The University of the State of New York

The State Education Department
State Review Officer
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No. 21-019

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

Appearances:
Anne Leahey Law, LLC, attorneys for respondent, by Anne C. Leahey, 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 parent) appeals from the decision of an impartial hearing officer (IHO) which determined that the educational program and services recommended by respondent's (the district's) Committee on Special Education (CSE) for the student for the 2020-21 school year was appropriate and denied the parent's request for compensatory education for the 2020-21 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The student in this case has been the subject of nine prior State-level administrative appeals (see Application of a Student with a Disability, Appeal No. 20-135; Application of a Student with a Disability, Appeal No. 19-121; Application of a Student with a Disability, Appeal No. 19-021; Application of a Student with a Disability, Appeal No. 18-110; Application of a Student with a Disability, Appeal No. 18-075; Application of a Student with a Disability, Appeal No. 18-064; Application of a Student with a Disability, Appeal No. 17-079; Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040). Accordingly, the parties' familiarity with the facts and procedural history preceding this case—as well as the student's educational history—is presumed and they will not be repeated herein unless relevant to the disposition of the issues presented in this appeal.

Relevant to the current appeal, the CSE convened on August 10, 2020 to conduct an annual review and develop an IEP for the student for the 2020-21 school year (see generally Dist. Ex. B). The August 2020 CSE recommended placement in a 12:1:1 special class with related services including, two 30-minute sessions of individual occupational therapy (OT) per week, three 30-minute sessions of physical therapy (PT) per week, three 30-minute sessions of individual speech-language therapy per week, one 30-minute session of group (5:1) speech-language therapy per week, four 90-minute sessions of individual special instruction per week, and two 60-minute sessions of parent counseling and training per month (Dist. Ex. B at pp. 15-16). The CSE also recommended the support of a 2:1 aide during transitions, additional supplementary aids and services and program modifications/accommodations, as well as assistive technology devices, including an iPad at home and at school and access to a computer during classwork (id. at pp. 16-17). The CSE further recommended services on a 12-month basis (id. at pp. 17-18). Finally, the August 2020 IEP indicated that the student's placement was " Other Public School District" (id. at p. 21).

At the conclusion of the August 2020 CSE meeting, the parent expressed his disagreement with the recommendations contained in the August 2020 IEP and indicated he would pursue due process (Dist. Exs. A at p. 3; C at p. 125).

In a due process complaint notice, dated August 11, 2020, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2020-21 school year.

On August 19, 2020, subsequent to the filing of the due process complaint notice, the district sent the parent a letter responding to the parent's request to tour the proposed placement outside of the district (Dist. Ex. M). The district requested that the parent confirm that he had reconsidered his position that he would only accept a placement within the district and indicated that if the parent had changed his position, the district would contact the out-of-district placement (another school district) and schedule a CSE meeting with the other school district in attendance "to discuss the program and placement" recommended by the district (id.).

An impartial hearing convened on September 8, 2020 and concluded on November 13, 2020 after seven days of proceedings (see Tr. pp. 1-1008).

The hearing record indicates that prior to the start of the hearing, the district made a motion to dismiss the parent's due process complaint notice (Sept. 8, 2020 Tr. p. 4). The IHO determined on the record that she would not dismiss the parent's due process complaint notice, but still gave the parent an opportunity to respond in writing to the district's motion to dismiss (Sept. 8, 2020 Tr. pp. 4, 17, 20). The hearing record does not reflect any further decision on the district's motion to dismiss, and it is presumed that the motion was denied as the hearing proceeded to a conclusion.

On September 16, 2020 a pendency hearing was held (Sept. 16, 2020 Tr. pp. 1-56). Thereafter, on September 27, 2020, the IHO issued an Interim Order on Pendency (see generally Interim IHO Decision). The IHO held that she "lack[ed] jurisdiction to issue a pendency decision as this issue has been determined by a federal district court (Interim IHO Decision at p. 3).[1] Since

[1] According to the IHO, the Court denied the parent's request for a preliminary injunction determining that the pendency placement was previously adjudicated and would not be modified (Interim IHO Decision at p. 3).

the parent elected the courts as the forum to determine pendency, the IHO determined that the issue of pendency was removed from the administrative process and the parent's request for pendency was denied (id.).

In a decision dated December 24, 2020, the IHO made multiple findings regarding the August 2020 CSE process and recommendations and denied the parent's request for compensatory education services (IHO Decision at pp. 8-13).

The IHO determined that the parent's allegation that the student was denied a FAPE "based on the CSE's failure to recommend a general education setting, or utilize goals based on the general education curriculum for [h]igh [s]chool students" was "not supported by [the] evidence" (IHO Decision at p. 9). More specifically, the IHO determined that the August 2020 CSE included all required members, and the parent meaningfully participated in the development of the August 2020 IEP (id.). The IHO held that there was no merit to the "[p]arent's allegation that [the] [d]istrict predetermined the student's educational placement for the 20[20]-21 school year, based on: the failure to consider the ability of the [d]istrict [h]igh [s]chool to educat[e] the student, the failure to consider the continuum of services, the failure to consider alternatives for the education [of] the student to attend his home-zoned school and the failure to include CSE required members" (IHO Decision at p. 11). The IHO found that the parent actively participated in the August 2020 CSE meeting, and the parent's disagreement with the August 2020 CSE recommendations "does not establish predetermination" (id.). However, the IHO found some of the parent's allegations regarding participation to be persuasive, in particular noting that the district failed to provide the parent with data and information regarding the student's performance on his goals (id. at p. 12). To remedy this violation, the IHO directed the district to provide the parent with quarterly reports of the student's progress (id.).

The IHO further determined that the recommendation for a "self-contained special education" class was not a denial of FAPE (IHO Decision at p. 9). In the next sentence, the IHO held that she did not "find the absence of a recommendation for general education to constitute a denial of FAPE" (id.). Finding that the hearing record demonstrated the student had "significant academic needs" and did not have the skills required for a general education curriculum, the IHO rejected the parent's allegation that the district did not implement an appropriately ambitious program for the student for the 2020-21 school year (id.).

The IHO further rejected the parent's allegations that "the [d]istrict failed to develop an appropriate IEP for the 20[20]-21 school year, based on the failure of the [d]istrict to utilize peer-based research for the 20[20]-21 school year, failure to have the general education staff coordinate with the CSE to modify the student's curriculum, and allegations that the CSE Chairperson drafted the IEP are without merit" (IHO Decision at pp. 9-10).

