determining whether an IEP places a student in the LRE, considering (1) whether education in the regular 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, quoting Oberti, 995 F.2d at 1217-18; see N. Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also 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).[25]

[25] 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).

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).

With regard to the first prong of the Newington analysis, the evidence in the hearing record reveals that the March 2017 CSE failed to consider whether education in the regular classroom, with the use of supplemental aids and services, could be achieved satisfactorily for the student. Instead, the evidence demonstrates that the March 2017 CSE, in making its placement recommendation for the 2017-18 school year, appeared to only consider program options the district already had available rather than making its recommendations based upon the student's needs, a consideration of the full continuum of alternative placements, and then offering the student the least restrictive placement from that continuum that was appropriate for his needs, in contravention of T.M. (752 F.3d at 165-67).

1. Whether the District Made Reasonable Efforts to Accommodate the Student in a Regular Classroom

In this case, the hearing record included a copy of the March 2017 CSE meeting minutes (see generally Dist. Ex. 35).[26] At the impartial hearing, the chairperson testified that the secretary responsible for taking the CSE meeting minutes "was trying to type word for word" the discussions that took place at the meeting (Tr. p. 151; see Tr. pp. 148-49). However, despite being the most contemporaneous reflection of the placement discussions held at the March 2017 CSE meeting, the IHO did not consider—or even cite to—this evidence in reaching the conclusion that the recommended 6:1+1 special class placement with the opportunity to push in to the general education kindergarten classroom met the LRE requirement (see Dist. Ex. 35 at pp. 3-5; IHO Decision at pp. 25-26).[27] On review, the most compelling evidence of the March 2017 CSE's missteps can be found in the CSE meeting minutes. For example, while the March 2017 CSE meeting minutes reflect a lengthy discussion about the "continuum of services" in reaching its placement decision, a closer examination of that information reveals that the majority of that discussion focused on the purported benefits of a special class placement for the student (see Dist. Ex. 35 at pp. 3-5; see also Tr. p. 156). The meeting minutes briefly document the March 2017 CSE's consideration—and rejection—of three other placement options: a "general education

[26] The hearing record also included a prior written notice, dated March 8, 2017, that generally reflected a very abbreviated summary of the placement options considered and rejected by the March 2017 CSE (compare Parent Ex. II at pp. 2-3, with Dist. Ex. 35 at pp. 3-5).

[27] In fact, the IHO appears to have cited to district exhibit 35 only once in the decision, when noting that the March 2017 CSE recommended ABA services for the student (see IHO Decision at p. 18).

setting with no special education supports," providing the student with related services only and no classroom support, and a "CT model" (Dist. Ex. 35 at p. 3; see Tr. pp. 151-54).[28]

At the impartial hearing, the chairperson testified that the CSE decided against a general education setting with no special education supports for the student because, based upon the "data collected and the evidence[,] everyone knew he needed services, therapies, [and] a special ed[ucation] teacher of some sort" (Tr. p. 153). According to the chairperson, the second placement option—providing the student with related services only and no classroom support—"would have been where [the student] received his therapies only" and "[n]o special education teacher support" (id.). The chairperson testified that the March 2017 CSE rejected the second placement option for the same reasons it rejected the first placement option (id.). Next, the chairperson explained that the "CT model" notation in the CSE meeting minutes referred to a "consultant teacher model where a student would be in a general education classroom and then a consultant teacher would push in to that classroom to provide supports within the classroom" (id.; see Dist. Ex. 35 at p. 3).[29] According to the chairperson, the "parents wanted that model," but "everybody else at the table did not believe that was enough support for [the student]" (Tr. p. 154).

Noticeably absent from the March 2017 CSE meeting minutes with respect to the outright rejection of the first three placement options, however, is any documentation reflecting the CSE's discussion about (1) whether the school district had 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 (see Dist. Ex. 35 at p. 3). Overall, the hearing record contains little, if any, evidence to establish that the district engaged in any meaningful LRE considerations that were individualized to this student when making its recommendation to remove the student from his nondisabled peers for approximately 70 percent of the instructional time envisioned under this student's plan for the 2017-18 school year (see Tr. pp. 334-35; see generally Dist. Ex. 35).

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[28] In the CSE meeting minutes, additional notations described the discussion of the "CT model" as having the regular education teacher "in charge on instruction," a special education would be in the classroom as "support but not to teach" for one hour in English language arts and one hour for mathematics, and that the special education teacher would be responsible for supporting other students in the class (Dist. Ex. 35 at p. 3). As a result, the meeting minutes reflected the conclusion that the CT model "would not be 1:1 support with [the student] during that hour" (id.).

[29] Although not required by State regulations, the hearing record did not include any evidence or information concerning whether the district opted to offer integrated co-teaching (ICT) services as part of its continuum of services (see 8 NYCRR 200.6[g]; see generally Oct. 23, 2017 Tr. pp. 1-17; Tr. pp. 1-930; Parent Exs. A-Z; AA-NN; PP-QQ; Dist. Exs. 1-43). At the impartial hearing, a district special education teacher—who attended both the student's March 2017 CPSE and CSE meeting and who worked as a consultant teacher in a district kindergarten classroom—testified that the district was not offering resource room services during the 2017-18 school year as part of its continuum of services (see Tr. pp. 70-71, 92; Dist. Exs. 20; 36; see also 8 NYCRR 200.6[f]). The special education teacher also testified that the kindergarten classroom where she provided consultant teacher services was "considered the inclusion classroom" (Tr. p. 73). Within the kindergarten classroom, she provided "small group teaching" to four or five students in English language arts and mathematics (Tr. pp. 73-74). When the special education teacher was not in the kindergarten classroom to provide support, a "classroom aide" provided the small group support (Tr. p. 74).

