



The University of the State of New York

The State Education Department

State Review Officer

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No. 20-047

Application of the BOARD OF EDUCATION OF THE HEWLETT-WOODMERE UNION FREE SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Ingerman Smith, LLP, attorneys for petitioner, by S. Fahad Qamer, Esq.

Law Offices of Regina Skyer and Assoc., LLP, attorneys for respondents, by Gregory Cangiano, Esq. and Linda A. Goldman, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to directly pay for the tuition costs at Bonim Lamokom (Bonim) for the 2018-19 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

At the time of the impartial hearing, the student was a 14-year old teenager with a diagnosis of Down Syndrome who was eligible for special education programs and services as a student with

an intellectual disability (see Dist. Exs. 21 at pp. 1, 6; 24).^{1, 2} The student attended a 12:1+1 class at Bonim, a private program created for students with Down Syndrome and other special needs housed within a "regular ed" yeshiva that provided students the opportunity to interact with typically developing peers (see Parent Ex. B). The student also received related services of speech-language therapy, occupational therapy (OT), and physical therapy (PT) (Parent Ex. D).

The student attended 12:1+1 special classes in public schools located in another school district for kindergarten through sixth grade (Tr. pp. 238, 240-41). In August 2017, the family relocated to the district that is the subject of this appeal (10/30/19 Tr. p. 241).

Prior to the start of the 2017-18 school year, the parent registered the student for attendance in the district's schools and toured a classroom for an 8:1+2 special class in the district's middle school (10/30/19 Tr. pp. 241-43). According to the parents, they were concerned about the restrictiveness of the 8:1+2 special class and informed the district via letter that they intended to place the student in a different school (10/30/19 Tr. p. 244).³ On September 18, 2017 a Subcommittee of the Committee on Special Education (CSE subcommittee) convened to develop an IEP for the student for the 2017-18 school year (Dist. Ex. 6). The meeting information summary indicated that the student was a "transfer student who was parentally placed in a non-public school" located outside of the district (id. at p. 1). The IEP indicated that prior to the 2017-18 school year, the student had received special education programming through the New York City Department of Education, which included "extended school year services" (12-month services) (id.). Based on the student's prior IEP, parent reports, teacher reports, current levels of school functioning, and CSE subcommittee discussion, the student was recommended for an 8:1+2 special class at the district middle school, along with adapted physical education, OT, PT, speech-language therapy, and a 1:1 aide (id.; see Dist. Ex. 5). The student attended Bonim for the 2017-18 school year (6/6/19 Tr. p. 59). A June 2018 progress report indicated that the majority of the student's academic skills were scattered between a pre-kindergarten and first-grade level (Dist. Ex. 9 at pp. 1-11).

The CSE subcommittee reconvened on June 20, 2018 to conduct an annual review of the student's program and develop an IEP for the student for the 2018-19 school year (Dist. Ex. 10). The meeting information summary indicated that based on parent reports, teacher reports, current levels of school functioning, and CSE subcommittee discussion, the student was recommended for an 8:1+2 special class at the district middle school, adapted physical education and related services (id. at p.1). More specifically, for the 10-month school year the June 2018 CSE subcommittee recommended that the student attend 8:1+2 special classes (one time daily for 40 minutes) for

¹ The hearing record includes four transcripts dated June 6, 2019, June 14, 2019, July 30, 2019, and October 30, 2019. The transcripts dated June 6, 2019 and June 14, 2019 were paginated consecutively (Tr. pp. 1-328). The pagination for the transcript dated July 30, 2019 began with page one, continuing with consecutive pagination in the October 30, 2019 transcript (Tr. pp. 1-333). For purposes herein, any citation to the transcript will be notated with the transcript date and page number (i.e., 6/6/2019 Tr. p. 50; 6/14/19 Tr. p. 50; 7/30/19 Tr. p. 50; 10/30/19 Tr. p. 50).

² 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]).

³ The hearing record does not contain a copy of the letter referenced by the parent.

English-Language Arts (ELA), functional math, topics of science and health, community awareness, and communication skills (id. at p. 15). The CSE subcommittee also recommended that the student participate in adapted physical education once daily for forty minutes (id.). In addition, the CSE recommended that the student be provided with weekly related services consisting of three 30-minute sessions of individual OT, two 30-minute sessions of individual PT, and three 30-minute sessions of individual speech-language therapy (id. at pp. 1, 15). The CSE subcommittee recommended that the student receive 12-month services, including attendance in an 8:1+1 special class for three hours per day and weekly related services consisting of two 30-minute sessions of individual speech-language therapy and two 30-minute sessions of small group OT (id. at pp. 1, 16-17). The June 2018 IEP reflected the CSE subcommittee recommendations for supplementary aids and services/program modifications/accommodations for prompting (during academic instruction), visual aids (to support learning), a slant board (for academic tasks), foot support (if feet not touching ground in classes), and concrete examples (provided during instruction) (id. at pp. 15-16). The CSE subcommittee recommended the student participate in the New York State Alternate Assessment, that he be exempt from the requirement for learning a language other than English, and that he be provided with special transportation in the form of a small bus or vehicle with an attendant and air conditioning, as well as curb to curb transportation (id. at pp. 17-18).

In a June 21, 2018 prior written notice sent to the parent, the district summarized the discussion and details of the previous day's CSE subcommittee meeting and the resultant recommendations for the student (Dist. Ex. 32). Notably, the prior written notice indicated that the parents advised the June 2018 CSE subcommittee that she was declining summer services as the student was going to camp (id.).⁴ In terms of the 2018-19 school year placement, the prior written notice indicated that the parent shared her disagreement with the CSE subcommittee's recommendation (id.). Although the parent stated that she was in agreement with the "assessment, needs, and goals," she wanted the student to maintain this then-current placement (id.). The prior written notice included details about why the recommendation was proposed, and a description of each evaluation procedure, assessment, record, or report used in the CSE subcommittee's decision (id.). The prior written notice indicated that the CSE subcommittee considered a 15:1+1 special class program at the district middle school, but that option was rejected because the program would not meet the student's academic needs, particularly his functional academic and daily living skills needs (id.). Also, the CSE considered the support of a 1:1 aide; however, that option was rejected because the student no longer needed that level of support (id. at p. 2). The parent shared that the student had a 1:1 aide in his elementary school due to toileting concerns (id.). However, the parent and staff from Bonim shared that toileting was not a significant issue this past year at school and the student did not need the 1:1 aide (id.). The CSE considered three sessions of PT per week during the school year (id.). The physical therapist at the CSE subcommittee meeting opined that the student's goals could be met with two sessions per week and that three sessions would be overly restrictive (id.). The parent shared her agreement with the decrease in PT (id.). The CSE subcommittee considered PT over the summer; however, that option was rejected as it was determined (with input from the parent) that the student did not need PT over the summer to

⁴ The hearing record included written correspondence dated June 26, 2018 from the parent "[t]o whom it may concern" to "certify the student would not be utilizing any (12-month) services or related services over the summer" (Dist. Ex. 13).

prevent regression with his motor skills (id.). The prior written notice indicated the CSE recommended moving up the student's reevaluation (from January 2019) to the forthcoming summer to help obtain updated information on the student's functioning (id.). Other information included in the prior written notice pertained to procedural safeguards, sources of contact for the parent to obtain assistance in understanding the special education process, and contact information to address the committee in person or in writing on the appropriateness of its recommendations (id.).

Following the June 2018 CSE meeting the district conducted a reevaluation of the student. The reevaluation included a social history update, a transition assessment, a speech-language evaluation, a vocational/employability assessment, an OT evaluation, a psychological evaluation, a PT evaluation, an educational evaluation, a classroom observation, and a level 1 career assessment (staff questionnaire). (Dist. Exs. 15-16; 18-23; 25; 27). The CSE subcommittee subsequently reconvened on November 13, 2018 for a reevaluation review (Dist. Ex. 28 at p. 1). Based on a review of the evaluations and committee member discussion, the CSE subcommittee continued to recommend the same special education program for the student (compare Dist. Ex. 10 at p. 1, with Dist. Ex. 28 at p. 1). However, the CSE subcommittee revised the student's present levels of performance and annual goals and added one 60-minute session per month of parent counseling and training to the IEP (compare Dist. Ex. 10 at pp.1, 3-17, with Dist. Ex. 28 at pp. 1, 4-21; see Dist. Ex. 31). According to a December 3, 2018 prior written notice, the CSE subcommittee discussed the need for an assistive technology and/or augmentative/assistive communication evaluation; however, the student's mother and school team agreed that they were not needed (Dist. Ex. 31 at p. 1).

A. Due Process Complaint Notice

In a due process complaint notice dated January 24, 2019, the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 2018-19 school year and sought funding for the student's placement at Bonim (Dist. Ex. 1 at p. 1).