With respect to transition planning, the IHO found that the August 2020 IEP transition goals were "inadequate based on the lack of a designation that the activities be provided within the Westhampton Beach local community and because a [t]ransitional [c]oordinator was not recommended" (IHO Decision at p. 8).

Next, the IHO addressed the parent's arguments related to the district's offer of a program within the student's least restrictive environment (LRE) (IHO Decision at p. 10). The IHO found

that the parent's claims were supported by the hearing record because the district did not apply for the student's enrollment at the other school district, and there was no offered placement for the 2020-21 school year (id.). Additionally, the IHO held that subsequent testimony regarding the other school district's ability to implement the recommended program could not rehabilitate the district's failure to make the recommendation in the August 2020 IEP as it denied the parent the ability to determine if the IEP could be implemented (id. at pp. 10-11).

Finally, the IHO addressed the parent's request for compensatory education services stating that she found no basis in the hearing record to award compensatory education (IHO Decision at p. 12). The IHO ordered the CSE to reconvene and "recommend a specific placement for the student," to review the student's transition goals and include "community opportunities" within the district and amend the student's IEP to include a transition coordinator (id. at p. 13).

IV. Appeal for State-Level Review

The parent appeals.[2] The crux of the parent's request for review is an objection to the IHO's determinations regarding whether the CSE should have recommended placement in a general education classroom with a general education curriculum for the student and whether the CSE should have recommended that the student be placed in a district public school. The parent also generally objects to the IHO's determinations regarding parent participation and predetermination, and more specifically asserts that the August 2020 CSE did not consider how it could apply its special education resources to address the student's individual needs within the district.

The parent further appeals from the IHO's denial of compensatory relief and seeks compensatory education for the FAPE violations identified by the IHO. Additionally, the parent seeks an order directing the district to educate the student within the district in the LRE.

The district interposed an answer generally denying those allegations contained in the parent's request for review. Further, the district argues that the parent's request for review should be dismissed for failure to comply with the practice regulations governing appeals to the Office of State Review. The district requests that the IHO decision be upheld, and any relief requested by the parent be denied.

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.

[2] As recently noted by the District Court of the Eastern District of New York in a matter between the same parties, although proceeding pro se, the parent is an attorney and, therefore his filings are "held to the same standards as pleadings drafted by lawyers" (C.K. v Westhampton Beach UFSD, 2020 WL 4740498, at *4 [E.D.N.Y. June 24, 2020], adopted at, 2020 WL 4743189 [E.D.N.Y. July 27, 2020]).

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]).[3]

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

VI. Discussion

A. Preliminary Matter - Compliance with Practice Regulations

The district contends that the parent's request for review should be dismissed as it fails to comply with Part 279 of the State regulations. Specifically, the district asserts that the request for review fails to "clearly specify the reasons for challenging the [IHO's] decision," fails to set forth a clear and concise statement of issues presented for review and grounds for reversal and fails to set forth citations to the hearing record (Answer at pp. 2-5, citing 8 NYCRR 279.4[a]; 279.8[c][1]-[3]). Moreover, the district contends that the parent's memorandum of law fails to comply with State regulation as it argues several issues that are not contained within the parent's request for review (Answer at pp. 5-6, citing 8 NYCRR 279.8[c][4]).

With respect to the content of a request for review, State regulation provides that a request for review "shall clearly specify the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate what relief should be granted by the [SRO] to the petitioner" (8 NYCRR 279.4[a]). In addition, section 279.4(a) provides that the request for review "must conform to the form requirements in section 279.8 of this Part."

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

In describing content requirements, section 279.8 of the State regulations requires that a request for review shall set forth:

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

(8 NYCRR 279.8[c][1]-[3]). The regulation further states 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][4]).[4]

Initially, issues concerning the form and content of the parent's pleadings filed with the Office of State Review have arisen in several prior appeals involving this student, including Application of a Student with a Disability, Appeal No. 19-121; Application of a Student with a Disability, Appeal No. 19-021, Application of a Student with a Disability, Appeal No. 18-110, Application of a Student with a Disability, Appeal No. 17-079, Application of a Student with a Disability, Appeal No. 17-015, and Application of a Student with a Disability, Appeal No. 16-040). The parent has been repeatedly cautioned that his failures to comply with the practice regulations could result in dismissal or rejection of his pleadings and, in fact, the parent's appeal was dismissed in Application of a Student with a Disability, Appeal No. 19-021 for failure to comply with the practice regulations, as well as on alternative grounds.

Turning to the parent's pleading, as noted above, State regulation requires that a request for review shall, in part, "identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding" (8 NYCRR 279.4[a]). Tethered closely to this requirement is the State regulation mandating that a request for review set forth a "clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review" (8 NYCRR 279.8[c][2]). Here, the parent generally complies with the stated regulations by setting forth issues presented for review in separately numbered paragraphs with highlights of the specific issue using italicized text, which distinguishes the issue presented from the argument in support of each issue (see generally Req. for Rev.). However, while the parent identifies the IHO findings from which he

[4] Here, the parent stated that he does not appeal from the IHO's findings that were in his favor and the district does not cross-appeal from the IHO's determinations that the August 2020 IEP transition goals were inadequate, that the district did not recommend a placement for the student, and that the district did not provide the parent with information regarding the student's progress towards his goals. Therefore, to the extent that the district does not cross-appeal from the IHO's determinations of these issues, the IHO's findings on these issues have become final and binding on the parties.

disagrees, the parent does not grapple with the IHO's determinations but instead, reargues the district's alleged errors and violations as a basis for the appeal (see generally Req. for Rev.).

However, perhaps the most important element the parent's pleading lacks is any "citations to the record on appeal, and identification of the relevant page number(s) in the [] hearing transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number" (8 NYCRR 279.8[c][3]). The request for review does not include any citations to the evidence in the hearing record, either by citation or through an explanation of how evidence presented during the hearing is relevant to the arguments being set forth on appeal (see generally Req. for Rev.). The parent's failure to provide references to the hearing record as required by regulation not only impairs the district's ability to appropriately respond to the parent's allegations but also places me in a position where I must rely on guesswork to construe the record basis for parent's allegations on appeal.

