The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 19-021

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

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

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which determined that the educational program and services respondent's (the district's) Committee on Special Education (CSE) recommended for the student for the 2018-19 school year were appropriate.[1] The appeal must be dismissed.

II. Overview—Administrative Procedures

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

[1] Throughout the decision, references to the "parent" refer to the student's father unless otherwise noted.

§§ 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

The student in this case has been the subject of six prior State-level administrative appeals (see Application of a Student with a Disability, Appeal No. 18-110; Application of a Student with a Disability, Appeal No. 18-075; Application of a Student with a Disability, Appeal No. 18-064; Application of a Student with a Disability, Appeal No. 17-079; Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040). Accordingly, the parties' familiarity with the facts and procedural history preceding this case—as

well as the student's educational history—is presumed and they will not be repeated herein unless relevant to the disposition of the issues presented on appeal.

On May 22, 2018, a CSE convened to conduct the student's annual review and to develop an IEP for the 2018-19 school year (see DPC I, IHO Ex. XXVIII at pp. 1-2, 16-18; see generally DPC I, IHO Ex. XXI).[2, 3] Finding that the student remained eligible for special education and related services as a student with an intellectual disability, the May 2018 CSE recommended a 12-month school year program, which for July and August 2018 consisted of related services (speech-language therapy, occupational therapy [OT], and physical therapy [PT]), the services of an individual aide, and daily special instruction; for the September 2018 through June 2019 portion of the school year, the CSE recommended a 12:1+1 special class placement to "focus on functional academics and vocational skills," adapted physical education, related services (speech-language therapy, OT, PT, and parent counseling and training), and special instruction (delivered in the home) (see DPC I, IHO Ex. XXVIII at pp. 16-18).[4] The May 2018 IEP also included: strategies to address the student's management needs; annual goals; supplementary aids and services, program modifications, and accommodations; assistive technology devices or services; and supports for school personnel on behalf of the student (specifically, consultation to the student's

[2] At the time of the May 2018 CSE meeting, the parent and district were engaged in the early phases of an impartial hearing pertaining to the 2017-18 school year, which the parent initiated via due process complaint notice dated March 8, 2018 shortly after a March 2018 CSE meeting (see Application of a Student with a Disability, Appeal No. 18-110 n.8; see generally DPC I, IHO Ex. I). For reasons explained more fully below, it became necessary to include the documentary evidence entered into the hearing record as part of the impartial hearing initially commenced to address the parent's contentions related to the 2017-18 school year with the hearing record assembled for a subsequent impartial hearing; for ease of reference, citations to evidence adduced through the impartial hearing held for the 2017-18 school year will be prefaced by "DPC I," (i.e. DPC I, IHO Ex. II) and citations to evidence adduced at the subsequent impartial hearing will be prefaced by "DPC III" (i.e., DPC III, IHO Ex. II) (see IHO Decision at pp. 77-78 [separating documentary evidence entered in the hearing record into two exhibit lists with headings labeled with "DPC I" and "DPC III"]). Ultimately, the administrative hearing process with respect to all of the parent's contentions related to the 2017-18 school year were addressed in at least two State-level administrative appeals (see Application of a Student with a Disability, Appeal No. 18-110; Application of a Student with a Disability, Appeal No. 17-079; see generally Application of a Student with a Disability, Appeal No. 18-075).

[3] At the time of the May 2018 CSE meeting, the student was receiving the following as pendency (stay-put) services: all related services (OT, PT, and speech-language therapy) delivered to the student within the district public school during the morning; and 35 hours per week of "instructional hours (his academics) at home provided by two special education teachers who work[ed] with [the student] 1:1, one from 10:00 a.m. to 3:00 p.m., and the other from 3:00 p.m. to 5:00 p.m." (DPC I, IHO Ex. XXIX at p. 2). The evidence in the hearing record reveals that the pendency services arose per agreement of the parties (id.). One of the special education teachers providing the student with a portion of his 1:1, home-based academic instruction during pendency began working with the student in September 2016 and will be referred to throughout this decision as either the student's "then-current special education teacher" or "special education teacher" (Tr. pp. 1433, 1441-43). The then-current special education teacher attended the May 2018 CSE meeting, as well as CSE meetings held for the student in March 2018 and April 2018 (compare Tr. pp. 1433, 1443, with DPC I, IHO Ex. VIII at p. 2, and DPC I, IHO Ex. XXI at p. 2, and DPC I, IHO Ex. XXVII at p. 2). The then-current special education teacher was not a district employee, but instead, was employed through an agency (see Tr. pp. 1441-43).

[4] The student's eligibility for special education programs and related services as a student with an intellectual disability is not in dispute (see 34 CFR 300.8[c][6]; 8 NYCRR 200.1[zz][7]).

educational team regarding "Information on Disability and Implications for Instruction") (id. at pp. 8, 10-17). At that time, the May 2018 CSE recommended an "Other Public School District" within which to implement the student's May 2018 IEP, which was the same out-of-district public school location recommended at the March 2018 CSE meeting to implement the student's 2017-18 IEP (id. at p. 20; compare DPC I, IHO Ex. XXI at pp. 194-97, 206, with DPC I, IHO Ex. VIII at pp. 183-201, and DPC I, IHO Ex. IX at pp. 13-17).[5]

On or about June 6, 2018, the parent filed a second due process complaint notice (June 2018 due process complaint notice) (see DPC I, IHO Ex. II at pp. 1-2; DPC I, IHO Ex. III at p. 1; DPC I, IHO Ex. XXIV at pp. 3-4; see generally DPC I, IHO Exs. XXI-XXIII).[6] Pursuant to State regulation, the IHO assigned to the ongoing impartial hearing for the parent's March 2018 due process complaint notice was assigned to the matter regarding the parent's June 2018 due process complaint notice (see 8 NYCRR 200.5[j][3][ii][a][1]; DPC I, IHO Ex. III at pp. 1-2). In the June 2018 due process complaint notice, the parent listed approximately 17 allegations describing the "reasons" for filing the due process complaint notice (DPC I, IHO Ex. II at pp. 1-3). Overall, the allegations focused on the district's failure to conduct a "meaningful analysis" of its obligation and capacity to educate the student in the least restrictive environment (LRE)—and more specifically, within the district itself; the district improperly "'outsourc[ed]'" the student's educational program and placement to an out-of-district public school; the CSE process and CSE composition (including general allegations of bias and predetermination); the district's failure to use its special education resources to implement the student's "unique and individualized educational goals"; failing to develop an "'appropriately ambitious'" IEP for the student based upon "grade level learning 'content' standards" as opposed to "fabricated 'functional academic content standards' geared toward mastery of some nebulous form of 'life skills' curriculum"; and the district's refusal to apply for an age variance to facilitate the student's "potential educational program and placement within the newly formed '12:1:1 alternately assessed' program" located within the district middle school for the 2018-19 school year (id.). As relief, the parent sought, in part, an order directing the district to "implement a certain program and placement recommendation (or variant thereof), authored by [a specific individual]" (id. at p. 3).[7] In addition, the parent requested an award of

[5] In an interim order dated June 5, 2018, the IHO denied the parent's request to modify the student's pendency services, described above, to include allowing the student to "attend his neighborhood school for lunch and specials, such as music or art" (DPC I, IHO Ex. XXIX at pp. 7-11). The parent appealed the IHO's interim decision on pendency to the Office of State Review, and an SRO upheld the IHO's decision in its entirety (see Application of a Student with a Disability, Appeal No. 18-064).

[6] Similar to the March 2018 due process complaint notice, the parent did not identify—with any specificity—the CSE meeting or the IEP that formed the basis for the allegations in the June 2018 due process complaint notice, except for noting that the parent sought relief for the "academic year commencing in September 2018" (compare DPC I, IHO Ex. II at pp. 1-3, with DPC I, IHO Ex. I at pp. 1-2).

[7] Alternatively, but "albeit of lesser propriety," the parent sought an order directing the district "to apply for a 'waiver' . . . therein seeking the placement of [the student] into a newly formed '12:1:1—alternately assessed' special class" located at the district middle school for the "academic year commencing in September 2018" (DPC I, IHO Ex. II at p. 3). The application for an age variance—as both an issue to be resolved and as a request for relief—was fully resolved in the parent's previous State-level administrative appeal (see Application of a Student with a Disability, Appeal No. 18-110).

"appropriate compensatory education and for the reimbursement of all legal and consultation fees expended through the duration of any convened impartial hearing" (id.).

After consolidating the parent's two due process complaint notices, the IHO issued a decision, dated June 28, 2018 (June 2018 decision), granting, in part, the district's amended motion to dismiss the parent's March 2018 and June 2018 due process complaint notices (see DPC I, IHO Ex. IV at pp. 6-14, 16; see also Application of a Student with a Disability, Appeal No. 18-110). Based upon the district's motion and relevant to this appeal, the IHO dismissed several issues raised by the parent in the June 2018 due process complaint notice based upon the principles of res judicata, which effectively precluded review or resolution of any of the "substantive recommendations" of the May 2018 CSE regarding the 2018-19 school year at the impartial hearing (DPC I, IHO Ex. IV at pp. 10-15).

On or about July 9, 2018, the parent filed a State complaint with the New York State Education Department's (NYSED's) Office of Special Education (see DPC III, IHO Ex. IV at pp. 28, 33).[8] Based upon the evidence in the hearing record, the parent alleged in the State complaint that the district failed to "develop an [IEP] for the 2017-18 school year that reflected [the student's] academic achievement and functional performance and indicated the individual needs of the [s]tudent" (id. at p. 35). At that time, the parent asserted, among other things, that the "'academic'" present levels of performance in the 2017-18 IEP (developed at CSE meetings held in May 2017, June 2017, March 2018, and April 2018) were "deficient because they were not aligned with grade level general education curriculum content standards" (id.). The parent also alleged that, "when developing the IEPs for the 2017-2018 school year" at CSE meetings held in May 2017, June 2017, March 2018, and April 2018, the district failed to "consider results of the [s]tudent's performance on any general State or district-wide assessment (i.e. Alternate Assessment)" (id. at p. 30).[9]

[8] Under the IDEA, its implementing regulations, and State regulations, parents have two avenues available to resolve disputes with a school district regarding the education of a student with a disability: the impartial due process hearing process and the State complaint resolution process. A parent or a district may initiate an impartial hearing 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]). Under the State complaint process, a parent may file a complaint against a district for failure to comply with the terms of an IEP, violation of the IDEA and its regulations, or failure to implement an IHO's due process decision (8 NYCRR 200.5[*l*]; see 34 CFR 300.151-153).

[9] At the impartial hearing, the student's then-current special education teacher testified that she administered the New York State alternate assessment (NYSAA) to the student during the 2016-17 school year (Tr. pp. 1445-46). The special education teacher also testified that she received training on how to administer the NYSAA in or around October or November 2016, shortly after beginning to provide the student's pendency services in September 2016 (Tr. pp. 1446-47). Although the special education teacher could not specifically recall when she administered the NYSAA to the student, it appears that the eighth grade tests were scheduled for State-wide administration in March through June 2017 (for ELA and mathematics) and September through December 2016 (for science and social studies) (compare Tr. pp. 1445-46, with "2016-17 Elementary- and Intermediate-level Testing Schedule," NYSED [Nov. 2016], available at http://www.p12.nysed.gov/assessment/schedules/2017/38testschedule17rev.pdf).

Thereafter, the parties proceeded to, and completed, the impartial hearing for the parent's consolidated due process complaint notices on August 1, 2018 (see DPC III, IHO Ex. IX at pp. 1-4; Application of a Student with a Disability, Appeal No. 18-110).

By letter dated September 6, 2018, the parent—and the district's superintendent—received notice of the findings of the Special Education Quality Assurance (SEQA) Regional Office with respect to the parent's July 2018 State complaint (see DPC III, IHO Ex. IV at pp. 28, 33). SEQA did not sustain either of the allegations (id. at pp. 30-32, 35-39). With respect to the allegations about the academic present levels of performance in the student's 2017-18 IEP, SEQA found that, consistent with State regulations, the IEP "included the [s]tudent's present levels of academic achievement and functional performance" as described within SEQA's decision (id. at pp. 37-39). SEQA further indicated that, contrary to the parent's assertion, State regulations did not "require the present levels of academic achievement and functional performance to be aligned with the State's general education learning standards," noting that the student participated in the "New York State Alternate Assessment (NYSAA) for students with a severe cognitive disability, significant deficits in communication/language and adaptive behavior and who require[d] a highly specialized educational program" (id. at p. 39). In addition, SEQA found that, contrary to the parent's contention, State regulation did not "require that the scores on State assessments be documented on the IEP" even though the "model IEP form" used by districts provided "a space for the district to document this information" (id. at p. 32). SEQA also noted that the district "reported the NYSAA results for the 2016-17 school year were made available to the [d]istrict on August 2, 2017" (id. at p. 31). According to SEQA's investigation, the student's then-current special education teacher attended the "CSE meetings" during the 2017-18 school year and "shared information" about the student's "strengths and needs" (id. at pp. 31-32). In particular, SEQA found that, at the March 2018 CSE meeting, the "special education teacher stated that using the results of the alternate assessment, she incorporated more 'wh' questions so the [s]tudent could increase his comprehension and vocabulary skills" (id. at p. 32). In light of this information, SEQA concluded that the district "did consider the results of the NYSAA when that information was available to the CSE" and that the "present levels of performance and recommended goals were consistent with the [s]tudent's performance on the NYSAA" (id.).

Shortly after SEQA's response to the parent and district—and prior to the IHO issuing a final decision in the pending impartial hearing—the parent initiated another impartial hearing by due process complaint notice dated September 14, 2018 (September 2018 due process complaint notice) pertaining solely to the 2018-19 school year (see DPC III, IHO Ex. I). Pursuant to State regulation, the IHO assigned to the parent's prior, yet still pending, impartial hearing was assigned to the newly initiated matter (see 8 NYCRR 200.5[j][3][ii][a][1]; DPC III, IHO Ex. III at pp. 1-3). In a "Combined Answer and Motion to Dismiss" dated September 21, 2018, the district argued to dismiss the parent's September 2018 due process complaint notice based upon a variety of defenses, including but not limited to, res judicata or collateral estoppel (see generally DPC III, IHO Ex. IV).

On September 27, 2018, the IHO held a prehearing conference and the parties discussed whether to consolidate the September 2018 due process complaint notice with the matter already pending before the IHO (see Tr. pp. 1-13). Based upon the parties' stated preferences at the prehearing conference and upon consideration of the factors under State regulations concerning the IHO's discretion to consolidate the matters, the IHO issued a "Second Interim Consolidation

Order" dated September 27, 2018, within which the IHO declined to consolidate the September 2018 due process complaint notice with the pending impartial hearing and indicated that the newly initiated matter would "proceed separately" (DPC III, IHO Ex. IV at pp. 3-4; see Tr. pp. 6-7). The IHO issued a final decision, dated September 29, 2018 (September 2018 decision), addressing the remaining issues raised in the parent's March 2018 and June 2018 due process complaint notices (see generally DPC III, IHO Ex. IX).[10]

Shortly thereafter, the parent filed an amended due process complaint notice, dated October 1, 2018 (October 2018 due process complaint notice) (see DPC III, IHO Ex. II). Both parties then completed their respective submissions with respect to the district's September 2018 motion to dismiss (see generally DPC III, IHO Exs. V-VII). In a decision dated November 1, 2018 (November 2018 decision), the IHO denied the district's request to dismiss four out of a total of five allegations from the parent's due process complaint notices (see DPC III, IHO Ex. VIII at pp. 3-8). The IHO did, however, dismiss the parent's allegation that the district failed to provide the student's "special education teacher and related service providers with the general education curriculum" because, according to the IHO, this assertion "essentially challeng[ed] the appropriateness of the student's pendency services," which the parties had fully litigated in the past (id. at pp. 5-6).

On November 2, 2018, an SRO issued a decision with respect to the parent's appeal of the IHO's September 2018 decision (see Application of a Student with a Disability, Appeal No. 18-110; see generally DPC III, IHO Ex. IX). The SRO sustained, in part, the parent's appeal, by remanding for the IHO's consideration the question of whether the district failed to offer the student a free appropriate public education (FAPE) for the 2018-19 school year based upon the "substantive issues or claims" raised in the June 2018 due process complaint notice (Application of a Student with a Disability, Appeal No. 18-110; see generally DPC I, IHO Ex. II).