The parents alleged that the district denied the parents the opportunity to participate in the development of the student's program (Dist. Ex. A at p. 7). More specifically, the parents asserted that they raised concerns regarding the student, but the district did not consider the parents' concerns in recommending an 8:1+2 program "without meaningful opportunities for integration" or supports for the student to remain in a less restrictive environment (id.).

The parents further alleged that the CSE's recommendation was not based on the information available to the CSE, including the student's prior IEP and a psychoeducational evaluation (Dist. Ex. 1 at p. 3). According to the parents, the district's failure to conduct a vocational assessment resulted in a denial of FAPE (id. at pp. 4-5). The parents further alleged that the annual goals contained in the June 2018 IEP were immeasurable and generic (id. at p. 5). The parents contend that the goals did not include a baseline or sufficiently describe the skills the student would be expected to demonstrate, instead using generic language (id.). Additionally, the parents asserted that the annual goals were not tailored to the student's educational and social-emotional needs (id.). The parents further contended that the resources recommended to address

the student's management needs were insufficient as they only included three generic strategies and did not identify the student's social-emotional needs (id. at pp. 5-6).

According to the parents, the CSE did not adequately consider special factors (Dist. Ex. 1 at pp. 6, 7). The parents alleged that the CSE did not consider positive behavioral supports to address the student's behaviors that "have clearly impeded [the student] from learning" (id. at p. 7). The parents also alleged that the CSE did not consider assistive technology, as the CSE did not conduct an assistive technology evaluation or consider whether assistive technology would allow the student to access his educational program (id. at p. 6).

The parents asserted that the recommend 8:1+1 special class was not appropriate for the summer because the student needed "meaningful opportunities to interact and work alongside the mainstream population," the CSE did not justify the recommendation for an 8:1+1 special class for three hours per day, and the CSE did not justify the reduction in OT and speech-language therapy or "the removal" of PT (Dist. Ex. 1 at pp. 2-3). The parents further alleged that the change in program recommendation beginning in September 2018 is evidence that the recommendation for the summer was not based on the student's needs but on what was available in the district (id. at p. 3).

With respect to the 8:1+2 special class recommendation beginning in September 2018, the parents claimed that the class was inappropriate because it was more restrictive than the 12:1+1 special class the student had been successful in and it would not support the student's independence in the community (Dist. Ex. 1 at p. 3). The parents alleged that the recommended program would not have allowed the student any opportunities to participate with mainstream peers other than during recess (id. at p. 4).

The parents contended that the student's mother visited the proposed class and determined that it "was geared toward working on functional life skills" and that it would "forego [the student's] academic needs" (id. at p. 3). The parents alleged that the class did not have a suitable peer grouping as many of the students exhibited behavioral problems and the grouping lacked appropriate peer models (id. at p. 4).

Finally, the parents alleged that their placement of the student at Bonim for the 2018-19 school year was appropriate and that equitable considerations supported the parents' claims (Dist. Ex. 1 at pp. 7-8). As relief, the parents requested placement of the student at Bonim for the 2018-19 school year (id. at p. 8).

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing on June 6, 2019, which concluded on October 30, 2019 after four days of hearings (June 2019 Tr. pp. 1-328; July-October 2019 Tr. pp. 1-333). In a decision dated January 31, 2020, the IHO determined that the district did not offer the student an appropriate program for the 2018-19 school year, the parents met their burden of proving that Bonim was an appropriate placement, and equitable considerations supported the parents' requested relief (IHO Decision at pp. 8-11). The IHO also noted that the parents were only seeking payment from the district for the portion of the school day that was not devoted to religious instruction, and accordingly awarded the parents ninety percent of the cost of Bonim for the 2018-

19 school year (*id.* at p. 11). On a final note, the IHO found the parents could not afford to front the cost of tuition and directed the district to reimburse the parents for any payments made to Bonim and to make the remaining payments directly to the school (*id.* at pp. 11-13).

With respect to the IHO's finding that the CSE's recommendation for a 8:1+2 special class was not appropriate, the IHO found that the class was smaller, and thus more restrictive, than the 12:1+1 class the student had been attending (IHO Decision at p. 8). The IHO also found that the proposed mainstreaming opportunity for the student in the district was a voluntary program that was not included on the IEP, and was thus retrospective and could not be considered in determining the appropriateness of the offered program (*id.* at pp. 8-9). The IHO contrasted the mainstreaming opportunities the student had at Bonim, finding them to be significant, with the mainstreaming opportunities available in the district, finding them to be insufficient in comparison (*id.*). Additionally, the IHO accepted the testimony of the principal of Bonim that the district's program would not have had an appropriate grouping for the student (*id.*). Finally, the IHO noted that an 8:1+2 special class is intended for "students whose management needs are determined to be intensive" and that the evidence in the hearing record did not indicate that this student had such needs (*id.* at p. 10).

IV. Appeal for State-Level Review

The district appeals from the IHO's determination that the district did not offer the student a FAPE for the 2018-19 school year.

The district contends that the recommendation for an 8:1+2 special class was appropriate to address the student's intensive management needs and further contends that the student needed to be in a program that addressed activities of daily living and functional academic skills. According to the district, a 12:1+1 class would not have been supportive enough for the student. The district asserts that the IHO erred in comparing the district's recommendation for an 8:1+2 special class with the class the student was in at Bonim and that the IHO should have analyzed the district's recommendation independently. Additionally, the district asserts that the student was in a 12:1+2 class at Bonim and required additional supports as the student also received 1:1 instruction in his core academic classes. The district further alleges that the IHO erred in finding the district's 8:1+2 special class was not in the student's LRE. To that end the district asserts that the proposed class was as close to the student's home as possible and was located in a community school which provided an opportunity for the student to socialize with typically developing peers. In addition, the district contends that the district's program provided opportunities for the student to access the local community in field trips. The district contends that the IHO erred in not taking into consideration mainstreaming opportunities that were available at the district school, contending that the parents were aware of these opportunities during the CSE meeting and that the district's testimony merely explained and justified the program recommendation. Additionally, the district contends that the IHO erred in finding that the district would not have grouped the student appropriately. The district argues that the IHO's finding was speculative, as the parents were not aware of the grouping at the public school when they decided to place the student at Bonim.

The district also appeals from the IHO's determinations that the district's placement of the student at Bonim was appropriate and that equitable considerations weighed in favor of the parents. The district's specific objections include that it is a long commute from the student's home (over one hour in each direction) and therefore outside of his community, the school is not the student's least restrictive environment because the other students in the class are all male and diagnosed with Down Syndrome, the other students are at a lower cognitive level than the student, and the student's teachers at the school are not qualified because they are not certified in special education and do not have college degrees. Regarding equitable considerations, the district contends that the parents were not open to considering the district's program.

In an answer, the parent argues for upholding the IHO's determination that the district did not offer the student a FAPE in the LRE or an appropriate peer group.

V. Applicable Standards

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

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

FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (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]).²

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should

have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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. Scope of Review

As an initial matter, it is necessary to identify which of the parties' arguments are properly before me on appeal. State regulations governing practice before the Office of State Review require that the parties set forth in their pleadings "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 further specify that "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][2], [4]; see 8 NYCRR 279.4[a]).

Initially, the parents asserted a number of issues in their due process complaint notice which are not raised in their request for review, such as claims related to parent participation, evaluative information, annual goals, management needs, 12-month services, and special factors such as positive behavioral supports and assistive technology. The IHO did not address these claims in his decision and the parents do not raise these claims in their request for review or argue that the IHO failed to address them. Accordingly, because it is not an 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]), I am constrained to determine that the claims set forth in the request for review and not raised on appeal have been abandoned by the parents and will not be considered further.

B. June 2018 IEP

The IHO made several findings with respect to the June 2018 IEP. Of particular note, the IHO found that the recommended 8:1+2 special class was not in the student's LRE and further found that the student's management needs did not warrant placement in an 8:1+2 special class. The district appeals from those findings.

1. The Student's Needs

For purposes of context, it is necessary as a preliminary matter to consider the evaluative information available to the June 2018 CSE subcommittee regarding the student's needs and abilities and whether the resultant IEP provided the student with a FAPE in the LRE.