Furthermore, to the extent that the parent elaborates or expands upon arguments in support of the issues in the request for review within the memorandum of law, or argues additional grounds upon which to conclude that the district failed to offer the student a FAPE for the 2020-21 school year solely within the memorandum of law, the parent—who is an attorney—is reminded that a memorandum of law is not a substitute for a pleading (see 8 NYCRR 279.4, 279.6; see also Application of the Dep't of Educ., Appeal No. 12-131). State regulations direct that "[n]o pleading other than a request for review, answer, answer with cross-appeal, or answer to a cross-appeal, will be accepted or considered" by an SRO, "except a reply to any claims raised for review by the answer or answer with cross-appeal that were not addressed in the request for review, to any procedural defenses interposed in an answer, answer with cross-appeal or answer to a cross-appeal, or to any additional documentary evidence served with the answer or answer with cross-appeal" (8 NYCRR 279.6[a]). Thus, any arguments included solely within the memorandum of law have not been properly raised and will not be considered or addressed in this decision. Moreover, it is not this SRO's role to research and construct the appealing parties' arguments or guess what they may have intended (see, e.g., Gross v. Town of Cicero, 619 F.3d 697, 704 [7th Cir. 2010] [appellate review does not include researching and constructing the parties' arguments]; Fera v. Baldwin Borough, 2009 WL 3634098, at *3 [3rd Cir. Nov. 4, 2009] [a party on appeal should at least identify the factual issues in dispute]; Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 841 [10th Cir. 2005] [generalized assertion of error on appeal is not sufficient]; see generally, Taylor v. American Chemistry Council, 576 F.3d 16, 32 n.16 [1st Cir. 2009]; L.I. v. Hawaii, 2011 WL 6002623, at *9 [D. Hawaii Nov. 30, 2011]; Lance v. Adams, 2011 WL 1813061, at *2 [E.D. Cal. May 6, 2011] [the tribunal need not guess at the parties' intended claims]; Bill Salter Advertising, Inc. v. City of Brewton, 2007 WL 2409819, at *4 n.3 [S.D. Ala. Aug. 23, 2007]).[5]

The district's contentions relative to the form and content of the parent's request for review, when viewed in light of the parent's history of noncompliance, weigh heavily in favor of dismissing the parent's appeal especially where, as here, the parent has been cautioned—based upon the very same contentions asserted by the district in this appeal—about the effect of his continued failure to comply with the practice regulations in five separate appeals initiated by the parent (see

[5] The request for review does not identify the August 2020 IEP present levels of performance as an issue for review; however, the parent argues in the Memorandum of Law that the present levels of performance were not appropriate. Therefore, such argument is not properly raised and will not be considered herein.

Application of a Student with a Disability, Appeal No. 19-121; Application of a Student with a Disability, Appeal No. 18-110; Application of a Student with a Disability, Appeal No. 17-079; Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040). In each of those appeals, an SRO declined to dismiss the request for review based upon noncompliance, but specifically cautioned the parent that, "while a singular failure to comply with the practice requirements of Part 279 may not warrant an SRO exercising his or her discretion to dismiss a request for review or reject a memorandum of law (8 NYCRR 279.8[a]; 279.13; see Application of a Student with a Disability, Appeal No. 16-040), an SRO may be more inclined to do so after a party's repeated failure to comply with the practice requirements" (Application of a Student with a Disability, Appeal No. 19-021). Consequently, at this juncture the parent's failure to comply with the practice regulations, together with the parent's repeated lack of compliance in five of the nine State-level administrative appeals previously initiated by the parent, will result in a dismissal of the parent's appeal, with prejudice.

Nevertheless, even assuming for the sake of argument that the parent's failure to comply with the practice regulations did not warrant a dismissal of this appeal, the evidence in the hearing record does not support overturning the IHO's findings that the district did not deny the student a FAPE by failing to provide the student with access to the general education curriculum, by failing to develop an "appropriately ambitious" IEP, by failing to align the student's annual goals with grade-level learning standards, or by recommending a 12:1+1 special class placement located within an out-of-district public school (see generally Req. for Rev.). In an abundance of caution, therefore, I will address the general FAPE claims that can be gleaned from the parent's request for review and which, as discussed above, largely mirror allegations previously asserted by the parent in the due process complaint notice.

B. August 2020 IEP

The IHO denied the parent's request to find that the district "failed to implement an appropriately ambitious" program for the student for the 2020-21 school year (IHO Decision at p. 9). The IHO's conclusion was based upon several factors (id.). First, the IHO held that the August 2020 CSE was properly constituted and as evidenced by the August 2020 meeting transcript, the parent was afforded "meaningful participation in development of the IEP" (id.). Second, the IHO determined that the August 2020 CSE recommended PT, OT, speech-language therapy, assistive technology, adapted physical education, an aide for transitions, an education consultant and parent counseling and training (id.). Third, the IHO held that the "evaluation before the CSE made clear that the [student] was functioning well below grade level, with significant academic needs and without the cognitive, language and functional skills for a general education curriculum" (id.). The IHO concluded that based upon the hearing record, the August 2020 CSE's recommendation for a 12:1+1 special class was not a denial of FAPE, and further, the "absence of a recommendation for general education" did not constitute a denial of FAPE (id.).

On appeal, the parent asserts overall—and without any accompanying argument—that the district failed to "facilitate" a FAPE because the district "failed to develop" an IEP "that was appropriately ambitious" (Req. for Rev. at p. 3). The parent further argues that the district failed to offer an "appropriately ambitious" IEP because the district failed to use "appropriate assessments" to determine the student's "present levels of performance," the district failed to align the student's "goals with appropriate learning standards," the district failed to facilitate the student's

"access to the general education curriculum," and the district failed to use "peer-based research in supporting its educational placement recommendation" (id. at pp. 3, 6).

Here, as described more fully below, the recommendation for placement in a 12:1+1 special class at a public school in another school district would have offered the student a FAPE.

1. Predetermination

Before turning to the substantive review of the August 2020 IEP, I will briefly address the parent's procedural claims relating to the August 2020 CSE meeting. The parent alleges he was denied the right to meaningfully participate in the decision-making process and that the August 2020 CSE's recommendations were predetermined. The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see T.F. v. New York City Dep't of Educ., 2015 WL 5610769, at *5 [S.D.N.Y. Sept. 23, 2015]; A.P. v. New York City Dep't of Educ., 2015 WL 4597545, at *8, *10 [S.D.N.Y. July 30, 2015]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *17 [E.D.N.Y. Aug. 19, 2013] [stating that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] [noting that a "professional disagreement is not an IDEA violation"]; Sch. for Language & Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] [finding that "[m]eaningful participation does not require deferral to parent choice"]). The key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *10-*11 [E.D.N.Y. Sept. 2, 2011], aff'd 506 Fed. App'x 80 [2d Cir. Dec. 26, 2012]; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [E.D.N.Y. 2009], aff'd, 366 Fed. App'x 239 [2d Cir. Feb. 18, 2010]). Districts may "'prepare reports and come with pre[-]formed opinions regarding the best course of action for the child as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions'" (DiRocco v. Bd. of Educ. of Beacon City Sch. Dist., 2013 WL 25959, at *18 [S.D.N.Y. Jan. 2, 2013] [alternation in the original], quoting M.M. v. New York City Dept. of Educ. Region 9 (Dist. 2), 583 F. Supp. 2d 498, 506; [S.D.N.Y. 2008]; see B.K. v. New York City Dept. Of Educ., 12 F. Supp. 3d 343, 358-59 [E.D.N.Y. 2014] [holding that "active and meaningful" parent participation undermines a claim of predetermination]).