On November 7, 2018, the parties returned to the impartial hearing to begin the presentation of testimonial evidence to resolve the remaining issues identified by the IHO in the November 2018 decision and to also enter documentary evidence into the hearing record (see Tr. pp. 1-29). At that time, although an SRO had issued a decision in the parent's State-level administrative appeal, neither the IHO nor the district's attorney had read the decision (see Tr. pp. 29-30). The parent, an attorney, indicated that, based upon a quick reading of the decision, the SRO "remanded all substantive matters for the 2018-2019 academic year" (Tr. p. 30). After further discussions and the presentation of opening statements by both the district and the parent, the impartial hearing proceeded with testimonial evidence (see Tr. pp. 30-202).

In a letter to the parties dated November 13, 2018, the IHO reported that she had "accepted the remand appointment from the decision" of the SRO in Application of a Student with a Disability, Appeal No. 18-110 (DPC III, IHO Ex. XII at p. 1). Having reviewed the SRO decision and the parent's June 2018 due process complaint notice, the IHO enumerated the following issues as "remanded for review":

[10] The parent appealed the IHO's September 29, 2018 final decision to the Office of State Review (see generally Application of a Student with a Disability, Appeal No. 18-110).

1. [The district] refuse[d] to conduct a meaningful analysis regarding its capacity to educate [the student] within the district itself, which remain[ed] the least restrictive learning environment possible.

2. The refusal of the [district] to conduct any meaningful discussions or to participate in any educational workshops regarding the subject district's actual capacity to educate [the student] internally.

3. The refusal of the [district] to meaningfully apply its special education resources, related services and supplementary aids towards implementing the unique and individualized educational goals of [the student].

4. The [district] refuse[d] to formulate an [IEP] that [was] 'appropriately ambitious.'

5. The impropriety of the philosophical perspective of the CSE Chairperson related to how IEP formulation must occur within the 'modern age' and in accord with the precepts of the [IDEA]. Specifically, the refusal of the IEP Chairperson to acknowledge that IEP formulation must occur with the intent to adopt grade level learning 'content' standards geared towards mastery of the grade level general education curriculum, as opposed to the CSE Chairperson's own fabricated 'functional academic content standards' geared toward mastery of some nebulous form of 'life skills' curriculum.

6. The impropriety of 'outsourcing' [the student's] educational program and placement to [an out-of-district public school] predicated upon the foundationally wrong perspective harbored by the CSE Chairperson as outlined in paragraph '2a'.

7. The impropriety of 'outsourcing' [the student's] educational program and placement to a segregated class within a segregated setting without being able to cite a single scientific study supporting such decision; and furthermore, in direct defiance to the law and the overwhelming body of scientific evidence conclusively proving the impropriety of such placement.

8. The [district] recommended an outsourced educational program and placement to the [out-of-district public school] that [was] not within the least restrictive learning environment possible.

9. The impropriety of outsourcing [the student] to a 'life skills' program that [was] not predicated upon facilitating IEP's [sic]

> designed to promote education based upon New York State learning standards and access to the general education curriculum.

(id. at pp. 1-2; see DPC I, IHO Ex. II at pp. 1-3).

Next, the IHO identified the following as the "claims . . . preserved in the current impartial hearing:"

> 1. The [d]istrict ha[d] failed to procure and utilize the 'alternate assessment' testing results for purposes of evaluating and determining the academic standing and progress of [the student] which remain[ed] necessary for appropriately developing his IEP;
>
> 2. The [d]istrict ha[d] failed to develop an [IEP] for [the student] that [was] supported by peer-based research; and
>
> 3. The [d]istrict refuse[d] to apply for an 'innovative program waiver' which should be considered as a program/placement alternative along the 'continuum of services/placements' which would facilitate the educational placement of [the student] in the least restrictive learning environment possible.

(DPC III, IHO Ex. XII at pp. 2-3; see DPC III, IHO Exs. I-II; DPC III, IHO Ex. VII at pp. 3-8).

In the same letter, the IHO explained that, due to the overlapping nature of some of the claims, it might be advisable to consolidate the "two due process proceedings," but that she would allow the parties to "state their positions regarding consolidation" prior to reaching a decision on that point (DPC III, IHO Ex. XII at p. 3). Next, the IHO further clarified the issues to be resolved at the impartial hearing, noting first that the "core of the remanded proceedings" was whether the recommended "program and placement" for the 2018-19 school year located at an out-of-district public school was appropriate (id.). To determine this issue, the IHO indicated that the "IEPs developed at the May and August CSE meetings" would be reviewed (id.). In addition, the IHO clarified that, although the parent did not challenge the "CSE's determination of [the student's] functioning other than the question of alternate assessment testing," the dispute focused on whether it was appropriate to educate the student in a "functional academic or 'life skills' program" and ultimately, whether the district sustained its burden to establish the appropriateness of the IEPs and whether the out-of-district public school was the LRE for the purpose of implementing the student's program (id.). To assist in that inquiry, the IHO would "accept evidence to support the parent['s] claim that any 'outsourcing' of [the student's] education [was] inappropriate" (id.).

Next, the IHO advised that the parent "may present evidence in support of [the] argument that the functional academic program [was] not appropriate to meet the student's needs and [was] not backed by peer-reviewed research" (DPC III, IHO Ex. XII at p. 3). In addition, the IHO would allow the parent to present evidence that the "CSE should have developed an 'appropriately ambitious' IEP which adopt[ed] grade level content standard and [was] geared toward mastery of grade level general education curriculum" (id.). The IHO also noted that the parent could present evidence that the "general education learning environment in a community school [was] the [LRE]

to meet [the student's] needs and that the CSE must apply its resources to place [the student] in the community school" (id.).

Finally, the IHO noted that the district's "'capacity'" to educate the student was "not relevant," and relatedly, that the IHO's inquiry would focus on whether the "program recommended" was appropriate and not whether the district had the "capacity to create" the parent's "preferred program" (DPC III, IHO Ex. XII at pp. 3-4).

On November 15, 2018, the IHO held a second prehearing conference, and at least initially, the parties discussed whether to consolidate the remanded issues with the current due process complaint notices (see Nov. 15, 2018 Tr. pp. 1-6).[11] After briefly discussing the need for an extension to the compliance date, the IHO then entertained a discussion regarding the issues as "framed" in the IHO's November 13, 2018 letter and the presentation of evidence at the impartial hearing (see Nov. 15, 2018 Tr. pp. 6-31).

In a "Third Interim Consolidation Order" dated November 19, 2018, the IHO considered the parties' agreement to consolidate the remanded issues with the impartial hearing already underway, together with the factors under State regulation (DPC III, IHO Ex. X at pp. 1-4). As a result, the IHO consolidated the matters (id. at pp. 3-4). On November 20, 2018, the parties returned to the impartial hearing, which concluded on January 8, 2019, after five days of proceedings (see Tr. pp. 242-1578).

A. Impartial Hearing Officer Decision

In a decision dated February 20, 2019, the IHO concluded that the district offered the student a FAPE in the LRE for the 2018-19 school year (see IHO Decision at pp. 50-76). Initially, the IHO identified the 12 total issues presented for resolution at the impartial hearing (id. at pp. 6-7).[12] Prior to addressing each issue separately, the IHO described—in a lengthy and carefully detailed manner—the procedural background of this case from its inception in the 2014-15 school year when the parent filed the first due process complaint notice involving a different public school district, as well as including previous findings made since that time by IHOs and SROs (id. at pp. 7-20). Next, the IHO described the more recent procedural background of the matter now before her, noting at length the discussions held at CSE meetings in March, April, and May 2018, which, according to the IHO, produced the disputed May 2018 IEP (id. at pp. 20-40). Before noting the applicable legal standards (id. at pp. 48-50), the IHO set forth testimonial evidence elicited at the impartial hearing (id. at pp. 40-48). Finally—and as reflected herein—the IHO analyzed each issue separately, and sequentially, as set forth in the beginning of the decision (compare IHO Decision at pp. 50-76, with IHO Decision at pp. 6-7).

[11] For reasons not explained, the transcript of the November 15, 2018 proceedings was not consecutively paginated with the transcripts from the September 27 and November 7, 2018 proceedings. To avoid confusion, only citations to the November 15, 2018 transcript of the prehearing conference will be prefaced with the date of that impartial hearing.

[12] The IHO's recitation of the issues to be addressed within the decision reflected a verbatim copy of the issues the IHO identified for the parties in the November 13, 2018 letter (compare IHO Decision at pp. 6-7, with DPC III, IHO Ex. XII at pp. 1-3).

"[1.] [The district] refuse[d] to conduct a meaningful analysis regarding its capacity to educate [the student] within the district itself, which remain[ed] the least restrictive learning environment possible" (IHO Decision at pp. 6, 50).

On this point, the IHO found that the parent renewed the "same argument and position" advocated from the beginning of this dispute with the district, to wit, that the district was obligated to "conduct a meaningful analysis of its capacity to educate the child within the [d]istrict by applying all its resource and special education and related services" (IHO Decision at pp. 50-51). The IHO noted that prior IHOs and SROs "expressed in the numerous decisions" that the district was "not legally mandated to educate the student" within the district "or create a program for the student . . . , if the student's needs [could not] be met with the use of supplementary aids and services" (id. at p. 51). According to the IHO, the parent—who continued to "renew the same argument"—did not "grasp the concept" that the district was required to recommend an "appropriate program in the [LRE]" and that program need not "be the ideal program desired by loving parents" (id. [emphasis in original]). "To fulfill that requirement," the IHO noted that the "inquiry" started with "identifying . . . the student's needs" in order to develop an IEP to educate the student appropriately and did not start with the district's "capacity to educate" the student (id.).

Next, the IHO indicated that, for the "past three years," neither the student's needs nor the severity of his disability justifying "his removal from general education" had been disputed by the parent (IHO Decision at p. 52). However, the parent now challenged the student's "removal from general education" for one reason: "to support the position that [the student] must be educated" in the district, which the IHO characterized as an "attempt to relitigate the same issue under a new legal theory" and which the IHO found "unavailing" (id.). According to the IHO, the parent's "theory center[ed] around the [d]istrict's alleged failure to assess [the student's] abilities in light of the student's relation to the general education curriculum learning standards" (id.). However, the IHO found the parent's argument "flawed in light of the determination in the IEP that the student's disabilities [were] so severe that he ha[d] been removed from regular education learning standards requirements" and because the hearing record failed to contain any evidence that "would support a change in that determination" (id.). Looking at the IEP, the IHO pointed to the following language: "'removal from the general education environment occur[red] only when the nature or severity of the disability [was] such that, even with the use of supplementary aids and services, education [could not] be satisfactorily achieved'" (id.). At that time, the student was "deemed to be removed from all general academic education due to his severe disability," which, the IHO noted, was defined by State regulations as the following:

> Students who have limited cognitive abilities combined with behavioral and/or physical limitations and who require[d] highly specialized education, social, psychological and medical services in order to maximize their full potential for useful and meaningful participation in society and for self-fulfillment. Students with severe disabilities may experience severe speech, language, and/or perceptual-cognitive impairments, and evidence challenging behaviors that interfere with learning and socialization opportunities. These students may also have extremely fragile physiological conditions and may require personal care, physical verbal support and or prompts and assistive technology devices.

(IHO Decision at p. 52, citing 8 NYCRR 100.1[2][iv]).[13] In addition, the IHO explained that the "alternate performance level for State learning standards and the State assessment for students with severe disabilities reflect[ed] 'the knowledge, skills and understanding that such students [were] expected to know and be able to do as indicated in their [IEPs]'" (id. at p. 53, citing 8 NYCRR 100.1[2][iv]). As a student with a severe disability, the IHO noted that the "performance level and standard for [the student's] goals [was] not achievement of the New York State grade level content, but to 'maximize potential for useful and meaningful participation in society'" (id. at p. 53).

While the IHO understood the parent's "frustration because, in their view, their son's education c[ould] be satisfactorily achieved, if all the parties would agree to create the 'hybrid' program they have been seeking," the IHO also noted that the district "had not agreed to develop the program sought by the parents" (IHO Decision at p. 53). Furthermore, the IHO found that the district was not "required to create a program as requested" by the parent, and thus, dismissed the parent's claim.

"[2.] The refusal of the [district] to conduct any meaningful discussions or to participate in any educational workshops regarding the subject district's actual capacity to educate [the student] internally" (IHO Decision at pp. 6, 53).

Contrary to the parent's contention, the IHO found that the hearing record did not contain any evidence that the "CSE did not conduct any meaningful discussions regarding the [d]istrict's capacity to education [the student]" (IHO Decision at p. 53). Instead, the IHO found that the CSE chairperson "accepted the documents provided to her" by the parent with regard to the "inclusion model being advocated during the March [2018] meeting" (id.). Moreover, the IHO found that "[m]uch of the three CSE meetings concerned the [parent's] request to create the hybrid program and a discussion of how such a program could be implemented" and further noted that the "parents [were] active and powerful advocates for their preferred program" (id.). With respect to the "educational workshops" suggested by the parent, the IHO found "no requirement that school personnel must participate" in such (id. at p. 54). The IHO noted that school personnel were already "subject to ongoing professional development as part of their duties " (id.). In light of the above, the IHO dismissed the parent's claim (id.).

"[3.] The refusal of the [district] to meaningfully apply its special education resources, related services and supplementary aids towards implementing the unique and individualized educational goals of [the student]" (IHO Decision at pp. 6, 54).

Here, the IHO found that, after the CSE completed the "development of the May IEP," a discussion took place concerning the fact that the district "did not currently offer the small class life skills program being recommended" for the student (IHO Decision at p. 54). Thus, the hearing record failed to contain evidence to "support a finding that the [d]istrict failed to provide [the student] a FAPE because it did not meaningfully apply its special education resources, related services and supplementary aids towards implementing the unique and individualized educational goals for [the student] within the [d]istrict" (id.). Moreover, the IHO noted that, as had been

[13] When citing to this particular State regulation in the decision, it appears that the IHO made a typographical error, and the correct citation for the State regulation cited for this proposition is 8 NYCRR 100.1(t)(2)(iv).

"previously determined," the district "may cross-contract with another public-school district to provide [the student with] the recommended program" (id.).

"[4.] The [district] refuse[d] to formulate an [IEP] that [was] 'appropriately ambitious'" (IHO Decision at pp. 6, 54).

Reviewing the May 2018 IEP, the IHO found that it included a "program . . . designed for [the student] to 'maximize his full potential for useful and meaningful participation in society and for self-fulfillment" (IHO Decision at p. 54). According to the IHO, the IEP's "ambition" was for the student to "develop skills to foster independence" and to that end, included "functional academics in math and [ELA], which [were] geared towards acquisition of work and integration in his community" (id.). In addition, the IEP provided the student with opportunity to improve his "adaptive skills" and "participate with his typical peers at lunch and in electives" (id. at p. 55). Given the "social strengths" as described by the "parents during the various CSE meetings," the IHO found it would be "more likely than not that [the student] would develop friendly and supportive relationships in any school he attend[ed] if given the chance" (id.). As a final point, the IHO indicated that the "parents, their educational advocate and [the student's] special education teachers were all active participants in the CSE meetings," the parent's "concerns were specifically made a part of the IEP," and the student's then-current special education teacher's "contributions to drafting [the student's] goals were geared to offer [the student] educational benefit" (id.). Consequently, the IHO dismissed the parent's claim (id.).

"[5.] The impropriety of the philosophical perspective of the CSE Chairperson related to how IEP formulation must occur within the 'modern age' and in accord with the precepts of the [IDEA]. Specifically, the refusal of the IEP Chairperson to acknowledge that IEP formulation must occur with the intent to adopt grade level learning 'content' standards geared towards mastery of the grade level general education curriculum, as opposed to the CSE Chairperson's own fabricated 'functional academic content standards' geared toward mastery of some nebulous form of 'life skills' curriculum" (IHO Decision at pp. 6, 55).

The IHO found no evidence to support the parent's contention that the district or the CSE chairperson violated the student's "rights to appropriate IEP formulation by not adopting grade level learning standards for [the student]" (IHO Decision at p. 55). The IHO indicated that, because the student was "identified as having a severe disability," he was not "subject to the same grade level learning 'content' standards as his typical peers" and thus, the student's program was "not expected to be geared towards mastery of grade level general education curriculum" (id.). Instead, the student's IEP was "expected to reflect the skills, knowledge and understandings that a student with [his] cognitive functioning [was] expected to know" and the "goal" was to "maximize his potential given his particular disability" (id. at pp. 55-56). According to the IHO, the student's IEP "appropriately focused on the skills [he] would need to work towards independent living and improved adaptive functioning" (id.).