Testimonial evidence elicited at the impartial hearing, while providing some insight into the CSE's decision-making process when selecting the student's placement in the LRE, was also insufficient to establish that the district appropriately considered or applied the two-prong Newington test. Instead, the testimony reveals that the district staff who attended the March 2017 CSE meeting possessed a very limited understanding, overall, of what other special education supports and services could be delivered to a student in a general education setting. In particular, testimony from district staff did not demonstrate an understanding of how special education supports and services might be used to accommodate this student in general education setting for purposes of LRE. For example, the district special education teacher who attended the student's March 2017 CPSE and March 2017 CSE meetings testified that, as a committee member, she tries to "figure out . . . the most beneficial [program] for the students" (Tr. p. 84). However, she also testified that she did not review "any reports or any other documentation" about the student prior to the CSE meeting, and other than occasionally seeing the student in his preschool classroom, she never "officially" conducted an observation of the student before the meetings (Tr. pp. 84-85). She also never worked directly with the student (see Tr. p. 93). Based upon the information presented at the March 2017 CSE meeting by the student's "therapists" and parents, the special education teacher testified that she "felt like [the district] could probably meet his needs" in a 6:1+1 classroom and "then figure out where [the district] could integrate him best into the kindergarten classroom" (Tr. p. 85).[30] However, as a "big proponent of integration," the special education teacher also testified that if a "placement in general education would have been appropriate" she "definitely" would have spoken up at the meeting (Tr. p. 86). According to the special education teacher, "it sounded like [the student] needed a lot of support in many therapies throughout his day" and he would "need a lot of support going into a kindergarten classroom" (Tr. p. 87).

On cross-examination, the special education teacher testified that "additional supports" such as "OT, PT, speech, [and] counseling," could be offered to special education students in a general education environment (Tr. p. 89). However, when asked if the March 2017 CSE considered providing related services to the student in a general education setting or in a setting similar to how he received those services in the UPK program, the special education teacher responded, "I think it was discussed but the committee decision was for a 6:1:1 classroom placement" (Tr. pp. 89-90).[31] She further testified that the student was making "inconsistent" progress in the "therapies" he received in the UPK program (Tr. p. 91). The special education teacher testified that she did not seek input from the student's SEIT/ABA provider, who did not

[30] To be clear, the student never received any related services from the providers attending the March 2017 CSE meeting because the district did not invite any of his CPSE providers to the CSE meeting (see Tr. p. 133; compare Dist. Ex. 36, with Dist. Ex. 20 at p. 1). Moreover, the student's SEIT/ABA provider was not invited to attend either the March 2017 CPSE or CSE meeting (see Tr. p. 133; compare Dist. Ex. 36, with Dist. Ex. 20 at p. 1).

[31] The March 2017 CSE meeting minutes do not reflect any discussion about providing the student's related services as push-in services within a general education setting for the 2017-18 school year (see Dist. Ex. 35 at pp. 3-5; see also Tr. pp. 213-15).

attend the CSE meeting, about whether the student "could be accommodated or supported appropriately [in] a general education environment" (Tr. pp. 94-95).[32]

The student's preschool teacher also testified at the impartial hearing (see Tr. pp. 417-90). Notably, the preschool teacher shared how the information provided to her by the student's SEIT/ABA provider enabled her to work with the student, providing what State regulations describe as indirect consultant teacher services for the student.[33] For example, the preschool teacher testified that she would speak to the SEIT/ABA provider about "strategies to be used" in the classroom with the student (Tr. p. 462). More specifically, she spoke to the student's SEIT/ABA about "getting [the student] from place to place" because the student "would easily be distracted by things going on in the hallways" or he would "sit down" (id.). The preschool teacher testified that "we worked with her on terminology to use as far as getting him to keep walking or if he did sit down how to get him to stand up"—like using "wait time and different prompts" (id.).

The preschool teacher also testified about the potential benefit of providing the student with consistent special education teacher support in the classroom, as well as ABA services. Initially, the preschool teacher testified that the student did not receive any special education teacher support while attending the UPK program; but the SEIT/ABA provider did attend school with the student on approximately "three" occasions (Tr. pp. 462-63). When asked if she believed the student would have "benefited from the availability of consistent special education teacher support in [her] classroom," the preschool teacher testified that "[c]onsistent" was the "most meaningful" word to her—and she clarified that while she did not think the "way [the SEIT] worked with him at home" would have worked in the classroom, she did think that "having someone like [the SEIT] who knew exactly the terminology she used and the prompts that she had used . . . if [she] could have had [the SEIT] there all the time certainly. Any child would have benefited from that" (Tr. pp. 463-64). The preschool teacher also testified that she had "worked in inclusion classrooms" and she did not "know how ABA would work in the classroom" (Tr. p. 464). But the preschool teacher acknowledged that she could "see the carry over if someone was working with him outside of the classroom and then worked with him in the classroom, yes, I think that would be beneficial" (id.).

Next, the preschool teacher testified about certain supplementary aids and services and accommodations the student received while attending the UPK program and whether those could be provided in a general education setting. According to the preschool teacher, the student had a "1:1 aide" to address "safety concerns," and in light of her experience in a general education

[32] Although the district superintendent did not attend the March 2017 CSE meeting, when asked at the impartial hearing whether "additional services other than consultant teacher services c[ould] be delivered to a special education student in a regular education environment," she responded, "Yes" (Tr. p. 66; see Tr. pp. 62-66).

[33] Without using the specific terms, the special education teacher essentially received indirect consultant teacher services when seeking assistance from the student's SEIT/ABA provider. State regulation defines indirect consultant teacher services as "consultation provided by a certified special education teacher . . . to regular education teachers to assist them in adjusting the learning environment and/or modifying their instructional methods to meet the individual needs of a student with a disability who attends their classes" (8 NYCRR 200.1[m]; 200.6[d]). The March 2017 CSE meeting minutes do not reflect any consideration of indirect or direct consultant teacher services for the student, other than the "CT model" the district already had available (see generally Dist. Ex. 35 at pp. 3-5).