The parent's allegation is without merit as the hearing record supports the IHO's conclusion that the parent was able to express his concerns regarding the recommended program and services and he fully participated in the August 2020 CSE meeting (IHO Decision at p. 11; see Dist. Ex. C). The parent attended the meeting, asked questions and shared ideas all of which was documented in the CSE meeting transcript as well as the August 2020 IEP (Dist. Exs. A at pp. 2-3; B at pp. 8-10; C at pp. 10-14, 22-33, 35-39, 41-42, 44, 51-52, 57-70, 73-95, 99-103, 113-125).

The district's director of pupil personnel services informed the parent during the August 2020 CSE meeting that the CSE needed to focus on the student's present levels of performance, strengths, and needs prior to discussing the recommendations for the student (Dist. Ex. C at pp. 13-16).[6] The parent's post-hearing brief appears to focus the predetermination argument on the director of pupil personnel services' references to a recommendation for placement of the student in another school district (IHO Ex. I at pp. 6-8); however, the director first indicated the other school district was part of the CSE's discussion from the prior school year (Dist. Ex. C at p. 63), and as noted in the IHO Decision, the August 2020 IEP did not identify a specific school district to implement the IEP (Dist. Ex. B at p. 21).[7] Overall, there is insufficient basis presented on appeal to depart from the IHO's finding that the parent had an opportunity to participate in the development of the August 2020 IEP and the district did not predetermine the contents of the student's IEP.

2. Annual Goals

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

[6] The district's director of pupil personnel services presented direct testimony by affidavit and was subject to cross-examination by the parent (Oct. 29, 2020 Tr. pp. 158-449; see Dist. Ex. CCC). State regulation provides that "[t]he [IHO] may take direct testimony by affidavit in lieu of in-hearing testimony, provided that the witness giving such testimony shall be made available for cross examination" (8 NYCRR 200.5[j][3][xii][f]).

[7] Although the parent disagrees with the August 2020 CSE placement recommendation, he asserts on appeal that the August 2020 CSE did make a specific placement recommendation (Req. for Rev. at pp. 7-8). However, the hearing record supports the IHO's finding on this issue; in fact, both parties seem to agree that in order to recommend placement in the other school district, the district needed to invite a representative from that district to a CSE meeting for the student (see 8 NYCRR 200.4[d][4][i][a]). The district sent the parent a letter to this effect on August 19, 2020 (Dist. Ex. M); however, there is no indication in the hearing record that another CSE meeting took place.

[8] To be clear, the parent's request for review cannot be construed to assert a direct challenge to the appropriateness of the annual goals or corresponding short-term objectives in the August 2020 IEP; however, to the extent that the parent's request for review could be interpreted to assert a goals claim, the deficiency alleged to have rendered the goals inappropriate is the district's failure to align the annual goals with grade-level learning standards. Instead, the annual goals must meet a simpler criterion—which is that each annual goal must be "measurable." Moreover, the applicable State regulations cited above also do not require that a student's annual goals must be aligned with grade-level learning standards in order to be appropriate to meet the student's needs.

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

The August 2020 IEP includes 13 annual goals and corresponding short-term objectives in the areas of reading, writing, mathematics, speech-language, motor skills, daily living skills, and other (Dist. Ex. B at pp. 13-16). During the August 2020 CSE meeting, the parent objected to the annual goals proposed for the 2020-21 school year because the parent believed the annual goals were not "formulated or correlated to the alternate assessment essential elements at [the student's] grade level" (Dist. Ex. C at p. 80). The parent also expressed his opinion that the district needed to have more collaboration between the special education and general education teachers in developing the student's annual goals (id. at p. 81). However, at the August 2020 CSE meeting, the student's special education teacher stated that she worked with the district's educational consultant and the goals "were written for [the student's] grade level" and "related to [his] level of development and there were high school level goals that were picked from the dynamic learning" (Dist. Ex. C at pp. 81-82; see Dist. Ex. CCC at pp. 25-26, 47, 51).[9] The district's director of pupil personnel services clarified the difference between a curriculum and annual goals included on an IEP; explaining that "IEP goals will not encompass all of the essential elements," rather, the purpose of annual goals is to focus on "the unique needs of the individual student" (Dist. Ex. C at pp. 84-85). According to the director of pupil personnel services, the CSE collaborated and chose annual goals that were appropriate to work on with the student for the next school year (id.at p. 85). The parent disagreed with the director's opinion that all of the essential elements did not have to be included in the IEP (id. at pp. 85-86). Moving on to the related services goals, the parent agreed with the goals but indicated that he wanted the student's annual goals to be explored with respect to the student's development "in a general education setting and curriculum" (id. at p. 86).

As noted above, overall, alignment of the IEP with State academic content standards "must guide, and not replace, the individualized decision-making required in the IEP process" (Questions and Answers on Endrew F. v. Douglas County Sch. Dist. Re-1, 71 IDELR 68; Dear Colleague

[9] In terms of the student's curriculum, the district's director of pupil personnel services testified that the student's curriculum was modified to meet the student's needs using the unique learning system curriculum (Oct. 29, 2020 Tr. pp. 238-40, 254-55; see Dist. Exs. SS, TT, WW, XX; Dist. Ex. CCC at p. 11). The student's special education teacher explained at the August 2020 CSE meeting that the unique learning system curriculum "is a modified version of the [c]ommon [c]ore curriculum" adapted for students with disabilities (Oct. 29, 2020 Tr. pp. 376-77; Dist. Exs. C at pp. 24-25, 83; CCC at pp. 11, 27).

Letter, 66 IDELR 227; see "Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ., at p. 31 [Dec. 2010] [noting that "[g]oals should not be a restatement of the general education curriculum" and that, in developing goals, CSEs should inquire "'What skills does the student require to master the content of the curriculum?' rather than 'What curriculum content does the student need to master?'"]).