"[6.] The impropriety of 'outsourcing' [the student's] educational program and placement to [an out-of-district public school] predicated upon the foundationally wrong perspective harbored by the CSE Chairperson" (IHO Decision at pp. 6, 56).

On this point, the IHO briefly concluded that, contrary to the parent's contention, the hearing record contained no evidence to support a finding that the "educational program" recommended for the student for the 2018-19 school year was "inappropriately 'outsourced'" (IHO Decision at p. 56). The IHO found that the district "demonstrated that it did not have the program being recommended within the [d]istrict and it [was] entirely within the [d]istrict's purview and obligation to contract with another public school district to provide the recommended program" to the student (id.).

"[7.] The impropriety of 'outsourcing' [the student's] educational program and placement to a segregated class within a segregated setting without being able to cite a single scientific study supporting such decision; and furthermore, in direct defiance to the law and the overwhelming body of scientific evidence conclusively proving the impropriety of such placement" (IHO Decision at pp. 6, 56).

The IHO concluded that the hearing record failed to include any evidence to support a finding that the out-of-district public school recommended for the implementation of the student's IEP was a "'segregated setting'" (IHO Decision at p. 56). Instead, the hearing record revealed that the recommended "class [was] a special class with students of similar needs . . . housed in a public high school" (id.). The IHO also found that the student's "integration into mainstream classes explained by [the parent's expert witness at the impartial hearing], including a consumer science class, could easily be offered in [the out-of-district public school]" (id.). With respect to the "negative view of the program [as] being housed in a separate wing or a basement," the IHO found that such description was "credibly challenged" by a district witness, "who stated that all students enter[ed] the building through the same doors" (id.). Next, the IHO concluded that the CSE chairperson was not "required to identify a specific scientific study to support the recommendation for a special class, taught by a licensed special education teacher, for a student who [was] designated as having a severe disability" (id.). Additionally, the IHO noted that the "provision requiring evidence based and peer reviewed education [was] to avoid the indiscrimina[te] use of a charlatan methodology being used to educate disabled students" (id. at pp. 56-57).

"[8.] The [district] recommended an outsourced educational program and placement to the [out-of-district public school] that [was] not within the least restrictive learning environment possible" (IHO Decision at pp. 6, 57).

The IHO briefly concluded on this issue that the evidence in the hearing record supported a finding that the "[out-of-district public school] program recommended for [the student] for the 2018/19 school year [was] the [LRE]" (IHO Decision at p. 57). The IHO noted that district witnesses "testified that the program recommended for [the student] was not available at the time of the CSE meetings at the community high school" (id.). In addition, the "program recommended ha[d] previously been deemed the [LRE] to meet [the student's] needs" and the hearing record failed to include any evidence that "would lead to a conclusion that there had been a change which would warrant a different finding given the same set of facts" (id.).

"[9.] The impropriety of outsourcing [the student] to a 'life skills' program that [was] not predicated upon facilitating IEP's [sic] designed to promote education based upon New York State learning standards and access to the general education curriculum" (IHO Decision at pp. 6, 57).

Initially, the IHO concluded that the hearing record failed to contain any evidence to support a finding that the student's "IEP [was] inappropriate because it [was] not related to the New York State learning standards related to the general education curriculum" (IHO Decision at p. 57). In support, the IHO noted that the "decision to remove [the student] from the general education environment for all academic subjects"—as set forth in the IEP—was "undisputed" (id.). In fact, the CSE chairperson testified that this "recommendation was placed on the IEP prior to her becoming involved in [the student's] program" (id.). The IHO further noted that, as explained in the CSE chairperson's testimony, the "relation of alternately assessed students to the general education [was] at the 'access points' for [S]tate standards," meaning that "they look[ed] to 'prerequisite skills' and 'access points' they would need to have put in place" (id.). The CSE chairperson also explained that "[i]t [was] not at the same level of standards that a general education student would be expected to attain" (id.). Instead, according to the IHO, the "standard [was] related to what would be expected of a student with a severe disability and related to meaningful participation in society, not achievement of the general education learning standards" (id. at pp. 57-58).[14] The IHO clarified that, while that did not mean that the student was "not provided access to general education curriculum, it mean[t] that such curriculum [was] at his level and provided in a special class" (id.).

Next, the IHO indicated that, at the impartial hearing, the CSE chairperson was asked to review a guidance document issued by the United States Department of Education, which she had "previously reviewed with [the parent]" (IHO Decision at p. 58). According to the IHO, the "document set[] forth a disabled student's right to access the general education curriculum" and when questioned about the document, the CSE chairperson testified that, "while a disabled student ha[d] the right to access to general education, there [were] exceptions" (id.). She further testified that "assessments listed on the IEP [were] within the three-year guidelines and accurately reflect[ed] [the student's] functioning" (id.). The IHO then noted that the hearing record did not contain any evidence "suggesting that [the student's] cognitive abilities had improved in the last two years" and "there was discussion about progress monitoring on goals on the IEP from [the student's] special education teacher" (id.). In addition, the IHO noted that the CSE chairperson testified that "she did not believe modifying the tenth-grade general education curriculum would be appropriate to meet [the student's] needs" and that the student's then-current special education teacher had been "provided with Unique Learning systems curriculum which [was] geared towards educating alternately assessed students" (id. at pp. 58-59).

Turning to the testimony provided by the parent's expert about the "general education aspect of her recommended 'hybrid' program," the IHO noted that district staff found the "hybrid program was 'vague'"—which the IHO similarly found "vague because it d[id] not actually exist" in the district (IHO Decision at p. 59). At the impartial hearing, the parent's expert described in testimony "how other school districts approach[ed] an effort to include students with Downs [sic] syndrome in regular education classes" (id.). More specifically, the parent's expert "outline[d] a

[14] The IHO also noted testimony of the CSE chairperson that the student was "first identified as an alternately assessed student" when attending a different public school district, and the "extent to which a student [was] removed from the general education environment [was] noted on the student's IEP" (IHO Decision at p. 58). In addition, the CSE chairperson testified that the "special class program at the [d]istrict's high school was Regents track and the students ha[d] I[ntelligence] Q[uotient] ranges between 102 and 110" and "that placement in that class would not be appropriate for [the student]" (id.).

possible model where [the student's] adaptive functioning needs could be met," testifying "about being on time for the school bus, or conversations with siblings and peers about course work or how adaptive living could be addressed in a consumer science class" (id.). According to the IHO, the program model recommended by the parent's expert required—"[i]n reality"—"collaboration among the school personnel being asked to create it" (id.). Also according to the IHO, the parent's expert "based a lot of her testimony of the likelihood of success of . . . such a program on the willingness of the [d]istrict's staff to implement this model" (id.). Ultimately, the IHO concluded that the "creation of the hybrid model [was] an administrative decision and presently too amorphous and speculative to make a determination as to whether it would be appropriate" (id. at pp. 59-60).

With respect to the out-of-district public school recommended for the implementation of the student's IEP for the 2018-19 school year, the IHO found that the parent's expert's "familiarity with the 'life skills' program . . . [was] non-existent" (IHO Decision at p. 60). The IHO noted that, while the parent's expert lacked any familiarity with the program, "her description of what a 'life skills' program entailed was very negative" (id.). For example, the parent's expert testified that in "her experience of life skills programs [regionally]," such programs did "not adhere to general education, there [was] no access to typical peers, they [were] housed within the 'back wings' and ha[d] a separate entrance" and those students had "no access to after school activities" (id.). The IHO pointed out, however, that the parent's expert acknowledged that the "decision of whether a student would be placed in a self-contained class was a decision of the CSE based upon the student's needs" (id.).

Although the parent's expert testified that "nothing in the law . . . provide[d] that the severity of a student's disability c[ould] justify removal from the general education curriculum," the IHO disagreed (IHO Decision at p. 60). Here, the IHO noted that the law did provide that the "severity of a disability may warrant removal from the general education curriculum in order to meet the student's needs" (id.). Based upon the parent's expert's testimony that a district's decision to create a "'hybrid' type of inclusion program" rested primarily on the "will of the staff," the IHO concluded that the decision was, therefore, "clearly discretionary and not something that [was] required" (id.).[15]

Consistent with the parent's expert's testimony, the IHO concurred that whether the student required a "self-contained class [was] a determination for the CSE" (IHO Decision at p. 61). Furthermore, the IHO noted that a CSE "determines whether [this student] [was] a student with a severe disability . . . whose demonstrated cognitive ability prevented him from completing the grade level general education curriculum even with program modification and adaptations" (id.). The IHO found that, in this case, "[t]hat decision, was made long before the 2018/2019 school year," that decision had not been previously challenged by the parent, and the parent did not presently challenge that decision (id.). Moreover, the IHO found that, even if the CSE conducted the "specific benchmarking assessment requested by the parents, [the student's] identification as a

[15] The IHO noted that the parent's expert pointed to a State guidance document issued in November 2015—titled "'Blueprint for Improved Results'"—as the "objective criteria" that a district must consider (IHO Decision at pp. 60-61). The IHO opined that the "Blueprint" was a "guidance document, not a template to determine whether the individual program recommended for a particular student, such as [this student], [was] appropriate" (id. at p. 61).

student with a severe disability would not necessarily change" and the hearing record did not include any "argument or evidence" to alter this conclusion (id. at pp. 61-62).

Next, the IHO addressed the confusion arising from the "focus on 'learning standards' and core curriculum" at the impartial hearing (IHO Decision at p. 62). The IHO noted that the parents, in "their zeal to have [the student] attend the home district," had "partially abandoned their agreement that he would be appropriately placed in a functional academic/life skills program" and discussed whether the student "could be place in a ninth grade English class" with the "curriculum modified to his level" (id.). First, the IHO explained that New York State developed "certain learning standards for each grade level in each content area" (id.). For example, "for ninth grade, one learning standard in English may be a student's ability to identify how an author develops character in literature" (id.). According to the IHO, a "teacher may build a unit with daily lesson plans which target[ed] that 'learning standard' through the reading of 'To Kill a Mockingbird'" (id.). For this student, the "learning standard may be modified . . . to identifying various aspects of a character in a story—[was] the character angry, sad, happy and how did the author demonstrate that" (id.). While the special education teacher "will not [use] 'To Kill a Mockingbird' because [the student was] reading at a first grade level, not on par with his same age peers," the IHO noted that the "learning standard will be aligned with New York State requirements and [the student's] goals may be aligned with those requirements" (id.).

Next, the IHO found that the student's "IEP goals [were] aligned with the New York State Learning standards including comprehension, reading, math, social/emotional functioning and safety concerns based upon his individual present level of performance" (IHO Decision at p. 62). The IHO opined that the arguments advanced by the parent appeared "to be an attempt to obfuscate an authentic attempt to address [the student's] needs"; while "successful at confusing the staff, [the parent] did not convince the CSE that [the student] should be sitting in a ninth or tenth grade English class with a teaching assistant modifying 'To Kill a Mockingbird'" (id.).

"[10.] The [d]istrict ha[d] failed to procure and utilize the 'alternate assessment' testing results for purposes of evaluating and determining the academic standing and progress of [the student] which remain[ed] necessary for appropriately developing his IEP" (IHO Decision at pp. 6, 63).

"[11.] The [d]istrict ha[d] failed to develop an [IEP] for [the student] that [was] supported by peer-based research" (IHO Decision at pp. 7, 63).

Next, the IHO considered together, and at length, the issues identified as numbers "10" and "11" (IHO Decision at pp. 7, 63-73). Initially, the IHO clarified that the parent alleged that the district "failed in its obligation to properly determine [the student's] present levels of performance because it failed to utilize objective data, alternate assessments testing and peer-based research" (id. at p. 63). Ultimately, the IHO concluded that the evidence in the hearing record did not support the parent's contentions and, instead, demonstrated that the district "properly assessed [the student's] present levels of performance with the input of [the student's] parents and special education teachers" (id.).

With regard to alternate assessment testing, the IHO turned to the CSE chairperson's testimony indicating that the student's "special education teacher . . . would be responsible for

identifying [his] functioning levels and administering the alternate assessment" (IHO Decision at p. 63). The CSE chairperson further explained that the alternate assessment testing would be administered to the student via computer with the special education teacher "sitting next to him," and the special education teacher would "administer specific questions to the student to establish a baseline" (id.). The IHO also noted that, according to the CSE chairperson's testimony, the "assessment [was] based upon the dynamic learning maps" and the "teacher may read the questions and provide all accommodations" to the student during the assessment, which would be "sent to the NYSED for review and scoring" (id.).

At the impartial hearing, the district entered the results of the student's "alternate assessment for the 2016/2017 school year" (eighth grade) into evidence, which—according to the CSE chairperson's testimony—the district had received in "August 2018, after the CSE had already met to develop the May [2018] IEP" (IHO Decision at p. 63).[16] The CSE chairperson also testified that the "information would be used by the special education teacher and considered by the CSE" (id.). According to the CSE chairperson, the student's then-current special education teacher, "who administered the alternate assessment [had attended] the CSE meeting and provided the information which formed the basis for [the student's] present levels of performance" (id. at pp. 63-64). The IHO noted that the "basis for determining the student's present levels of performance was the objective testing, the special education teacher's report of his functioning and [the student's] progress on his IEP goals" (id. at p. 64). The IHO also noted that, according to the CSE chairperson, the CSE "reviewed objective intelligence testing and the achievement tests (WIAT) to determine [the student's] present levels" as well as "a Vineland assessment of [the student's] adaptive functioning" (id.).

Next, the IHO referenced the State complaint filed by the parent with respect to the district's alleged failure to "properly consider" the alternate assessment results, which SEQA ultimately deemed "unfounded" (IHO Decision at p. 64). The IHO noted that SEQA's finding was based upon information that the student's "special education teacher who worked with [him] every day and actually administered the assessment [attended] the CSE meeting to accurately report [the student's] functioning" (id.). According to the CSE chairperson, the student's alternate assessment testing results for the 2016-17 school year reflected that he was "not meeting the standards for alternate assessment in ELA and [m]ath" (id.).

The parent argued that the district's failure to consider the alternate assessment testing results in the development of the student's IEP violated State regulation, which required the CSE to "consider the results of all [S]tate assessments" (IHO Decision at p. 64). The CSE chairperson testified, however, that the CSE based its determination of the student's "present level of performance on [his] 'baseline'"—which would be determined by the "student's special education teacher" (id.).

Next, the IHO turned to the testimonial evidence presented by the parent's "educational advocate" who attended the student's CSE meetings held for the 2018-19 school year (IHO Decision at pp. 65-66). The IHO noted that the advocate testified that "she supported the [parent's]

[16] Prior to the administration of the alternate assessment to the student during the 2016-17 school year, the alternate assessment had been previously administered to the student during the 2015-16 school year when the student attended a different public school district (compare DPC III, Dist. Ex. 2, with DPC III, Parent Ex. C).

request to create an inclusion model program" within the district, and in her view, "she believed an inclusion program should be attempted in [the district]" in light of the student having been "successful in the inclusion program as an elementary student in [a different public school]" (id. at p. 65). According to the advocate, the district could try the program and reconvene a CSE if necessary to adjust it (id.).

As reported by the IHO, the advocate testified that the "CSE did not refer to any 'peer based research' in the development of its program" for the student (IHO Decision at p. 65). She opined that the district, "like any other school district, [was] capable of creating the 'hybrid' plan recommended by [the parent's expert]" (id.). Overall, the IHO found that the advocate's testimony, in large part, focused on "her confusion as to why the [d]istrict would not use its resources to create the hybrid program being requested" (id.). However, the advocate also testified about her belief that the student's "LRE 'should be' based on the environment closest to the child's home" and that a "child such as [this student] should be in the general education as much as possible" (id.). According to the IHO, the advocate did concede that the student required "life skills but in her view she believed that the 'great team of teachers' [were] 'up for the job'" (id.). She also testified that the student had a right to "access general education curriculum in a school closest to his home" (id. at p. 66).

Next, the IHO noted that the advocate testified that the district did not "have enough assessment data to conclude that [the student] could not have access to the general education curriculum to learn his academics" (IHO Decision at p. 66). The advocate further testified that to assess the present levels of performance, the "CSE would need to have observations of the student, written work samples, evaluation, annual progress monitoring, [and] discussion with the parents and the team" (id.). Having attended "all three CSE meetings," the advocate "stated that there was no peer based research or assessment data for [the student]" (id.). Based upon her review of the guidance documents from "NYSED," the advocate opined that the district was "obligated to use its resources to educate" the student in the district (id.). Notwithstanding the foregoing, the IHO concluded that the issue of why the district did not create the "hybrid program or a life skills program" within the district was not before her, and she declined to weigh in on the propriety of the district's decision to open a "'life skills' type of class in the middle school but not at the high school" (id.).