environment, a student could not have the "support of a one-to-one aide" because it was not "something that normally happen[ed]" (Tr. p. 465). She explained that, based upon attending CSE meetings when she taught kindergarten, "it was difficult to get a one-on-one aide unless we could show that there w[ere] safety concerns" (id.). With respect to preferential seating—an accommodation provided to the student in the UPK classroom—the preschool teacher testified that while it could also be implemented in a general education setting, it was "difficult" to implement in the UPK class (Tr. p. 466). She explained that "it was hard to find a place to put him . . ., where he was not distracting to the other children, where the adult working with him was not blocking the vision of the other children" (id.). The preschool teacher testified that a vision specialist could consult with a regular education teacher to adapt presentation for visually challenged students (id.). She also admitted that, before this student, she had "never worked with a vision therapist before" and "it was difficult [in the UPK setting] because [he was] not part of [the district] staff" (Tr. pp. 466-67). With regard to this student, the preschool teacher also admitted that he would "benefit from the consultation of a vision specialist on a regular basis to adapt the presentation of instruction" (Tr. p. 467). She also testified that the "push in" speech-language therapy services the student received in the UPK program were "beneficial" to him (Tr. pp. 467-68). In particular, the speech-language therapist helped the student with his "social interaction with other children" and she "was able to engage [the other students]" with him (Tr. p. 468). However, the preschool teacher then testified that the speech-language therapy services recommended in the March 2017 IEP—to be delivered in the therapy room and "outside the classroom"—would be beneficial for the student (Tr. p. 470).[34]

At the impartial hearing, the district elementary school principal (principal) who attended the March 2017 CSE meeting also testified (see Tr. pp. 251-66). During the 2017-18 school year, the elementary school had four kindergarten classrooms with approximately 15 students per class (see Tr. pp. 253-54). The principal testified that "[s]ome" of the four kindergarten teachers were dually certified as both regular education and special education teachers (Tr. p. 254). Each kindergarten classroom also had additional staffing, consisting of the "equivalent" of a full-time aide "all day" (Tr. pp. 254-55). He also testified that none of the kindergarten students had a "dedicated one-to-one aide," and "[t]ypically," a student who required a "dedicated one-to-one aide" would be in a "different classroom" (Tr. p. 255). The principal also testified that the only other "classroom option[]" for kindergarten during the 2017-18 school year was a 6:1+1 "primary classroom" (id.). With respect to this particular student, the principal testified that, in order to implement his IEP, the district had to "institute a new primary" 6:1+1 special class by hiring aides and a new special education teacher with expertise to "specifically work with this student" (Tr. pp. 260-62). In addition, the district hired a "teaching assistant" to work specifically with this student (Tr. p. 262). According to the principal, the district also updated the technology available in the classroom the student was expected to attend to include "portable devices, iPads, [and] tablets" (Tr. pp. 262-63).

[34] The March 2017 CSE meeting minutes do not reflect any discussion about providing the student with consultant teacher services (either direct or indirect) within a general education setting or how the student's 1:1 aide or accommodations (such as preferential seating) or supplementary aids and supports (such as vision therapy consultation services) could be used to accommodate the student within a general education setting (see Dist. Ex. 35 at pp. 3-5).

On cross-examination, when asked if a "one-to-one aide" could be provided in a "general education setting," the principal responded that "[u]sually [a] one-to-one aide [was] directly related to an IEP so it's a student who may be in an inclusion classroom, yes" (Tr. p. 264). He further explained, however, that "[t]ypically, no," a one-to-one aide would not be provided in a "general education classroom" (Tr. pp. 264-65). He also testified the district did currently have special education students who were "placed in the general education" setting, and if the "need arose," the district would "follow guidelines to determine if students [were] eligible for a one-to-one aide typically related to safety or physical need" (id.).

At the impartial hearing, the chairperson testified during cross-examination that the March 2017 CSE did not discuss any other placement options or program options for the student "between" the general education consultant teacher model and the "self-contained special education class" as reflected in the CSE meeting minutes (Tr. pp. 173-74; see Dist. Ex. 35 at p. 3). She also testified that, based upon her experience as a CSE chairperson in the district, there were no "higher levels of support" that could be offered in a "general education environment," other than consultant teacher services (Tr. p. 174).

Thus, to the extent that the testimony suggests that the March 2017 CSE recognized that the student's needs required more supports and services than could be offered in a "general education setting with no special education supports," by providing the student with related services only and no classroom support, or in the district's "CT model," this same testimony does not answer the question of why, when providing additional supports to the student in a 6:1+1 special class placement, the CSE believed that the student had to be removed from his nondisabled peers in order to receive sufficient additional support. This is essentially the question that is always posed by the first prong of the Newington test with respect to whether education in the regular classroom, with the use of supplemental aids and services, could be achieved satisfactorily for this student. In light of the fact that the student attended an integrated UPK program with push-in related services and accommodations with additional home-based special education supports and services, it is reasonable to conclude from the first prong of the Newington test that at a minimum, the district's "CT model" should have been considered first as the least restrictive placement that could address the student's needs with additional special education supports and services (see T.M., 752 F.3d at 162), rather than immediately deciding to remove the student from the general education setting and his nondisabled peers.

Instead, while the district recognized that the student required more support than could be provided to the student solely within a "general education setting with no special education supports," with related services only and no classroom support, or a "CT model," and proceeded to consider a special class placement, the hearing record thereafter lacks any evidence that the district considered the student's placement in either a general education setting with special education supports" or a "CT model" with additional special education supports for the 2017-18 school year. It appears that the reason for not considering these options was that essentially, such programs did not already exist at the district. The same reasoning, the nonexistence of an in-district integrated summer program, was advanced by a district before the Second Circuit and the Court resoundingly rejected that reasoning (T.M., 752 F.3d at 166). The Court instructed that if the district did not wish to create an integrated program, it was not required to, but that it was required to place the student in an integrated program elsewhere (id.). Similarly, the evidence in the hearing record in this case demonstrates that the district recommended the only program it had

already created: namely, a 6:1+1 special class placement with the opportunity for the student to push into a general education kindergarten classroom, with 1:1 aide support, for calendar, play time, lunch, recess and specials.

Based on the foregoing, the evidence in the hearing record supports a finding that the March 2017 CSE did not meaningfully engage in the Newington analysis to determine whether the student could be satisfactorily educated in a general education classroom with the use of supplemental aids and services.