Additionally, while a CSE should include member(s) that "know the expectations of the general education classroom for the corresponding grade of the student both in terms of what learning (i.e., knowledge and skills) is expected (general curriculum) as well as how the students are expected to access and demonstrate what they have learned," ultimately the annual goals and recommended supports and services included in the IEP must be aligned with the student's strengths, needs, and present levels of performance (see "The Role of the Committee on Special Education in Relation to the Common Core Learning Standards," at pp. 1-2, Office of Special Educ. Field Advisory [June 2014]; see also 34 CFR 300.320[a][1], [2], [4]; 8 NYCRR 200.4[d][2][i], [iii], [v]). To that end, alignment of the IEP with State academic content standards "must guide, and not replace, the individualized decision-making required in the IEP process" (Questions and Answers on Endrew F. v. Douglas County Sch. Dist. Re-1, 71 IDELR 68 [OSEP Dec. 2017]; Dear Colleague Letter, 66 IDELR 227).[10]

Consistent with the above standards, the evidence in the hearing record supports the IHO's determination that the annual goals aligned with the student's needs and otherwise met the requirements of the IDEA and federal and state regulations (Oct. 29, 2020 Tr. pp. 159-61, 226-228, 262, 265-66; see Dist. Ex. C at pp. 81-82, 84-85). The parent's allegations concerning the alignment of the student's goals to the general education content standards or curriculum do not support a finding that the district denied the student a FAPE on either procedural or substantive grounds (see Jefferson Cty. Bd. of Educ. V. Lolita S., 581 Fed Appx 760, 763 [11th Cir. 2014] [finding that a goal based on the state's standards for ninth grade students was not individualized for the student whose reading comprehension fell at a first-grade level]; see J.S. v. Clovis Unified Sch. Dist., 2017 WL 3149947, at *14 [E.D. Cal. July 25, 2017] [noting with approval a CSE's development of annual goals for a student with significant cognitive disabilities that focused on prerequisite skills to grade-level academic content], aff'd, Solorio v Clovis Unified Sch. Dist., 748 Fed Appx 146 [9th Cir 2019]).

3. Peer-Reviewed Research

The parent incorporates an argument regarding the district's lack of evidence of peer-reviewed research, within the context of his challenge to the LRE—arguing that the IHO "overlooked" "the fact that the [] district's educational recommendation was not supported by any

[10] Further, specific information about the curriculum or content that a teacher would use to instruct a student is the sort of information that would more appropriately be found in a teacher's lesson plans, rather than in an IEP (see Opportunity To Examine Records; Parent Participation in Meetings, 71 Fed. Reg. 46,689 [Aug. 14, 2006] [explaining a change of language in 34 CFR 300.501[b][3] in order to avoid the impression "that teaching methodologies and lesson plans must be included in the IEP"]; see also Avila v. Spokane Sch. Dist. 81, 2014 WL 5585349, at *6 [E.D. Wash. Nov. 3, 2014] [finding that "[a]n IEP is not a lesson plan and does not provide the specific methodology to be utilized, but is instead a broad overview or roadmap of a student's special education program, setting forth the present level of education performance, goals, objectives, and special services and staff to be provided"]).

peer-based research and moreover remained entirely divergent to the peer-based research that does exist" (Req. for Rev. at pp. 2, 6-7).

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

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

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

While recognizing the IDEA's requirements regarding peer-reviewed research, courts have generally declined to find an IEP or a recommended program was not appropriate on the sole basis that it violated this provision of the IDEA (see Ridley Sch. Dist. v. M.R., 680 F.3d 260, 275-79 [3d Cir. 2012]; Joshua A. v. Rocklin Unified Sch. Dist., 319 Fed. App'x 692, 695 [9th Cir. Mar. 19, 2009] [finding that "[t]his eclectic approach, while not itself peer-reviewed, was based on 'peer-reviewed research to the extent practicable'"]; A.G. v. Bd. of Educ. of Arlington Cent. Sch. Dist., 2017 WL 1200906, at *9 [S.D.N.Y. Mar. 29, 2017] [rejecting the parents' arguments that the Wilson Reading System must be used "with fidelity" or exclusively in order to provide a FAPE and finding that the incorporation of aspects of Wilson instruction as part of a balanced literacy program was permissible]; see also Pitchford v. Salem-Keizer Sch. Dist. No. 24J, 155 F. Supp. 2d 1213, 1230-32 [D. Or. 2001] [rejecting an argument that a district's proposed IEP was not appropriate because it provided for an eclectic program and holding that the district's offer of FAPE was appropriate notwithstanding its refusal to offer an ABA approach]).[11] Here, the parent appears

[11] The IDEA expresses a preference that educational services be based on peer-reviewed research, but it is far less clear that, if a student's educational program is reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances, that the lack of peer-reviewed research will nevertheless result in a denial of a FAPE. As one court recently stated of the requirement "To the contrary, the IDEA explicitly says 'to the extent practicable,' which in and of itself suggests that peer-reviewed research is not always required (E.M. v. Lewisville Indep. Sch. Dist., 2018 WL 1510668, at *10 [E.D. Tex. Mar. 27, 2018], aff'd, 2019 WL 1466959 [5th Cir. Apr. 1, 2019]; see also Bd. of Educ. of Albuquerque Pub. Sch. v. Maez, 2017 WL 3278945, at *7 [D.N.M. Aug. 1, 2017]; J.S., 2017 WL 3149947, at *10 [noting that there is no absolute requirement that an IEP be supported by peer-reviewed research, but only that it be supported to the 'extent practicable.']; Damarcus S. v. Dist. of Columbia, 190 F. Supp. 3d 35, 51 [D.D.C. 2016] [rejecting the student's claim that an IEP that failed to specify the research-based, peer-reviewed instruction resulted in a denial of a FAPE]).

to weigh the research tending to support his preferred program for the student against the alleged lack of research in support of the CSE's recommended program; however, this application of the requirement for a program to be supported by peer-reviewed research was rejected in the official comments to the regulations, as set forth above (Statement of Special Education and Related Services, 71 Fed. Reg. 46,664-65 [Aug. 14, 2006]). Moreover, the requirement that the recommended special education program or services be based on peer-reviewed research generally arises in the context of methodology disputes. The preference that a student be educated in the LRE is based on decades of research (see 20 U.S.C. § 1400[c][5]), but the standard for examining whether a recommended placement constitutes a particular student's LRE is subject to its own legal standard and the parent may not avoid application of the Newington test merely by producing general research publications about the benefits of mainstreaming students with disabilities. While I am sympathetic to the parent's interest in keeping abreast of the current research on mainstreaming and bringing such materials to the attention of the district in his efforts to persuade the district to place the student in a general education setting, the LRE for the student remains a creature of legal interpretation based on the entirety of the relevant educational evidence contained in the hearing record.