After reviewing the advocate's testimony on these issues, the IHO next examined the testimony provided by the student's mother (see IHO Decision at pp. 66-69). Initially, the IHO noted that the student's mother testified about her participation at "various CSE meetings" (id. at p. 66). She specifically testified that the "purpose of the April 2018 CSE was to conduct a program review to complete the development of the IEP for the 2018/2019 school year" (id.).[17] As reported by the IHO, the student's mother "requested that the CSE review [the student's] present levels of performance because it had been a few years" and she sought "'some kind of validity' of that information" (id.). Additionally, the student's mother testified that "there were no measurable

[17] According to the transcript of the April 2018 CSE meeting, it was held as a "requested review for [the student's] current 2017-'18 [sic] school year IEP for the present levels of performance, [and] goals" (DPC I, IHO Ex. XXVII at pp. 1, 3). It is unclear whether the IHO's reference to the 2018-19 school year in the decision was a typographical error or was the product of misinterpreting the student's mother's testimony, which did not specifically speak to a particular school year (compare IHO Decision at p. 66, with Tr. pp. 564-67).

criteria to determine [the student's] levels" (id.). When the CSE discussed the student's ability to read "To Kill a Mockingbird," the student's mother disagreed with the CSE chairperson and another CSE member, who—according to the student's mother—did not think the student could read that book and who also believed that the student "would not be appropriate in a regular education literature class at his grade level" (id. at p. 67). The IHO noted that the student's mother "wanted to establish [the student's] levels because it had not been done in the prior three years" (id.). According to the student's mother, the CSE had also not "informed her as to how the alternate assessments were to be used" (id.). In addition, the IHO noted that the student's mother believed that the student "should have been tested at least four times a year to establish his benchmark," and furthermore, the district "refused" her requests for "benchmark testing" (id.). The IHO also noted that "[i]n addition to not conducting benchmark testing, [the student's mother] said the [d]istrict would not provide [the student's] special education teachers with any of the general education curriculum for [the student's] grade" (id.). The student's mother testified that, even though she "emailed the principal of the [district]," the district still failed to provide the "general education curriculum" (id.). As reported by the IHO, the student's mother believed the student "should be placed on his grade level in general education curriculum and then it should be modified to his level" (id.).

Based upon her understanding of State regulations, the student's mother testified that the student's "cognitive ability was irrelevant" and "his low IQ [was] 'not supposed to block him from attaining the general education curriculum or have access to general education peers'" (IHO Decision at p. 67). She also noted that the student was "not a good tester," which, according to the IHO, "seemed to imply that his IQ was not an accurate reflection of what [the student] could achieve" (id.). Next, the IHO noted that, according to the student's mother, the "educational consultant" concurred with her requests for benchmark testing of the student and "that his teachers receive grade level curriculum" (id.).[18] The student's mother also testified that the student's "special education teacher collected data but she did not conduct any weekly testing" (id.).

Next, the IHO noted that the parent entered the results of the student's 2015-16 alternate assessment testing into the hearing record as evidence (see IHO Decision at p. 68). And although the student's mother testified that she had the 2015-16 alternate assessment testing results in her possession, "she did not bring them to the CSE meeting herself" (id.). The CSE chairperson acknowledged in her testimony that the "CSE did not review the results of this assessment in developing the May [2018] IEP" (id.). She further "confirmed that [the student] was not assessed using the NWEA, [AIMS]web, SRI or the Fountas and Pinnel[l] assessments" (id.).[19] According to the student's mother, the CSE chairperson "did not respond to their requests to have the [student's] functioning level assessed" (id.).

[18] The "educational consultant" referenced in the student's mother's testimony was the individual hired by the district to fulfill the recommendation in the student's IEPs as "Supports for School Personnel on Behalf of the Student"—who, according to the IEPs, would provide "Information on Disability and Implications for Instruction" (DPC I, IHO Ex. IX at p. 14; DPC I, IHO Ex. XXVIII at p. 17; see DPC I, IHO Exs. XIV at p. 18).

[19] At the impartial hearing, the CSE chairperson testified that the district, to her knowledge, did not use "AIMSweb" as an assessment tool or as a way to establish benchmarks (see Tr. pp. 431-32). In addition, the hearing record did not otherwise explain any of the tools mentioned in her testimony.

Following a brief summary of email exchanges between the parent and the CSE chairperson, the IHO noted that the hearing record did not include any "evidence that the parents' [sic] intended to work cooperatively" with the district (IHO Decision at p. 68). The IHO further noted that the "dispute was at a level which clearly demonstrated the breakdown in communication between the parents and [the CSE chairperson]," and in light of these circumstances, "[i]t was reasonable for [the CSE chairperson] to be careful in her responses to the parents given the numerous threats of litigation against [the CSE chairperson] personally" (id.). In particular, the IHO revealed that, in "one such email to [the CSE chairperson], [the student's mother] state[d] "'as the chair of my son's CSE you have been negligent in your duties to provide my child with a [FAPE] by not presenting/discussing or allowing for the consideration of the full continuum of services that [was] offered at [the district]'" (id.). In addition, the IHO characterized the "communication from the parents to [the CSE chairperson as] a bombardment of harsh and insulting missives" and noted further that the "parents' inquiries were obviously sent, not to work towards a consensus, but in an effort to harass [the CSE chairperson]" (id. at pp. 68-69). As a final comment, the IHO noted that "it was to no one's surprise when [the CSE chairperson] informed those present that she was leaving the [d]istrict's employment in February 2019" (id.).[20]

Returning to the IEP process, the IHO revisited the CSE chairperson's testimony, which indicated that the "CSE developed the present levels of performance based upon the reports of the providers and information provided during the CSE meetings" (IHO Decision at p. 69). According to the CSE chairperson, "part of the discussion [included] where the student [was] as a learner," including a discussion of his "strengths, weaknesses and interests" (id.). The CSE chairperson also testified that the "[parents] initially agreed with the present levels of performance and the goals developed for [the student]" (id.). Moreover, to the extent that the parents expressed "disagreement with some of the academic goals," the district had "conducted benchmark assessments using Fountas and Pinnel[l] reading assessments which would be reviewed at a subsequent CSE meeting" (id.). The IHO noted, however, that the "evaluation was not available at the time of the CSE meetings which [were] the subject of this hearing" (id.).[21]

Next, the IHO noted the student's mother's testimony that "without the benchmark assessments it [was] impossible to know where [the student] f[e]ll in terms of his reading and math levels" (IHO Decision at p. 69). The student's mother also testified that, "many times," she requested "assessments to determine [the student's] levels and ability to access general education with modification and adaptions" through various emails to the CSE chairperson (id.). The parent's

[20] Indeed, the parent's personal attacks on the CSE chairperson overflowed into litigation in which the parent sought to remove the CSE chairperson as the director of pupil personnel services at the district (see Application of a Student with a Disability, 58 Ed. Dep't Rep., Decision No. 17452 [2018] [denying the parent's application], available at http://www.counsel.nysed.gov/Decisions/volume58/d17542). Similarly, the parent sought to remove the district's superintendent from the district (see Application of a Student with a Disability, 58 Ed. Dep't Rep., Decision No. 17453 [2018] [denying the parent's application], available at http://www.counsel.nysed.gov/Decisions/volume58/d17453).

[21] To be clear, this portion of the CSE chairperson's testimony occurred on December 11, 2018 (see Tr. pp. 893-94).

advocate also requested "benchmark testing" and, according to the student's mother, the educational consultant requested the same (id.).

Turning, next, to the testimonial evidence provided by the student's then-current special education teacher on the parent's behalf, the IHO noted that she had been the student's "home teacher for the past three years" and began working with this student in September 2016 (through the current school year) (IHO Decision at p. 70). The special education teacher testified that she attained a "dual masters' in special education and reading," and, while reporting a "varied" work experience as a teacher, the IHO characterized that the special education teacher's experience was primarily as a "teaching consultant for various agencies" with "intermittent breaks from teaching to work in retail" (id.). Based upon the hearing record, the IHO reported that the special education teacher had approximately "one year" of experience teaching within a public school (id.).

According to the IHO, the special education teacher "administered the alternate assessment" to the student during the 2016-17 school year (IHO Decision at p. 70). However, it was the "only time she tested [the student] and she did not obtain the results of the assessment" (id.). In spring 2017, the special education teacher "requested the results from the testing company and the agency that she worked for but did not receive it from them" (id.). According to the IHO, the special education teacher "was not curious enough however, to follow up with the [d]istrict to find out what [the student's] assessment results were until the end of the 2017/2018 school year" and was told, at that time, that the results "come from" the district—"and she 'left it at that'" (id.).

As further reported by the IHO, the special education teacher testified that "she never conducted any other assessments to benchmark [the student] during the two years that she worked with him" (IHO Decision at p. 70). According to the special education teacher, "she did not test him because she did not have any assessment materials" (id.). The IHO found this testimony "curious" because, "[a]s a trained and experienced special education teacher it [was] surprising that she would not have the facility to conduct an assessment of [the student] herself" (id.). The special education teacher testified, however, that she "requested the assessment materials in June 2018 from the . . . education[al] consultant"—after the May 2018 IEP was developed (id. at pp. 70-71). According to the special education teacher, she requested the materials to "prepare for [the student's] triennial evaluation which would be in 2019" because she "'wanted to start off the next school year on the right note and make sure that we had everything for [the student] in place'" (id. at p. 71). The IHO noted that the special education teacher was an "active participant and reporter on [the student's] functioning and present levels of performance at the CSE meetings" (id.).

Based upon her work experience, the special education teacher testified that she had been responsible for "conducting initial and triennial evaluations for students" (IHO Decision at p. 71). The IHO opined that "certainly [she] had the experience to know what assessments should be conducted," and moreover, the special education teacher "acknowledged her experience in benchmarking student levels and identifying [present levels of performance]" (id.). She also confirmed that "conducting benchmark assessments was a discussion at every meeting and she was concerned about developing [the present levels of performance]" (id.). Despite having her own experience conducting benchmark assessments, the special education teacher testified that she "asked the educational consultant what assessment to use" and added that the student's "other special education teacher had experience administering the [F]ountas and [P]innel[l] assessment"

but had not done so in this case (id.). According to the IHO, the special education teacher "appeared to be at a loss as to how to obtain the materials for the assessments" and was "[s]imilarly perplexed as to what curriculum she was using with [the student]" (id.). As noted by the IHO, the special education teacher testified that "she wanted general education curriculum but that she was receiving no support" (id.). The IHO further noted that the special education teacher—who began working with the student in September 2016—and "saw him five days per week" "state[d] that she was never provided with the curriculum to educate [the student] appropriately" and so she "developed her own curriculum for [him], worked on his goals and developed his skill base in reading and math" (id. at pp. 71-72).

The IHO opined that, "[i]t [was] odd that given the intensive daily instruction [the special education teacher] was delivering to [the student] that she felt at a loss to identify his current levels" (IHO Decision at p. 72). In addition, the IHO noted that the special education teacher "did not voice a failure to accurately report [the student's] levels at any of the meetings" currently before the IHO, but rather, she "stated that her assessments of [the student's] levels were based upon her data collection" (id.). The special education teacher further indicated that she "did not conduct any formal assessment because . . . she was not provided with any tools" (id.). The IHO noted, however, that a review of the CSE meeting transcripts "demonstrate[d] that [the special education teacher] did not imply at any time that she was unable to provide the CSE with an accurate description of [the student's] functioning" (id.).

Next, the IHO noted that, in reporting the student's present levels of performance to the CSE, the special education teacher relied, generally, upon her experience working "one on one with a student to see where [he or she was]" rather than "judg[ing] [a student] by [the] numbers" from any formal assessment tool (IHO Decision at p. 72). With regard to developing "her own curriculum" for the student, the special education teacher testified that "it 'would have been easier for [her]' if she had received the curriculum from the school district" (id.). When asked at the impartial hearing why she did not "obtain[] the New York State curriculum from the NYSED website," the special education teacher responded, "'why would I do that?'" (id.).

Finally, the special education teacher testified that in summer 2018 after the May 2018 CSE meeting, the CSE chairperson "directed" her to "align [the student's] goals with grade level learning standards" (IHO Decision at p. 72). According to the IHO, it was "apparent from a review of the transcript of the CSE meetings that all agreed that the IEP would be updated upon completion of the Fountas and Pinnel[l] testing" (id.).

In light of the foregoing, the IHO concluded that the hearing record did not include any evidence to support the parent's contention that the district failed to properly assess the student's needs to develop an appropriate program; therefore, the IHO dismissed the parent's related claims (IHO Decision at p. 73).

"[12.] The [d]istrict refuse[d] to apply for an 'innovative program waiver' which should be considered as a program/placement alternative along the 'continuum of services/placements' which would facilitate the educational placement of [the student] in the least restrictive learning environment possible" (IHO Decision at pp. 7, 73).

On this final issue, the IHO noted that the parent alleged that the district's failure to "initiate an innovative program waiver pursuant to [State regulation]" violated the student's rights (IHO Decision at p. 73). According to the parent's view, the district was obligated to apply for an innovative program waiver—as part of the continuum of services in State regulations—to create the "'hybrid' program recommended" by the parent's expert, who testified that "in her opinion the [d]istrict ha[d] the capacity to educate [the student] within the [d]istrict" (id. at pp. 73-74). The IHO also noted that, according to the parent's expert, the district's obligation to apply for an innovative program waiver was "triggered when a [d]istrict want[ed] to create a program that may not comply" with existing State regulations (id. at p. 75). The CSE chairperson testified, however, that the "innovative [program] waiver would be applicable if the [d]istrict were creating a pilot program—but that was not the circumstances being suggested by the parents" (id. at pp. 75-76). Ultimately, the IHO concluded that the hearing record failed to contain any evidence to support a finding that the district's "refusal to apply for an innovative program waiver denied [the student] a [FAPE]" (id. at p. 76).

IV. Appeal for State-Level Review

The parent appeals. As the first issue, the parent argues that the "district failed to 'meaningfully analyze' and/or apply its 'special education resources' towards addressing the unique and individualized needs of the [student], prior to 'outsourcing' his educational-placement" (Req. for Rev. at pp. 1-3 [emphasis in original]). The parent asserts as the second issue that the "district failed to develop an [IEP] reasonably calculated to facilitate a FAPE that was 'appropriately ambitious'" (id. at p. 3 [emphasis in original]). Related to the second issue, the parent alleges that the "district failed to develop an IEP that utilized the [student's] 'alternate assessment testing results' or any other 'peer-based research' towards developing the [student's] academic 'present levels of performance'" (id. at pp. 3-4 [emphasis in original]). Also related to the second issue, the parent argues that the "district failed to provide the [student] access to the 'general education curriculum'" (id. at pp. 4-5 [emphasis in original]). Next, and also related to the second issue, the parent asserts that the "district failed to align the [student's] goals with grade-level learning standards" (id. at p. 5 [emphasis in original]). As a third issue, the parent contends that the "district itself remains the Least Restrictive Learning Environment [LRE])" (id. at pp. 5-7). The parent argues as a fourth issue that the "'outsourced' educational-placement recommendation proffered by the . . . district ([the out-of-district public school]) is not an educational-placement recommendation in accord with the doctrine of LRE" (id. at pp. 8-9 [emphasis in original]). As a fifth and final issue, the parent contends that "'[e]quitable [r]elief' remains necessary in order to reconcile the educational deprivations suffered by the [student] and to ensure the future provision of the [student's] FAPE" (id. at pp. 9-10).

In an answer, the district responds to the parent's allegations by denying each and every allegation in the request for review. Thereafter, the district argues to dismiss the parent's request for review for failing to comply with various regulations governing practice before the Office of State Review. Finally, the district generally argues to uphold the IHO's decision in its entirety.[22]

[22] Upon review of the evidence in the hearing record, the undersigned determined that it was necessary to seek clarification of the hearing record and that additional evidence may be relevant and necessary for a full review of the parties' claims pursuant to 8 NYCRR 279.10(b). In a letter sent to both parties dated March 28, 2019, the

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

---

undersigned directed the district to provide the October 19, 2018 IEP, any State complaints that were filed by the parents in connection with the May 2018 IEP or subsequently developed IEPs, any State documents responsive to the parents' State complaints and the resolution of those complaints, and any subsequent IEPs that may have been generated to comply with any corrective measures to remediate the alleged violations contained in the State complaints requested therein (34 CFR 300.151-300.152; 8 NYCRR 200.5[*l*]). The letter also offered the parties an opportunity to state their positions as to whether a State Review Officer should consider the documents as additional evidence pursuant to 8 NYCRR 279.10(b). Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). The district and the parent each provided responses, however, based upon the evidence already contained in the hearing record, I do not find the additional evidence necessary to render a decision in this matter.

