



The University of the State of New York

The State Education Department

State Review Officer

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No. 21-148

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, L.L.P., attorneys for petitioner, by S. Fahad Qamer, Esq.

The Law Offices of Regina Skyer and Associates, L.L.P., attorneys for respondents, by Gregory Cangiano, 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 reimburse the parents for their son's tuition costs at Bonim Lamokom (Bonim) for the 2020-21 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

The student in this matter has received diagnoses of Down Syndrome and intellectual disability and exhibited global developmental delays (see Tr. pp. 393-94; Parent Exs. H; I; J; Dist. Exs. 7 at p. 1; 16 at p. 1). According to the parent, the student received Early Intervention services at an early age, after which from two to five years of age the student was enrolled in a private general education preschool program with push-in supports (Tr. p. 394). The student transitioned to a 12:1+1 program from kindergarten through sixth grade and began attending a 12:1+1 program

at Bonim during the 2017-18 school year (Tr. pp. 278, 394-95).¹ The student continued at Bonim during the 2018-19 school year (see Dist. Exs. 3; 10 at p. 1).

In preparation for the student's reevaluation review in 2018, the district conducted a July 7, 2018 social history update, a July 13, 2018 transition assessment, a September 25, 2018 speech-language evaluation, a September 27, 2018 occupational therapy (OT) reevaluation, a September 27, 2018 psychological evaluation, a September 28, 2018 physical therapy (PT) reevaluation, an October 9, 2018 educational evaluation, and an October 17, 2018 classroom observation (Dist. Exs. 3-10). The parent reported in the July 2018 social history update, that the student had a mild hearing loss, that he benefited from small group instruction and repetition, and that although he was open to learning, he was known to become easily distracted (Dist. Ex. 3 at p. 2).² The parent noted the student's interests and indicated that the student was "very friendly and got along well with peers" (id.). The July 2018 transition summary indicated that the student usually or always got along with his parents, siblings, and friends, was cooperative at home, followed directions, and stayed on task during home activities (Dist. Ex. 4 at p. 1). The transition summary also reported that the student sometimes was able to use his free time constructively, did his homework without being told to, and sometimes accepted constructive criticism (id.). The student reportedly had not yet engaged in jobs other than household tasks or expressed interest in postgraduation employment, but the parent identified the student's interests and hobbies (id. at pp. 1-2).

The September 2018 speech-language evaluation was conducted at the district education center (Dist. Ex. 5 at p. 1). The student's performance on the Clinical Evaluation of Language Fundamentals-Fifth Edition (CELF-5) yielded "scores in the very low severe range," with expressive and receptive vocabulary test scores below the first percentile (id. at pp. 3-4, 7). With respect to articulation, the student's score "fell in less than the first percentile" on the Goldman-Fristoe Test of Articulation-3 and the evaluator noted that the student's speech intelligibility was compromised due to articulation errors and rapid rate of speech (id. at p. 7). The evaluator noted that results of the Functional Communication Profile-Revised, a measure of the student's functional expressive and receptive language skills, indicated that he was able to express his wants, needs, and preferences, communicate information regarding past and future events, as well as describe his daily routine (id.). The student was noted to have functional vocabulary and engaged in spontaneous conversation with a partner, but he struggled to provide information during structured testing (id.). Receptively, the speech-language evaluation report indicated that the student understood basic concepts and semantic categories, followed routine commands, and demonstrated comprehension of some nonverbal communication such as gestures (id.).

According to the September 2018 OT re-evaluation report the student was assessed using the Developmental Test of Visual Perception (DTVP-A), the Beery-Buktenika Test of Visual Motor Integration (VMI), the WOLD Sentence Copy test, and clinical observations (Dist. Ex. 6 at p. 1). The evaluator reported that the student's performance on the DTVP-A indicated that the student's general visual perception skills, motor-reduced visual perception skills, and visual motor

¹ The Commissioner of Education has not approved Bonim as a school with which school districts may contract for the instruction of students with disabilities (8 NYCRR 200.1[d], 200.7).

² According to the September 2018 psychological evaluation report, the parent reported that the student's hearing loss was due to fluctuating fluid in his ears which did not impact his daily functioning (Dist. Ex. 7 at p. 1).

integration skills were significantly below average (below the first percentile) (id. at p. 5). Likewise, the results of the VMI indicated that the student's visual motor integrations skills, visual discrimination skills, and motor coordination skills were also below the first percentile (id.). The student copied 25.6 letters per minute which was at a second-grade rate (id.). The evaluator noted that the student utilized a four-finger grasping pattern with a small amount of dynamic finger movement for paper/pencil tasks and a significant amount of whole hand/wrist movements, which impeded fine control of a pencil (id. at p. 6). However, he accurately grasped scissors and although his cutting was choppy, it was accurate despite mild difficulty managing the paper with his left hand (id.). The report noted that the student was able to visually track a moving object but with breaks in gaze, yet he was able to complete slow smooth pursuit at the far outer portions of his visual field (id.). When attempting quick pursuits, the student moved his head and his eyes, and tearing noted during tracking activities indicated to the evaluator that the student experienced visual fatigue (id.). The student was able to copy from near-point and although his writing was large for the space, 75 percent of the letters were readily recognizable, and he placed small but obvious space between most words (id.). The student tossed, caught, and kicked a ball, hopped two-footed, skipped, and performed jumping jacks (id.). The evaluator noted that there were no overt signs of sensory processing deficits (id.). Overall findings indicated that the student presented with marked delays in visual motor, handwriting, and visual perceptual skills that appeared to have a significant impact upon the student's ability to perform daily tasks at school, with other sources of information indicating that he demonstrated delays in school-related self-help skills (id.).

The September 2018 psychological evaluation report indicated that the student was assessed using the Kaufman Assessment Battery for Children- Second Edition Normative Update (KABC-II NU), the Adaptive Behavior Assessment System-Third Edition (ABAS-3); Parent Form, a social history update, and a review of records (Dist. Ex. 7 at p. 1). The evaluator reported that the student was interested in the testing process, and he maintained good overall attention, but he required additional explanations and examples beyond the standard instructions for most tasks (id. at p. 6). Overall, according to the Fluid-Crystallized Index, the student scored in the lower extreme range of functioning (FCI=59), performing as well as or better than less than 0.3 percent of children his age (id.). The evaluator reported that the student's scores fell within the lower extreme range on the following indices assessed: fluid reasoning, (SS=57, 0.2nd percentile), short-term memory (SS=57, 0.2nd percentile), crystallized intelligence (SS=52, 0.1st percentile), and visual processing (SS=69, 2nd percentile), and that his visual processing abilities were an area of relative strength (id.). Reportedly, the student's long-term storage and retrieval abilities fell into the below average range and were also areas of relative strength (SS=78, 7th percentile) (id.). The evaluator opined that the student's pattern of scoring indicated that while it was expected that he would have difficulties in all areas assessed, his personal strengths could be tapped into for tasks that involved repetition to establish associative memory/learning as well as those that were paired with visual information (id.).

The September 2018 psychological evaluation report stated that the ABAS-3 was administered to the student's mother to assess the student's adaptive and activities of daily living (ADL) skills (District Ex. 7 at p. 6). Accordingly, as per the parent's report, the student obtained a score of 66 on the general adaptive composite which was in the first percentile (extremely low range) (id.). With respect to the conceptual and practical domains the student reportedly performed

in the extremely low range, and his performance was in the below average range regarding the social domain (id.).

In September 2018 the district conducted a PT re-evaluation (Dist. Ex. 8). According to the PT re-evaluation report, the student was assessed using the Bruininks-Oseretsky Test of Motor Proficiency-Second Edition (BOT-2) and his scores were in the below average range in strength and well below average in bilateral coordination, balance and speed and agility (id. at p. 2). The evaluator indicated that the student's body coordination composite score was in the first percentile, with strength and agility scores in the sixth percentile (id.). According to the evaluator, the student's performance indicated that he presented with delays in bilateral coordination, motor planning, body in space awareness, balance, strength and agility which negatively impacted his ability to function throughout the day (id.).

The October 2018 educational evaluation report reflected the student's academic performance as assessed by the Woodcock-Johnson IV Test of Achievement (WJ-IV) (Dist. Ex. 9 at p. 1). The student's performance in all areas of academic ability, including reading, writing, and mathematics, was below the first percentile in the very low range (Dist. Ex. 9 at p. 2). According to the report, the student read words such as 'fish' and 'keep' but had difficulty with words like "them" and "light" (id. at p. 3). With respect to writing, the evaluator reported that the student printed the letters "a", "t", "p", "w", "i" and "T", and distinguished between lower case and capital letters, but had difficulty spelling words such as "is" and "fun" (id. at p. 4). Regarding math calculations the evaluator indicated that the student added some one-digit numbers, but had difficulty subtracting one and two-digit numbers (id.).