The "evaluation results" section of the June 20, 2018 IEP reveals that the CSE subcommittee had various reports from Bonim available for its consideration, including an OT progress summary report, a PT progress summary report, and a speech-language progress summary report, all dated June 20, 2018 and all containing a description of the student's then-present levels of performance (PLEPs) and recommended annual goals (Tr. pp. 60-63; Dist. Exs. 9 at pp. 10-22; 10 at p. 2). The CSE subcommittee also had a special education progress report provided by Bonim available for review (Tr. p. 60-62; Dist. Exs. 9 at pp. 2-9; 10 at p. 2). In addition, the evaluation section reflected the results of a January 2016 psychoeducational evaluation that included administration of the Wechsler Abbreviated Scale of Intelligence- Second Edition (WASI-II) and the Woodcock-Johnson Tests of Achievement- Third Edition (WJ III ACH) (Dist. Ex. 10 at p. 2; see Dist. Ex. 3).⁵ Lastly, the June 2018 IEP and the June 21, 2018 prior written notice indicated the CSE subcommittee considered input provided by the parents and principal and special education teacher from Bonim (Dist. Ex. 32 at p.1; see Dist. Ex. 10 at pp. 2-7). Testimony by the CSE chairperson confirmed the availability of the Bonim reports (6/6/19 Tr. pp. 53-54, 69-63). The CSE chairperson reported that the subcommittee used the progress report provided by Bonim as a starting point for a conversation about the student's functional levels and then "talked it out" with the parent, Bonim principal, and the student's special education teacher (6/6/19 Tr. pp. 71-72). The CSE Chairperson testified that the student's present levels of performance were generated from the information provided by the parent and Bonim staff (6/6/19 Tr. p. 72; see Dist. Ex. 9). The CSE chairperson further indicated that the CSE subcommittee used reports from Bonim as a basis for developing the student's IEP and that, as part of the discussion during the meeting, he added things to the IEP (6/6/19 Tr. pp. 101-02; 181).

The present levels of performance of the June 2018 IEP included information about the student's basic cognitive/daily living skills, academics (reading, writing, mathematics, and speech-language abilities), social development, and physical development (Dist. Ex. 10 at pp. 2-6).

With regard to the student's basic cognitive/daily living skills, the June 2018 IEP indicated that the student had Down Syndrome and "was classified with an Intellectual Disability" (Dist. Ex. 10 at p. 3; see Dist. Ex.7). The IEP specified the student knew "a lot of his own personal information" and could verbally state his age, the names of his siblings, the name of his town, his street address, birthday (month and day), and telephone number (6/6/19 Tr. p. 73; Dist. Ex. 10 at p. 3). The student had not mastered his parents' names, his complete address, and complete birthday (month, day, year) (id.). According to the IEP, the student had mastered his knowledge of all the major colors (Dist. Ex. 10 at p. 3). In addition, he was able to identify the following body parts: mouth, eyes, nose, feet, hair, tongue, head, ears, hands, legs, arms, and fingers (6/6/19 Tr. p. 73; Dist. Ex. 10 at p. 3). The student followed one-step and two-step directions but did not consistently follow three or four-step directions (6/6/19 Tr. p. 73; Dist. Ex. 10 at p. 3). In terms of

⁵ Testimony by the CSE chairperson indicated that the information in the January 2016 psychoeducational evaluation report was not used directly to develop the student's June 2018 IEP, although he reviewed the report prior to the meeting (6/6/19 Tr. pp. 65-66; Dist. Ex. 3).

self-help skills, the student put on clothing, cared for his own toileting needs, tied his shoes and knew which shoe went on which foot, took care of personal items, and prepared for different activities with minimal supervision (6/6/19 Tr. pp. 73-74; Dist. Ex. 10 at p. 3).

With regard to reading, the June 2018 IEP indicated the student was able to recite the whole alphabet and read all uppercase and lowercase letters (6/6/19 Tr. p. 74; 10 at p. 3). According to his school, the student's word recognition, oral reading, and reading comprehension were all at the kindergarten level (6/6/19 Tr. p. 75; Dist. Ex. 10 at p. 3). The IEP further indicated that the student's current school (Bonim) used a decoding program to teach the student basic reading skills (6/6/19 Tr. pp. 75-76; Dist. Ex. 10 at p. 3). At the time the IEP was developed, the student was on Book A, which addressed "the consonant level" (6/6/19 Tr. p. 76; Dist. Ex. 10 at p. 3). At the time, the student was developing his consonant and vowel blends but had not yet mastered all the consonant sounds (Dist. Ex. 10 at p. 3). The June 2018 IEP identified that the student had mastered consonant-vowel-consonant (CVC) words and was working on mastering consonant-consonant-vowel (CCV) words (6/6/19 Tr. p. 76; Dist. Ex. 10 at p. 3). The student had also mastered approximately 15-20 sight words (Dist. Ex. 10 at p. 3). However, the IEP indicated that according to the parent, the student used to have a larger bank of sight words (*id.*).⁶ The IEP noted that the student did not yet read for information, and while he was able to identify and label pictures, he could not make inferences based on a picture (*id.*). The parent shared that the student could read some basic text messages and the weather on the phone (*id.*).

With regard to writing, the June 2018 indicated that the student was able to print all uppercase letters, write 16 lowercase letters and was still working on mastering the other 10 lowercase letters (6/6/19 Tr. p. 76; Dist. Ex. 10 at p. 3). The student was able to write his own name, but no other personal information (Dist. Ex. 10 at p. 3).⁷ The IEP indicated that spelling was not a part of the student's current curriculum and his knowledge of that skill was not assessed by his program (6/6/19 Tr. p. 77; Dist. Ex. 10 at p. 3; see Dist. Ex. 9 at p. 6). The CSE chairperson indicated that the parents informed the CSE subcommittee that the student had worked on spelling in the past, but that it was not part of his program at Bonim during the 2017-18 school year (6/6/19 Tr. pp. 77-78; see Dist. 9 at p. 6).

With regard to mathematics, testimony by the CSE chairperson indicated the progress report provided to the CSE subcommittee contained different elements of functional math (i.e., money skills, counting skills, number recognition) (6/6/19 Tr. p. 80). Reflecting the progress report from Bonim, the IEP indicated the student was able to rote count up to 50 but had not mastered rote counting past that point (compare Dist. Ex. 9 at 4, with Dist. Ex. 10 at p. 3). The student demonstrated one-to-one correspondence (Dist. Ex. 10 at p. 3). He recognized numbers up to nine but did not recognize numbers from 10 and above (*id.*). The student added single digits (without regrouping) with sums up to eight (6/6/19 Tr. p. 80; Dist. Ex. 10 at p. 3). He did not yet

⁶ The January 2017 IEP, which was developed when the student attended a public middle school in another district, indicated that the student had learned over 60 sight words since the start of that school year (2016-17) (Dist. Ex. 5 at p. 1).

⁷ Although the June 2018 IEP indicated the student was able to write his own name but no other personal information at that point, the report from Bonim and testimony by the CSE chairperson indicated the student could also write his age and telephone number (Tr. p. 77; Dist. Ex. 9 at p. 4).

have any subtraction skills and the student was not exposed to a calculator at Bonim (6/6/19 Tr. pp. 80-81; Dist. Ex. 10 at p. 3). According to the IEP, the parents shared that the student was exposed to a calculator in his school prior to Bonim, and he demonstrated some subtraction skills there (Dist. Ex. 10 at p. 3). With regard to money, the student used the correct name for labeling pennies, nickels, and dimes but did not do so for a quarter and a dollar (6/6/19 Tr. p. 81; compare Dist. Ex. 9 at p. 9 and Dist. Ex. 10 at p. 3). The IEP indicated that the student understood values for one cent, five cents, and ten cents (Dist. Ex. 10 at p. 3). With regard to telling time, the student understood "clock space" by units of five and he understood how to count minutes by fives (6/6/19 Tr. p. 81; Dist. Ex. 10 at p. 4). The student did not know how to read a digital clock formally (6/6/19 Tr. p. 81; Dist. Ex. 10 at p. 4). As noted in the IEP, the student did not relate time with his own activities and did not possess calendar skills (Dist. Ex. 10 at p. 4).

With regard to the student's speech-language development, consistent with the Bonim speech-language progress report, the June 2018 IEP indicated the student presented with receptive, expressive, and pragmatic language delays (compare Dist. Ex. 9 at p. 20 and Dist. Ex. 10 at p. 4). The student was easily distracted and often needed to be redirected to complete simple tasks (Dist. Ex. 10 at p. 4). The June 2018 IEP indicates that the student could answer simple "wh" questions but had difficulty with "why" and "how" questions (id.). The student also had difficulty with temporal concepts (id.). The IEP noted that the student presented with delays in his syntax skills, as he often skipped articles in his sentence production (id.). The student presented with a frontal lisp for the phonemes /s/ and /z/ and the /ts/ cluster and with a tongue protrusion on lingual sounds /t, d, n, l/, which affected his speech intelligibility (id.). In addition, the student spoke with an increased rate of speech, which further affected his clarity (id.). In the area of social pragmatics, the IEP noted that the student had difficulty with maintaining and transitioning topics in conversation and using appropriate proximity (id.). According to the June 2018 IEP, the student understood many quantitative, directional, and positional concepts (e.g., big/little, full/empty, open/closed, on/off, top/bottom, up/down), but struggled with others (e.g., long/short, large/small, over/under, forward/backward) (id.). The student was able to answer basic wh-questions (i.e., Who is this picture about?) but struggled to provide further explanation about it (id.). The student had difficulty categorizing objects and his vocabulary comprehension was an area of weakness for him (id.).