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. Preliminary Matters—Compliance with Practice Regulations

The district contends that the request for review must be dismissed for failing to comply with State regulations governing the initiation of the review and the form requirements for pleadings (see 8 NYCRR 279.4[a], [e]; 279.8[c][1]-[3]).

State regulations provide that a request for review "shall clearly specify the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate what relief should be granted by the [SRO] to the petitioner" (8 NYCRR 279.4[a]). Additionally, a petitioner "shall file the notice of intention to seek review, notice of request for review, request for review, and proof of service with the Office of State Review . . . within two days after service of the request for review is complete" (8 NYCRR 279.4[e]).[24] Finally, the request for review "must conform to the form requirements in section 279.8 of this Part" (8 NYCRR 279.4[a]).

Section 279.8 of the State regulations requires that a request for review shall set forth:

> (1) the specific relief sought in the underlying action or proceeding;
>
> (2) a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review; and
>
> (3) citations to the record on appeal, and identification of the relevant page number(s) in the hearing decision, hearing transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number.
>
> (4) any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer.

(8 NYCRR 279.8[c][1]-[4]).

[24] Rather than filing the notice of intention to seek review, notice of request for review, request for review, and proof of service with the Office of State Review pursuant to State regulation, the parent filed these papers with the Office of Counsel at the New York State Education Department. Although this misstep may have been a clerical error, it does not go unnoticed that the parent correctly filed the same papers in previous State-level administrative appeals with the Office of State Review.

Generally, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or the dismissal of a request for review by an SRO (8 NYCRR 279.8[a]; 279.13; see M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]; T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015], quoting Foman v. Davis, 371 U.S. 178 [1962]).

In determining whether the parent's request for review violates the practice regulations, it is first necessary to review evidence in the hearing record and the IHO's final decision, itself, for irregularities that may have led to the parent's inability to comply with the practice regulations (see generally Application of a Student with a Disability, Appeal No. 19-009 [remanding matter to the IHO due to poorly drafted IHO decision precluding petitioner's ability to formulate a request for review that complied with practice regulations]). To this end, the IHO's decision has been summarized in great detail above. Unlike the facts and circumstances in Application of a Student with a Disability, Appeal No. 19-009, the IHO in this case identified both the remanded issues (nine issues) and the current issues preserved (three issues) for resolution at the impartial hearing, and, in a November 13, 2018 letter, the IHO put both parties on notice of all of these issues to be addressed (see DPC III, IHO Ex. XII at pp. 1-3). Additionally, the IHO allowed the parties to discuss the issues set forth in the IHO's letter at a prehearing conference to further clarify those issues, as well as the parties' respective positions (see Nov. 15, 2018 Tr. pp. 6-31). Also unlike the facts and circumstances in Application of a Student with a Disability, Appeal No. 19-009, the IHO in this case delineated the issues to be resolved in the final decision—in separate paragraphs sequentially numbered 1 through 12 and consistent with the order of the issues as set forth in the November 13, 2018 letter to the parties—and, thereafter, addressed each issue separately and organized in a manner that left absolutely no doubt as to the issue being analyzed by the IHO (see IHO Decision at pp. 50-76). Moreover, the IHO clearly identified each issue in the decision by visually altering the specific text of each issue, such as the font (i.e., using bold text) and formatting (i.e., using left aligned paragraphs with each sentence of the issue indented), from the analysis of each issue (i.e., regular text and left aligned paragraph) (id.). Finally, when identifying the issues in both the November 13, 2018 letter and in the final decision, it appears that the IHO purposefully copied the language used by the parent in the June 2018, September 2018, and October 2018 due process complaint notices, in an attempt, perhaps, to honor and address the issues as expressed by the parent (compare IHO Decision at pp. 50, 52-57, 63, 73, and DPC III, IHO Ex. XII at pp. 2-3, with DPC I, IHO Ex. II at pp. 2-3, and DPC III, IHO Ex. I, and DPC III, IHO Ex. II, and DPC III, IHO Ex. VI at pp. 3-8).

Turning to the parent's pleading, as noted above, State regulation requires that a request for review shall, in part, "identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding" (8 NYCRR 279.4[a]). Tethered closely to this requirement is the State regulation mandating that a request for review set forth a "clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise

rulings, failures to rule, or refusals to rule presented for review" (8 NYCRR 279.8[c][2]). Here, the parent, in partial compliance with the foregoing, sets forth issues presented for review in separately numbered paragraphs (i.e. using Roman numerals I, II, II.A, II.B, II.C, III, IV, and V) and highlights the specific issue using bold, italicized text, which distinguishes the issue presented from the argument in support of each issue (i.e., regular font text) (see generally Req. for Rev.). Upon further inspection, however, this reflects, at best, a level of technical compliance with the practice regulations that cannot overcome the abject noncompliance when examining the issues presented by the parent and the accompanying arguments in support. In this instance—and especially given the IHO's meticulous recitation and organization of the issues within the final decision—the parent could have easily replicated the IHO's recitation and organization of the issues in the request for review to more fully ensure compliance with the practice regulations. And while State regulations do not require that a request for review include a verbatim recitation of an issue as set forth by an IHO in a final decision, the parent's decision to either wholly or slightly recast or reframe some of the issues presented on appeal in the request for review makes it difficult—if not impossible at times—to discern the IHO's specific "findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding" and the "precise rulings, failures to rule, or refusals to rule presented for review" consistent with State regulations (8 NYCRR 279.4[a]; 279.8[c][2]; compare Req. for Rev. at pp. 1, 3-5, 8-9, with IHO Decision at pp. 50, 52-57, 63, 73).

Adding to the confusing nature of the issues that the parent saw fit to articulate in the request for review is the parent's complete failure to set forth "citations to the record on appeal, and identification of the relevant page number(s) in the hearing decision, hearing transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number" (8 NYCRR 279.8[c][3]). The request for review does not include one citation to the evidence in the hearing record (see generally Req. for Rev.). Perhaps even more egregious, however, is the parent's failure in the request for review—as the district argues—to "clearly specify the reasons for challenging the [IHO's] decision" (8 NYCRR 279.4[a]). Simply stated and contrary to the requirements of State regulation, the request for review does not identify one error made by the IHO, other than opining approximately three times that—based upon the parent's view of the evidence in the hearing record—it was unclear or a "mystery" as to how the IHO reached the ultimate conclusion that the district "formulated an IEP reasonably calculated to facilitate a FAPE that was 'appropriately ambitious'" (Req. for Rev. at pp. 4-5 [emphasis in original]; see generally Req. for Rev.). Instead, the parent points to the district's alleged failures or errors as a basis for the appeal (see generally Req. for Rev.). However, as summarized in detail above, the IHO articulated the grounds for her determinations in a very thorough and organized fashion.

For example, the parent sets forth the following as the first issue presented for appeal under Roman numeral I: the "district failed to 'meaningfully analyze' and/or apply its 'special education resources' towards addressing the unique and individualized needs of the [student], prior to 'outsourcing' his educational-placement" (Req. for Rev. at p. 1 [emphasis in original]). Upon first glance, this issue does not reflect, verbatim, any of the issues identified or analyzed by the IHO (compare Req. for Rev. at p. 1, with IHO Decision at pp. 6-7). It most closely resembles the following issue in the IHO's decision (i.e., issue number three): "The refusal of the [district] to meaningfully apply its special education resources, related service and supplementary aids towards implementing the unique and individualized educational goals of [the student]" (compare Req. for Rev. at p. 1, with IHO Decision at p. 6). In fact, the parent—in the accompanying memorandum

of law—points to a page in the IHO's decision where this issue was analyzed by the IHO, which provides the only guidance as to the precise ruling or finding being challenged by the parent because the argument supporting this contention immediately thereafter in the request for review does not include one citation to the hearing record or the IHO's decision (compare Req. for Rev. at pp. 1-3, with IHO Decision at p. 6, and Parent Mem. of Law at pp. 6-7).

As another example, the parent sets forth the following as the second issue presented for appeal under Roman numeral II: the "district failed to develop an [IEP] reasonably calculated to facilitate a FAPE that was 'appropriately ambitious'" (Req. for Rev. at p. 2 [emphasis in original]). This issue directly corresponds to an issue in the IHO's decision (i.e., issue number four) (compare Req. for Rev. at p. 2, with IHO Decision at p. 6). The IHO analyzed this issue separately within the body of the decision (see IHO Decision at pp. 54-55). Yet in the request for review, the parent does not include any argument pointing to any error in the IHO's analysis of this specific issue (see Req. for Rev. at p. 3). Similar to the issue above, the only guidance the parent offers with respect to any type of argument of IHO error on this issue is found in the parent's accompanying memorandum of law, wherein, again, the parent points to one page in the IHO's decision and develops further arguments in support (compare Req. for Rev. at p. 2, with Parent Mem. of Law at pp. 14-15). And instead of directly challenging the IHO's finding with respect to this specifically articulated issue, the parent appears to support this contention by arguing three subparts under Roman numerals II.A, II.B, and II.C (see Req. for Rev. at pp. 3-5). With respect to these three subparts, only those issues set forth in Roman numerals II.A and II.B reflect issues in the IHO's decision (i.e., issues number 5, 10, and 11) (compare Req. for Rev. at pp. 3-5, with IHO Decision at pp. 6-7). The parent's issue set forth under Roman numeral II.C does not correspond to any issue identified by the IHO, even though the parent points to one page in the IHO's decision as related to this issue (compare Req. for Rev. at p. 5, with IHO Decision at pp. 6-7, and Parent Mem. of Law at pp. 20-22). Again, because the parent fails to include any citations to the hearing record, the only guidance the parent otherwise offers with respect to which of the IHO's findings are challenged is found within the accompanying memorandum of law (compare Req. for Rev. at pp. 3-5, with Parent Mem. of Law at pp. 15-20).

Finally, to the extent that the issues identified under Roman numerals III and IV both address the student's LRE, such contentions reflect the issue identified by the IHO in the decision (i.e., issue number 8) (compare Req. for Rev. at pp. 5, 8, with IHO Decision at p. 6). However, the arguments set forth in support of each issue in the request for review fail to include any citations to the hearing record (see Req. for Rev. at pp. 5-9). In the memorandum of law, the parent appears to address both issues within one subheading (i.e., "Point X: The respondent district remains the most LRE and not the [out-of-district public school]") (Parent Mem. of Law at pp. 22-24 [emphasis in original]).

In addition to the foregoing, the parent also fails to identify what an SRO should do with the IHO's decision, such as seeking to overturn or reverse the decision, either in part or in its entirety (compare 8 NYCRR 279.4[a] [requiring that a request for review must "indicate what relief should be granted by the [SRO] to the petitioner"], with Req. for Rev.), and similarly fails to set forth the "specific relief sought in the underlying action or proceeding" (compare 8 NYCRR 279.4[c][1], with Req. for Rev.).

Overall on appeal, the parent does not grapple with the IHO's determinations but instead, reargues the district's alleged errors and violations as a basis for the appeal (see generally Req. for Rev.). Furthermore, to the extent that the parent elaborates or expands upon arguments in support of the issues in the request for review within the memorandum of law, or argues additional grounds upon which to conclude that the district failed to offer the student a FAPE for the 2018-19 school year solely within the memorandum of law, the parent—who is an attorney—is reminded that a memorandum of law is not a substitute for a pleading (see 8 NYCRR 279.4, 279.6; see also Application of the Dep't of Educ., Appeal No. 12-131). State regulations direct that "[n]o pleading other than a request for review, answer, answer with cross-appeal, or answer to a cross-appeal, will be accepted or considered" by an SRO, "except a reply to any claims raised for review by the answer or answer with cross-appeal that were not addressed in the request for review, to any procedural defenses interposed in an answer, answer with cross-appeal or answer to a cross-appeal, or to any additional documentary evidence served with the answer or answer with cross-appeal" (8 NYCRR 279.6[a]). Thus, any arguments included solely within the memorandum of law have not been properly raised and will not be considered or addressed in this decision. Moreover, it is not this SRO's role to research and construct the appealing parties' arguments or guess what they may have intended (see, e.g., Gross v. Town of Cicero, 619 F.3d 697, 704 [7th Cir. 2010] [appellate review does not include researching and constructing the parties' arguments]; Fera v. Baldwin Borough, 2009 WL 3634098, at *3 [3rd Cir. Nov. 4, 2009] [a party on appeal should at least identify the factual issues in dispute]; Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 841 [10th Cir. 2005] [generalized assertion of error on appeal is not sufficient]; see generally, Taylor v. American Chemistry Council, 576 F.3d 16, 32 n.16 [1st Cir. 2009]; L.I. v. Hawaii, 2011 WL 6002623, at *9 [D. Hawaii Nov. 30, 2011]; Lance v. Adams, 2011 WL 1813061, at *2 [E.D. Cal. May 6, 2011] [the tribunal need not guess at the parties' intended claims]; Bill Salter Advertising, Inc. v. City of Brewton, 2007 WL 2409819, at *4 n.3 [S.D. Ala. Aug. 23, 2007]).

The district's contentions relative to the form and content of the parent's request for review, when viewed in light of the parent's history of noncompliance, weigh heavily in favor of dismissing the parent's appeal especially where, as here, the parent has been cautioned—based upon the very same contentions asserted by the district in this appeal—about the continued failure to comply with the practice regulations in four separate appeals initiated by the parent (see Application of a Student with a Disability, Appeal No. 18-110; Application of a Student with a Disability, Appeal No. 17-079; Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040). In each of those appeals, an SRO declined to dismiss the request for review based upon noncompliance, but specifically cautioned the parent that, "while a singular failure to comply with the practice requirements of Part 279 may not warrant an SRO exercising his or her discretion to dismiss a request for review or reject a memorandum of law (8 NYCRR 279.8[a]; 279.13; see Application of a Student with a Disability, Appeal No. 16-040), an SRO may be more inclined to do so after a party's repeated failure to comply with the practice requirements" (Application of a Student with a Disability, Appeal No. 18-110; Application of a Student with a Disability, Appeal No. 17-079; Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040). Consequently, at this juncture the parent's lack of compliance in the instant appeal, together with the parent's repeated lack of compliance in four of the six State-level administrative appeals previously initiated by the parent, will result in a dismissal of the parent's appeal, with prejudice.

Nevertheless, even assuming for the sake of argument that the parent's failure to comply with the practice regulations did not warrant a dismissal of this appeal, the evidence in the hearing record does not support the following contentions reasonably discerned from the request for review: whether the district denied the student a FAPE by failing to consider the student's alternate assessment testing results in developing the present levels of performance, by failing to provide the student with access to the general education curriculum, by failing to align the student's annual goals with grade-level learning standards, and by recommending a 12:1+1 special class placement life skills program located within an out-of-district public school as the student's LRE (see generally Req. for Rev.).

B. Access to the General Education Curriculum, Alternate Assessment, and Learning Standards

On appeal, the parent asserts overall—and without any accompanying argument—that the district failed to develop an IEP that was reasonably calculated to "facilitate a FAPE that was 'appropriately ambitious,'" based, in part, upon the allegations that the district failed to "provide the [student] with access to the 'general education curriculum'" and similarly failed to "align the [student's] goals with grade-level learning standards" (Req. for Rev. at pp. 4-5). As they are generally referenced in the parent's arguments on appeal, the standards and requirements pertaining to a disabled student's access to the general education curriculum and the relationship of a student's eligibility for alternate assessments to his or her access to general education content-based standards, as well as how the foregoing relate to a CSE's development of a student's IEP, are addressed herein.

As set forth above, an IEP must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances" (Endrew F., 137 S. Ct. at 999, 1001; see Rowley, 458 U.S. at 206-07). The United State Supreme Court in Endrew F. discussed the standards for provision of a FAPE to students with disabilities and noted that, for a student "fully integrated in the regular classroom, as the Act prefers, what that typically means is providing a level of instruction reasonably calculated to permit advancement through the regular curriculum" (Endrew F., 137 S. Ct. at 1000). However, for a student "not fully integrated in the regular classroom" and "not able to achieve on grade level," the IEP must be "appropriately ambitious in light of his circumstances," and set forth "challenging objectives" (id.). Likewise, the IDEA requires that an IEP must describe how the student's disability affects involvement in and be designed to enable the student to make progress in the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I][aa]; [II][aa]; [IV][bb]; 34 CFR 300.320[a][1][i]; [2][i][A]; [4][ii]; 8 NYCRR 200.4[d][2][i][a]; [iii][a][1]; [v][a][2]; Endrew F., 137 S. Ct. at 1000), which is "the same curriculum as for nondisabled children" based on the State's academic content standards (34 CFR 300.320[a][1][i]; see 8 NYCRR 200.1[t]; Present Levels of Academic Achievement and Functional Performance, 71 Fed. Reg. 46,662 [Aug. 14, 2006] ["[A]n IEP that focuses on ensuring that the child is involved in the general education curriculum will necessarily be aligned with the State's content standards"]; Dear Colleague Letter, 66 IDELR 227 [OSERS/OSEP Nov. 16, 2015]).