2. The Educational Benefits Available to the Student in a Regular Class, with Appropriate Supplementary Aids and Services, Compared to the Benefits of a Special Education Class

On this point, the parents contend that the IHO ignored evidence indicating that the student would benefit from "greater inclusion opportunities" and that, based upon progress made related to the student's behavior, he could "'sit and attend with support in a typical classroom.'"

With respect to the final placement option discussed at the March 2017 CSE meeting—identified as "smaller classes" in the meeting minutes—it appears that the discussion focused, at least initially, on how this option differed from the "CT model" (see Dist. Ex. 35 at p. 3). For instance, the CSE meeting minutes reflected that the student would not receive "a lot of 1:1 instruction" in the "CT model" and that the special education teacher would "develop curriculum for [the student]" and "not the whole class like the CT class" (id.).[35] At that point in the discussion, the parents raised concerns about the student's ability to remain accepted by his nondisabled peers—as he was in his integrated UPK program—if he attended a 6:1+1 special class placement (id. at pp. 3-4). At least one CSE member explained that the student could "[p]ossibly" complete one year in a "small class" and then move into a general education setting, having learned "skills" that allowed him to do so (id. at p. 4). Another CSE member indicated that in a "smaller group [the district] will learn more about [the student] and it c[ould] transfer over" (id.). Yet another CSE member noted that the district would "build up his skills" as soon as possible and "then integrate him" (id.). At that point, the district principal stated that the student's program would include "how much time he w[ould] spend in the class" (id.). Other CSE members added that, based upon their individual experiences, "teachers d[id] a good job of fostering that social piece with [the students] who push into a classroom" and they had "never seen a class not accept a sp[ecial] ed[ucation] student" (id.).

Next, the CSE meeting minutes reflect that the chairperson spoke about her "impression from reports and all [of the] therapist[s]" that the student was "learning 1:1 and making progress," but that in the UPK program, he was "not learning as much as in the 1:1 setting" (Dist. Ex. 35 at p. 4). She also noted that the "evidence . . . points to the smaller class" (id.). The parents then

[35] Although the meeting minutes reflect the CSE's apparent concern that the student receive 1:1 instruction, the resulting IEP, despite noting that the student was "able to learn new skills efficiently in a one-to-one setting," did not indicate that the student required—and contained no recommendation for—1:1 instruction (Parent Ex. G at p. 3; see generally Parent Ex. G). The recommended ABA specialized instruction did not specify that it would be provided in a 1:1 ratio, or guarantee any specific amount of direct ABA instruction to the student (Parent Ex. G at p. 17).

indicated that the student knew his "abc's, shapes and colors but [did not] interact with peers" (id.). The student's preschool teacher added that "maybe in a smaller class he w[ould] learn more," she was "afraid [he was] going to lose what he kn[ew]," and the student was not "ready to imitate peers" (id.).

The March 2017 CSE continued by reviewing the student's "therapies" and how the "volume of pull outs" would affect the student's instructional time in general education setting as opposed to a 6:1+1 special class placement (Dist. Ex. 35 at p. 4). It was at this point in the meeting when the parents asked if the student could "start out with" the general education setting; the chairperson responded at the meeting that the district "probably would not have a 6:1:1 class for him to go into" if the general education setting did not "work" (id.). The parents indicated their confusion, asking whether the 6:1+1 special class would exist if the student did not start in that classroom (id.). The principal then stated "this [was] the business side of a school" (id.). After a bit more discussion, the student's mother acknowledged the need to "make a decision" but raised the issue of LRE because she was "not totally convinced" (id.). The chairperson noted that the LRE was "different for every single child" but that this student was "2 on 1" when he was at the district with an individual aide and being educated with nondisabled students (id. at pp. 4-5).[36] The preschool teacher added that the student's needs in the IEP could not be met in a general education setting, and the chairperson also added that the student's "day will be tailored to him more in the 6:1:1" special class (id. at p. 5). The chairperson further noted that the student would be "pulled out for therapies" and "miss ELA or math or reading" (id.). The student's mother questioned, then, whether it was a "scheduling issue"; and in response, the "Committee [indicated] no but [that] it d[id] play a part" (id.). At that point in the meeting, the chairperson indicated that the CSE "legally ha[d] to make a decision" and the parents wanted one day to consider it (id.). It then appears that after the parents left the meeting, the CSE continued and made the decision to recommend the 6:1+1 special class placement with opportunities to push into the general education setting for "calendar" and "lunch" (id.).

At the impartial hearing, the chairperson testified that the CSE discussed the student's "educational needs, safety needs, the amount of therapies he was getting, [and] the 6:1:1 would afford more for instruction at his level and be able to address his individual needs better than any of the other models" (Tr. p. 155). She also testified that the district did not have enough students to populate any other self-contained special class placements, such as a 15:1+1 or a 12:1, at the kindergarten to second grade levels (see Tr. pp. 155-56). At the time of the impartial hearing, the 6:1+1 special class placement recommended for the student consisted of only two students (see Tr. p. 156). When the March 2017 CSE recommended the 6:1+1 special class, the parents did not "want that" option, and expressed concerns about the "socialization piece, learning from model peers" and that they wanted the student in a general education setting "really to learn from peers" (Tr. p. 156). However, the preschool teacher spoke to this issue, and according to the chairperson, she indicated that the student "didn't really interact much with peers," he did not "seem really aware of peers around him," and he "needed assistance to interact with them when he was in the

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

UPK setting" (Tr. p. 157; but see Parent Ex. O). In making the decision to recommend the 6:1+1 special class placement, the chairperson testified that she looked at "all the data presented from my therapists, listen[ed] to the conversation going on around the table, and t[ook] into account what [she] believe[d] would be best for the child" (Tr. p. 158).