With regard to the parent's concerns about the student's basic cognitive, academic, and activities for daily living (ADL) skills, the June 2018 IEP indicated the student's mother shared with the CSE subcommittee that the student had a great year at Bonim (Dist. Ex. 10 at p. 5). She reported that the student made progress with his ADL skills, organization, math, and reading skills, as well as with his ability to follow routines in school (id.). In addition, the parent shared with the subcommittee her concern that the assessment of the student's functional skills (as per his school's report) did not always match what she observed at home (id.). According to the IEP, there were some (unspecified) academic skills that the parent observed at home that were not observed at school (id.).

With regard to the student's present levels of social development, the June 2018 IEP indicated the student enjoyed being social with his peers and interacting with others (Dist. Ex. 10 at p. 5). The IEP described the student as well-behaved and noted that he participated twice weekly with nondisabled peers as study partners in a push-in model and during physical education class

(id. at pp. 4, 5). The IEP indicated the student's social skills were described as an area of relative strength (id. at p. 5). The student participated socially in sports programs in the community and he enjoyed music and watching sports videos (classic professional games and bloopers) on an iPad (id.). The IEP indicated that per report from the student's school team (from Bonim), there were no social needs to be addressed through special education at that time (id.). According to the IEP, the student's mother shared that sometimes the student would be stubborn, but there were no significant social concerns (id.). She also shared that she wanted to see the student sustain social interactions for a longer period of time (id.). The IEP indicated that the parents' desire for the student to increase the length of his social interactions would be addressed through goals targeted in speech-language therapy (id.).

With regard to the student's present levels of physical development, the June 2018 IEP included OT and PT summary information consistent with progress reports from his OT and PT providers at Bonim (Dist. Ex. 10 at p. 5).⁸ Specific to OT, the IEP indicated the student displayed moderate handwriting skills and had difficulty with various pre-writing and ADL tasks (id.). The student presented with upper extremity weakness and decreased fine motor skills (id.). In addition, he had a decreased attention span and displayed deficits in visual perceptual/motor and ADL skills, all of which affected his performance in the school and home environment (id.). The IEP stated that the student's delays limited him in the classroom setting, "not allowing him to learn appropriately and [the student] require[d] intervention in this area" (id.). The IEP noted that the student had demonstrated progress in some of his ADL skills (id.). He was able to self-feed during lunchtime with occasional verbal cues; however, his face could be dirty after eating and he was unaware of this (id.).⁹ The IEP indicated that the student was able to button his own shirt independently most of the time (id.). The student was able to close his zipper on his sweater, but still had difficulty with his winter coat (id.). The parent reported that the student just needed practice to complete this skill (id.). According to the IEP, the student was working on his pre-writing/writing skills, such as pencil grasp and forming various lowercase letters properly (id.). The IEP noted that the OT provider reported the student would be using a computer to aid in written communication skills (id.; see 6/6/19 Tr. pp. 172-73).

Turning to PT, the June 2018 IEP indicated that the student received PT services to address his gross motor delays (Dist. Ex. 10 at p. 5). The student's delays were related to his kyphotic and slouch posture, quality of gate and stair negotiation, coordination and balance, strength and endurance, as well as his flexibility and range of motion in his lower extremities (id.). According to the IEP, these delays negatively affected the student's performance in the classroom and physical education setting (id.). The IEP noted that the student had been making "great progress" with object manipulation such as catching and throwing different size balls from various distances (id.). At the time of the June 2018 CSE meeting, the student was able to catch a tennis ball from

⁸ Review of District Exhibit 9 revealed that pages 10-11 and pages 12-13 are duplicates (see Dist. Ex. 9 at pp. 10-13).

⁹ The CSE chairperson indicated that the statement "He is able to self-feed during lunch time with occasional verbal cues," was taken directly from the OT progress report from Bonim (Tr. p. 101; Dist. Ex. 9 at p. 10). He reported that the CSE subcommittee added, "However, his face can be dirty after eating, and he is unaware of this," because that information was brought to the attention of the CSE subcommittee and it was not included in the progress report (Tr. pp. 101-02; Dist. Ex. 9 at p. 10).

five feet with hands and chest (*id.*). The student had been making steady progress with lower extremity strength/endurance demonstrated by improved performance in activities such as frog jumps, broad jumps, and hopping (*id.*). In addition, the student had made slight progress with increasing his lower extremity range of motion, specifically in the hamstrings and lower back, which affected proper performance of physical activities and proper sitting and standing posture (Dist. Exs. 9 at p. 17; 10 at pp. 5-6). According to the IEP, the student required multiple prompts to attend to task and constant redirection when distracted (Dist. Exs. 9 at p. 17; 10 at p. 6). The student was learning to skip, leap, hop, and gallop (*id.*). The IEP indicated that, as reported by Bonim, the student "did not know left and right" (Dist. Ex. 10 at p. 6).

In terms of the student's strengths in physical development, the June 2018 IEP indicated that the student was a pleasant boy and he enjoyed prizes as a good incentive for motivation (Dist. Ex. 10 at p. 6). In addition, the student enjoyed playing basketball and hockey with his peers (Dist. Ex. 9 at p. 17). The IEP listed the following physical development needs of the student: improve ADL skills; improve skills for holding a pencil and writing lowercase letters; improve ability to use a keyboard, scan the keyboard and learn where the letters are located; improve visual perceptual skills and spatial concepts ; improve posture, stair negotiation, coordination, balance, strength and flexibility; and improve body in space awareness (Dist. Ex. 10 at p. 6). With regard to adapted physical education needs, the IEP indicated the student needed to improve his dynamic behavior and coordination skills (*id.*). The IEP further noted that the parent said she did not have any additional concerns other than the needs that were discussed and agreed upon during the CSE subcommittee meeting (*id.*).

With regard to the student's academic, developmental and functional needs, including consideration of student needs that were of concern to the parent, the CSE chairperson testified that the June 2018 CSE subcommittee used the progress report from Bonim as the basis for determining the student's needs, in conjunction with discussion with the student's teacher, principal, parent, and other committee members who were listening and provided feedback about what they considered next steps in the student's development (6/6/19 Tr. p. 82; *see* Dist. Ex. 9).¹⁰ The June 2018 IEP indicated that the student required small group instruction, tasks broken down

¹⁰ The June 2018 IEP listed following identified student needs: (1) increase his knowledge of his personal data; (2) increase his self-help skills such as keeping his shirt tucked in, keeping his hands and feet clean after meals, and using personal hygiene items such as deodorant and sunscreen; (3) increase his ability to identify major body parts, including hip and ankle; (4) learn to print his personal data, including his address, to complete a form; (5) improve his decoding skills by increasing his knowledge of consonant blends; (6) improve his sight word vocabulary; (7) improve his reading comprehension from a kindergarten level to the lower end of first grade level; (8) learn to apply his reading skills to follow a simple direction; (9) develop his spelling skills, particularly words two or three letters in length; (10) learn to recognize numbers 10-20; (11) improve his addition skills by adding sums up to 12; (12) improve his money recognition skills such as with a quarter and a dollar; (13) improve his skills with adding points to create sums of money (specifically using nickels and dimes to create sums up to 50 cents); (14) improve understanding of time as it applies to his routine; (15) increase his ability to produce speech sounds correctly and controlling his rate of speech; (16) improve his ability to maintain a topic of conversation; increase his vocabulary; (17) improve his ability to categorize objects; provide further explanation about what is going on in a picture and be able to sequence pictures in the appropriate order; (18) increase his understanding of concepts (Dist. Ex. 10 at p. 4).

into simple steps, and an incline board and foot support to address his management needs (Dist. Ex. 10 at p. 6).