Relatedly, the IDEA requires that students with disabilities must be included in all general State and local assessment programs with appropriate accommodations, and that alternate assessments provided to students who cannot participate in regular assessments must be indicated in their IEPs (20 U.S.C. §§ 1412[a][16][A], [C]; 1414[d][1][A][i][VI]; 34 CFR 300.160[a];

300.320[a][6]; 8 NYCRR 200.4[d][2][vii]). For those students with the most significant cognitive disabilities, their performance can be measured against alternate academic achievement standards, but such standards must also be aligned with the State's grade-level content standards and promote access to the general education curriculum (20 U.S.C. §§ 1412[a][16][A], [C]; 6311[b][1][E]; 34 CFR 200.1[d]; 200.6[a][2][ii][B]; [c][1][i]; 300.160[c]; Dear Colleague Letter, 66 IDELR 227).[25] New York has revised its methods for administration of alternate assessments and, as of the 2017-18 school year, ELA, mathematics, and science are assessed using Dynamic Learning Maps (DLM), "a computer-delivered adaptive assessment measuring a student's achievement of the . . . Common Core Learning Standards at a reduced level of depth, breadth, and complexity" ("Important Information Regarding changes to the New York State Alternate Assessment (NYSAA) in Social Studies and Science," Office of Instructional Support Mem. [Feb. 2017], available at http://www.p12.nysed.gov/assessment/nysaa/2016-17/nysaa-socialstudies-science.pdf; "Changes to the New York State Alternate Assessment Beginning with the 2015-16 School Year," Office of Special Educ. Mem. [Sept. 2015], available at http://www.p12.nysed.gov/specialed/publications/2015-memos/documents/nysaa-field-memo-2015-16-school-year.pdf).[26]

Overall, while a CSE should include member(s) that "know the expectations of the general education classroom for the corresponding grade of the student both in terms of what learning (i.e, knowledge and skills) is expected (general curriculum) as well as how the students are expected to access and demonstrate what they have learned," ultimately the annual goals and recommended supports and services included in the IEP must be aligned with the student's strengths, needs, and present levels of performance (see "The Role of the Committee on Special Education in Relation to the Common Core Learning Standards," at pp. 1-2, Office of Special Educ. Field Advisory [June 2014]; see also 34 CFR 300.320[a][1], [2], [4]; 8 NYCRR 200.4[d][2][i], [iii], [v]). To that end, alignment of the IEP with State academic content standards "must guide, and not replace, the individualized decision-making required in the IEP process" (Questions and Answers on Endrew F. v. Douglas County Sch. Dist. Re-1, 71 IDELR 68 [OSEP Dec. 2017]; Dear Colleague Letter, 66 IDELR 227).[27]

---

[25] The Elementary and Secondary Education Act of 1965 (ESEA), 20 U.S.C. 6301 et seq., requires states to adopt challenging academic content standards and aligned academic achievement standards (20 U.S.C. § 6311[b][1][A]-[B]). The Act permits states to adopt alternate academic achievement standards for students with the most significant cognitive disabilities, provided those standards meet certain requirements (20 U.S.C. § 6311[b][1][E][i]).

[26] With regard to the content assessed with Dynamic Learning Maps, "blueprints" in each subject area set forth "major claims," which are organized into "conceptual areas" and further into "essential elements" assessed for each grade (see, e.g., "DLM English Language Arts Year-End Assessment Model Blueprint for New York," at pp. 1-9, available at https://dynamiclearningmaps.org/sites/default/files/documents/Manuals_Blueprints/Blueprint_ELA_NY.pdf). As an example, for grade 9, the conceptual area "[c]onstruct understandings of text" for the major claim "[s]tudents can comprehend text in increasingly complex ways," would be assessed based on 9 essential elements, including a student's ability to "[l]ocate sentences that support an author's central idea or claim" ("DLM English Language Arts Year-End Assessment Model Blueprint for New York," at pp. 1, 2, 9).

[27] Further, specific information about the curriculum or content that a teacher would use to instruct a student is the sort of information that would more appropriately be found in a teacher's lesson plans, rather than in an IEP (see Opportunity To Examine Records; Parent Participation in Meetings, 71 Fed. Reg. 46,689 [Aug. 14, 2006]

Here, it is undisputed that the student's "severe disabilities require[d] the use of alternate performance indicators to appropriately assess [his] abilities and needs" (DPC I, IHO Ex. IX at p. 16; DPC I, IHO Ex. XIV at p. 20; DPC I, IHO Ex. XXVIII at p. 19). The parent does not now challenge that determination. However, with regard to the contention that the district failed to provide the student with access to the general education curriculum, the parent more specifically points to what he characterizes as the district's "antiquated and wrong perspective" that providing alternately assessed students with the "'general education curriculum' would be 'educationally unsound'" (Req. for Rev. at p. 4).[28] While not explained in the request for review, a review of the transcripts generated in connection with the March 2018, April 2018, and May 2018 CSE meetings sheds light on the genesis of the parent's contentions.[29]

It appears that the parent's issue concerning the district staff's posture with respect to the educational soundness of modifying the "general education curriculum" relates back to a comment made by a district special education teacher at a March 2018 CSE meeting (compare DPC I, IHO Ex. XXI at p. 6, with DPC I, IHO Ex. VIII at pp. 2, 190). Near the conclusion of the March 2018 CSE meeting, as the CSE members narrowed the discussion to a final program recommendation and a site location (out-of-district public school) at which to implement the student's 2017-18 IEP, the parents, their advocate attending the CSE meeting, and the student's then-current special education teacher continued to press the CSE chairperson to educate the student within the district (DPC I, IHO Ex. VIII at pp. 182-204). During that discussion, the district special education teacher attending the meeting questioned the appropriateness of modifying or adapting a "high school Common Core curriculum that [was] Regents track" to the "first grade level" for this student, who demonstrated reading skills at a "first grade level" (id. at pp. 189-90). As the discussion proceeded, both the district special education teacher and the CSE chairperson voiced concerns about

---

[explaining a change of language in 34 CFR 300.501[b][3] in order to avoid the impression "that teaching methodologies and lesson plans must be included in the IEP"]; see also Avila v. Spokane Sch. Dist. 81, 2014 WL 5585349, at *6 [E.D. Wash. Nov. 3, 2014] [finding that "[a]n IEP is not a lesson plan and does not provide the specific methodology to be utilized, but is instead a broad overview or roadmap of a student's special education program, setting forth the present level of education performance, goals, objectives, and special services and staff to be provided"]).

[28] To be clear, the parent does not point to any part of the May 2018 CSE process or the May 2018 IEP, itself—or to any evidence in the hearing record—to support this contention, to support finding that the district actually held this "antiquated or wrong perspective," or to otherwise demonstrate how such "antiquated and wrong perspective" manifested in a violation of the IDEA, its implementing regulations, State law, or State regulations such that it denied the student a FAPE (see generally Req. for Rev.). Instead, the parent's arguments more closely resemble a leveled attack on the CSE chairperson's professional knowledge and ability to perform her job, as well as whether the CSE chairperson committed to memory every guidance document on the topic of alternately assessed students, access to the general education curriculum, and alignment with grade-level learning standards (id.). To a lesser extent, the arguments could also sound in claims that the district could not implement the May 2018 IEP through the use of curriculum modifications (id.). However, without citations to the evidence in the hearing record, it is not an SRO's job to now advance arguments on the parent's behalf in support of either interpretation of this argument.

[29] The operative IEP reviewed in this decision is the May 2018 IEP; however, because discussions at the March and April 2018 CSE meetings (relating to the 2017-18 school year) informed the content included in the May 2018 IEP, and for that purpose alone, those CSE meetings are referenced herein.

modifying the curriculum to that extent and "maintain[ing] the integrity of the program" and that such a decision would be "educationally unsound" (id. at pp. 190-91, 196). Later during the same discussion, the district special education teacher stated that, instead, the student required a program that met his needs and that it would not be "appropriate to bend a curriculum to a point that it's not even the same curriculum" (id. at pp. 192-93). Using the book, "To Kill a Mockingbird" as an example of a "common piece of literature" taught in middle school and/or ninth grade, the district special education teacher opined that, given the student's deficits, he would not be able to "comprehend" the material presented through this book (id. at pp. 193-95). To this statement, the parent countered that the student "would just read the book the best that he could" and "would comprehend the best that he could" (id. at p. 195). Again, the CSE chairperson opined that she "respectfully disagree[d]" with the parents' stated positions and reiterated that it would be "educationally unsound" for the student (id. at p. 196).

At the April 2018 and May 2018 CSE meetings, the conversation about whether the general education curriculum could be modified to meet the student's needs continued but also expanded to address the student's access to general education content standards (see DPC I, IHO Ex. XXI at pp. 5-6; DPC I, IHO Ex. XXVII at pp. 1-5). In support of his position that the student's program should provide for the student's access to the general education content standards, the parent presented the CSE chairperson with federal and State guidance documents, which the CSE chairperson reviewed (see DPC I, IHO Ex. XXI at pp. 5-6; DPC I, IHO Ex. XXVII at pp. 8-9; see also Dear Colleague Letter, 66 IDELR 227).[30] At the April 2018 CSE meeting, the CSE chairperson maintained that the recommendation of the CSEs for a functional academic program with mainstreaming opportunities was made based on the student's current levels and did not represent an attempt on the part of the district to deprive the student access to the general education curriculum (see DPC I, IHO Ex. XXVII at pp. 6). In addition, at both CSE meetings, the CSE chairperson pointed out the impact of the student's significant cognitive disabilities, and his resultant need to be alternatively assessed, on the content learning standards utilized by the district (see DPC I, IHO Ex. XXI at p. 7; DPC I, IHO Ex. XXVII at pp. 10-11; see also Tr. p. 167).[31] In particular, the CSE chairperson referenced that the district could use "access points" to the regular education content standards based on the student's level and deficits, which may not be equivalent to the student's chronological age or chronological "grade,"[32] and that the district was further

[30] At the impartial hearing, the CSE chairperson testified that, based upon her review of the federal guidance document dated November 16, 2015, she agreed that the student had the "right to access the general education curriculum" and "grade level learning standards," but qualified her agreement by stating "there [were] exceptions and there [were] limitations . . . noted" within that same document (Tr. pp. 162-63; see generally DPC III, Parent Ex. A).

[31] At both the April and May 2018 CSE meetings, the parent emphasized the distinction between content-based standards and achievement- or performance-based standards (DPC I, IHO Ex. XXI at pp. 8-9; DPC I, IHO Ex. XXVII at p. 11).

[32] This CSE chairperson's description of access points resembles New York's use of alternate grade level indicators, or "entry points" to the grade-level expectations, with core curricula for the purpose of assessing a student's achievement of content-subject matter (see "Important New York State Alternate Assessment (NYSAA) Information," NYSED [especially "Introduction and Overview" and "Understanding the Core Curriculum's Role in Alternate Assessment"], available at http://www.p12.nysed.gov/assessment/nysaa/info.html). This is approach to alternate assessment was in place prior to and appears to have been replaced by New York's adoption of the

"bound to look at New York State alternate assessment and . . . CDOS performance standards based on the student's IEP" (DPC I, IHO Ex. XXI at pp. 11-12, 13-14; DPC I, IHO Ex. XXI at p. 7; see also Tr. pp. 165-66).[33, 34] At the impartial hearing, the CSE chairperson elaborated that, as an alternately assessed student, the student was "not able to at this point achieve the grade level standards," and therefore, the district needed to "provide him with prerequisite skills that will give him access to that standard" (Tr. pp. 166-67; see Tr. pp. 167-71). Further, at the May 2018 CSE meeting, the CSE chairperson maintained that, given the student's levels, certain aspects of the general education curriculum were not appropriate (DPC I, IHO Ex. XXI at p. 8). The educational consultant also spoke at the May 2017 CSE meeting and confirmed that, prior to the meeting, she, herself, met with "staff" and discussed the student's disability and its "implications for instruction" (DPC I, IHO Ex. XXI at pp. 23-24). The educational consultant also indicated that she met with

---

dynamic learning maps methods for administration of alternate assessments.

[33] At the impartial hearing, the CSE chairperson clarified that "CDOS" referred to the Career Development and Occupational Studies standards, which she described as "career and college ready standards" (Tr. p. 881; see generally DPC III, Dist. Ex. 6). Beginning in the 2013-14 school year, the Board of Regents established the skills and achievement commencement credential and the CDOS commencement credential, as more meaningful substitutes for the prior credential known as the IEP diploma ("New York State Career Development and Occupational Studies Commencement Credential," at p. 1, Office of Special Educ. Mem. [June 2013], available at http://www.p12.nysed.gov/specialed/publications/CDOScredential-613.pdf; "Skills and Achievement Commencement Credential for Students with Severe Disabilities," at p. 1 [Office of Special Educ. Field Advisory April 2012], available at http://www.p12.nysed.gov/specialed/publications/SACCmemo.pdf; see 8 NYCRR 100.5[b][7][i][f]-[g]; 100.6; 100.9[g]). The skills and achievement commencement credential is available to students with severe disabilities who have been instructed and assessed on the alternate performance level for the State learning standards and is issued along with an "exit summary," which summarizes the student's academic achievement and functional performance, and documentation of, among other things, the student's achievement against the CDOS learning standards and the student's level of academic achievement and independence as measured by the NYSAA ("Skills and Achievement Commencement Credential for Students with Severe Disabilities," at pp. 1-2). The CDOS commencement credential is available to students with or without disabilities and on its own or as part of a regular diploma and recognizes a student's preparation and skills for post-school employment (see "Career Development Occupational Studies Graduation Pathway Option," Office of Instructional Support, at p. 1, available at http://www.nysed.gov/common/nysed/files/programs/curriculum-instruction/cdos-field-memo-june-2016.pdf; "New York State Career Development and Occupational Studies Commencement Credential," at p. 1). In order for students to develop the knowledge and skills necessary to earn either the skills and achievement commencement credential or the CDOS credential, students must be provided instruction that supports the achievement of the CDOS learning standards (see "New York State Career Development and Occupational Studies Commencement Credential," at p. 2; "Skills and Achievement Commencement Credential for Students with Severe Disabilities," at p. 3). The State has published the CDOS learning standards, as well as a resource guide further describing the standards, which are in the areas of career development, integrated learning, and universal foundation skills (see "Learning Standards for Career Development and Occupational Studies at Three Levels, NYSED, available at http://www.p12.nysed.gov/cte/cdlearn/documents/cdoslea.pdf; "Career Development Occupational Studies Resource Guide with Core Curriculum," NYSED, available at http://www.p12.nysed.gov/cte/cdlearn/documents/CDOS-intro.pdf; see also ("New York State Career Development and Occupational Studies Commencement Credential," at pp. 4-5).

[34] Much discussion was had at the May 2018 CSE meeting about the availability of content standards for alternately assessed students compared to the content standards for general education students, which were located on the State's website (DPC I, IHO Ex. XXI at pp. 10-11, 13, 15-17, 22).

the student's home-based instructors and "sent some information about New York State learning standards" to them (id. at pp. 24-26).[35]

Notably, the May 2018 IEP includes documentation of parent concerns, which were shared during the April 2018 CSE meeting, that the student needed "to have the IEP aligned with curriculum standards" and "a challenging specially designed modified curriculum with use of the continuum of services" (DPC I, IHO Ex. XXVIII at p. 5; see DPC I, IHO Ex. XXVII at pp. 84-92).[36] The IEP also noted as a parent concern that the student had a "consultant who [was] knowledgeable of his disability and experienced with educating the school district staff, teachers and related service providers, utilizing contemporary evidence based strategies, tools, and techniques to include [the student] within the LRE in Academics, Development, Functional, Physical, Management Needs which ha[ve] been in place since 2014" (DPC I, IHO Ex. XXVIII at p. 5; see DPC I, IHO Ex. XXVIII at p. 8). Similarly, the IEP noted as a parent concern that the student needed a "[c]onsultant who [was] knowledgeable and experienced with students [with] Down Syndrome to modify the general education curriculum and establish a Challenging Individual Specifically Designed Instruction using contemporary evidence based inclusion models which ha[ve] been in place since 2014" (DPC I, IHO Ex. XXVIII at p. 8).