A district school psychologist conducted a classroom observation in October 2018 and described the student's participation in the classroom activities (Dist. Ex. 10 at pp. 1-2). The observer reported that the student was on task and responded appropriately to directions and feedback during both reading and mathematics activities (id.). The student verbally identified the correct month, pointed out the correct month, and followed along appropriately during the calendar activity (id. at p. 1). The student worked steadily on money worksheets while waiting for the teachers to check his work before starting the next worksheet, and remained quietly in his seat while he waited (id. at pp. 1-2). The assistant teacher told the observer that once shown how to count a certain set of coins, the student applied that skill independently throughout the "problem set" (id. at p. 2). The head teacher conveyed that the student "love[d] to do work" and was "usually on target with completing his math work" but that in finishing his work quickly he sometimes made errors due to rushing (id. at p. 2). During reading instruction, the student worked on phonics worksheets independently followed by 1:1 instruction for decoding with the head teacher (id.). The student was observed to actively try to sound out the words presented and decoded many of the words when he applied the strategies, he worked steadily and remained on task during 1:1 instruction, and was responsive to feedback to correct errors that were pointed out (id.). The student was noted to transition back to his seat after the 1:1 instruction (id.).

The November 2018 level 1 career assessment reflected the staff ratings of the student with respect to basic job-related skills, work behaviors, motivation, preparation, and self-advocacy (Dist. Ex. 11). The student's skills were generally rated as occurring "sometimes" or "usually" (see id.). None of the skills were identified as "developing," with a few skills rated as "always" including that he exhibited appropriate grooming/hygiene, was goal oriented, demonstrated determination/perseverance, and had the ability to talk about wants, needs and desires (id.).

The student remained at Bonim for the 2019-20 school year (see Tr. p. 396). As discussed further below, Bonim prepared a December 19, 2019 readiness report and related services progress reports for speech-language therapy, OT, and PT for consideration in developing the student's 2020-21 IEP (Tr. pp. 338-40, 356-57; Dist. Exs. 12-15).

A CSE convened on June 3, 2020, to review the student's present levels of performance, establish the student's needs, and recommend a program for the 2020-21 school year (Dist. Ex. 16 at p. 1). Having determined the student's eligibility for special education and related services as a student with an intellectual disability, for the 12-month portion of the school year commencing on July 6, 2020, the June 2020 CSE recommended an 8:1+1 special class placement for three hours each day with two 30-minute sessions per week of individual speech-language therapy, and two 30-minute sessions per week of individual OT (id. at pp. 15-16).³ Commencing on September 3, 2020, the CSE recommended one 41-minute session per day of a 12:1+1 special class for English and five 41-minute sessions per day of a 8:1+2 special class (Dist. Ex. 16 at p. 14).⁴ With respect to related services, the CSE recommended two 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a small group (2:1), two 30-minute sessions per week of individual OT, one 30-minute session per week of OT in a small group, one 30-minute session per week of individual PT, and one 60-minute session per month of parent counseling and training in a small group (id. at pp. 14-15). The CSE also recommended modifications for the student throughout the school day including the provision of prompts to pace himself during academic instruction, visual aids to support learning, and concrete examples presented during instruction (id. at p. 15). The CSE developed approximately 22 annual goals and identified post-secondary goals for living, working, and learning as an adult (id. at pp. 8-14). To support the student in his transition from school to post-school living, the CSE identified a coordinated set of transition activities related to instruction, related services, community experiences, employment and adult living objectives, and acquisition of daily living skills (id. at pp. 16-17).

In a prior written notice dated June 3, 2020, the district informed the parent of the June 3, 2020 CSE's recommendations (Dist. Ex. 17). The prior written notice indicated that the continuum of services had been reviewed, and although a full day 8:1 special class placement was considered, the CSE determined that the student could "receive special class programs in a 12:1 setting in the areas of [r]eading and English" (id. at p. 1).⁵

On August 25, 2020, the parent signed an enrollment contract with Bonim for the 2020-21 school year (Parent Ex. L).

³ The student's eligibility for special education as a student with an intellectual disability is not in dispute (34 CFR 300.8[c][6]; 8 NYCRR 200.1[zz][7]).

⁴ One of the daily 41-minute sessions of the 8:1+2 special class was devoted to adapted physical education instruction which was to be provided in the gym (Dist. Ex. 16 at p. 14).

⁵ According to the prior written notice, the parent agreed with the CSE's "discussion and recommendations" (Dist. Ex. 17 at p. 1).

A. Due Process Complaint Notice

In a due process complaint notice dated October 15, 2020, the parents alleged that the district failed to offer the student a FAPE on procedural and substantive grounds for the 2020-21 school year and maintained that the recommended program and placement were incapable of providing the student with an appropriate education (IHO Ex. 1 at pp. 1-2).

The parents contended that the proposed program was inappropriate because although the student required individualized and small group instruction, he made progress in a less restrictive setting, namely a 12:1:1 program in all subject areas (IHO Ex. 1 at p. 2). The parents argued that the student required a highly structured, individualized education program that could address his unique needs while also providing him with a supportive curriculum that promoted independence in the community with meaningful opportunities to interact with the mainstream population to develop the necessary social, emotional, and behavioral skills he needed (*id.* at p. 2).

The parents argued that the proposed program was "heavily weighted towards vocational and functional skills" and asserted that the student was engaged in learning academic skills and was able to continue to learn academic skills to "promote functional adulthood" (IHO Ex. 1 at p. 2). In addition to voicing their concerns regarding a vocationally focused program and the student's needs to continue with academic learning, the parents contended that the student required pre-vocational skill training before engaging in a heavily weighted vocational program and asserted that the recommended program was "not appropriately ambitious" in light of the student's specific needs (*id.* at p. 3). Additionally, the parents maintained that the CSE's recommendation was not supported by the available documentation and that the IEP did not describe the basis of the CSE's recommendations (*id.*).

The parents argued that the recommended program was not the student's least restrictive environment because it was located in a community school that "will not afford [the student] the actual opportunity to interact and be educated amongst his typically developing peers" (IHO Ex. 1 at p. 3). The parents contended that the CSE did not provide the student with the "necessary supports, services, and programs to maximize his ability to participate with his typically developing peers" and that the IEP failed to address how the student would have opportunities to learn alongside typically developing peers (*id.*).

The parents objected to the recommended program maintaining that it did not provide the student with a suitable and functional peer grouping for instruction and social purposes noting that the proposed grouping was likely to cause the student to regress due to "many of the students hav[ing] significant social challenges" resulting in a lack of appropriate peer models (IHO Ex. 1 at p. 3). The parents asserted that the annual goals and short-term objectives were generic, not measurable and did not encompass all the student's identified special education needs citing the lack of evaluative criteria, evaluative procedures, and schedules to measure progress asserting that the goals were not "uniquely tailored to the [student's] educational and social-emotional needs" (*id.* at pp. 3-4).

The parents alleged that they were denied a chance to meaningfully participate in the development of the student's IEP because the CSE did not consider their concerns regarding the student's academic and social-emotional functioning (IHO Ex. At p. 4). They disagreed with the program recommendation due to the lack of meaningful opportunities for integration and special education supports that would allow for the student to participate in a less restrictive environment

thereby not giving the parent's concerns meaningful consideration (id.). The parents contended that the related services goals were not based on current information and that the CSE failed to provide sufficient support to properly address the student's challenging behaviors that impeded the student's education and that of others (id.). Further, the parents contended that the postsecondary goals were not appropriately ambitious, the district failed to evaluate the student in all areas of suspected disability, the IEP did not include peer reviewed research-based methods, did not consider the effectiveness of the reading instruction that had been provided, and did not adequately describe the basis of the CSE's recommendations (id. at pp. 4-5). Lastly, the parents maintained that the district's failure to discuss, consider, or develop a remote learning plan resulted in a denial of FAPE (id.).

As relief, the parents sought the costs of the student's tuition at Bonim for the 2020-21 school year (IHO Ex. 1 at p. 5).

B. Impartial Hearing Officer Decision

After a pre-hearing conference on November 23, 2020, an impartial hearing convened on February 23, 2021, and concluded on March 12, 2021, after three days of proceedings (see Tr. pp. 1- 435). In a decision dated May 24, 2021, the IHO determined that the district failed to offer the student a FAPE in the least restrictive environment for the 2020-21 school year, that Bonim was an appropriate unilateral placement, and equitable considerations favored reimbursement less the 10 percent portion due to religious education for the cost of the parents' unilateral placement (IHO Decision at pp. 19-21).

First, the IHO determined that the parents did not have a meaningful opportunity to participate at the June 2020 CSE meeting as no one at the CSE informed the parents that the class would be composed of nine students rather than the presumed eight as indicated by the 8:1:2 recommendation, nor were the parents apprised of the disparity in the grades and ages of the students (IHO Decision at p. 16). The IHO indicated that the IDEA expresses the desirability of integrating students into the general education setting and opined that it should be included in the four corners of the IEP (id.). The IHO also found that the district testimony regarding mainstreaming opportunities the district could provide the student were not included in the IEP which undermined the "credibility whether this was an appropriate program for the student" (id. at p. 17).