Furthermore, the CSE chairperson indicated that the CSE subcommittee addressed the student's needs listed in the student's IEP by developing 31 measurable annual goals, each one aligned to a need included in the IEP (6/6/19 Tr. p. 82-97; compare needs Dist. Ex. 10 at pp. 4-7 and goals Dist. Ex. 10 at pp. 7-15). As the CSE subcommittee recommended that the student participate in alternate assessment, each annual goal included in the June 2018 IEP had multiple short-term objectives that broke the goal down into smaller intervals/benchmarks of achievement, leading toward anticipated achievement of the goal (6/6/19 Tr. pp. 111, 180-81; Dist. Ex. 10 at pp. 7-15, 17).¹¹

With regard to special factors, the June 2018 IEP indicated that the student did not need behavioral interventions, supports and other strategies to address behaviors that impeded his learning or the learning of others, nor did he need a behavior intervention plan (Dist. Ex. 10 at p. 6). Although the IEP indicated the student needed a device or service to address his communication needs (i.e., writing), testimony by the district special education teacher who participated in the June 2018 CSE subcommittee indicated that the student's parent and his team from Bonim thought the student would be highly distracted by an assistive technology device and that they did not want to pursue assistive technology at that time but would revisit the possibility of assistive technology in the future (6/6/19 Tr. pp.110-11; 6/14/19 Tr. pp. 278, 310-11; Dist. Ex. 10 at pp. 5, 7).

2. 8:1+2 Special Class

The district objects to the IHO's comparison of the 8:1+2 special class recommendation with the class the student was attending at Bonim and contends that the student needed the supports available in an 8:1+2 special class.

State regulations provide that a special class placement with a maximum class size not to exceed 8 students, staffed with one or more supplementary school personnel, is designed for "students whose management needs are determined to be intensive, and requiring a significant degree of individualized attention and intervention" (8 NYCRR 200.6 [h][4][ii][b]).¹²

¹¹ 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]; 20 U.S.C. §1414[d][1][A][i][I][cc]; 34 CFR 300.320[a][2][ii]).

¹² Supplementary school personnel "means a teacher aide or a teaching assistant" (8 NYCRR 200.1 [hh]). A teaching assistant may provide "direct instructional services to students" while under the supervision of a certified teacher (8 NYCRR 80-5.6 [b], [c]; see also 34 CFR 200.58 [a][2][i] [defining paraprofessional as "an individual who provides instructional support"]). A "teacher aide" is defined as an individual assigned to "assist teachers" in nonteaching duties, including but not limited to "supervising students and performing such other services as support teaching duties when such services are determined and supervised by [the] teacher" (8 NYCRR 80-5.6 [b]). State guidance further indicates that a teacher aide may perform duties such as assisting students with behavioral/management needs ("Continuum of Special Education Services for School-Age Students with

The CSE chairperson testified that some students who required placement in an 8:1+2 program had intensive management needs but it depended on the student and there was a range (6/6/19 Tr. pp. 157-58). He opined that management needs could be related to a student's academic and cognitive levels, as well as their behavior (6/6/19 Tr. p. 158; see 6/6/19 Tr. pp. 173-74). The CSE chairperson indicated the student did not have intensive behavioral needs, but he was not able to handle higher level academics given his cognitive and academic levels (6/6/19 Tr. pp. 158, 173). The CSE chairperson explained that from an instructional standpoint, the student required a small teacher-student ratio to support his level of disability, particularly in consideration of his motor and speech (articulation) needs (6/6/19 Tr. p. 174). He further explained that the student's June 2018 IEP outlined the instructional support the student needed to address his management needs which included tasks broken down into smaller steps and small group instruction, to address the student's daily living skills, communication, speech, reading, writing and math goals (6/6/19 Tr. pp. 174-75, 177; see Dist. Ex. 10 at p. 6). According to the CSE chairperson, in making the 8:1+2 special class recommendation for the student, the CSE subcommittee went through the continuum of services available at the district's middle school (6/6/19 Tr. pp. 111). He stated that in terms of a special class program, the student needed something that was specially designed to address his functional academics, his daily living skills goals, and his physical goals (6/6/19 Tr. p. 111). Furthermore, the student was recommended for alternate assessment and he required goals that had regular data collection (6/6/19 Tr. p. 111). According to the CSE chairperson, the 31 annual goals included in the June 2018 IEP required a lot of direct instruction, data collection, and intervention (6/6/19 Tr. pp. 111-12). He opined that in order to address the student's annual goals, an intensive program was necessary for the student) and the district's 8:1+2 program allowed for that level of instruction (6/6/19 Tr. pp. 111-12).

During the principal from Bonim's testimony, he agreed that the difference between the district's recommended program and the student's class at Bonim was four students (7/30/19 Tr. p. 163). When asked if he thought having four additional students in the class made such a huge difference that the district's recommended program became inappropriate, the principal indicated, although he did not know what went on in the class with eight students, the student was thriving in a 12:1+1 class, so that is what he would recommend (7/30/19 Tr. pp. 162-63).¹³ The principal further indicated that he spoke with the parent after the CSE subcommittee meeting and learned there were students in the recommended class with different disabilities, something he was not aware of at the time of the meeting and with which he disagreed (7/30/19 Tr. p. 164). In response to questioning, the principal expressed a belief that in order for the student to function in a class, all of the students in the class needed to have a diagnosis of Down Syndrome (7/30/19 Tr. pp. 164-65). In particular, the principal testified that students with Down Syndrome do not work well with students with autism, expressing a belief that "a lot of [students with autism] are not verbal" and "they have a lot of behaviors" (7/30/19 Tr. pp. 165, 188-89). The Bonim principal opined that he "would not want [the student] to model those behaviors" (7/30/19 Tr. p. 189). The principal

Disabilities," at p. 20, Office of Special Educ. [Nov. 2013], available at <http://www.p12.nysed.gov/specialed/publications/policy/continuum-schoolage-revNov13.pdf>).

¹³ In response to a question about whether the four fewer students would make the district's program inappropriate for the student, the Bonim principal avoided answering the question directly by responding, "Every student is a world and every student helps out, correct" (7/30/19 Tr. pp. 163-64).

testified that his opinion was based on "clinical data from research," but was unable to cite to any particular study at that time (7/30/19 Tr. p. 165). The parent testified that she believed it was beneficial for the student to be in a classroom with other students with Down Syndrome because "...they learn similarly and they have a similar temperament and get along well...and they need the same kind of support" (10/30/19 Tr. pp. 254-55). However, contrary to the principal's testimony about his preference for the student to be in a class comprised of only students diagnosed with Down Syndrome, the parent testified that she "'believe[d] that [wa]s not necessary (10/30/19 Tr. p. 254).

The parent testified that she met with the CSE representative and the special education teacher of the 8:1+2 classroom in late August 2017 when school was not yet in session because she wanted to know about the placement options in the district (10/30/19 Tr. pp. 242-43; see 6/14/19 Tr. pp. 236-37). She saw the physical classroom but was unable to see students or the flow of the day (10/30/19 Tr. p. 243). Although the parent did not recall the conversation "exactly," she noted that she and the teacher discussed the structure of the classroom, how the day ran, and the support (id.). The teacher gave her a tour of the classroom (id.). The parent indicated that at that time she felt concerned because she thought the 8:1+2 special class was "a little too restrictive" for the student as he had always been in a 12:1+1 classroom and she thought a 12:1+1 class was "more appropriate" for the student (10/30/19 Tr. p. 244). The parent reported that from what staff explained there seemed to be a large emphasis on vocational skills (id.). The parent wanted a program that was a little more academic because she thought the student could achieve more academically (id.). The parent testified that she did not inform the district of her concerns about the 8:1+2 special class when she toured the school but sent a letter to the CSE chairperson after she toured the classroom that indicated the parents' concerns and notified the district the student would be attending a different school (id.; see Parent Ex. A at pp. 3, 4 [raising similar concerns regarding the parents' visit to the school but dated August 2018]). With regard to the June 2018 IEP, the June 2018 prior written notice indicated the parent shared that she agreed with the assessments, needs, and goals, but that she disagreed with the 8:1+2 placement recommendation because she wanted to maintain the student at his then-current placement (Dist. Ex. 32 at p. 1).

Based on the foregoing, the hearing record supports the district's contention that the CSE subcommittee's recommendation for an 8:1+2 special class in conjunction with the recommended related services and program accommodations described above, was designed to provide the student with sufficient individualized support such that the IEP was reasonably calculated to enable the student to receive educational benefits for the 2018-19 school year. While the parent may have preferred the 12:1+1 student to adult class ratio at Bonim, , the district is not required to replicate the preferred setting, when the district's recommendation is appropriate (see, e.g., Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at *6 [N.D.N.Y. June 19, 2009]; Watson v. Kingston City Sch. Dist., 325 F.Supp.2d 141, 145 [N.D.N.Y. 2004]).

3. Least Restrictive Environment

I will next address the district's challenge to the IHO's finding that the program recommended by the June 2018 IEP was not in the student's LRE. Specifically, the district contends that the IHO erred because the recommended program was both as close to the student's home as possible and included mainstreaming opportunities due to the fact that the proposed class

was located in a community school. Additionally, the district objects to the IHO's decision not to consider information regarding the mainstreaming program available at the public school.

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. 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 non-disabled 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).