Based upon the foregoing, it appears that the CSE—while trying to convince the parents that the student would "obtain greater educational benefits from a more restrictive setting" (T.M., 752 F.3d at 162)[37]—did not weigh or consider the educational benefits available to the student in a regular class with appropriate supplementary aids and services, in contravention of the second factor under the Newington analysis. Had the March 2017 CSE—and the IHO—more systematically applied Newington, the evidence in the hearing record demonstrates that the student was making progress interacting with his nondisabled peers and that the student would benefit from increased opportunities to be with his nondisabled peers (see Tr. p. 614; Parent Exs. V at p. 2; W at p. 2).

For example, at the impartial hearing the preschool teacher testified that the student "followed the regular school day schedule," except when he attended his "therapies" (Tr. pp. 459-60). While in the UPK program, the student would choose to "read a book with a friend" during playtime (meaning, he and another student would "look at pictures together," sometimes with the assistance of his speech-language therapist asking the student to point to things in the book), thus facilitating the student's "interaction with other peers" (Tr. pp. 460-61). She also testified that during this playtime, the "other child would ask [the student] to find things in the book," and this was "one way he could engage with the other student" (Tr. p. 461). The preschool teacher testified that they "tried to work on social interaction while [the speech-language therapist] was there" in the classroom (id.).

Regarding initiating contact with his peers, the preschool teacher testified that, toward the end of the school year when the class was sitting on the rug, the student would "hit at" his peers (Tr. p. 433). The preschool teacher explained that "normally" this would not be "acceptable behavior," but in this case, the student was not actually "punching" his peers and she interpreted this behavior as demonstrating that the student was aware of his peers (id.). However, while acknowledging the student's awareness of his peers, the preschool teacher also testified that she did not feel the student was engaging in peer modeling and that she did not think that his academic abilities improved being around general education peers (Tr. p. 434).

In a February 2017 UPK progress report prepared by the preschool teacher and reviewed at the March 2017 CSE meeting, she reported that the student was beginning to follow classroom routines using picture cards; he was sitting more appropriately for calendar time; he could, with assistance, stand for the pledge of allegiance to the flag; and he was looking at the flag for part of the time (see Parent Ex. S at p. 1; see also Tr. p. 450). At that time, the student could "enter the classroom, go to his cubbie and with assistance put his things in the cubbie" (Parent Ex. S at p. 1). During playtime, the student would sit at the table with peers for "turn taking activities" and the

[37] At the impartial hearing, the chairperson testified that the March 2017 CSE spent approximately "half" of the meeting discussing the 6:1+1 special class placement option (Tr. pp. 155-56).

student would use his "PECs book to choose a preferred play activity" (id.).[38] Because the student showed "little interest in including peers in his play," the preschool teacher began "having him engage more into free play time with peers," and the student, with "adult assistance," would "roll a ball, look at a book, play with toy cars, or use the slide with peers" (id.). In addition, the preschool teacher indicated that while the student still had assistance from adults he could do things "a little bit" more independently and that staff saw the student was beginning to notice the other children more (Tr. p. 484).

In a March 2017 annual vision summary report available to the March 2017 CSE, the evaluator indicated that the student had "shown a global development of his vision (and social, and pre-academic) skills" (Parent Ex. R at p. 1; see Tr. p. 187). The evaluator opined that the student's growth in these areas was "related to the gentle, appropriate and challenging experiences provided to [the student] in his classroom and school environment" (Parent Ex. R at p. 1).

Also, within a February 2017 PT record review/service recommendation report prepared in anticipation of the March 2017 CSE meeting, the reviewer indicated that the student inconsistently "imitate[d] some motor play that he observe[d]" (Dist. Ex. 30; see Tr. pp. 141-42).

As noted in a February 2017 psychoeducational evaluation summary report, the student's most current IEP indicated he was "demonstrating better awareness of who [was] in his environment by watching peers and adults around him and tolerating their proximity to him" (Parent Ex. T at p. 2). At the impartial hearing, the district school psychologist who prepared the summary report testified about the student's "peer engagement" (Tr. pp. 308, 317-18). She testified that the student "definitely . . . did interact [with a peer] during snack time," noting further that the student was "tolerant of that peer being there" (Tr. p. 317). She also testified that, at the beginning of "free time," the student was "with peers very briefly" and he was "not resistant to being with his peers and not necessarily running away from peers" (Tr. pp. 317-18).[39]

Finally, a February 2017 music therapy annual review report revealed that while the student initially attended music therapy "outside of the classroom one time a week" individually, his therapy sessions "recently . . . included a classmate" (Parent Ex. W at p. 1).

Based on the foregoing, the hearing record supports the district's determination that the educational benefits available to the student in a special education class may have been greater than those available to him in a regular class without additional supports; however, it does not

[38] PECS is an acronym for the Picture Exchange Communication System, which uses pictures to assist a student in communicating (Tr. p. 281).

[39] The school psychologist also testified that while she reviewed the SEIT/ABA provider's February 2017 progress report prior to the March 2017 CSE meeting, she did not "include information from this in [her] report" (Tr. p. 325). According to the SEIT/ABA February 2017 progress report, the student's needs in the area of social development included strengthening his "parallel play skills" and creating "more opportunities to develop cooperative play skills" (Parent Ex. V at p. 2; see Tr. pp. 540-41, 562). The chairperson testified that the SEIT/ABA February 2017 progress report was available to the March 2017 CSE, but the SEIT/ABA provider, herself, was not invited to the CSE meeting (see Tr. pp. 132-33).

indicate that the district considered the relative benefits of the two with appropriate supplementary aids and services provided to the student in a regular class.

3. The Possible Negative Effects of the Inclusion of the Student on the Education of the Other Students in the Class

On this point, the parents contend that the student did not display, with any regularity, "negative behaviors warranting exclusion from a regular classroom, including aggressive or unsafe behaviors such as hitting, kicking, punching or biting." In addition, the parents argue that any behavior or safety challenges presented by the student were successfully addressed by the recommended 1:1 aide. The district denies these assertions, arguing that the student's impact on other students was a "potential concern" and noting that the student did not "appreciate common dangers in the UPK classroom."