With respect to the goals, the IHO found that they were not necessarily measurable and did not in all respects address the student's present levels of performance, and also stated that one of the goals was not reasonably ambitious, a speech goal did not identify the target sounds, and another goal regarding WH questions did not specify the student's grade level or type of paragraph, and that a motor goal did not specify how the student was to achieve the goal while maintaining his posture (id. at pp. 17-18). The IHO further stated that despite the district's contention that the related services goals were derived from Bonim, the IEP was nonetheless the responsibility of the CSE (id. at p. 18).

Regarding the issue of whether the district's program was the least restrictive environment for the student, the IHO stated that the respective ratios in the parents' preferred program of a 12:1+1 versus the district's recommended program of 8:1+2 did not present a meaningful difference with respect to LRE as both placements were self-contained (IHO Decision at p. 18).

However, the IHO "believed" that the program at Bonim "afforded [the student] participat[ion] with non-disabled peers during lunch, scheduled buddy time, and access in the hallway more so than the actual [district] IEP provides to [the student]" (id. at pp. 18-19). Therefore, the IHO determined that the district failed to offer the student a FAPE in the least restrictive environment for the 2020-21 school year (id. at p. 19).

Having found the district failed to offer the student a FAPE for the school year in dispute, the IHO concluded that that Bonim knew the student's needs and provided individualized, concrete instruction, motivated the student with a token behavioral plan, and tailored instruction to meet the student's educational needs (IHO Decision at pp. 20-21). The IHO also found that the unilateral placement provided the needed related services and that progress reports demonstrated that the student was making progress (id. at p. 21). Based on these findings, the IHO determined that the unilateral placement—Bonim— was appropriate (id. at p. 21). Finding that the equities favored the parent, the IHO ordered direct funding or tuition reimbursement for the cost of Bonim less 10 percent for the portion of the program during which religious instruction was provided for the 2020-21 school year (id. at p. 21).

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 2020-21 school year.

The district asserts that the IHO erred in finding that the parent did not have a meaningful opportunity to participate in the June 2020 CSE meeting when she stated that the district teacher's testimony inferred that the teacher knew the makeup of the class and there would be disparity in grades and ages of the student but failed to provide the parent with a class profile, thereby preventing the parent's meaningful participation in the CSE meeting. The district contends that class profiles are not required to be provided to the parent. Further the district asserts that the parent testified that the CSE informed her that the functioning levels of the student in the 8:1+2 were appropriate compared to the student, and that apart from the ELA class, the 12:1+1 was not appropriate since the students were too high functioning compared to the student. Further, the district maintains that the parent fully participated at the CSE meeting, particularly during the discussion of the student's academic and social skills, and also engaged in the CSE's development of goals for the student.

The district also asserts that the IHO erred in finding a denial of FAPE on the grounds that the CSE did not sufficiently know the student because the CSE relied on evaluations from 2018 and did not observe the student. The district maintains that it was sufficiently informed of the student's disabilities as the parent, student's teacher, and Bonim principal participated in the CSE meeting and informed the committee regarding the student's current level of functioning. Additionally, the CSE had current related services and educational summary progress reports provided by Bonim.⁶

⁶ In the request for review the district also notes that the 2018 evaluations were current, and a classroom observation was not required at that time as it was an annual review not a reevaluation, as well as noting that at the time of June 2020 CSE the Covid-19 pandemic remained ongoing.

The district contends that the IHO erred in determining that the district's program was not the least restrictive environment for the student and that the IEP failed to indicate the mainstreaming opportunities available to the student at the district's recommended placement. The district maintains that the recommended 12:1+1 and the 8:1+2 were located in a public-school building in the student's community which allowed for the opportunity to socialize with typically developing peers and provided access to the local community as well as allowing for community field trips and opportunities to learn about places located in the student's community. The district also maintains that the IHO erred in not considering the school's Best Buddies program and other extracurricular activities available in the district because the services were not listed on the June 2020 IEP. The district contends that the recommended placement and program were made with the understanding that mainstreaming opportunities were available, which the parents were aware of, as it was discussed at the June 2020 CSE meeting. Further, the district contends that the IEP is required to list the special education services "which would remove the student from the general education environment" and that students with disabilities must participate in the general education environment "except to the extent described in the IEP"; accordingly, the district argued that it was not required to include on the IEP every mainstreaming opportunity available to the student. The district also noted that the IHO erred in ruling that the adapted physical education would occur in a self-contained classroom as the teacher's testimony indicated that it took place in the gym while the other half of the gym was used by general education students and all students used the "turf" together.⁷

The district asserts that the IHO erred in finding that the annual goals in the June 2020 IEP were neither measurable nor addressed the present levels of performance as the goals were developed by the entire CSE and were based on the information from the Bonim progress reports. Further, the district noted that there was no disagreement regarding the goals at the CSE meeting and both the Bonim principal and the parent testified that, for the most part, the goals were appropriate.

With respect to the program recommendation for a 12:1+1 for ELA and 8:1+2 classrooms for the remaining subject areas with related services of OT, PT, and speech-language therapy, the district asserts that the IHO erred in finding the district did not offer the student an appropriate program. The district states that the recommendation was based on updated progress reports and information provided by individuals who knew the student well, the recommended program with modifications, aids, and services in the IEP was appropriate and that the 8:1+2 class addressed the student's intensive management needs, as well as allowing for the intensive support the student needed throughout the day due to his low functioning both academically and cognitively. Additionally, the 12:1+1 class for ELA was appropriate because the Bonim director informed the CSE that the student functioned at a higher level in that area. The district also cited to the student's need to engage in ADL and functional academic skills which the 8:1+2 class provided.

Regarding the unilateral placement, Bonim, the district contends that it is not appropriate as it was not the least restrictive environment. The district asserts that Bonim is a distance from the student's home, the student's class consists entirely of students with Down Syndrome providing

⁷ In the request for review the district also asserts that the IHO erred in comparing mainstream opportunities between the district program and the student's unilateral placement but rather the IHO should have considered the district's program independently.

limited role models for the social skills the student needs to develop, and the school has only male students and staff. The district also points to issues regarding the student's instruction by a teaching assistant who was not qualified to teach and the provision of religious instruction that is barred from reimbursement.

The district contends that equities do not favor the parent as they were neither open to considering the district's program and placement nor made attempts to obtain information regarding the appropriateness of the recommendations.

In their July 7, 2021 answer, the parents assert that the IHO correctly found that the district denied the student a FAPE in the least restrictive environment, the parents were denied meaningful participation in the CSE meeting, and in finding that the district's IEP failed to appropriately incorporate mainstreaming opportunities to ensure the student would have mandated access to typically developing peers; therefore, the student was denied a FAPE. The parents also contend that the IHO was correct in finding that the IEP failed to provide appropriately ambitious annual goals and short-term objectives as well as finding that Bonim was an appropriate placement.

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" (Andrew 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 Andrew 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]).⁸

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

⁸ 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" (Andrew F., 137 S. Ct. at 1000).

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. June 2020 CSE Process

1. Parent Participation

The district appeals from the IHO's determination that the parent did not have the opportunity to meaningfully participate in the June 2020 CSE meeting. The IHO found that no one at the June 2020 CSE meeting indicated to the parents that the class the student was recommended to attend would have included nine students or that there would have been a disparity in the age range of the students (IHO Decision at p. 16).

Initially, the June 2020 CSE recommended that the student receive one 41-minute session of instruction per day in a 12:1+1 special class for English and for four 41-minute sessions daily in an 8:1+2 special class (Dist. Ex. 16 at p. 14).⁹ The executive director for special education testified that she sought variances from the New York State Education Department to place one additional student who was under the age of 16 and therefore outside of the required 36-month age span in the student's 8:1+2 special class (Tr. pp. 253-56; see 8 NYCRR 200.6[h][6]). According to the executive director, those variances were granted in September 2020 and therefore, the student would have had "a seat coming into the district" had he attended the first day of school (Tr. pp. 256-57).

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

⁹ The June 2020 IEP indicated that the adaptive physical education, the special 12:1+1 class, and the 8:1+2 special class recommended duration was for 41-minutes per session (Dist. Ex. 16 at p. 14). The hearing record makes reference to the program providing special classes in "periods," which are presumed to be the same as the 41-minute sessions specified in the IEP and will be referred to as periods throughout this decision (Tr. pp. 92, 158, 160, 171-72, 237, 242). The hearing record does not indicate how many periods there were in the school day.