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).

Initially, to the extent the parents argue, and the IHO found, that the district's recommendation for an 8:1+2 special class was more restrictive than the 12:1+1 special class the student attended at Bonim due to the size of the class, such a finding is not consistent with the principals of LRE. As illustrated by the legal standards referenced above, the question of whether a student's placement is in the appropriate LRE focuses first and foremost on a student's access to nondisabled peers. Accordingly, contrary to the IHO's reference to "LRE" in analyzing the appropriateness of the recommended 8:1+2 class and his apparent view that the class was more restrictive due to the number of students (IHO Decision at p. 8), any difference between the ratios of the 12:1+1 special class provided at Bonim and the recommended 8:1+2 special class do not bear on LRE (34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; R.B. v. New York Dep't of Educ., 603 Fed App'x 36, 40 [2d Cir. Mar. 19, 2015][stating that "[t]he requirement that students be educated in the least restrictive environment applies to the type of classroom setting, not the level of additional support a student receives within a placement"; see T.C. v. New York City Dep't of Educ., 2016 WL 1261137 at *13 [S.D.N.Y. Mar. 30, 2016] [finding that the IHO's application of LRE requirement to a ratio dispute was improper, stating that "[a] less restrictive environment refers to the ratio of special education to general education students in the same classroom, not the ratio of special education students to teachers"]). Additionally, as discussed above, with regard to the student's needs the hearing record does not suggest that the student would be more poorly served by an IEP that calls for a small special class having eight peers as opposed to 11 or 12 peers like the one the student received at Bonim. The small special class ratio aligns with the student's needs as identified in the evaluative information before the CSE subcommittee, and the district was not required to precisely mimic the ratio that the student had been receiving at Bonim in order for its recommendation to be appropriately tailored to the student's needs and likely to result in educational benefit to the student.

Having discussed the allegations regarding the ratio of the special class, it must next be noted that neither party presents an argument related to the first prong of the Newington test—in other words neither party asserts that the student could be satisfactorily educated in a general education setting with the use of supplemental aids and services. Accordingly, whether the district's program is in the LRE turns on the second prong of the Newington test, whether the district has included the student in school programs with nondisabled students to the maximum extent appropriate (Newington, 546 F.3d at 120).

With respect to mainstreaming opportunities available in the district, the parent testified that during the June 2018 CSE subcommittee meeting, the district "...did mention their Bulldog Buddies program" and that it was "a program in the school for inclusion"; however the district did not give specific details as to when exactly in the school day it took place or how it was offered (10/30/19 Tr. pp. 253, 295, 302).¹⁴ She further testified that she did not ask questions to attempt to clarify the mainstream opportunities available in the district before rejecting the district's recommended program because, she thought it was "important for the district to be very clear and articulate about what they are offering" and not her job to do "detective work to find out" (10/30/19 Tr. p. 302).

The district's executive director of special education (director) testified that the district had a "solid and robust" Bulldog Buddies program, a derivative of an international program called Best Buddies, which she described as a friendship socialization program where students with disabilities were paired with nondisabled peers to create friendships and to develop friendships, both in school, and with parental encouragement, out of school as well (6/6/19 Tr. p. 28). The director noted that Bulldog Buddies was facilitated by a staff member in the school building, was supported by the district's special education PTA, and was based upon a lot of student interest (6/6/19 Tr. pp. 28-29). According to the CSE chairperson, as part of Bulldog Buddies, students in the building volunteered to work with the students who had significant developmental disabilities, mostly the students in the 8:1+2 special class (6/6/19 Tr. p. 99). The CSE chairperson testified that the program was individualized, and he could not "say exactly what each Bulldog Buddy does for each kid" because it depended on a variety of things including the teacher and the strengths of the students involved (6/6/19 Tr. p. 100).

The IHO noted that the district presented evidence regarding Bulldog Buddies, which the IHO described as a bimonthly voluntary club that was not put on the student's IEP (IHO Decision at pp. 8-9). As a result, the IHO noted that, consistent with R.E., the parents and the student could not rely on this mainstreaming being available, even if it was a real and meaningful opportunity, which was not shown at the hearing to be the case (IHO Decision at p. 9). Accordingly, I must determine whether the IHO erred in rejecting the testimony regarding the Bulldog Buddies program available at the public school.

In reviewing the program offered to the student, the focus of the inquiry is on the information that was available at the time the IEP was formulated (see C.L.K. v Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013]; D.A.B. v New York City Dept. of

¹⁴ The parent acknowledged that she had also been informed about Bulldog Buddies the prior school year (10/30/19 Tr. p. 295).

Educ., 2013 WL 5178267, at *12 [S.D.N.Y. Sept. 16, 2013]). Retrospective evidence presented at a hearing that materially alters an IEP may not be relied upon and/or used to rehabilitate an inadequate IEP (see R.E., 694 F.3d at 188). However, it is not clear whether a mainstreaming program, such as Bulldog Buddies, is something that should be included on an IEP.

With respect to participation with students without disabilities, the State IEP form prompts districts to "[e]xplain the extent, if any, to which the student will not participate in regular class, extracurricular and other nonacademic activities" (Dist. Ex. 10 at p. 17). According to State guidance, this may be done "by identifying the percent of the school day or by identifying particular activities that the student will not participate in with his/her nondisabled peers" ("Questions and Answers on Individualized Education Program (IEP) Development, The State's Model IEP Form and Related Documents," at p. 45, Office of Special Educ. [Oct. 2010], available at <http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf>). On the student's June 2018 IEP, the district indicated that the student would not participate in regular education in all academic areas, physical education, or when engaged in speech-language therapy, OT, or PT (Dist. Ex. 10 at pp. 17-18). Based on the State guidance governing what is required to be included in the IEP, implicit in the June 2018 IEP is that the student would participate in other school activities with his nondisabled peers.

The director testified that the district had multiple programs available to support students in the 8:1+2 special class, including after school programs, a socialization program, and participation in the Bulldog Buddies program (6/6/19 Tr. p. 30). The director further testified that Bulldog Buddies was a socialization program and was not placed on students' IEPs (6/6/19 Tr. p. 48). However, Bulldog Buddies might be discussed at a CSE meeting in terms of an opportunity available for a student who had social goals on their IEP (Tr. p. 48). Additionally, in discussing whether the district's after-school program had to be recommended on a student's IEP or whether it was a building level service, the director testified that it depended on the needs of the student (6/6/19 Tr. pp. 31-32). She explained that if the student was participating in a socialization program it would not go on the IEP (Tr. p. 32). However, if the district determined that a student's IEP goals could not be managed within the confines of the school day, then an extended school day program would be recommended and specifically noted on the IEP, because the purpose of the extended day program would be to continue to work on the student's IEP goals after school (Tr. p. 32).

Review of student's June 2018 IEP shows that it contained a speech-language goal targeting the student's ability to "maintain a topic of conversation for 4 conversational turns" for four out of five trials every four weeks (Dist. Ex. 10 at pp. 10-11). This goal and its aligned benchmarks were consistent with the parent's stated concern/desire at the June 2018 CSE subcommittee meeting for the student to increase the length of his social interactions (id. at p. 5). However, the IEP also indicated that the student's social skills were an area of relative strength and that the student did not have any social needs to be addressed through special education (id.). Additionally, there is no indication that the annual goal targeting improving the student's conversation skills needed to be worked on with nondisabled peers or that it could not be worked on within the 8:1+2 special class. Accordingly, any possible recommendation on the student's IEP for a type of program such as the Bulldog Buddies program relates entirely to the extent of the student's participation with regular education students rather than to a specific support related to the student's identified needs.

Under these circumstances, provided that the testimony regarding the program is not in conflict with the terms of the IEP (which as discussed above identifies areas where the student will not participate in regular class, extracurricular, and other nonacademic activities), I do not find that it is being relied on or used to rehabilitate an inadequate IEP.

Turning to whether the recommended program was in the student's LRE, the hearing record shows that the 8:1+2 special class recommended for the student for the 2018-19 school year had adequate opportunities for the student to participate in mainstream activities with his general education peers. First, testimony by the director showed, that overall, the district valued and encouraged inclusion of special education students with their typically developing general education peers. The director testified that the district middle school had about 700 students in grades six through eight (6/6/19 Tr. p. 26). The school offered a full continuum of special education services beginning with related services and resource room programs and including integrated co-teaching services and self-contained classes (6/6/19 Tr. pp. 26-27). According to the director, the middle school had an 8:1+2 special class, which she described as a "functional life skills program" (6/6/19 Tr. p. 27).¹⁵ The director testified that since she began working in the district almost five years ago, her goal had been to create a more inclusive school environment for all students specifically students with disabilities (6/6/19 Tr. pp. 24, 27). The director indicated that students with IEP's were "fully integrated" into the school to the greatest extent possible, which included "everything and anything" from sports, clubs, after-school activities, before-school activities, homework assistance, and field trips (6/6/19 Tr. p. 27). She explained, "Anything that any other students in the building would avail themselves of, our students with disabilities have the same opportunity" (*id.*). The director further explained that the district did not view students with disabilities as "separate from" rather it viewed them as "part of" and the district did not distinguish between one group or the other in terms of their ability to fully participate (6/6/19 Tr. pp. 27-28).