Reviewing the evidence in the hearing record supports the parents' contentions. For example, at the impartial hearing the preschool teacher identified her "safety concerns" about the student as "leaving the classroom if someone wasn't there watching him," and in light of his vision difficulties, "making sure when he's moving around the classroom [that] he's safe" (Tr. pp. 444-45). However, the preschool teacher also testified that the student's 1:1 aide addressed these concerns in the UPK program (see Tr. p. 465). To the extent that the February 2017 psychoeducational evaluation summary report noted that the student would "crawl away from adults" if he was not attending or cooperating, grabbed at adults or peers near him, or stood up to leave the group (see Parent Ex. T at p. 2), it seems reasonable that the strategies recommended in the management needs section of the March 2017 IEP or the student's 1:1 aide would also be able to address these concerns (see Parent Ex. G at pp. 12-13, 15). Additionally, at the impartial hearing, the student's then-current OT provider testified that the student did not engage in unsafe behaviors, such as "hitting, kicking, punching, [or] biting," and any "safety concerns" she had about the student could be addressed by a 1:1 aide (Tr. pp. 411-12; see Tr. p. 408).

Accordingly, the hearing record supports a finding that the March 2017 CSE failed to meaningfully engage in the first prong of the Newington analysis to determine whether the student could be satisfactorily educated in a general education classroom with the use of supplemental aids and services. Since the district failed to meet its obligation to consider whether the student could satisfactorily be educated in the general education setting with supplemental aids and services, there is no reason to discuss the second prong of the LRE analysis. Absent evidence that the district undertook the necessary analysis, the hearing record cannot support a finding that the district offered the student a FAPE in the LRE as required (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]).[40]

[40] Assuming for the sake of argument that, after examining the factors under the first prong, it was 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 of the Newington analysis requires consideration of whether the district included the student in school programs with nondisabled students to the maximum extent appropriate (Newington, 546 F.3d at 120).

C. Relief

Having determined that the district failed to offer the student a FAPE in the LRE for the 2017-18 school year, the next inquiry focuses on what relief, if any, the parents may be entitled to as a remedy for the LRE violation. On appeal, the parents do not identify any specific relief sought, other than requesting the "relief sought in their due process complaint (P-H), together with any other relief deemed just in the premises."[41]

In reviewing the due process complaint notice, the parents requested several revisions to the student's 2017-18 IEP as relief: namely, to provide the student with an "appropriate placement in the LRE, with the necessary supplementary aides, services, and/or program accommodations/modification for the 2017-18 school year"; to "accurately reflect" the student's present levels of performance and needs, and relatedly, to develop "appropriate measurable annual goals"; to "accurately reflect" the student's ASD diagnosis and ensure the IEP met all the requirements of State regulations pertaining to students with autism, including parent counseling and training; and to "amend" the student's IEP to "provide for appropriate home-school communication" to facilitate the "carryover of daily lessons" and to report information about the student's "engagement in instruction and support of behavioral and emotional needs," his ability to "demonstrate understanding and on task attention to instruction," and to provide information about the student's "issues related to his ASD and other medical needs" (Parent Ex. H at pp. 8-9).

However, a dispute between the parties in an appeal must at all stages be "real and live," and not "academic," or it risks becoming moot (see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]; Patskin, 583 F. Supp. 2d at 428; J.N. v. Depew Union Free Sch. Dist., 2008 WL 4501940, at *3-*4 [W.D.N.Y. Sept. 30, 2008]; see also Chenier v. Richard W., 82 N.Y.2d 830, 832 [1993]; Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714 [1980]; Application of a Child with a Disability, Appeal No. 07-139). In general, cases dealing with issues such as desired changes in IEPs, specific placements, and implementation disputes may become moot at the end of the school year because no meaningful relief can be granted (see, e.g., Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 05-058; Application of a Child with a Disability, Appeal No. 04-027; Application of a Child with a Disability, Appeal No. 00-037; Application of the Bd. of Educ., Appeal No. 00-016; Application of a Child with a Disability, Appeal No. 96-37). Administrative decisions rendered in cases that concern such issues that arise out of school years since expired may no longer appropriately address the current needs of the student (see Daniel R.R., 874 F.2d at 1040; Application of a Child with a Disability, Appeal No. 07-139; Application of the Bd. of Educ., Appeal No. 07-028; Application of a Child with a Disability, Appeal No. 06-070; Application of a Child with a Disability, Appeal No. 04-007).

In this case, much of the parents' proposed relief in the due process complaint notice sought revisions or amendments to the March 2017 IEP—which expired at the end of the 2017-18 school

[41] The parents' memorandum of law submitted in support of their request for review offers no guidance regarding the relief to be awarded, other than making the same blanket statement as in the request for review: to wit, the parents seek the relief requested in the due process complaint notice (compare Parent Mem. of Law at p. 30, with Req. for Rev. at p. 10).

year (June 30, 2018), just prior to the issuance of this decision—and therefore, granting these revisions as relief at this juncture is no longer meaningful.

To the extent that the parents still seek compensatory educational services for the district's failure to offer the student a FAPE in the LRE for the 2017-18 school year, the parents did not identify for the IHO in the due process complaint notice—or now, for the undersigned SRO in either their request for review or memorandum of law—their position about how to best remediate the situation (i.e., the total amount of compensatory education services by type, along with frequency, duration, and location recommendations) (see generally Req. for Rev.; Parent Mem. of Law). In addition, the parents do not point to any legal authority for the proposition that compensatory educational services would effectively remediate an LRE violation (see generally Req. for Rev.; Parent Mem. of Law). Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education relief may be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). Within the Second Circuit, compensatory education relief in the form of supplemental special education or related services has been awarded to such students if there has been a denial of a FAPE (see Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; Student X. v. New York City Dep't of Educ., 2008 WL 4890440, at *23 [E.D.N.Y. Oct. 30, 2008] [finding that compensatory education may be awarded to students under the age of 21]).

The purpose of an award of compensatory educational services or additional services is to provide an appropriate remedy for a denial of a FAPE (see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994] [holding that "[a]ppropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA"]). Accordingly, an award of additional services should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; S.A. v. New York City Dep't of Educ., 2014 WL 1311761, at *7 [E.D.N.Y. Mar. 30, 2014] [noting that compensatory education "serves to compensate a student who was actually educated under an inadequate IEP and to catch-up the student to where he [or she] should have been absent the denial of a FAPE"] [internal quotations and citation omitted]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should

have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]; Puyallup, 31 F.3d at 1497 [finding "[t]here is no obligation to provide a day-for-day compensation for time missed"]).