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 F.L. v. Bd. of Educ. of Great Neck Union Free Sch. Dist., 735 Fed. App'x 38, 40 [2d Cir. Aug. 24, 2018] [noting that "[a] professional disagreement is not an IDEA violation"], quoting P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008]; 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"]; Sch. for Language & Comm'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]). When determining whether a district complied with the IDEA's procedural requirements, the inquiry focuses on whether the parents "had an adequate opportunity to participate in the development" of their child's IEP (Cerra, 427 F.3d at 192). Moreover, "the IDEA only requires that the parents have an opportunity to participate in the drafting process" (D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *11 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80 [2d Cir. Dec. 26, 2012], quoting A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208, 216 [D. Conn. 2006]; see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [noting that the IDEA gives parents the right to participate in the development of their child's IEP, not a veto power over those aspects of the IEP with which they do not agree]).

During the impartial hearing, the parent's testimony generally reflected her active participation in the June 2020 CSE meeting (Tr. pp. 397-98, 400, 418-20). She testified that, at the June 2020 CSE meeting, the team discussed the student's transition to the high school, she was made aware that the curriculum in the 8:1+2 special class was vocationally based as opposed to academically based, and the team discussed the student's program at Bonim (Tr. pp. 397-98). The parent testified that she "pushed back" on the district CSE members belief that the district's 12:1+1 special class would not be appropriate for the student for most of the day (Tr. p. 398). Specifically, she testified that she expressed her concern about the appropriateness of the 8:1+2 special class because the student was "thriving in a 12:1+1 and [she] didn't see any reason to restrict him further" (id.). The parent also testified that the district members of the CSE explained that the 8:1+2 special class was "very heavily focused on vocational skills" and that she "expressed [her] disagreement and [her] concern with that placement," in that she believed that the student had "more academic gains to make" and she was "not ready" for the student's program to be vocationally focused (Tr. p. 400). The parent affirmed that at the CSE meeting she expressed her disagreement with the recommended program and would not agree to a placement that she had not seen (Tr. p. 418). Further, the parent indicated that she had received information regarding the recommended program "in June," that she had all her questions answered, and that she was "a full participant" in the June 2020 CSE meeting (Tr. pp. 419-20). The parent stated that at the June 2020 CSE meeting she was given the opportunity to say what she wanted, she was not stopped from voicing her opinion or making her opinion heard to the members of the CSE, and she had the opportunity to participate at the CSE meeting (id.). Additionally, the parent stated that the student's annual goals were reviewed and that she participated in the development of annual goals (Tr. p. 420). She also indicated that the student's Bonim teacher and principal did not object to or raise concern about the annual goals, that she believed they were appropriate, and that she only disagreed with the placement (id.).

The district special education teacher testified that at the June 2020 CSE meeting, a discussion ensued with the family and Bonim participants with respect to including more academic goals on the IEP in addition to general functional goals (Tr. pp. 193, 199). The district special education teacher also stated, consistent with the parent's testimony, that the parent and the Bonim participants indicated at the CSE meeting that the student continued to have room to grow with his academics, which the committee did not disagree with, which was the reason for the inclusion of the academic goals on the IEP (Tr. pp. 200-01, 213).¹⁰

As stated above, the district must ensure that the parents are afforded an opportunity to participate in the CSE meeting and that the parent's right to participate is not impeded during the development of the IEP. In determining whether the parent was afforded meaningful participation at a CSE meeting, the analysis rests not on whether there is complete agreement among the parties but rather, did the parents have the opportunity to express their views during the drafting of the student's IEP. In this case, as demonstrated by testimony of district personnel as well as the parent, the hearing record establishes that the parent was afforded the opportunity to participate in the development of the June 2020 IEP, particularly as it related to the development of the annual goals and was also able to express her disagreement with the recommended 8:1+2 special class placement (see Tr. pp. 397-98, 400, 419-420).

Additionally, the IHO's determination that the parent was denied meaningful participation because the district did not provide the parent with a class profile at the CSE meeting indicating that there would be an additional student in the class and the age range of the students was more than 36 months is in error. As an initial matter, there is no evidence that, although the district ultimately sought a variance with respect to the class size and age range of the student, it knew at the time of the CSE meeting what the precise contours of the class would be with respect to size or age range. Moreover, State regulations provide for procedures to follow in the event a district is seeking a variance as to the class sizes or age range limitations (8 NYCRR 200.6[h]6), and there is no indication in the hearing record that the district did not follow the procedure for obtaining a variance (see Tr. pp. 253-56). Further, as previously described, the evidence in the hearing record showed that the parent actively participated in the June 2020 CSE meeting, which is the measure by which a parent participation claim must be analyzed, and the lack of disclosure of the classroom profile is not a basis to determine that the parent was denied meaningful participation at the June 2020 CSE meeting resulting in a denial of FAPE (see E.P. v. New York City Dep't of Educ., 2016 WL 3443647, at *11 [S.D.N.Y. June 10, 2016] [parent was not denied of her right to participate in student's educational placement when district did not provide parent with the identity and verbal ability of the prospective students in its proposed class]). Moreover, even if the district's failure to disclose the class size and profile could be construed as a procedural error, there is no evidence that, given the parents' active participation otherwise and the overall appropriateness of the recommendations made, as discussed further below, such error deprived the student of a FAPE. As such, the IHO's finding to the contrary must be reversed.

¹⁰ The CSE chairperson also testified that Bonim representatives and the parent participated in the goal development at the June 2020 CSE meeting (Tr. p. 74).

2. Evaluative Information

Prior to turning to the substance of the IHO's findings related to the recommended program and LRE, the district asserts that the IHO erred in finding a denial of FAPE because the June 2020 CSE did not know the student, the CSE relied on evaluations from 2018, and the CSE did not conduct an observation of the student.

Initially, although the IHO made findings that the district special education teacher who attended the June 2020 CSE meeting testified that she did not know the student, that the CSE did not conduct an observation of the student, and that the evaluations relied on in making the recommendations at the June 2020 CSE meeting were conducted in 2018, the IHO does not appear to have specifically determined that any of these factors contributed to her overarching finding that the district denied the student a FAPE (see IHO Decision at pp. 7, 16-17). Rather, the IHO's reference to these issues appears to be related to the IHO's weighing of the evidence regarding the recommended program and LRE concerns raised by the parents (id. at pp. 16-17). With that in mind, a review of the evaluative information available to the June 2020 CSE will form the basis for the analysis of the recommended program.

The chairperson of the June 2020 CSE meeting testified that in preparation for the meeting she reviewed information about the student that was contained in the district's "document repository" which held "all of the reports and information that [the district] receive[d] for the upcoming meeting" (Tr. pp. 36-37). According to the CSE chairperson, she reviewed the student's 2019-20 IEP and underlying documents, as well as "all of the updated information from current providers, progress notes on the goals," and "any updated testing and evaluations that [were] there" (Tr. pp. 36-37; Dist. Ex. 16 at p. 1). The evaluative information section of the June 2020 IEP reflected results from some of the assessments completed in 2018 and that the CSE also had information from a June 3, 2020 special education progress report, and OT, PT, and speech-language progress summaries dated June 3, 2019 (Dist. Ex. 16 at pp. 2-4; see Dist. Exs. 5-9).¹¹

The Bonim principal testified that he had daily interactions with the student, was involved in developing his curriculum, and had observed the student in the classroom (Tr. pp. 266-67, 273-74). He also testified that he had provided information to the June 2020 CSE with respect to the student's related services and social skills annual goals, his ELA, mathematics, and ADL skills, as well as the progress the student had made over the 2019-20 school year (Tr. pp. 343-345). The CSE chairperson testified that the principal of Bonim shared some of the information from the December 2019 readiness report with the June 2020 CSE (see Tr. pp. 50-52; Dist. Ex. 12). According to the Bonim principal, the student's teacher participated during the June 2020 CSE meeting and provided information to the CSE about the student's academic functioning (Tr. pp. 323-24, 345; Dist. Ex. 16 at p. 1). Additionally, the Bonim principal testified that the information in the OT, PT, and speech-language progress reports and the December 2019 readiness report were reviewed at the June 2020 CSE meeting (Tr. pp. 338-40, 356; Dist. Exs. 12-15; see Tr. p. 63).¹²

¹¹ The June 2020 IEP indicated that all of the related services progress report listed on the IEP were provided by the therapists at Bonim (Dist. Ex. 16 at p. 2).

¹² Although the Bonim related services reports were undated, the age of the student at the time of the PT progress report suggested that it was prepared in December 2019, and the age of the student reflected in the speech-language progress report suggested that was prepared in May 2020 (Dist. Exs. 13 at p. 1; 15 at p. 1). The OT

Review of the June 2020 IEP shows that the present levels of performance information came directly from the Bonim reports (compare District Ex. 16 at pp. 4-7, with Dist. Exs. 12-15).¹³

Based on the above, the hearing record supports a finding that the June 2020 CSE had sufficient, current information about the student provided by both Bonim progress reports and the participation of the Bonim principal and the student's teacher. Therefore, the IHO's finding that the CSE did not sufficiently know the student due to reliance on evaluations from 2018 and the lack of a class observation is not supported by the hearing record.