In light of the foregoing, while the evidence in the hearing record demonstrates that the parties engaged in significant discussions related to the student's participation in alternate assessments and how that determination related to his ability to access the general education curriculum and grade-level learning standards in the development of his IEPs, the same evidence demonstrates the confusing nature of this information and, perhaps relatedly, the CSE chairperson's inability to fully clarify these points to the parent's satisfaction. Despite this imprecision, the May 2018 IEP included a statement of parent concerns about the student's access to the general education curriculum and grade-level learning standards in the IEP, which the student's mother shared at the April 2018 CSE meeting (see DPC I, IHO Ex. XXVIII at pp. 5, 8; see DPC I, IHO Ex. XXVII at pp. 84-92). Moreover, as noted above, the parent has not articulated how, even assuming that the May 2018 CSE's approach to developing the student's IEP—and the CSE's alleged lack of consideration of general education content standards or curriculum for the student—deprived the student a FAPE. However, to the extent an argument to this end may be discerned they are examined below, particularly with respect to the parent's argument about the annual goals in the May 2018 IEP.

[35] The educational consultant did clarify, however, that it was not her responsibility to write the present levels of performance or annual goals, but that she could provide "assistance and guidance" on the New York State learning standards to the student's special education teachers who would be responsible for writing the present levels of performance and annual goals (DPC I, IHO Ex. XXI at pp. 24-26). The educational consultant indicated that she had sent "resources" to the parent as well. (id. at p. 25).

[36] The hearing record does not include an IEP generated as a result of the April 2018 CSE meeting; however, the revisions made to the present levels of performance at the April 2018 CSE meeting appeared in the May 2018 IEP for the 2018-19 school year (compare DPC I, IHO Ex. IX at pp. 3-5, with DPC I, IHO Ex. XXVIII at pp. 3-8, and DPC I, IHO Ex. XXVII at pp. 34-177).

C. May 2018 IEP

1. Present Levels of Performance—Alternate Assessment Results

Turning now to the May 2018 IEP, in support of the generic contention that the district failed to develop an IEP that was reasonably calculated to facilitate a FAPE that was "'appropriately ambitious,'" the parent argues that the district failed to develop an IEP that "utilized the [student's] 'alternate assessment testing results' . . . towards developing the [student's] 'present levels of performance'" (Req. for Rev. at pp. 3-4).[37]

Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1];8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a][1]-[2]; 8 NYCRR 200.4[d][2]). While not explicitly required by federal regulation (see 34 CFR 300.324[a][1]-[2]), State regulation provides that CSE's review the student's academic, developmental and functional needs of the student should include "as appropriate, the student's performance on any general State or districtwide assessment programs" (8 NYCRR 200.4[d][2] [emphasis added]).

On this point, it is undisputed that the CSEs that convened in March 2018, April 2018, and May 2018 CSE did not consider the results of the student's 2015-16 or the 2016-17 alternate assessment testing results in the development of the student's present levels of performance contained in the May 2018 IEP. However, even assuming that the failure to consider the results of the student's State-wide assessments may have constituted a procedural violation, the hearing record fails to include any evidence that this procedural inadequacy impeded the ability of the CSE to accurately describe the student's strengths and needs in the present levels of performance or to develop appropriate annual goals and recommend an appropriate placement for the student for the student, or that the purported violation otherwise impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or 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]).

At the impartial hearing, the CSE chairperson testified that students who functioned significantly below the levels of their peers or who had significant or profound disabilities may qualify for the NYSAA and would not be required to take Regents exams (see Tr. p. 92). She explained that New York State had one set of content standards that applied to every student in kindergarten through twelfth grade, that the NYSAA was aligned with the State standards, and the NYSAA monitored a student's attainment of those standards using dynamic learning maps (see Tr.

[37] Intertwined with this allegation, the parent also argues that the district failed to develop an IEP that "utilized . . . any other 'peer-based research' towards developing the [student's] 'present levels of performance'" (Req. for Rev. at pp. 3-4); however, as discussed below, this allegation pertains more closely to an argument about the recommended placement.

pp. 157-58). The CSE chairperson further testified that the NYSAA was administered every year up through a student's eighth grade school year, and then it was administered "once before [a student] exit[ed]" from school (Tr. p. 404).

The hearing record shows that the present levels of performance for the student's 2018-19 IEP were developed over the course of the March, April and May 2018 CSE meetings. At the March 2018 CSE meeting the student's then-current special education teacher briefly shared information regarding the student's NYSAA performance and its impact on programming with the CSE. Specifically, the special education teacher reported that the student was "getting a little bit more fluent with his sentences, a little bit better than he had done on some of the testing that I did, the New York State assessment" (DPC I, IHO Ex. VIII at p. 23). The special education teacher added that the student had done "really well on most portions of that" and "[w]ith looking at that, I've been pulling more out of him with the who, what, where questions so that he can comprehend and also work on vocabulary increasing as well with the social stories" (id. at pp. 23-24).

At the April 2018 CSE meeting, the committee spent a large portion of the meeting on the task of reviewing and revising, as appropriate, the present levels of performance in the 2017-18 IEP with significant input from both parents attending the meeting (DPC I, IHO Ex. XXVII at pp. 33-177). The student's mother shared with committee members a prepared statement detailing what she believed to be the most appropriate present levels of performance for the student (id. at pp. 33-41). The student's mother indicated that she limited her statement to parent concerns and the student's strengths and weaknesses because she was "aware of those" and was unable to write present levels of performance for the student's "reading and writing and math and speech" (id. at pp. 33-34). With respect to specific language to be included in the present levels of performance, at the April 2018 CSE meeting, both the student's mother and her educational consultant signaled agreement with the present levels of performance as they were being developed (see Tr. pp. 68-72). With respect to the description of the student's writing abilities and needs, the parents' educational consultant commented "I think that's good for this year. I think that's perfect" (DPC I, IHO Ex. XXVII at pp. 68-69). Similarly, the student's mother commented "sounds good" when provided with a description of the student's abilities and needs related to mathematics and daily living skills (id. at pp. 69-72). Near the conclusion of the meeting, the CSE decided to put off discussion and revision of the annual goals in the student's IEP for the upcoming school year (2018-19) (id. at pp. 201-14). However, as described above, the April 2018 CSE documented the parent's concerns, which appeared in the May 2018 IEP (DPC I, IHO Ex. XXVIII at p. 5; see DPC I, IHO Ex. XXVII at pp. 84-92).

At the May 2018 CSE meeting, the student's special education teacher and related services providers reviewed the student's IEP goals and the progress he had made during the 2017-18 school year, describing the student's then-current strengths and needs in the process (DPC I, IHO Ex. XXI at pp. 44-139). The CSE chairperson testified that she could not speak as to why the CSE did not use the NYSAA results at the May 2018 annual review, but stated that she knew the team worked "extremely diligently" looking at the student's most recent evaluations, progress toward his annual goals, previous IEPs, and data collected from working with the student to "drive that IEP on the present levels of performance" (Tr. p. 403).

While acknowledging the CSE's responsibility to use a variety of measures to develop a student's IEP, the CSE chairperson opined there was not a "great deal of information provided" in

the NYSAA results and that the scores "just basically" gave the district information regarding whether the student was meeting, partially meeting, or not meeting assessment standards, and that the NYSAA scores and rubric did not provide the district with "an acute area to focus on with goals" (Tr. pp. 399, 414-15). In addition. the district special education teacher testified that there was very little information to gain from the NYSAA scores and noted that when the committee looked at the scores at the most recent CSE meeting, they did not provide a great wealth of information (Tr. p. 622).

Moreover, as previously noted, SEQA—in a September 2018 response to the parent's July 2018 State complaint—addressed, and deemed unfounded, the claim regarding the district's alleged failure to use the student's NYSAA results in the development of the student's 2017-18 IEP (see DPC III, IHO Ex. IV at pp. 28-32). The September 2018 SEQA response also stated that regulations do not require that the scores on State assessments be documented on the IEP (DPC III, IHO Ex. IV at p. 32). Although SEQA's response was confined to the 2017-18 school year, the same factors that SEQA considered in determining that the parent's July 2018 State complaint was unfounded remained true at the time the student's May 2018 IEP for the 2018-19 school year was developed. Accordingly, the reasoning outlined in the September 2018 SEQA decision lends further support to a finding that the district's failure to use NYSAA results in developing the student's May 2018 IEP did not impede the student's right to a FAPE.

2. Annual Goals

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]). Short-term instructional objectives or benchmarks—described as "measurable intermediate steps between the student's present levels of performance and the measurable annual goal"—are required for students who participate in alternate assessment (see 8 NYCRR 200.4[d][2][iv]; see 20 U.S.C. §1414[d][1][A][i][I][cc]; 34 CFR 300.320[a][2][ii]).[38]

[38] To be clear, the parent's request for review cannot be construed to assert a direct challenge to the appropriateness of the annual goals or corresponding short-term objectives in the May 2018 IEP; however, to the extent that the parent's request for review could be interpreted to assert that the failure to align the annual goals with grade-level learning standards rendered the annual goals inappropriate because they lacked baselines upon which to measure progress, the applicable State regulations cited above do not require "baseline" functioning levels to be included in annual goals in an IEP (R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *13 [S.D.N.Y. Sept. 27, 2013] [noting that with respect to drafting annual goals "[c]ontrary to Plaintiffs contention . . . . , nothing in the state or federal statute requires that an IEP contain 'baseline levels of functioning' from which progress can be measured], aff'd 589 Fed. App'x 572 [2d Cir. Oct. 29, 2014]). Instead, the annual goals must meet a simpler criterion—which is that each the annual goal must be "measurable." Moreover, the applicable State regulations cited above also do not require that a student's annual goals must be aligned with grade-level learning standards

State guidance describes short-term instructional objectives as the "intermediate knowledge and skills that must be learned in order for the student to reach the annual goal" ("Guide to Quality [IEP] Development and Implementation," at pp. 37-38, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). According to the same State guidance, short-term instructional objectives break down the skills or steps necessary for a student to accomplish an annual goal into discrete components (id.). Benchmarks are described as "major milestones that the student will demonstrate that will lead to the annual goal"; benchmarks "usually designate a target time period for a behavior to occur" and generally establish "expected performance levels that allow for regular checks of progress that coincide with the reporting periods for informing parents" of progress toward the annual goals (id.). "Short-term instructional objectives and benchmarks should be general indicators of progress, not detailed instructional plans, that provide the basis to determine how well the student is progressing toward his or her annual goal and which serve as the basis for reporting to parents" (id.).

The May 2018 IEP included 26 annual goals with corresponding short-term objectives that were aligned with, and designed to address, the student's identified needs in the areas of study skills, reading, writing, mathematics, speech-language skills, social/emotional and behavioral skills, motor skills, and daily living skills (see DPC I, IHO Ex. XXVIII at pp. 10-15; compare DPC I, IHO Ex. XXVIII at pp. 10-15, with DPC I, IHO Ex. XXVIII at pp. 3-8). A careful review of the annual goals reveals that, consistent with State regulations, each annual goal included the requisite evaluative criteria (i.e., 75 percent success over 10 weeks, 3 out of 5 trials with moderate assistance over one week, 80 percent success with moderate assistance for three consecutive days), evaluation procedures (i.e., recorded observations, structured observations of targeted behavior), and schedules to measure progress (i.e., weekly, monthly) (see DPC I, IHO Ex. XXVIII at pp. 10-15).

In developing the annual goals in the May 2018 IEP for the 2018-19 school year, the May 2018 CSE initially reviewed and discussed, at length, the student's "progress to date" on his then-current annual goals for each related service and academic area prior to—and in direct conjunction with—creating the annual goals for the upcoming school year (DPC I, IHO Ex. XXI at pp. 36-152; compare DPC I, IHO Ex. IX at pp. 7-13, with DPC I, IHO Ex. XXVIII at pp. 10-15). Notably, each parent, either individually or together, expressed agreement with the annual goals created at the May 2018 CSE meeting. For example, with respect to the annual goals drafted for the student's participation in adapted physical education, the student's mother commented "[t]hat's great," "[t]hat sounds like fun," and "[t]hat would be fantastic" (DPC I, IHO Ex. XXI at pp. 37-40). Similarly, in response to the updated progress on his annual goals, as well as the newly created annual goals, as reported by the physical therapist at the May 2018 CSE meeting, the student's mother stated "[t]hanks for setting the bar high" and "[t]hat's a good goal" (id. at p. 69). Also, the hearing record reveals that both parents were actively involved in, and contributed to, the discussions involving the academic annual goals to be included on the 2018-19 IEP (id. at pp. 139-52).

The parent asserts that the district failed to align the student's annual goals with grade-level learning standards. As noted above, CSEs are required to develop short-term objectives or

in order to be appropriate to meet the student's needs.

benchmarks for students designated to participate in alternate assessments (see 8 NYCRR 200.4[d][2][iv]; see also 20 U.S.C. §1414[d][1][A][i][I][cc]; 34 CFR 300.320[a][2][ii]). However, the IDEA does not require a student's IEP goals to align with the state's alternate assessment based on alternate achievement standards; rather, some students may require annual goals for activities that are not closely related to a state's academic content and academic achievement standards (Measurable Annual Goals, 71 Fed. Reg. 46,663 [Aug. 14, 2006]). Further, as noted above, overall, alignment of the IEP with State academic content standards "must guide, and not replace, the individualized decision-making required in the IEP process" (Questions and Answers on Endrew F. v. Douglas County Sch. Dist. Re-1, 71 IDELR 68; Dear Colleague Letter, 66 IDELR 227; see "Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ., at p. 31 [Dec. 2010] [noting that "[g]oals should not be a restatement of the general education curriculum" and that, in developing goals, CSEs should inquire "'What skills does the student require to master the content of the curriculum?' rather than 'What curriculum content does the student need to master?'"]).

At the May 2018 CSE meeting and prior to creating the annual goals for the upcoming school year, the student's mother asked the CSE chairperson whether the student's annual goals "should be derived from the skills and achievement CDOS document or exit document" and specifically whether the student's "academic goals" should be derived from the same source (DPC I, IHO Ex. XXI at pp. 16-17). The CSE chairperson responded by stating, "I didn't say that" (id. at p. 17). She continued to explain that, while "some goals" were needed to address the performance standards noted above, the student's IEP also needed goals to address his "areas of need and deficit in the areas of math, writing and reading, speech, OT, PT" and those areas were where the student's goals were "driven based upon area of deficit and area of need" (id. at p. 18). In addition, the CSE chairperson confirmed for the student's mother that "all IEP goals [were] based on area of need and deficit," including the student's "academic goals" (id.). The CSE chairperson also clarified for the student's mother that the student's annual goals were derived from an area of need and "not necessarily identifying a specific standard" where a student struggled (id. at p. 19).

Based on all of the foregoing, the evidence in the hearing record supports a finding that the annual goals aligned with the student's needs and otherwise met the requirements of the IDEA and federal and state regulations. Further, the parent's allegations about the alignment of the goals to the general education content standards or curriculum do not support a finding that the district denied the student a FAPE on either procedural or substantive grounds (see Jefferson Cty. Bd. of Educ. V. Lolita S., 581 Fed Appx 760, 763 [11th Cir. 2014] [finding that a goal based on the state's standards for ninth grade students was not individualized for the student whose reading comprehension fell at a first-grade level]; see J.S. v. Clovis Unified Sch. Dist., 2017 WL 3149947, at *14 [E.D. Cal. July 25, 2017] [noting with approval a CSE's development of annual goals for a student with significant cognitive disabilities that focused on prerequisite skills to grade-level academic content], aff'd, Solorio v Clovis Unified Sch. Dist., 748 Fed Appx 146 [9th Cir 2019]).

3. Peer-Reviewed Research

With respect to peer-reviewed research, although the parent incorporates his argument within the context of his challenge to the CSE's development of the student's present levels of performance, it appears that, in fact, the parent's argument pertains to the educational placement

recommended by the CSE and his overall contention that it did not represent the student's LRE; to wit, in his memorandum of law, the parent alleges that the CSE's recommendation to "remov[e] [the student] from the general education setting" and from his "home community" was unsupported by peer-reviewed research (Parent Mem. of Law at p. 16).