The district special education teacher testified that at the middle school level, the Bulldog Buddies consisted of a group of students who met bimonthly as a club (6/14/19 Tr. pp. 251-52, 302). She indicated that the students met with a special education teacher supervisor who trained them in disabilities and different teaching procedures including basic prompts and reinforcement (6/14/19 Tr. p. 252). The students who were trained then volunteered in the special education teacher's classroom during recess (6/14/19 Tr. p. 252).¹⁶ According to the special education teacher, the Bulldog Buddies came into her class for leisure activities such as Uno, board games, and coloring (6/14/19 Tr. pp. 252-53). The special education teacher reported that depending on the volunteer students' schedules they also came to her classroom during homeroom to socialize (6/14/19 Tr. p. 252). The special education teacher noted that the frequency with which the

¹⁵ Testimony by the director indicated the district did not have a 12:1+1 special class at the time of the June 2018 CSE subcommittee meeting or at the time of the impartial hearing (6/6/19 Tr. pp. 49-50). She noted that if there was a need for the district to create a 12:1+1 special class, she had the authority to do so (6/6/19 Tr. p. 50). The district had a yearly discussion as to whether it had a group of students needing that level of education and would potentially open such a class with less than twelve but more than one student (6/6/19 Tr. p. 50).

¹⁶ The special education teacher testified that the length of the recess period depended on how long the students took to eat lunch (6/14/19 Tr. p. 252). She indicated that the students stayed in the lunchroom until the lights flickered which was half-way through the period or 20 minutes (6/14/19 Tr. p. 252).

Bulldog Buddies came into her class varied based on what was going on in general education (6/14/19 Tr. p. 315). She indicated that during finals her class did not get a lot of Bulldog Buddies because they were using their free time to study; however, at the end of the year her class "got a lot" (6/14/19 Tr. p. 315). The special education teacher reported that sometimes her class received Bulldog Buddies every day for multiple periods and some weeks they did not see as many (6/14/19 Tr. p. 316). She indicated that the program was "totally volunteer" and that students had the option to come or not (6/14/19 Tr. p. 316).

With regard to other opportunities for participation in school activities with nondisabled peers, such as during after-school and early-morning activities, the director indicated that everything was available to students who participated in the 8:1+2 program, including the homework help that occurred in the morning (6/6/19 Tr. pp. 29-30). If a student required additional assistance to participate, such as supervision or academic support, the district would provide it as an extension of the student's day, both in the morning and in the afternoon (6/6/19 Tr. p. 30). According to the director, the district had an extended school day program for students who needed services after school and the district could provide academic support and or a socialization program during that time (6/6/19 Tr. p. 30). She noted that some of the students participated in an extension of the Bulldog Buddies program (Best Buddies) at the district high school for socialization (*id.*). The director indicated that the district encouraged students to participate in anything they demonstrated interest in (*id.*). Sometimes the district helped students with disabilities choose an activity by telling them about the different clubs and activities available, and by promoting that level of inclusion (6/6/19 Tr. pp. 30-31). The director indicated that the staff members that supervised those clubs and activities were well-aware of the needs of the students participating and students were well supported (*id.*). The director reported that the number of clubs fluctuated yearly, depending on level of interest and available staff to supervise each club (*id.*). She also indicated that there were students with disabilities in the district that participated in different sports teams, and other clubs such as cheerleading and art club (*id.*). The director stated that whatever was available in a given year was available to all students including the students in the 8:1+2 special class (*id.*).

More specifically, the special education teacher of the recommended 8:1+2 special class indicated that her students engaged with general education students all day (6/14/19 Tr. p. 247). She noted that her student's lockers were intermixed with general education students' lockers in the hallway, and therefore her students encountered typical students on average, four to six times a day (i.e., morning, before snack, before lunch, every change of class, before an activity) (6/14/19 Tr. pp. 247-48, 299-300). The students were provided support as needed by the classroom staff (6/14/19 Tr. pp. 299-300). During lunch, the 8:1+2 special class ate with the entire seventh grade, supported by the two classroom teaching assistants, the two additional aides, and the behavior consultant (6/14/19 Tr. pp. 247-48, 300-01; *see* 6/14/19 Tr. p. 299). The special education teacher reported that sometimes her students sat at a general education table in the lunchroom or sometimes typical students sat with her students at their class table (6/14/19 Tr. pp. 247). Other opportunities to be with typically developing students occurred anytime her students were in the hallways, for example going to therapy or lunch, in the nurse's office and the main office, or depending on the student, during recess (6/14/19 Tr. pp. 248-49). In addition, the 8:1+2 special class sometimes went to the school track for its exercise unit and at the same time a typical general education class was on the track (6/14/19 Tr. p. 249). The 8:1+2 special class was always invited to and often

attended school assemblies that were held eight to ten times per year (6/14/19 Tr. p. 250). The students stayed for varying amounts of time depending on the length of the assembly (*id.*). According to the special education teacher, the 8:1+2 special class took "a lot" of field trips to various places in the community, directly related to units addressed in class (6/14/19 Tr. pp. 253-54). Consistent with the previously discussed testimony by the director, the special education teacher indicated that her students had the same opportunities as typically developing peers to participate in clubs, including intramural sports (6/6/19 Tr. p. 31, 6/14/19 Tr. pp. 250-51). Also consistent with the director's testimony, she reported that the district usually provided support as needed (6/14/19 Tr. p. 251; *see* 6/6/19 Tr. p. 31). Furthermore, the special education teacher's testimony about Bulldog Buddies supported the testimony provided by the director in that she reported Bulldog Buddies was run by a special education teacher and the club allowed students with disabilities to interact with typical peers for leisure activities during homeroom, recess, and afterschool (6/6/19 Tr. p. 31; 6/14/19 Tr. pp. 249, 252, 302).¹⁷ In addition, the Bulldog Buddies volunteers met with a special education teacher supervisor twice a month to receive training in disabilities and different teaching procedures (i.e., basic prompts, reinforcement) as they wanted to learn how to be more effective helpers (Tr. pp. 251-520).

The CSE chairperson indicated that the district tried to link the 8:1+2 special class to the community, noting that there were community field trips (6/6/19 Tr. pp. 153-54). The CSE chairperson also noted the Bulldog Buddies program (6/6/19 Tr. p. 154). He testified that the students in the 8:1+2 special class were part of the building—they ate lunch with the other students in the building, walked the halls of the building, and got to know other students and other students got to know them (*id.*). He reported the Bulldog Buddies program served a two-fold purpose in that it allowed students to work on goals, but also addressed the greater purpose of beginning to ready students for life as they got older (*id.*). The CSE chairperson indicated that community was important for the student because the "biggest challenge" for students with disabilities was generalizing skills learned in the classroom to community settings (*id.*). He noted the district was ultimately preparing students in the 8:1+2 special class to be able to access vocational opportunities, living opportunities, and social opportunities (6/6/19 Tr. pp. 154-55). The CSE chairperson opined that for students to have access to students from their community and places in the community helped foster the generalization process (6/6/19 Tr. p. 155). He reported that "at this age" (middle school) the district was looking to help students develop academic goals and skills, while also having an eye on transition, and how to prepare students for their next steps (*id.*).

Overall, while some of the testimony regarding the Bulldog Buddies program involved mainstreaming opportunities during the school day (at times when the June 2018 IEP noted that the student was expected to be in a special class setting), much of the testimony regarding the available mainstreaming opportunities in the district involved lunch, sharing space in the hallways of the building, leisure activities during homeroom, recess, assemblies, and community outings. Based on this testimony, the student would have participated with nondisabled peers in the public school and there is sufficient support in the hearing record to find that although the student would

¹⁷ The special education teacher indicated that at the time of the impartial hearing none of the students in her class participated in clubs or intramural sports (6/14/19 Tr. p. 301). She also testified that there was one student in the class who ate lunch with nondisabled peers and offered additional testimony about a student who spent recess with a regular education class, either outside or inside to play (the card game) UNO (6/14/19 Tr. p. 249).

not have participated in regular education during all academic areas, physical education, or when engaged in speech-language therapy, OT, or PT, the student would have been appropriately included in school programs with nondisabled students.