B. June 2020 IEP

1. The Student's Needs

Although not in dispute on appeal, a description of the student's needs is necessary to evaluate the appropriateness of the June 2020 IEP. Review of the June 2020 IEP present levels of performance shows that it reflected the information contained in the Bonim progress reports and as such, will be used to discuss the student's skills and deficits as known to the June 2020 CSE (compare Dist. Ex. 16 at pp. 4-7, with Dist. Exs. 12-15).

According to the June 2020 IEP, the student's reading skills fell in the "upper first" grade level relative to word recognition, oral reading and reading comprehension (Dist. Ex. 16 at p. 5). Reportedly, the student recited the whole alphabet, read all uppercase and lowercase letters, and gained information from books about real things by looking at the pictures or being read to (id.). The student was also able retell a story from a picture book with reasonable accuracy, recognize his own name in print, orient to pages with an understanding of reading from top to bottom and left to right, read at least five words in the environment, recognize 50 percent of the letters of the alphabet, and use attack skills to attempt to read unknown words (id.). Although the student reportedly did not distinguish between fantasy and reality in stories, he located page numbers on request and read five nouns and basic sight words on request (id.).

According to the June 2020 IEP the student's mathematics skills fell in the lower first grade level with respect to computation skills and problem-solving skills (Dist. Ex. 16 at p. 5). The student reportedly counted to 100, understood 1:1 correspondence, understood a number of quantitative concepts such as long/short, large/small, thick/thin, more/less, among other things, and identified numerals to 125 (id.). The student also solved addition problems with sums to 19 without regrouping, two-digit addition problems with regrouping, subtraction problems with sums of 10, and used the correct name for labeling pennies, nickels, dimes, quarters, and a dollar (id.). Further, with respect money skills the student reportedly understood the values for one to 25 cents, added nickels to the sum of 75 cents, and nickels and dimes to the sum of 25 cents (id.). Regarding calendar skills the student mastered identifying the number of days in a given month, stated the

report did not include the age of the student or the date the report was prepared (see Dist. Ex. 14). Despite the lack of dates on the reports, the Bonim principal testified those were the documents reviewed during the June 2020 CSE meeting (Tr. pp. 338-40; Dist. Exs. 13-15).

¹³ The June 2020 IEP present levels of performance are not in dispute in this matter.

day of the week when given a date of the month, and told time on an analog clock to the hour and half hour (id.).

With respect to writing, the June 2020 IEP indicated that the student printed all uppercase and lowercase letters, he wrote his name, age, telephone number and address, and was working on copying sentence with increasing clarity (Dist. Ex. 16 at p. 5). The student's spelling skills were reportedly at the lower first grade level (id.). The June 2020 IEP identified the student's cognitive/daily living skills noting that he stated his own personal information, identified colors, numbers, and letters, and mastered the identification of all major and minor body parts (id.). The student reportedly followed one to four step directions (id.). Regarding self-help skills, the IEP also indicated that the student put on clothing, cared for his own toileting needs, tied his shoes, understood which shoe went on which foot, and took care of his personal items (id.).

The June 2020 IEP indicated that the student presented with receptive and expressive language delays along with difficulty producing clear speech sounds (Dist. Ex. 16 at p. 4). The student reportedly had difficulty with age-appropriate language skills such as what things go together, naming opposites, putting things in the correct order and similar skills (id.). The student was known to have difficulty with appropriate sentence structure during conversation which in conjunction with his other difficulties, hindered his ability to participate in classroom discussions (id.). The IEP indicated that the clarity of the student's speech production was hindered by his quick rate and "unintelligible manner" (id.). His speech intelligibility was also impacted by delayed articulation skills and slurred speech which negatively impacted his participation in classroom discussions and communication with others (id.).

With respect to the student's motor abilities and needs, the June 2020 IEP indicated that the student received PT to address gross motor delays involving the student's kyphotic and slouched posture, poor quality of gait and stair negotiation, fair coordination and balance, overall strength and endurance, as well as his flexibility in his lower extremities (Dist. Ex. 16 at p. 6). The IEP noted that the student's motor delays negatively impacted his performance in the classroom and physical education setting but indicated that the student had made progress related to object manipulation such as catching and throwing a ball of varied sizes, and lower extremity strength/endurance skills as seen in activities such as frog jumps, hurdle jumps, and hopping on one foot (id.). Reportedly, the student had made progress regarding lower extremity range of motion which affected proper performance of physical activities and proper sitting and standing posture (id.). The June 2020 IEP indicated that the student required verbal cues to tend to tasks and minimal redirection when distracted (id.).

Turning to the student's self-help and fine motor needs, the June 2020 IEP indicated that he fed himself during lunch with minimal cues for cleanliness, buttoned his own shirt independently, and closed the zipper on his sweater, but demonstrated difficulty with his coat when his vision was occluded (Dist. Ex. 16 at p. 6). The student was working on pre-writing/writing skills including using an appropriate pencil grasp and forming various shapes and letters appropriately (id.). The IEP noted that the student applied excessive pressure on his pencil during coloring/pre-writing/ handwriting activities (id.). According to the IEP, the student had difficulty maintaining an upright position against gravity, difficulty with dynamic standing balance, and he was unable to maintain an upright position while on a moderately unstable surface with eyes open and feet together for more than a few seconds (id.). The IEP also noted that the student exhibited motor coordination deficits, and limitations with motor planning as well as terminating movements

during motor tasks (id.). The student's rhythmic movements were described as jerky, irregular, and asymmetrical and the student demonstrated proprioceptive hyposensitivity as demonstrated by his impulsive and risk-taking behaviors (id.). The student was also described as having difficulty sitting for increased duration, fidgeting, and touching objects for proprioceptive input (id.). The IEP indicated that the student had poor body and spatial awareness, stumbled, and bumped into objects and presented with difficulty sustaining his attention to engage in tasks for increased duration (id.).

The June 2020 IEP indicated that the student was very social, well behaved, got along with both his classmates and teacher, and actively participated in school (Dist. Ex. 16 at p. 6). Further, according to the IEP the student did not present with social/emotional needs that required special education services and indicated that the parent did not report any social/emotional concerns (id.).

Based on the student's present levels of performance, the June 2020 CSE identified the student's needs (Dist. 16 at pp. 5-7). With respect to speech-language skills, the IEP indicated that the student needed to improve his articulation, sequence, and conversational skills, and his ability to write grammatically correct sentences, categorize objects, and answer WH questions (id. at p. 5). Regarding academic skills, the IEP indicated that the student needed to improve his overall reading and comprehension skills, knowledge of basic mathematic operations, functional mathematic and money skills, and independent task competition skills, as well as his ability to follow written directions for task completion (id. at p. 6).

With respect to the student's gross motor skills, the IEP indicated that the student needed to improve his strength and endurance, balance and coordination, and range of motion (Dist. Ex. 16 at p. 7). Regarding fine motor skills, the IEP indicated that the student needed to improve his written communication skills, self-care skills, fine motor skills, and self-coping skills (id.). For adapted physical education, the IEP noted that the student needed to improve his core strength and endurance (id.). Additionally, the IEP indicated that the student exhibited a decreased ability to filter out extraneous auditory stimuli as seen by his inability to attend to and complete simple tasks in distracting environments with moderate verbal redirection, and also that his deficits in visual perceptual/motor and ADL skills affected his performance in both his home and school environment (id.).

With respect to the student's management needs the June 2020 IEP indicated that the student "require[d] specially designed instruction throughout the school day provided in a structured setting with a small student-to-teacher ratio" (Dist. Ex. 16 at p. 7).¹⁴ The IEP also identified that the student needed prompting to pace himself during academic instruction, visual aids to support learning, and concrete examples presented during instruction (id. at p. 15).

¹⁴ The June 2020 IEP also included post-secondary needs including that the student needed to develop prevocational skills, independent living skills, as well as gross and fine motor skills (Dist. Ex. 16 at p. 8). It also indicated that the student needed to explore his interests, improve communication skills, continue to work on reading decoding, fluency, accuracy and comprehension, mathematical applications and problem solving, and written expression skills (id.).

2. Annual Goals

The district contends that the IHO erred in finding that the annual goals included in the June 2020 IEP were not measurable and did not address the student's present levels of performance.

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]).

In this matter, the June 2020 IEP included 22 annual goals with approximately 43 accompanying short-term objectives to address the student's needs (Dist. Ex. 16 at pp. 9-14). The hearing record indicates that the annual goals were derived from the CSE meeting discussion about the student's needs and current levels of performance which included the parent, the Bonim principal, and the student's Bonim teacher, as well as from the information in the Bonim progress reports (Tr. pp. 74, 120-21, 198-99).