In this case, although the hearing record primarily contains evidence of the student's needs leading up to the March 2017 CSE meeting, more than a year has passed and the hearing record is devoid of evidence of the student's current needs (see generally Oct. 23, 2017 Tr. pp. 1-17; Tr. pp. 1-930; Parent Exs. A-Z; AA-NN; PP-QQ; Dist. Exs. 1-43). Additionally, as described more fully below, the student did not receive the full complement of pendency services as ordered by the IHO during the administrative proceedings, and the hearing record does not include any evidence regarding progress the student may have made as a result of receiving even some of his pendency services (see generally Oct. 23, 2017 Tr. pp. 1-17; Tr. pp. 1-930; Parent Exs. A-Z; AA-NN; PP-QQ; Dist. Exs. 1-43). Therefore, given the passage of time and the parents' failure to identify with any specificity what, if any, compensatory educational services may be warranted to effectuate the purpose of such an award and to remediate an LRE violation, the parents' request is dismissed.

During the pendency of the administrative review proceedings, the Office of State Review became aware that the parties intended to convene a CSE meeting in June 2018 to develop the student's IEP for the 2018-19 school year. No further information about the scheduled CSE meeting or resultant IEP was provided to this office. In light of this decision, however, it may be necessary for the parties to convene an additional CSE meeting to ensure compliance with the LRE requirement. The parties are also strongly encouraged to take advantage of the resources available to them to improve the conduct of their next CSE meeting and the likelihood of reaching an agreement regarding the student's program, including obtaining the participation of the student's home-based service providers for the 2017-18 school year and considering the possibility of engaging a third-party neutral facilitator.[42] Where, as here, the parents believe that the district has predetermined its recommendation for their child's placement in special classes, a neutral third party may assist the parents and district in appropriately engaging in an LRE analysis: determining what services would be necessary to support the student in the general education environment, whether such a placement could be appropriately achieved and, if not, the maximum extent appropriate to which the student could be included in the regular class setting. Further, if the parties need advice or assistance in assessing or implementing inclusion strategies and solutions, the use of an inclusion consultant may prove beneficial and, although I deem it premature to order the retention of a consultant at this juncture, this remedy may be available under the proper circumstances if the inclusion issue remains unresolved in a future proceeding (see generally Application of a Student with a Disability, Appeal No. 17-015).

[42] The State Education Department has a pilot program for IEP facilitation that is not currently available in the district; however, the district and parent are not precluded from obtaining the services of an impartial third party if they believe it "would help facilitate communication and the successful drafting of the student's IEP" as a result of the current impasse regarding the degree to which the student should be educated in a regular classroom (see Individualized Education Program (IEP) Facilitation Pilot Program, Office of Special Educ. [Oct. 2015], available at http://www.p12.nysed.gov/specialed/dueprocess/iep-facilitation/IEPFacilitation.html). Similarly, the parties may attempt to resolve their dispute through mediation (34 CFR 300.506; 8 NYCRR 200.5[h]).

D. Pendency

The parents assert that the IHO erred in finding that the parents chose to keep the student at home with no services rather than send him to the 6:1+1 special class recommended by the March 2017 CSE. In particular, the parents assert that they "lawfully enforced the [s]tudent's pendency rights," and that when the district did not implement the student's pendency placement, the parents privately obtained home-based services "until compliance could be ordered." The district responds that the parents "refused to allow the [s]tudent [to] begin school in September 2017, and elected to keep him home without services for months."[43]

The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law § 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see T.M, 752 F.3d at 170-71; Mackey v. Bd. of Educ. of the Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]); M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X, 2008 WL 4890440, at *20). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]).

The pendency inquiry focuses on identifying the student's then current educational placement (Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906). The Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents and Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]). The pendency provision also does not require that a student remain in a particular site or location; rather, "it guarantees only the same general level and type of services that the disabled child was receiving" (T.M., 752 F.3d at 170-71 [noting that "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers"]; Concerned Parents., 629 F.2d at 753, 756; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]). An unappealed IHO decision may also establish a student's current educational placement for purposes of pendency (S.S., 2010 WL 983719, at *1; Student X, 2008 WL 4890440, at *23; Letter to Hampden, 49 IDELR 197 [OSEP 2007]).

At the impartial hearing, counsel for the parents asserted that the district had "remained adamant in restricting the student's access to a regular classroom [and] refused to comply with the

[43] Neither party has appealed the IHO's pendency determination, and so it has become final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

student's pendency rights" (Tr. p. 48). The district superintendent testified that the district "made all of the arrangements necessary to have him start at any time with all of the therapies based on the pendency ruling" (Tr. p. 61). However, when asked on cross-examination "[i]f the student had showed up on the first day would he have been able to go to a . . . regular classroom," the superintendent testified that the district "would have been following his IEP" that called for placement in a 6:1+1 special classroom (Tr. p. 66). In addition, while the superintendent asserted that the district was prepared to provide the student's home-based services as required pursuant to pendency, she was not aware if anyone from the district had informed the parents or their counsel (Tr. p. 67). The student's mother affirmatively testified that while she was willing to accept the student's pendency services, no one from the district had notified her where to send the student to receive services or who would provide the student's home-based services (Tr. pp. 771-72). Accordingly, the hearing record does not establish that the district complied with its obligation to maintain the student's then-current educational placement during the pendency of the proceedings (20 U.S.C. § 1415[j]; Educ. Law § 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]).[44] While the pendency provision does not require a student to receive services at the same school site or location, or from the same service providers, it "entitles the [student] to receive the same general type of educational program [and i]t is up to the school district to decide how to provide that educational program, at least as long as the decision is made in good faith" (T.M., 752 F.3d at 171; Concerned Parents, 629 F.2d at 753). Under the circumstances, the hearing record does not support a determination that the district made a good faith determination regarding how to provide the student with his pendency services. Rather, the district took the position at the impartial hearing—unsupported by the law or the facts of this case—that an IEP which had never been implemented, was not agreed to by the parents, and which by its own terms was not yet in effect at the time the parents commenced the impartial hearing process, was the relevant IEP for purposes of determining the student's then-current educational placement (Parent Ex. J; see Parent Ex. NN at p. 6).