4. Educational Placement and LRE

The primary argument carried throughout the parent's request for review—including those thinly veiled as allegations relating to State learning standards, access to the general education curriculum, and aligning the annual goals to grade level content—focuses on the parent's desire for the student to be educated within the district, as close to home as possible and consistent with at least one factor to be considered by a CSE when recommending a placement in the LRE. In particular, the parent asserts that "all general education curriculum is capable of being modified and that the law specifically prohibits the removal of any student from the general education setting predicated upon the sole need to modify curriculum" (Req. for Rev. at p. 6). Furthermore, the parent argues that the district's violation of the LRE standard was evidenced in that the district did not explore whether it could use its special education resources to educate the student within the school district (id. at p. 4).

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 nondisabled peers as much as circumstances allow (Newington, 546 F.3d at 119, citing Daniel R.R., 874 F.2d at 1044). The Court explained that the inquiry is individualized and fact specific, taking into account the nature of the student's condition and the school's particular efforts to accommodate it (Newington, 546 F.3d at 120).

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).

The district's director of pupil personnel services testified that the August 2020 IEP was based upon the student's "present levels of academic achievement and functional performance"

(Dist. Ex. CCC at p. 34). Information about the student identified in the August 2020 IEP included summaries in the areas of OT, PT, speech-language therapy, parent training notes, together with the results of a January 2019 evaluation and the results of other testing from 2016 through 2018 (Dist. Exs. B at pp. 4-7; NN; CCC at pp. 34-39). The August 2020 IEP also provided detailed information relating to the student's academic achievement, functional performance and learning characteristics in the areas of speech-language, reading, math, writing, and study skills; the student's strengths, preferences, and interests; academic, developmental and functional needs; social development; and physical development (Dist. Exs. B at pp. 7-10; CCC at pp. 39-43).

The August 2020 IEP contained information provided by the student's speech-language therapist consistent with what was discussed during the August 2020 CSE meeting (compare Dist. Ex. B at p. 4, with Dist. Exs. C at pp. 5-12; CCC 5-7). In speech-language therapy the student worked on "improving his expressive and receptive language skills in the areas of grammar usage, social communication, and following directions" (Dist. Exs. B at p. 4). The student demonstrated improvement in using correct word order and identifying a simple problem (id.). He worked on "improving his ability to follow two-step directions" and following "directions with up to two adjective sequences" (id.). The student required an "extended wait time, (4 to 7 seconds)" in responding to questions (id.). He "exhibit[ed] some speech disfluencies, and stuttering, and speech production errors, articulation which continue[d] to interfere with his overall speech intelligibility" (id.). Finally, the student "continue[d] to exhibit significant receptive and expressive language deficits which interfere[d] with his ability to communicate effectively" (id.). Based upon his present levels, the speech-language therapist needed to work on his "functional speech" by continuing to improve his "receptive and expressive language skills" for communicating effectively and increasing his rate of speech (id.). When questioned at the CSE meeting by the parent, the speech-language therapist stated that the speech-language services could be in the classroom, if the class was "at his ability" (Dist. Exs. C at pp. 11-12; CCC at p. 7).

The student's occupational therapist stated at the August 2020 CSE meeting that the student has "functional handwriting," but "decreased legibility" and therefore, types as he is "very good" with the computer (Dist. Exs. B at p. 2; C at p. 49; CCC at p. 17). According to the occupational therapist, the student showed "slow and steady improvement with his intrinsic hand muscle strength" (Dist. Exs. B at p. 2; C at p. 49; CCC at p. 18). She further explained that although he has strength, he requires assistance with endurance to complete an activity (Dist. Exs. B at p. 2; C at pp. 49-50; CCC at p. 18). The student's bilateral skills are functional, but he requires assistance "when participating in higher-level bilateral coordination activities" (Dist. Exs. B at p. 2; C at p. 50; CCC at p. 18). The occupational therapist continued to work with the student on "functional activities" which he made "slow and steady progress" (Dist. Exs. B at pp. 2-3; C at p. 50; CCC at p. 18). On the August 2020 IEP, the occupational therapist noted that the student "exhibits deficits to the development of perceptual fine-motor skills and fine-motor endurance, which continue to have a negative impact on his ability to participate in his educational program" (Dist. Ex. B at pp. 2-3, 10). When questioned by the parent at the August 2020 CSE meeting about the location of the delivery of the OT services, the occupational therapist stated that the student's OT needs were demonstrated in any setting he was placed (Dist. Exs. C at pp. 51-52; CCC at p. 18).

During the August 2020 CSE meeting the physical therapist reported that the student had "deficits in coordination, strength, motor planning, and processing of directions" (Dist. Exs. B at p. 3; C at p. 45; CCC at p. 15). He required "verbal and physical prompts to complete a gross

motor task" and had difficulty independently performing multistep activities (id.). The student was able to safely walk throughout the school "without physical assistance" (Dist. Exs. B at p. 3; C at pp. 45-46; CCC at p. 16). Overall, the student "developed a sufficient level of school-based gross motor functioning and he ha[d] compensatory strategies that allow[ed] him to participate in a school environment" (Dist. Exs. B at p. 3; C at p. 48; CCC at p. 17). The physical therapist noted that the student was "doing well" and "able to function physically independently within his school environment" and he accomplished his 2019-20 goals (Dist. Exs. C at p. 98; CCC at p. 30). The physical therapist did not recommend PT for the 2020-21 school year, however, the parent requested that PT continue so the student did not regress (Dist. Exs. C at pp. 98-101, 119; CCC at p. 31). The CSE agreed and continued to recommend PT services (Dist. Exs. B at p. 15; C at p. 123; CCC at p. 34).