Regarding the measurability of the annual goals, review of the June 2020 IEP shows that each annual goal included evaluative criteria (i.e. 75 percent success over 12 weeks, 80 percent success over 10 weeks), evaluation procedures (i.e. teacher devised tests or worksheets, recorded observation of targeted behavior), and the schedule to be used to measure progress (i.e. weekly, every two weeks) (Dist. Ex. 16 at pp. 9-14). Additionally, the CSE chairperson testified that she reviewed all the goals to ensure they were measurable prior to moving forward, and she required the teacher to collect data on a weekly and biweekly basis to assess ongoing progress (Tr. pp. 69-70).

The CSE chairperson testified that the annual goals were created specifically for the student to meet his needs (Tr. p. 77).¹⁵ To address the student's reading comprehension needs, the June 2020 IEP included three annual goals to improve his ability to answer WH questions from content area text, state the central message or lesson from a text, and describe four major events from narrative and/or informational text, all at his reading level (Dist. Ex. 16 at pp. 6, 9-10). The two mathematics annual goals addressed the student's needs with respect to solving a variety of equations using addition, subtraction, multiplication, and division with a calculator and using the "dollar up" method to make real and simulated purchases when provided with verbal prompts (*id.* at p. 10). The district special education teacher testified that the student's goal with respect to solving equations involving basic operations was an academic goal and addressed the parents' wish for the student continue to learn to solve a variety of mathematical functions (Tr. p. 202).

¹⁵ As an example of the annual goals being developed specifically for the student, the CSE chairperson testified that the student's unintelligible speech was discussed at the CSE meeting and an annual goal to address articulation skills was included in response to the parent's request (Tr. pp. 121-22).

With respect to the related services annual goals the evidence in the hearing record indicated that the district related services providers worked with the student's teacher to give input based on the progress reports and, as a group, they identified the student's needs and developed the annual goals (Tr. pp. 133, 200). The CSE chairperson testified that one of the annual goals focused on the student's adaptive behaviors and ADL skills by improving his skills regarding independent task completion with minimal prompts (Tr. pp. 79-80). She stated that the motor goals were developed in response to the discussion at the June 2020 CSE meeting regarding the student's needs relating to his physical development and how they would support classroom activities and vocational programs (Tr. pp. 81-83). In comparing the recommended goals on the Bonim related services progress reports, the motor goals directly aligned with those included on the June 2020 IEP (compare Dist. Ex. 13 at p. 3, and Dist. Ex. 14 at pp. 3-5, with Dist. Ex. 16 at pp. 11-14). Specifically, the IEP included six annual goals that addressed the student's motor needs including improving his lower extremity trunk strength and endurance, balance and coordination, lower extremity range of motion, written communication skills using writing implements or keyboard, functional self-care skills for greater independence at school, shoulder, arm and hand control for fine motor tasks, and self-coping skills for greater task achievement in the classroom, and that he would complete exercises for upper body strength for completion of desk work independently and participate in physical activity for endurance (Dist. Ex. 16 at pp. 7, 11-14).

The CSE chairperson testified that the communication annual goals were developed specifically for the student based on the present levels of performance (Tr. pp. 69-70). The June 2020 IEP put forth six annual goals to address the student's identified speech-language needs with respect to improving his ability to produce clear, complete and grammatically correct sentences, group items by category, sequence picture cards to show an event, produce target speech sounds in words and sentences, answer a variety of WH questions based on paragraph length text read to him, and improve conversational skills (Dist. Ex. 16 at pp. 5, 10-11).

The June 2020 IEP also stated that student needed to develop his prevocational skills, which was addressed with annual goals to complete eight well-practiced classroom and vocational tasks independently while requesting help as needed, and following five-step directions to complete classroom and vocation tasks (Dist. Ex. 16 at pp. 8-9, 14). The CSE chairperson testified that the annual goal to complete eight well-practiced classroom and vocational tasks independently was written in broad terms so the task could be adjusted and stated that the purpose of the goal was to target task completion (Tr. p. 79).

In his testimony, the Bonim principal confirmed that the goals in the related services progress reports and IEP goals were reviewed at the June 2020 CSE meeting and that he and the student's teacher participated in the discussion related to the goals (Tr. pp. 338-41, 345). Further, the principal testified that Bonim staff provided the IEP related services goals to the CSE and that there were no objections to the goals at the meeting (Tr. pp. 343). He also testified that he provided information to the CSE regarding the student's ELA, mathematics, ADL, and social skills and also reported on the student's progress (Tr. pp. 344-45). Of all annual goals included in the June 2020 IEP the principal testified to only disagreeing with three of the annual goals—the study skills goal, a reading goal, and a mathematics goal (see Tr. pp. 341-54). Specifically, the principal indicated that he did not agree with the study skills goal; however, his testimony suggests that he initially interpreted the study skills annual goal as requiring the student to complete an eight-step task, not attend to and complete eight well-practiced classroom and vocational tasks, contrary to the purpose of the annual goal stated by the CSE chairperson (compare Tr. p. 79, with Tr. pp. 346-47; see Dist.

Ex. 16 at p. 9). According to the principal, the reading comprehension annual goal that required the student to describe four major events from content area subject texts was "not happening" as the student was only able to describe one or two major events at that time (see Tr. pp. 350-51). He also testified that he was not in agreement with the mathematics operations goal because it included multiplication and division which were not skills Bonim planned on working on with the student "in the near future" (Tr. pp. 351-54). However, although an overall read of the principal's testimony suggests that he believed these three annual goals were too ambitious for the student to achieve, as stated previously, 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). Further, although the Bonim principal disagreed with three of the 22 annual goals on the June 2020 IEP the parent confirmed that the annual goals were reviewed at the CSE meeting, that she, the principal, and the student's Bonim teacher participated in the development of the annual goals, and at the time of CSE meeting she did not object to those annual goals stating that "I believe the goals were appropriate, just not the placement" (Tr. pp. 419-20).

While the IHO cited to four annual goals out of the 22 annual goals recommended, finding that they lacked measurability, sufficient specificity, or did not align with the present levels of performance, a review of the June 2020 IEP compels a conclusion to the contrary. As stated above, the annual goals and short-term objectives aligned with the student's needs as presented without dispute in the IEP, were reasonably specific while allowing latitude in moving the goals forward as the student made progress and provided sufficient measurability by which to assess progress (compare Dist. Ex. 16 at pp. 5-7, with Dist. Ex. 16 at pp. 9-14). Alternatively, even if the IHO's finding with respect to the four identified annual goals was supported by the evidence in the hearing record, it is not a sufficient flaw in the substance of the IEP to constitute a denial of a FAPE.

3. 8:1+2 Special Class

The district objects to the IHO's finding that it failed to offer the student an appropriate program and contends that a 12:1+1 special class for ELA and the 8:1+2 special class for the remaining subjects with related services and modifications, aids, and services appropriately addressed the student's needs.¹⁶ The district asserts that the recommended placements addressed the student's intensive management needs and, due to the student's low functioning both academically and cognitively, he required intensive support throughout the day which could be provided in the 8:1+2 special class. The district further asserts that based on information from the

¹⁶ In addition to the 12:1+1 special class for ELA and the 8:1+2 special class for the remaining subjects, the June 2020 CSE recommended daily adapted physical education in an 8:1+2 special class and related services including individual speech-language therapy for two sessions per week for 30-minutes a session, small group (2:1) speech-language therapy for one 30-minute session per week, individual occupational therapy twice per week for 30-minutes per session, small group occupational therapy for one 30-minutes session per week, individual physical therapy for one 30-minutes session per week, and parent counseling and training in a small group for one 60-minute session per month (Dist. Ex. 16 at pp. 14-15). The CSE recommended modifications throughout the school day including prompting to pace himself during academic instruction, visual aids to support learning, and concrete examples presented during instruction (id. at p. 15). The student's management needs identified his needs for specially designed instruction in a setting with a small student-to-teacher ratio (id. at p. 7).

private school principal that the student was performing at a higher level in ELA, the 12:1+1 special class for that subject was appropriate.

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]).¹⁷ Further, State regulations provide that a special class placement with a maximum class size not to exceed 12 students, staffed with one or more supplementary school personnel, is designed for "students whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students" (8 NYCRR 200.6 [h][4][i]).

The June 2020 CSE chairperson testified that what the CSE knew about the student's functioning was "based on what the teacher was telling" them, and that the recommendations for the special class placements were based on what they knew at the time of the meeting (Tr. pp. 96-97). After a discussion regarding the types of classes offered at the high school, the whole continuum, the Bonim teacher's report that the student showed improvement in reading, what the student's needs were as well as the types of goals that were developed, the CSE ultimately decided that the student was appropriate for the 12:1+1 special class for ELA (Tr. p. 92).¹⁸ Specifically, the CSE chairperson stated that they looked at offering programing and special classes per period so that if the student needed more support in one area than another, the student could be in a 12:1+1 special class in one subject area and in an 8:1+2 special class in another area (*id.*). She testified that the 12:1+1 special class required a higher level of independence from the student but based on the conversation, which included the two participants from Bonim, the 12:1+1 special class for ELA was appropriate (Tr. pp. 92-93). Further, the CSE chairperson indicated that the CSE went by "separate areas" and looked at the goals and focus of skills for the different areas, discussed the 12:1+1 option versus the 8:1+2 options, considered the student's teacher's input, and made a

¹⁷ 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 Disabilities," at p. 20, Office of Special Educ. [Nov. 2013], available at <http://www.p12.nysed.gov/specialed/publications/policy/continuum-schoolage-revNov13.pdf>).