C. Grouping

The district contends that the IHO's finding that the public school would not have grouped the student with similar peers was speculative.

In addition to finding the district's proposed 8:1+2 special class too restrictive, the IHO also found that the "recommended public school class contain[ed] students with a mixture of disabilities" and it appeared that the students in the class were functioning at different levels (IHO Decision at p. 8). The IHO noted the testimony of the Bonim principal, that the student needed a similar peer group and that a placement with students with disparate needs would hinder the student's progress (*id.* at p. 9; see Tr. pp. 163, 166, 168). The district argues that the IHO erred and asserts that the IHO failed to provide a legal basis for his ruling that having students with a mixture of disabilities in a classroom made the classroom inappropriate (Req. for Rev. at p. 6). The district further asserts that at the time the parent rejected the district's recommended placement she was not aware of the students who were going to be placed in the 8:1+2 special class (*id.*). Nor did the parent visit the recommended classroom at the time it was proposed or ask any questions about the disabilities of the students who were in the classroom at the time (*id.*). The parents argue that district failed to meet the requisite showing that its program recommendation offered the student a functionally similar peer group in which he could make appropriate educational progress by being exposed to other students who could provide positive peer modeling and social opportunities (Answer at p. 3).

One of the problems with an improper grouping claim in this matter is that grouping is not a CSE determination and thus the claim is impermissibly speculative. As discussed in much greater length in Application of the Board of Educ., Appeal No. 18-033, the Board of Regents modified how the grouping of special education students is conducted in certain special education placements when it modified the policies regarding the process in which IEPs are created beginning in the 1991-92 school year. While the Regents' policy changes left intact the requirements in Section 200.6 that school districts must group students together by similarity of needs when they enter the public program (8 NYCRR 200.6 [a][3], [f]), the automatic right that parents once enjoyed to review that placement in a second mandated CSE meeting known as "phase II" that provided the opportunity for parents to examine the actual grouping of the student with his or her peers after a student begins attending the public program was explicitly discontinued under State regulation. Since that time, the State has never re-promulgated a policy to allow parents to challenge grouping when the child did not attend a public program either prospectively or retrospectively.

The State's approach to grouping is also distinct from any federal requirement. Neither the IDEA nor federal regulations require students who attend a special class setting to be grouped in any particular manner. The United States Department of Education has opined that a student must be assigned to a class based upon his or her "educational needs as described in his or her IEP" and not on "a categorical placement," such as one based on the student's disability category (Letter to

Fascell, 18 IDELR 218 [OSEP 1991]). While unaddressed by federal law and regulations, State regulations set forth some requirements that school districts must follow for grouping students with disabilities. State regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii]; 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [approving an IEP that placed a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]). It is in State regulation that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to: levels of academic or educational achievement and learning characteristics; levels of social development; levels of physical development; and the management needs of the students in the classroom (8 NYCRR 200.6[h][2]; see 8 NYCRR 200.1[ww][3][i][a]-[d]). The social and physical levels of development of the individual students must be considered to ensure beneficial growth for each student, although neither may be a sole basis for determining placement (8 NYCRR 200.6[a][3][ii], [iii]). Further, the management needs of students may vary, so long as the modifications, adaptations, and other resources provided to students do not "consistently detract from the opportunities of other students" in the class to benefit from instruction (8 NYCRR 200.6[a][3][iv]). SROs have often referred to grouping in the areas of academic or educational achievement, social development, physical development, and management needs collectively as "functional grouping" to distinguish that set of requirements from grouping in accordance with age ranges (see, e.g., Application of a Student with a Disability, Appeal No. 17-026).

Here, the student never actually attended the district's recommended 8:1+2 special class as he was unilaterally placed at Bonim for the 2018-19 school year (Parent Exs. M; N). Additionally, while the parent previously visited the public school, she did not observe any of the students in the class the student would have attended nor did she inquire about how the class may have been composed for the 2018-19 school year (see 10/30/2019 Tr. pp. 242-43, 292-95). Accordingly, the parent was not aware of how the student would have been grouped at the public school for the 2018-19 school year at the time she placed the student at Bonim. Any evidence about how the student would have been grouped if he had attended the public school is necessarily retrospective. The Second Circuit has held that "our precedent bars us from considering such retrospective evidence" (J.C. v New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. Mar. 16, 2016] [finding that "grouping evidence is not the kind of non-speculative retrospective evidence that is permissible" where the school possessed the capacity to provide an appropriate grouping for the student, and plaintiffs' challenge is best understood as "[s]peculation that the school district [would] not [have] adequately adhere[d] to the IEP", quoting R.E., 694 F.3d at 195). Various district courts have followed this precedent (G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at *15 [S.D.N.Y. Sept. 19, 2016]; L.C. v. New York City Dep't of Educ., 2016 WL 4690411, at *4 [S.D.N.Y. Sept. 6, 2016] ["Any speculation about which students [the student] would have been grouped with had he attended [the proposed placement] is just that—speculation. And speculation is not a sufficient basis for a prospective challenge to a proposed school placement"]). Therefore, with the record before me, any alleged grouping claim is impermissibly speculative. Although the student was not placed in the district's 8:1+2 special class due to his unilateral placement at Bonim and I find that the parents' argument regarding functional grouping is impermissibly speculative, I will review evidence in the hearing record regarding how the assigned public school would have grouped the student for the sake of thoroughness. In this matter,

the evidence in the hearing record shows that the district was at least capable of providing an appropriate functional group.

The executive director of special education for the district opined that based on the student's profile and observations of the student at his school he would be a "good fit" for the district's 8:1+2 special class (6/6/19 Tr. p. 40). The director reported that the teacher had "reviewed a lot of his information and documents and fe[lt] the functional group would measure well" (*id.*). She explained that the district wanted to be sure that students it placed in self-contained classes were grouped according to functionality (6/6/19 Tr. pp. 40, 44-45). She further explained that the district did not want a student who needed more to stay in a particular classroom because that was the class assigned to them (6/6/19 Tr. p. 40). The director stated that the student's profile "fit[] beautifully with the students [the district] ha[s] educated in our school in the past and currently (6/6/19 Tr. p. 41). She noted that the district's programs were often sought after by other districts for their students and the district only looked at students who it could functionally educate together (*id.*). The director confirmed that the 8:1+2 special class was a multi-graded class but reported that it did not exceed the 36-month span between the youngest and oldest student (6/6/19 at p. 41). The CSE chairperson testified he was familiar with and had worked with all but one of the students who would have attended the recommend 8:1+2 special class in September (2018) (6/6/2019 Tr. pp. 114-15). He opined that the functional grouping was appropriate for the student and that he did not have any concerns with respect to the student being grouped with the other students in the class (6/6/2019 Tr. p. 115; *see* 6/6/2019 Tr. pp. 118-19). According to the special education teacher of the proposed 8:1+2 special class, at the time she testified in June 2019 there were four students in her class, three of whom were classified as students with autism and one student who was classified as a student with multiple disabilities (6/14/19 Tr. pp. 237-38). The students ranged in age between 12 and 14 years old, which she confirmed was within a three-year age range (6/14/19 Tr. pp. 238, 294-95). The range of I.Q. levels in her class was in the same range as the student (6/14/19 Tr. pp. 314, 320). According to the special education teacher, the academic functioning levels of the students in her class ranged from kindergarten to second grade in English Language Arts (ELA) and from pre-kindergarten to second grade in math (6/14/19 Tr. pp. 238, 295). She reported that academically the student was functioning around a mid-first grade level and that he would be appropriately placed in her class (6/14/19 Tr. pp. 237-38). The special education teacher opined that the 8:1+2 special class was appropriate for the student because his age, functioning level, and management needs were comparable to the group of students in her class and "he would fit in really nicely" (6/14/19 Tr. p. 291). With regard to daily living skills, the special education teacher testified that at least one student in the class was comparable to the student, while two of the other students had "more robust" daily living skills and one student had "less robust" daily living skills than the student (6/14/19 Tr. p. 296).

Based on the evidence regarding the district's 8:1+2 special class, the hearing record demonstrates that had the student attended the program, the district was capable of grouping the student in compliance with State regulations.

VII. Conclusion

For the reasons set forth above, the IHO erred in determining the district failed to offer the student a FAPE in the LRE for the 2018-19 school year. Accordingly, I need not reach the

appropriateness of the parents' unilateral placement of the student at Bonim or equitable considerations and the necessary inquiry is at an end.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated January 31, 2020, is hereby modified by reversing that portion that found the district failed to offer the student a FAPE for the 2018-19 school year and directed the district to reimburse or directly pay 90 percent of the cost of the student's attendance at Bonim.

Dated: **Albany, New York**
 May 6, 2020

STEVEN KROLAK
STATE REVIEW OFFICER