The student was described in the August 2020 IEP as having "a multisensory learning style and benefit[ting] from visuals" (Dist. Exs. B at p. 8). The student "benefit[ted] from repetition of instructions, scaffolding of new concepts, and explicit vocabulary instruction" and "require[d] wait time to respond" (id.). The special education teacher reported that the student was reading at a level E independently (Dist. Exs. B at p. 7; C at p. 16). He "demonstrate[d] difficulty answering open-ended questions" and was "making progress" in looking at the text to find support for an answer (Dist. Exs. B at p. 7; C at pp. 17-18). In math, the student used "manipulatives to add and subtract 1-digit equations," but was unable to multiply or divide (Dist. Exs. B at p. 7). In terms of writing, the student needed "sentence starters to begin writing," and could develop a paragraph with several sentences with prompting (id. at p. 8). The special education teacher reported that the student "need[ed] to improve both his receptive and expressive language skills to increase his ability to communicate effectively" (Dist. Exs. C at p. 21; see Dist. Ex. B at p. 8;). She also reported that the student needed to work on using "grammatically correct sentence structure" in answering questions and in "conversational speech" (id.). Further, the student needed to "increase his reading comprehension to high-school level texts" and "learn strategies to aide in his comprehension of high-school level texts" (id.). According to his special education teacher he "need[ed] an increase in understanding of grammatical operations such as addition, subtraction, multiplication, and division in applying to real-world word [math] problems" (id.). He also needed to increase his independent study skills and decrease his prompt dependency (Dist. Exs. C at pp. 21-22).

Since the student was on home instruction as a result of pendency for the 2019-20 school year and virtual academic instruction during summer 2020, the student had no opportunity for social interaction with peers (Dist. Exs. B at p. 8; C at p. 34).[12] The student "demonstrated significant receptive and expressive language deficits which interfere[d] with his ability to communicate effectively with adults" (id.). He was described as "very social" but needed prompting to initiate greetings and introductions (Dist. Exs. B at pp. 8-9; C at pp. 34-35). The special education teacher reported that the student needed opportunities for socialization and to practice his skills with both disabled and non-disabled peers both above and below his age level (Dist. Exs. B at p. 9; C at pp. 35, 38-39). During the time the student was receiving instruction in the library he had an opportunity to participate in a teen group (ages 9-12), which the special

[12] According to the December 2019 IEP, the student was also on home instruction during the 2018-19 school year (see Dist. Ex. F at p. 7).

education teacher reported as being a beneficial way of practicing his social skills (Dist. Exs. C at pp. 40-42; CCC at p. 15). However, the parent requested that the student not participate because of the age range of the students in the group (Dist. Ex. C at pp. 40-42).

In connection with the student's physical development, it was reported to the August 2020 CSE that the student "demonstrate[d] deficits in coordination, strength, motor planning and processing of directions" (Dist. Exs. B at p. 9; C at p. 45). When asked by the parent about how OT could support the student in a general education setting, the occupational therapist reported that he believed the student would require OT in any possible setting that the student would go through (Dist. Ex. C at pp. 52-53).

In adaptive physical education the student was working on "throwing, catching, kicking, striking, as well as continuously running for up to a quarter of a mile" in a "highly structured and predictable environment" (Dist. Exs. B at p. 9; C at p. 53). The student had a delayed response time of five to 10 seconds that "affect[ed] his motor functioning" and ultimately "impact[ed] his safe participation in the physical education setting" (Dist. Exs. B at p. 9; C at pp. 53-54; CCC at p. 19). The student demonstrated "improvement in his cardiorespiratory endurance" and his "stretching routine" (Dist. Exs. B at p. 9; C at pp. 54-55; CCC at pp. 19-20). The student needed to improve his "motor processing," "eye hand and eye foot coordination," "fast movement skills," and his ability to "generalize skills to safely participate in activities" (Dist. Exs. B at p. 9; C at p. 56; CCC at p. 20).

The August 2020 IEP included management needs for the student which indicated that the student "need[ed] nonverbal, verbal and gestural cues to stay on task, to begin and to complete tasks in all areas of functioning" (Dist. Ex. B at p. 10). The student require[d] a "small teacher-to-student ratio program to address his "significant delays" together with "adult supervision" throughout the day (id.). In terms of the student's involvement in the general education curriculum, the August 2020 IEP reflected that the student had "global developmental deficits," academic, cognitive, receptive and expressive language delays," "fine motor and gross motor deficits" all of which impacted "his involvement and progress in the general education curriculum" (id. at pp. 10-11).

In order to address the student's needs the August 2020 CSE recommended placement in a 12:1+1 special class in an out-of-district public school (Dist. Ex. B at p. 15).[13] In addition to the program recommendation, the August 2020 CSE recommended two 30-minute sessions per week of individual OT; three 30-minute sessions per week of individual PT; three 30-minute sessions per week of individual speech-language therapy; one 30-minute session per week of group (5:1) speech-language therapy; four 90-minute sessions per week of individual special instruction in the home and community; and two one-hour sessions per month of individual parent counseling and training (id. at pp. 15-16). Further, the August 2020 CSE recommended supplementary aides, services and accommodations for the student as follows: an aide for six hours a day for transitions; checks for understanding during instructional time; wait time of up to 6 seconds for a response;

[13] The August 2020 CSE considered a half day BOCES program in career and technical education "to address transition goals and activities" (Dist. Exs. A at p. 2; C at pp. 61-62, 99; CCC at p. 22). However, the parent rejected this program stating it was not an integrated setting and the student can learn "what he needs for transition in high school" (Dist. Exs. A at p 3; C at pp. 100, 104-105).

movement breaks when the student exhibited fatigue; copies of class notes; reteaching of materials; an augmentative communication device (iPad with snap type pro applications, visual schedule, talking calculator); access to a computer with word processing and word prediction software; and access to audible books (id. at pp. 16-17). The August 2020 IEP also provided supports for school personnel on behalf of the student as follows: "[e]ducation [c]onsultant for the [t]eam for sixty hours a year[,] and an educational team meeting for 41 minutes once every quarter" (id. B at p. 17). Finally, the August 2020 IEP provided for extended school year services, testing accommodations, assistive technology in the home and a coordinated set of transition activities (id. at pp. 11, 17-20).[14]

With respect to the student's integration with general education students, the August 2020 IEP indicated that the student "will not participate in regular education in the following areas: [a]ll [a]cademic [a]reas, [s]peech, OT, PT, and [a]daptive [physical education] (PE)" (Dist. Ex. B at p. 21). The IEP also indicated that the student would participate in an adapted physical education program (id. at pp. 15, 21). The district's director of pupil personnel services testified that if the parent accepted placement in a 12:1+1 special class, the CSE would have reconvened to discuss what mainstreaming opportunities the student could have participated in, including "electives, lunch, and other general education possibilities" (Oct. 29, 2020 Tr. p. 324). The district's director of pupil personnel services described the 12:1+1 special class in the neighboring school district as being a special class where the student would be primarily educated with mainstreaming opportunities as appropriate (Dist. Exs. C at p. 63). She testified that the 12:1+1 special class "had a life skills component, whereby protocols, involving much repetition and modelling, would have been in place for lunch time, and other crucial matters such as social distancing and masking" (Dist. Ex. CCC at p. 54).[15]