¹⁸ The June 2020 CSE chairperson testified that the high school special education teacher and speech-language therapist presented information at the CSE meeting that described the difference between all the special classes, what the school day looked like, adaptive physical education, the vocational program, "the 8:1," the "12:1," integrated co-teaching, start time, running time, the "whole gamut," and how speech-language therapy was provided individually and in a group (Tr. pp. 102-03; see Dist. Ex. 16 at p. 1).

recommendation on what was most appropriate (Tr. pp. 94-95).^{19, 20} She indicated that the student required specialized instruction in reading, which was considered a priority area for the student, and that they had teachers in the special classes who were trained in various reading methodologies (Tr. pp. 100-01, 138). While the instruction in the "8:1" was "more of a functional approach" the 12:1+1 special class would provide "more targeted, more direct explicit instruction in reading by a particular reading trained teacher" (Tr. p. 138). The high school special education teacher testified that based on the reports from the student's current placement, the parent's agreement and concern, and the CSE's opinion that ELA was a strength for the student, the CSE recommended a class that would be "less restrictive and he would be challenged" (Tr. pp. 195-96; see Dist. Ex. 16 at p. 1).

With respect to the 8:1+2 special class recommendation for the remaining classes, the June 2020 CSE chairperson stated that there was "more intensive instruction" in terms of vocational skills, speech skills, ADL skills, and adaptive behaviors (Tr. p. 93). The hearing record indicated that the 8:1+2 special class was an unrated program so the section "would have to be about ability, not around grades, grade status" and was more of a functional approach (Tr. pp. 138, 150). The CSE chairperson testified that the CSE had information regarding the high school programs from the special education teacher, a speech-language pathologist, related service providers, and the student's Bonim teacher, and given that information, the recommended 8:1+2 special class was appropriate (Tr. pp. 97-98). She indicated that the recommendation was based on information from current providers, the programs were on the continuum of services "dictated" by the State Education Department, and they provided specially designed instruction based on the "prescription" of services in the IEP developed specifically to meet the student's needs (Tr. p. 99). She indicated that the student had "intensive" management needs that included an "intensive level of instruction and services" to access learning, and also that the student required a high level of explicit direct instruction to learn, which correlated with the intent of the 8:1+2 special class program (see Tr. pp. 99-100).

The high school special education teacher testified that at the CSE meeting she gave an overview of the 8:1+2 special class program (Tr. p. 207). She stated that the program provided an opportunity for "teaching new academic growth as well as starting to reach the more functional approach for academic and life skills" (Tr. p. 208). Further, she indicated that reading activities had a "functional tilt towards it" and the functional mathematics class worked on addition to maintain the skills the students had in terms of basic operations while moving toward using money, making purchases, "dollar up" skills, and making change (Tr. pp. 208-09). Additionally, although not specifically indicated on the June 2020 IEP but described as part of the recommended 8:1+2 special class, the high school special education teacher testified that the speech-language pathologist pushed into the class and worked on basic communication skills with the whole class (Tr. pp. 209-10). She further testified that in the 8:1+2 special class there were three periods of prevocational or vocational activities, that allowed for opportunities to go into the community to

¹⁹ The June 2020 CSE chairperson testified that the special class placement recommendation was based on what they understood of the student's needs at the time of the June 2020 CSE meeting and that if, after attending the recommended program their understanding of the student's needs was different, the CSE could reconvene at any time and address needed changes (Tr. pp. 96-97).

²⁰ The high school CSE chairperson stated that the 12:1+1 special education teachers were licensed in the specialty area that they taught (Tr. pp. 147, 150).

assess students' vocational needs (Tr. p. 210). The high school special education teacher stated that they have a "PACELAB" which she described as a vocational lab that mimicked life work situations where the students went daily and worked on skills such as completing tasks, following directions, and working as independently as possible (id.). For the more academically oriented students, she used one of the prevocational periods to work on academic skills (id.).

The high school special education teacher described a typical school day for the students in the 8:1+2 special class, which included adapted physical education, and functional reading instruction using the "Unique Learning/Use 2 to You" curriculum (Tr. p. 216). According to the high school special education teacher, that program was a standard-based curriculum for students with special needs based on universal standards of achievement aligned with general education (Tr. pp. 216-17). She stated that the curriculum broke out the activities into high interest articles that included reading, math, science, and social studies (Tr. p. 217). During functional mathematics instruction, depending on the students' level, she worked on activities such as completing various charts and graphs, using money, performing addition, subtraction, multiplication and division problems, counting with one to one correspondence, and using calculators, stating that it was all very individualized (Tr. pp. 217-18). These subjects were followed by the communication class with a focus on conversational skills, and after lunch the students had two of the three vocational periods, at which time the students worked in the job coaching program at various places in the community with a job coach (Tr. pp. 219-21). Those students who remained in the class worked on pre-community tasks including reading directions, working in the PACELAB, cooking, setting tables, doing laundry, completing jobs in the copy center, and engaging in vocational tasks in the school (Tr. p. 220). She also testified that the students received related services at different points throughout the day (Tr. pp. 221-22).

The high school special education teacher testified that, based on the student's evaluations, progress reports, and his profile, the student was appropriate for an 8:1+2 special class program because his functional levels and abilities to participate in his current placement were a match to what was being worked on in the district 8:1+2 program (Tr. p. 195). She also indicated that the student's profile suggested that for some areas it would be better to start in a smaller setting and build up his skills and then move the student to a "less restrictive" setting (Tr. pp. 196-97). She stated that the 8:1+2 class would be an appropriate placement because the student had a similar profile to those students in her 8:1+2 special class, citing to his IEP which indicated that the student had similar test results, and was working on letter and number recognition, reading at a first grade level, and working on basic addition, subtraction, functions and operations of basic math skills, which were all things she worked on in her class (Tr. pp. 197-98). The five 8:1+2 special class periods were identified as vocational (that could be up to three periods per day in or out of the classroom), a communications class taught by the speech-language pathologist, and an art and music class (Tr. pp. 171-72).

Due to the student's motor needs the committee had a discussion regarding adapted physical education and PT, ultimately deciding to recommend daily adapted physical education to address the student's needs regarding trunk strength and trunk control to support the student's participation in the general education classroom, and PT to address the student's needs regarding gross motor strength and navigation in a new building (Tr. pp. 93-94).

Based on the foregoing, the hearing record supports the district's contention that the CSE's recommendation for a 12:1+2 special class for ELA and 8:1+2 special class for the student's

remaining classes 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 2020-21 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]).

4. Least Restrictive Environment

The district contends that the IHO erred in finding that the district's recommended program was not in the student's LRE and that the IHO further erred in not considering evidence of the "Best Buddies" program and mainstreaming during other extracurricular activities available at the district public school. According to the district, the recommended program was in the student's LRE because it was located in a public-school building where the student could interact with typically developing peers and it allowed the student access to his home community.

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).

As stated above, the June 2020 CSE recommended one 41-minute period per day of 12:1+1 special class ELA instruction and four 41-minute periods per day of an 8:1+2 special class (Parent Ex. 16 at p. 14). Initially, as noted by the IHO, any difference between the ratios of the 12:1+1 special class provided at Bonim and the 8:1+2 special class recommended by the CSE 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"])).

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, in this matter, a determination regarding whether the district's program is in the LRE for the student turns on the second prong of the Newington test which focuses on the district's obligation to include the student in school programs with nondisabled students to the maximum extent appropriate (Newington, 546 F.3d at 120).

Regarding the district's available mainstreaming opportunities, the CSE chairperson testified that a "large part" of the discussion at the June 2020 CSE meeting revolved around the student attending school in his home community, changing classes in the hall, being in the lunchroom, and the "possibility of attending classes with nondisabled peers as well as future vocational programs (work study programs and work at a job in his community) stating that the student would be given an opportunity to participate with non-disabled students (Tr. pp. 103-104, 124).²¹ The high school CSE chairperson testified that the 12:1+1 classes are not located in a separate wing but rather are departmentalized and the students move from classroom to classroom (Tr. pp. 157-58). The 8:1+1 classroom is centrally located in the building with an operational kitchen, laundry area, and a bathroom (Tr. pp. 156-58). The 8:1+2 classroom is where classes for cooking, ADL lessons, and vocational lessons take place and where the students have the majority of their classes but, because of its central location "everybody stops in the room" (Tr. p. 157). The CSE chairperson opined on the advantages and importance of students attending school in their home community stating that it provides the students with exposure to riding the bus, working, shopping, engaging in extracurricular activities, and sporting events alongside peers (Tr. pp. 104-05). The hearing record indicates that students have lunch in the cafeteria with non-disabled peers and would take art and music in the general education setting therefore it was not included in the IEP (Tr. pp. 135-36; 206, 222).²² The hearing record indicates that the general education students and students with disabilities have the opportunity to sit together during lunch (Tr. pp. 159, 206).