Additionally, although State regulations do not require that a student who had previously been identified as a preschool student with a disability remain in a preschool program for which he or she is no longer eligible by reason of age (8 NYCRR 200.16[h][3][i]; see 8 NYCRR 200.5[m]), SROs have long noted that the IDEA makes no distinction between preschool and school-age children and consequently, if a student is no longer eligible to remain in a particular preschool program, the district remains obligated to provide the student with "comparable special education services during the pendency of an appeal from the CSE's recommendation for [the student's] first year of education as a school age child" (Application of a Child with a Handicapping Condition, Appeal No. 91-25; see Henry v. Sch. Admin. Unit No. 29, 70 F. Supp. 2d 52, 61 [D.N.H. 1999] [holding that when a student has aged out of a particular program, the district "must fulfill its stay-put obligation by placing a disabled student at a comparable facility"]; Application of a Student with a Disability, Appeal No. 16-020; see also Makiko D. v. Hawaii, 2007 WL 1153811, at *10 [D. Haw. Apr. 17, 2007]; Laster v. Dist. of Columbia, 394 F. Supp. 2d 60, 65-66 [D.D.C. 2005]; Letter to Harris, 20 IDELR 1225 [OSEP 1993]).

The hearing record contains no indication that the district made any meaningful effort—

[44] It is unclear from the hearing record why the parties or their counsel did not make arrangements to implement the student's pendency placement subsequent to the IHO's interim decision.

even after the IHO's interim decision on pendency—to implement the student's pendency placement, consisting of "the services in the pre-school IEP but in the recommended general education kindergarten setting" (Parent Ex. NN at p. 5). To the contrary, the hearing record reflects that during the 2017-18 school year, in lieu of the district implementing the student's pendency placement, the parents obtained 25 hours per week of ABA services through a private agency, as well as approximately two hours per week of SEIT services provided pro bono by a special education teacher who worked with the student through the Early Intervention Program and the CPSE (Tr. pp. 772-74; see Tr. pp. 647-48, 676-77; Parent Ex. DD). While the district contends that the services obtained by the parents were "nothing like the 6-hours per day of education [the student] would have received" at school, this assertion is irrelevant to whether the district made the services set forth in the April 2017 CPSE IEP available to the student during the pendency of these proceedings. Nonetheless, the hearing record does not contain sufficient evidence regarding the services obtained by the parents during the 2017-18 school year to determine whether the district should be required to reimburse the parents for the costs of obtaining those services (see T.M., 752 F.3d at 171-72). However, because the hearing record does not indicate that the district provided any of the services required, the student is awarded compensatory services, in the amount referenced in the IHO's interim decision on pendency (Parent Ex. NN at pp. 6-7), from the date of the parent's due process complaint notice through the date of this decision (E. Lyme, 790 F.3d at 455-57 [awarding compensatory education for a stay-put violation]). Because the 10-month school year contains 180 days (see Educ. Law § 3604[7]; 8 NYCRR 175.5[a], [c]), the equivalent of 36 weeks, this award may be calculated as 36 weeks of the services referenced in the IHO's determination on pendency.[45] Accordingly, the district shall fund the following 1:1 services for its failure to implement the student's pendency placement: 540 hours of SEIT services; 36 hours of music therapy; 72 hours of OT; 72 hours of PT; 144 hours of speech-language therapy; 36 hours of vision therapy; and 40 hours of parent counseling and training. The parties are directed to confer and determine the location in which these services should be provided to the student (at home or at school), so as to ensure the award does not impede the student's participation in his educational program going forward (see, e.g., M.M. v. New York City Dep't of Educ., 2017 WL 1194685, at *8 [S.D.N.Y. Mar. 30, 2017]).[46] The district shall not consider these services when developing future IEPs for the student, as they are awarded to remedy a past violation, rather than to offer the student a FAPE going forward (see Boose v. Dist. of Columbia, 786 F.3d 1054, 1056 [D.C. Cir. 2015] [noting that an IEP is required to "provide some educational benefit going forward," while the purpose of compensatory education is to "undo[] damage done by prior violations"] [quotations omitted]). The parent shall have until the conclusion of the 2020-21 school year in June 2021 to redeem these services, in an attempt to strike a balance between overwhelming the student with a surfeit of services and having the compensatory award cloud the CSE's determinations regarding

[45] To the extent the parents assert the district did not provide all of the speech-language therapy and OT required by the April 2017 CPSE IEP during summer 2017, as noted above the IHO awarded make-up services for such failure (IHO Decision at pp. 25, 28-29).

[46] The IHO also directed the district to provide as pendency a 1:1 aide and all other services indicated in the April 2017 IEP; however, the hearing record does not establish the extent to which the student requires an aide or adaptive/assistive technology devices to access the compensatory award. If the providers of the compensatory services determine the student requires an aide or particular devices to access the award, the district shall be responsible for ensuring their provision to the student (see M.M., 2017 WL 1194685, at *9).

how to provide the student an appropriate program on a going forward basis.

VII. Conclusion

In summary, the evidence in the hearing record establishes that, contrary to the IHO's decision, the district failed to offer the student a FAPE in the LRE for the 2017-18 school year.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated April 25, 2018, is hereby modified to the extent that it found that the district offered the student a FAPE in the LRE for the 2017-18 school year; and

IT IS FURTHER ORDERED that the district is directed to provide the student with compensatory pendency services consistent with the body of this decision or as otherwise agreed upon by the parties, to be used by the conclusion of the 2020-21 school year in June 2021.

Dated: **Albany, New York**
July 6, 2018

CAROL H. HAUGE
STATE REVIEW OFFICER