As noted by the district's director of pupil personnel services, the parent has not asserted that the student should not be in a special class (Parent Ex. CCC at pp. 51-52). For example, other than general LRE allegations, the only complaint about the special class recommendation contained in the due process complaint notice was that the district did not "consider the entire continuum of placement and service alternatives for the complainant for the 2020-2021 academic year, including the possible incorporation of a '12:1:1 special class' within the district, a hybrid program, or the complainant's inclusion in an existing 'alternately assessed special education class' within the defendant district for the 2020-2021 academic year (Aug. 11, 2020 Due Proc. Compl. Not.). During the August 2020 CSE meeting, the parent was clear that his preference was for the student to attend school in the district, either in a special class or a hybrid program, or by receiving

[14] The student is an alternatively assessed student for any State or district assessments of student achievement (Dist. Ex. B at p. 20).

[15] The district's director of pupil personnel services testified as to additional concerns regarding recommending a placement within the school district during the 2020-21 school year due to the COVID-19 pandemic (Parent Ex. CCC at pp. 53-54). For example, she testified that due to the student's "developmental delays and deficits, he could not have managed the social distancing and mask requirements" placing his health and the health of others at risk (id.). She further testified that the student requires prompts from his aide at lunch to wipe his mouth and clean his plate, and with the COVID-19 restrictions the aide could not assist the student during lunch (id.). In addition, she testified that as a result of the student's toileting needs, he used the nurse's office bathroom; however, due to COVID-19 restrictions he would not be able to use the nurse's bathroom for the 2020-21 school year as the nurse's office was limited to students who were sick (id. at p. 53).

instruction at home with push-ins at the district public school for lunch and electives (Dist. Ex. C at pp. 61-70, 99-102). The district's director of pupil personnel services explained that the district did not have a 12:1+1 special class available at the district high school as there were no other students appropriate for placement in a 12:1+1 special class (Oct. 29, 2020 Tr. pp. 298, 304, 418; Dist. Exs. C at pp. 65-66; CCC at pp. 23-24). Further, the August 2020 CSE rejected the parent's suggestion that the district make available a special class just for the student, with mainstreaming for lunch and electives, as the student "need[ed] opportunities for learning and practicing academic, independent living, employment and social skills with other students" (Oct. 29, 2020 Tr. p. 418; Dist. Exs. A at p. 3; C at p. 66; CCC at p. 23).

Based on the above, particularly the extensive discussions that took place during the August 2020 CSE meeting, the CSE's decision to recommend an out-of-district public school to implement the student's IEP was appropriate. As set forth in prior State-level administrative decisions pertaining to the student, while a school district "must provide a continuum of alternative placements that meet the needs of the disabled children that it serves," the Second Circuit has held that "a school district need not itself operate all of the different educational programs on this continuum of alternative placements. The continuum may instead include free public placements at educational programs operated by other entities, including other public agencies or private schools" (T.M., 752 F.3d at 165). This is consistent with State law, which allows districts to "[c]ontract[] with other districts for special services or programs" (Educ. Law § 4401[2][b]).

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

The evidence in the hearing record demonstrates that the district did not have the 12:1+1 special class program in place at the district high school at the time of the August 2020 CSE meeting (see Oct. 29, 2020 Tr. pp. 296, 298). Thus, the student's IEP required the "other arrangement" of a special class placement at a school other than a school located within the district (R.L., 757 F.3d at 1191 n.10; White, 343 F.3d at 380 [finding that "it was not possible for [the student] to be placed in his neighborhood school because the services he required are provided only at the centralized location, and his IEP thus requires another arrangement"]; Lebron, 769 F. Supp. 2d at 801; see, e.g., Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006] [noting that districts need not place students in the closest public school to the student's home if "the services identified in the child's IEP require a different location"]; Letter to Trigg, 50 IDELR 48).

As described herein, the district provided sufficient evidence to support finding that the program recommended in the August 2020 IEP offered the student a FAPE in the student's LRE.

C. Relief

Having determined that even if I were to consider the general arguments in the parent's procedurally defective request for review, I would not find a denial of FAPE in addition to the limited FAPE denial determined by the IHO, I next turn to whether the relief awarded by the IHO to address the district denial of FAPE to the student for the 2020-21 school year was a sufficient remedy. The IHO found a denial of FAPE due to the district's failure to identify where the August 2020 IEP would be implemented and found additional violations relating to the district's failure to provide quarterly progress reports to the parent and the adequacy of the transition goals for the student (IHO Decision at pp. 8, 10-12). As relief for those violations, the IHO directed the district to reconvene the CSE within 30 days of the decision to recommend a specific placement for the student, to review the student's transitional goals to include community opportunities, and to amend the student's IEP to include a transition coordinator (id. at p. 13).[16] The IHO noted that the parent had requested compensatory education in this matter but denied the parent's request finding that the parent did not identify a specific compensatory award and there was no basis in the hearing record to determine an award of compensatory education (id. at p. 12).[17] The parent appeals from this finding. However, instead of laying out what compensatory relief the parent is requesting, the parent requests that I "reflect upon the multitude of claims which were sustained by the IHO and to determine whether compensatory education is due attendant to those violations" (Req. for Rev. at p. 9). However, this request ignores the fact that the IHO specifically awarded relief attendant to each of the violations the IHO identified. As such, the parent's argument offers no rationale for why compensatory relief is necessary in this matter or why the IHO's awarded relief is insufficient, and therefore, there is no basis for departing from the IHO's determination on the issue of relief.

[16] Within the body of the decision, the IHO also directed the district to provide the parent with quarterly progress reports (IHO Decision at p. 12).

[17] In the parent's due process complaint notice and post-hearing brief, the parent requested "'back end' compensatory education" (IHO Ex. I at p. 20; Due Proc. Compl. Not. at p. 3). The only explanation as to the parent's request for compensatory education was in a footnote in the post-hearing brief which indicated that "'make up' education within the school year is likely impossible" and requested "monetary reimbursement" for education to be obtained after the student's graduation (IHO Ex. I at p. 20 n. 47).

VII. Conclusion

Based on the foregoing, there is insufficient basis to depart from the IHO's determinations regarding FAPE, the recommendation of the program in the student's LRE, or that the student is not entitled to compensatory educational services under the circumstances of this matter.

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
February 19, 2021

CAROL H. HAUGE
STATE REVIEW OFFICER