The high school special education teacher testified that the students travel throughout the building noting that homeroom is in one part of the school, they travel up to the art wing for art, music wing for music, to the gym for gym; according to the teacher, the special classes are not segregated, "they are just part of the school" (Tr. pp. 245-46). For example, she cited to the fact that the class next to hers is the Spanish classroom as they are located in the foreign language hall, therapy is at the end of the hall in the learning center, and adaptive physical education is in the gym with 20 other non-disabled students (Tr. p. 247). The high school special education teacher indicated that the school has a "Phys Ed leaders" program where students volunteer time and work with the adaptive physical education students and the same opportunity occurs with music and art (Tr. p. 207). She indicated that, if a student has a strength in art or music, the student can attend the mainstream classes and the school provides support if needed (Tr. p. 207). The high school CSE chair indicated that, in particular, the students in the 12:1+1 classes move about the halls together, as they change classes and the students in the 8:1+2 class can walk about in the hallways

²¹ The 8:1+2 special class teacher also testified that the mainstreaming opportunities discussed at the June 2020 CSE meeting took place in her class, that students were placed in clubs that correlated with their interests and provided examples of student's coming to pick up students in the 8:1+2 class and taking them to the club of their mutual interest (Tr. pp. 223-24).

²² The high school CSE chairperson testified that the 8:1+2 special class had art, music, and adaptive physical education which can be solely with themselves but then the general education students participate with the students in those classes (Tr. pp. 206-07).

or move to the rest rooms, noting they interact the same as everybody else (Tr. pp. 160-62). The students participate in school assemblies and go on community outings to get to know the local community parks, businesses, community resources, pools, museums, and bowling opportunities (Tr. pp. 161-63). According to the high school CSE chair the students with disabilities participate in field days (Tr. p. 163). The hearing record indicates that the students go on community field trips and "a lot of times when we go on a trip, the gen ed students attend with us" (Tr. pp. 163, 207).

The high school CSE chairperson testified that the high school has "a lot of offerings and opportunities for all students to really find their area from clubs to sports to theater, music writing" stating the students in special education have access to all the extracurricular activities (Tr. pp. 151-52, 175-76). She stated that they work with students, parents, and teacher "to really make that access seamless and to make their participation meaningful and rich" (Tr. p. 152).

Turning to the description of the "Best Buddies" program available in the district public school, the high school CSE chairperson and high school special education teacher testified that the school was part of the national Best Buddies program and stated that staff went for training regarding the program when the school joined the national chapter (Tr. pp. 152, 205). The hearing record indicates that students with disabilities are paired with non-disabled peers to promote friendship between students with intellectual disabilities and their peers promoting engagement in activities in school as well as outside of school on weekends and after school (Tr. pp. 152-53, 205). The high school CSE chairperson testified that the types of activities the students take part in included bowling, getting pizza, playing board games, seeing the students in physical activities after school such as supporting the student in performances such as acting, singing or backstage support (Tr. p. 153). She also indicated that the Best Buddies program is optional but that they "encourage all of the students to participate and it's something [she] highly encourage[s]" stating and if the student attended his home school, he would have the opportunity to participate in this program (Tr. pp. 153-55).

The high school CSE chairperson testified that there was a "very high number of nondisabled buddies and they also [came] into the class and [did] activities with our students" participating in adaptive PE classes and after-school activities (Tr. pp. 153-54). Regarding the frequency of contact between the students, the high school chairperson testified that they may come in every day or every other day and work with the students under the teacher's supervision and work along with their buddy (Tr. p. 154). She indicated that the program meets every Wednesday (Buddy Day) but the contact amongst the students varies depending on availability of the students (Tr. p. 154).²³

The high school CSE chairperson testified that additional mainstreaming opportunities were based on the student's interest; for example, the arts or athletics and although some clubs have a criterion they were "diligent in making sure that anything that that can possibly be blocking

²³ The high school special education teacher testified that the school had an extended day option for those students who needed more time to meet their IEP goals but the students who were not in the extended day program could stay for the "buddy meeting" which usually met three weeks out of the month (Tr. p. 224).

access can be removed or lessened by our work with disciplines, department people and different advisors that are working in the program" (Tr. pp. 155-56).

The high school special education teacher who attended the June 2020 CSE meeting testified that the Best Buddies officers (non-disabled students) and a buddy liaison (a student with disabilities), met in her classroom to plan different activities and noted that the Best Buddies program was not just open for students in the 8:1+2 and 12:1+1 special classes but was also open to students in the 15:1 special classes and those in the general education classes as well (Tr. pp. 225, 249). She indicated that the buddies were matched with students given to them by the Best Buddies program and she and the officers and the general education teacher, who was her cochair for the Best Buddies program, would match the general education students with the student with disabilities, explaining that the general education teacher knew the non-disabled students and she knew the students with disabilities, and they had a "match party" (Tr. pp. 225-26). The students were responsible for contacting the parents and introducing themselves and from there they sponsored activities three times a month (the fourth time is the officers meeting where they plan activities) (Tr. pp. 225-26). In addition to the Best Buddies meeting, the students are encouraged to get together once a month and they are urged to contact their buddy a few times a week via cell phone, text, or stopping by at lunch such that any friends might do (Tr. p. 226).

The high school special education teacher testified that the school hosted movie nights at the school, they sponsored a fall bash, a holiday party in December, a summer and winter party providing opportunities with the general education students (Tr. pp. 205-06). She also testified that students with disabilities have the same lunch period as the general student body in the "commons" and many times the students join up for lunch and engage in conversation with the students with disabilities (Tr. p. 206). Further she indicated that when "a lot" of the students have free periods they pop in the room to say hello to the students' with disabilities and they will pause to give the students an opportunity to have conversations (Tr. p. 206).

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 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, as was previously reviewed regarding the district's program offered to the student in middle school (see Application of a Student with a Disability, Appeal No. 20-047), it is not clear whether the specifics of a mainstreaming program, such as Best Buddies, is something that must 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. 16 at p. 18). 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 2020 IEP, the district identified areas where the student would not participate with general education students by noting "the student require[d] special instruction in an environment with a

smaller student-to-teacher ratio and minimal distractions in order to progress in achieving the learning standards" (Dist. Ex. 16 at p. 18). The IEP also noted that the student would participate in adapted physical education (*id.*). Based on the State guidance governing what is required to be included in the IEP, implicit in the June 2020 IEP is that the student would participate in other school activities with his nondisabled peers.

Based on the recommendations contained in the June 2020 IEP, it appears that the student would have spent approximately 4.8 hours per day in special classes, adapted physical education, and related services; which means that the remainder of the student's instructional day, at least 0.7 hours, would have involved opportunities for mainstreaming (Dist. Ex. 16 at pp. 14-15; *see* 8 NYCRR 200.1[q] [a full-day session is "a school day with . . . not less than 5 1/2 hours of instruction for students whose chronological ages are equivalent to those of students in grades 7 through 12"]; 8 NYCRR 175.5).

Consistent with the above, while some of the testimony regarding the Best Buddies program involved mainstreaming opportunities during the school day, such as that general education students could come into the special class to work on activities or join the adapted physical education class, times when the June 2020 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, assemblies, and community outings. Accordingly, as 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 and leaves time in a school day during which the student would be expected to integrate with general education student, I do not find that the testimony is being relied on or used to rehabilitate an inadequate IEP. Rather, the testimony served to provide some specific details with respect to the mainstreaming opportunities available to the student during the school day at times, pursuant to the IEP, when the student was not otherwise occupied with his special classes and related services.

Additionally, based on the testimony as to how the district high school arranged for the availability of mainstreaming for students in its special classes, including testimony concerning the Best Buddies program, there is sufficient support in the hearing record to find that the student would have been appropriately included in school programs with nondisabled students to the maximum extent appropriate given his placement in special classes and receipt of a variety of related services, all of which were also appropriate recommendations for the student in light of his undisputed special education needs.

VII. Conclusion

Having determined that the evidence in the hearing record supports a finding that the district offered the student a FAPE for the 2020-21 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether Bonim was an appropriate unilateral placement or whether equitable considerations weighed in favor of the parents' request for relief.

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

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated May 24, 2021, is modified by reversing that portion which found that the district failed to offer the student a FAPE, and ordered the district to fund the student's tuition costs at Bonim for the 2020-21 school year.

**Dated: Albany, New York
August 9, 2021**

**CAROL H. HAUGE
STATE REVIEW OFFICER**