The IDEA and State and federal regulations require that an IEP must include a "statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child" (20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]; see 8 NYCRR 200.4[d][2][v][b]). According to the Official Analysis of Comments to the federal regulations, based on this requirement:

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

(Statement of Special Education and Related Services, 71 Fed. Reg. 46,664-65 [Aug. 14, 2006] [emphasis added]).

While recognizing the IDEA's requirements regarding peer-reviewed research, courts have generally declined to find an IEP or a recommended program was not appropriate on the sole basis that it violated this provision of the IDEA (see Ridley Sch. Dist. v. M.R., 680 F.3d 260, 275-79 [3d Cir. 2012]; Joshua A. v. Rocklin Unified Sch. Dist., 319 Fed. App'x 692, 695 [9th Cir. Mar. 19, 2009] [finding that "[t]his eclectic approach, while not itself peer-reviewed, was based on 'peer-reviewed research to the extent practicable'"]; A.G. v. Bd. of Educ. of Arlington Cent. Sch. Dist., 2017 WL 1200906, at *9 [S.D.N.Y. Mar. 29, 2017] [rejecting the parents' arguments that the Wilson Reading System must be used "with fidelity" or exclusively in order to provide a FAPE and finding that the incorporation of aspects of Wilson instruction as part of a balanced literacy program was permissible]; see also Pitchford v. Salem-Keizer Sch. Dist. No. 24J, 155 F. Supp. 2d 1213, 1230-32 [D. Or. 2001] [rejecting an argument that a district's proposed IEP was not appropriate because it provided for an eclectic program and holding that the district's offer of FAPE was appropriate notwithstanding its refusal to offer an ABA approach]).[39]

[39] The IDEA expresses a preference that educational services be based on peer-reviewed research, but it is far less clear that, if a student's educational program is reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances, that the lack of peer-reviewed research will nevertheless result in a denial of a FAPE. As one court recently stated of the requirement "To the contrary, the IDEA explicitly says 'to the extent practicable,' which in and of itself suggests that peer-reviewed research is not always required (E.M.

Here, the parent appears to weigh the research tending to support his preferred program for the student against the alleged lack of research in support of the CSE's recommended program; however, this application of the requirement for a program to be supported by peer-reviewed research was rejected in the official comments to the regulations, as set forth above (Statement of Special Education and Related Services, 71 Fed. Reg. 46,664-65 [Aug. 14, 2006]). Moreover, the requirement that the recommended special education program or services be based on peer-reviewed research generally arises in the context of methodology disputes. The preference that a student be educated in the LRE is based on based on decades of research (see 20 U.S.C. § 1400[c][5]), but the standard for examining whether a recommended placement constitutes a particular student's LRE is subject to its own legal standard and the parent may not avoid application of the Newington test by simply producing more research publications about the benefits of mainstreaming students with disabilities.

4. Educational Placement and LRE

The primary argument carried throughout the parent's request for review—including those thinly veiled as allegations relating to State learning standards, access to the general education curriculum, and aligning the annual goals to grade level content—focuses on the parent's desire for the student to be educated within the district, as close to home as possible and consistent with at least one factor to be considered by a CSE when recommending a placement in the LRE. In particular, the parent asserts that the "district failed to 'meaningfully analyze' and/or apply its 'special education resources' towards addressing the unique and individualized needs of the [student], prior to 'outsourcing' his educational-placement" (Req. for Rev. at pp. 1-3 [emphasis in original]). Additionally, the parent asserts that the "district itself remains the [LRE]," and that the "'outsourced' educational-placement recommendation proffered by the . . . district ([the out-of-district public school]) is not an educational-placement recommendation in accord with the doctrine of LRE" (id. at pp. 5-9 [emphasis in original]).

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. of Webster Cent. Sch. Dist., 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. of Borough of Clementon Sch. Dist., 995 F.2d 1204, 1215 [3d Cir.

v. Lewisville Indep. Sch. Dist., 2018 WL 1510668, at *10 [E.D. Tex. Mar. 27, 2018], aff'd, 2019 WL 1466959 [5th Cir. Apr. 1, 2019]; see also Bd. of Educ. of Albuquerque Pub. Sch. v. Maez, 2017 WL 3278945, at *7 [D.N.M. Aug. 1, 2017]; J.S., 2017 WL 3149947, at *10 [noting that there is no absolute requirement that an IEP be supported by peer-reviewed research, but only that it be supported to the 'extent practicable.']; Damarcus S. v. Dist. of Columbia, 190 F. Supp. 3d 35, 51 [D.D.C. 2016] [rejecting the student's claim that an IEP that failed to specify the research-based, peer-reviewed instruction resulted in a denial of a FAPE]).

1993]; J.S. v. N. Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobol, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 CFR 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 CFR 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 CFR 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; the continuum also makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 CFR 300.115[b]).

To apply the principles described above, the Second Circuit adopted a two-pronged test for determining whether an IEP places a student in the LRE, considering (1) whether education in the general classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given student, and, if not, (2) whether the school has mainstreamed the student to the maximum extent appropriate (T.M., 752 F.3d at 161-67 [applying Newington two-prong test]; Newington, 546 F.3d at 119-20; see N. Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048-50 [5th Cir. 1989]). A determination regarding the first prong, (whether a student with a disability can be educated satisfactorily in a general education class with supplemental aids and services), is made through an examination of a non-exhaustive list of factors, including, but not limited to:

> (1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class

(Newington, 546 F.3d at 120; see N. Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50). The Court recognized the tension that occurs at times between the objective of having a district provide an education suited to a student's particular needs and the objective of educating that student with nondisabled peers as much as circumstances allow (Newington, 546 F.3d at 119, citing Daniel R.R., 874 F.2d at 1044). The Court explained that the inquiry is individualized and fact specific,

taking into account the nature of the student's condition and the school's particular efforts to accommodate it (Newington, 546 F.3d at 120).[40]

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).

While keeping these standards applicable to determining the LRE in mind, it is initially necessary to take into account the history of this particular student's relationship with the district and how that history interplays with the procedural requirements of the IDEA. In particular, the IDEA requires a CSE to review and, if necessary, revise a student's IEP at least annually (see 20 U.S.C. § 1414[d][4][A]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]) and a school district must have an IEP in effect at the beginning of each school year for each student with a disability within its jurisdiction (20 U.S.C. § 1414 [d][2][A]; 34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]). In addition to a district's obligation to review the IEP of a student with a disability periodically but at least annually, the IDEA and federal and State regulations also require a CSE, upon review, to revise a student's IEP as necessary to address: "[t]he results of any reevaluation"; "[i]nformation about the child provided to, or by, the parents" during the course of a review of existing evaluation data; the student's anticipated needs; or other matters (20 U.S.C. 1414[d][4][A]; 34 CFR 300.324[b][1][ii][C]; 8 NYCRR 200.4[f][2][ii]).

However, the review and revision of a student's IEP—even annually—does not occur in a vacuum. This is especially true in this instance, where the evidence in the hearing record reveals that three CSE meetings occurred in relatively short succession and information gleaned at each meeting contributed to the development of the student's May 2018 IEP now at issue, as well as the recommendations set forth in the May 2018 IEP (compare DPC I, IHO Ex. XXVIII, with DPC I, IHO Ex. VIII, and DPC I, IHO Ex. XXI, and DPC I, IHO Ex. XXVII).[41] Notably, each CSE meeting began with a report from each of the student's related services providers and his then-current special education teacher about the student's progress, to date, on his annual goals in each area and his present levels of performance (see generally DPC I, IHO Ex. VIII; DPC I, IHO Ex. XXI; DPC I, IHO Ex. XXVII).

In addition to the cumulative information provided through each CSE meeting, the May 2018 CSE was also informed in its decision-making process through prior IHO and SRO decisions concerning the student's FAPE in the LRE. For example, prior to the March 2018 CSE meeting, both an IHO and an SRO had already determined that the 12:1+1 special class placement in a life skills program in an out-of-district public school offered the student a FAPE in the LRE, and thus,

[40] 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).

[41] This assertion is further buttressed by the fact that the same CSE members attended each of the three CSE meetings, with few exceptions (compare DPC I, IHO Ex. VIII at p. 2, with DPC I, IHO Ex. XXI at p. 2, and DPC I, IHO Ex. XXVII at p. 2).

the March 2018 CSE's sole purpose was to identify the out-of-district public school location within which to implement the student's 2017-18 IEP, unless—as noted by that SRO[42]—the student's needs or the placement options available at the district (i.e., the recommended 12:1+1 special class placement in a life skills program) had otherwise changed to the extent that a different placement or location was warranted (see DPC I, IHO Ex. VIII at pp. 1, 3-4; see generally DPC I, IHO Ex. VI; DPC I, IHO Ex. VII).[43, 44] As part of the previous determination, the SRO also found that two separate consultants' reports—prepared with the specific intent to explore placement options within the district consistent with the student's LRE—had been fully considered and vetted by previous CSEs in reaching the decision to recommend a 12:1+1 special class placement in a life skills program in an out-of-district public school (see DPC I, IHO Ex. VII at pp. 13-29). At the March 2018 CSE meeting, the CSE did consider and discuss placement options, including pushing the student into general education classes and the extent to which modifications to the curriculum would be necessary or appropriate to meet the student's needs (see DPC I, IHO Ex. VIII at p. 61). The March 2018 CSE also discussed the parent's preferred placement option, to wit, creating a "hybrid program" consisting of a variety of components selected from the continuum of services (see generally DPC I, IHO Ex. VIII).

At the April 2018 CSE meeting, in addition to engaging in similar discussions regarding placement options on the continuum of services and the parent's preferred "hybrid program," the parent also presented the CSE chairperson with a State guidance document, dated December 2015, which, in part, the parent read to the CSE (DPC I, IHO Ex. XXVII at pp. 12-15; see "School Districts' Responsibilities to Provide Students with Disabilities with Specially-Designed Instruction and Related Services in the Least Restrictive Environment," Office of Special Educ. Field Advisory [Dec. 2015], available at http://www.p12.nysed.gov/ specialed/publications/2015-

[42] The SRO specifically instructed in the decision, which upheld the IHO's determinations, that "the district [was] not absolved of its obligation to continue to attempt to educate the student in the school he would have attended if not disabled unless the student's IEP requires some other arrangement" (DPC I, IHO Ex. VII at p. 28, citing 8 NYCRR 200.4[d][c][4][ii][b]). The same SRO further instructed that, "[w]hile at the time of the hearing in this matter, placement in the district was not a viable option, this may not always be the case, thus, a directive that required placement of the student outside of the district schools would impede the important statutory purpose of attempting, whenever possible, to have disabled students access the public school system through placement in a public school with their nondisabled peers" (DPC I, IHO Ex. VII at pp. 28-29, citing Walczak, 142 F.3d at 132 [noting that the preference for educating students in the least restrictive environment applies even when no mainstreaming with nondisabled peers is possible]).

[43] The evidence indicates that the March 2018 CSE convened to conduct a program review and to "[d]iscuss and recommend [a] program placement and location" for the remainder of the 2017-18 school year (DPC I, Dist. Ex. 2 at p. 2; see DPC I, IHO Ex. VI at pp. 16-17; DPC I, IHO Ex. VII at pp. 5, 7, 26-29; see generally DPC I, IHO Ex. VIII; DPC I, IHO Ex. IX).

[44] At the time of the March 2018 CSE meeting, the district did not have an "alternately assessed program at the high school or middle school level that would address [the student's] functional academic needs" (DPC I, IHO Ex. VIII at pp. 110, 183). However, the district did have "elementary students alternately assessed afforded education within the district" (id. at pp. 67-69, 151-52). Near the conclusion of the March 2018 CSE meeting, the parent's educational advocate asked whether the district had a "waiver for age" that would possibly allow the student "for next year to be in the middle school with the students coming [to the district]" (id. at pp. 181-82). However, the March 2018 CSE continued to recommend a 12:1+1 special class "alternately assessed program" for the student located in an out-of-district public school with "mainstreaming opportunities" for the remainder of the 2017-18 school year (DPC I, IHO Ex. VIII at pp. 183-201; DPC I, IHO Ex. IX at pp. 13-17).

memos/documents/SpecialEducationFieldAdvisoryMemoLRE.pdf; see generally DPC I, IHO Ex. XXVII). The parent read information concerning the LRE and, according to the parent's understanding, the State's "movement" and "effort" toward the goal of "integrat[ing] students . . . within their home school districts" in order to achieve the "least restrictive learning environment possible" (DPC I, IHO Ex. XXVII at p. 15). A brief discussion of this document resulted with the CSE chairperson acknowledging that, at that time, the district did not have a 12:1+1 "alternately assessed program" within the district and she had no further "answer" for the parent's question asking "why the district [was] unwilling to explore educating [the student]" in the "hybrid format" or in "other configurations that [were] available throughout the continuum of placement and services" (id. at pp. 15-17). The parent acknowledged that there was no "update" with regard to other placement options within the district, and in particular, a 12:1+1 "alternately assessed program" (id.).

Culminating at the student's annual review held in May 2018, the CSE ultimately recommended that the student, for the September 2018 through June 2019 portion of the school year, attend a 12:1+1 special class placement that "focus[ed] on functional academics and vocational skills" (i.e., a life skills program) located within the same out-of-district public school location recommended at the March 2018 CSE meeting to implement the student's 2017-18 IEP (see DPC I, IHO Ex. XXVIII at pp. 16-18, 20; compare DPC I, IHO Ex. XXI at pp. 194-97, 206, with DPC I, IHO Ex. VIII at pp. 183-201, and DPC I, IHO Ex. IX at pp. 13-17).

Turning to the more specific issue of whether the 12:1+1 special class placement (or "life skills program") in an out-of-district public school constituted the student's LRE, the evidence in the hearing record demonstrates that each of the three CSEs convened in March, April, and May 2018 included a discussion of this topic, and moreover, that that discussion had essentially been both a continuation—and to some extent, a repetition of—the same discussions held at CSE meetings in the development of the student's 2017-18 IEP (compare DPC I, IHO Ex. VIII, and DPC I, IHO Ex. XXI, and DPC I, IHO Ex. XXVII, with DPC I, IHO Ex. VI, and DPC I, IHO Ex. VII). Thus, while the May 2018 CSE may not have started the LRE discussion from scratch, so to speak, or proceeded linearly through the continuum of services in State regulations in order to conduct the Newington analysis described above, the overall result of three successive CSE meetings—and the discussions held therein—were sufficient to support the conclusion that the May 2018 CSE's decision to recommended an out-of-district public school to implement the student's IEP was appropriate and, furthermore, that the district was not required to create a program to meet its LRE obligations.

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

With respect to LRE, State and federal regulations provide that a district must "ensure" that a student attend a placement "as close as possible to the [student's] home" and "[u]nless the IEP of

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

The evidence in the hearing record demonstrates that the district did not have the 12:1+1 special class program in place at the district high school at the time of the May 2018 CSE meeting (see DPC I, IHO Ex. XXI at pp. 174-210; Tr. pp. 118, 124). Thus, the student's IEP required the "other arrangement" of a special class placement at a school other than a school located within the district (R.L., 757 F.3d at 1191 n.10; White, 343 F.3d at 380 [finding that "it was not possible for [the student] to be placed in his neighborhood school because the services he required are provided only at the centralized location, and his IEP thus requires another arrangement"]; Lebron, 769 F. Supp. 2d at 801; see, e.g., Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006] [noting that districts need not place students in the closest public school to the student's home if "the services identified in the child's IEP require a different location"]; Letter to Trigg, 50 IDELR 48). The evidence in the hearing record also demonstrates that the student's needs did not appreciably change from previous school years when similar recommendations were made to address his needs—despite the progress noted by the student's providers—to the extent that the student's then-current needs warranted placement in another setting on the continuum of services (compare DPC I, IHO Ex. VI, and DPC I, IHO Ex. VII, and DPC I, IHO Ex. XIV, with DPC, IHO Ex. IX, and DPC I, IHO Ex. XXVIII). Moreover, the parent does not point to any changes in the student's needs as a basis for such a finding (see generally Req. for Rev.). Given the foregoing, there is no reason to disturb the IHO's conclusion that the 12:1+1 special class placement in a life skills program located in an out-of-district public school offered the student a FAPE in the LRE for the 2018-19 school year, and the parent's assertions must be dismissed.

VII. Conclusion

Based on the parent's failure to comply with the practice regulations governing appeals to the Office of State Review, the appeal is dismissed. Further, on alternative grounds, the parent's appeal is dismissed as the evidence in the hearing supports the IHO's determination that the district offered the student a FAPE in the LRE for the 2018-19 school year.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
April 17, 2019

SARAH L. HARRINGTON
STATE REVIEW OFFICER