The University of the State of New York

The State Education Department
State Review Officer
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No. 12-003

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

Appearances:
Joseph M. Connors, Esq., attorney for petitioners

Whiteman Osterman & Hanna LLP, attorneys for respondent, Beth A. Bourassa, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which determined that the educational program respondent's (the district's) subcommittee of the Committee on Special Education (CSE subcommittee) had recommended for their son for the 2011-12 school year was appropriate. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local CSE that includes, but is not limited to, parents, teachers, at least one psychologist, and school district representatives (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]; 34 CFR 300.151-300.152, 300.506, 300.511; Educ. Law § 4404[1]; 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 300.514[c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

As discussed more fully below, the parents have not properly initiated this appeal; therefore, a detailed recitation of the student's educational history is unnecessary. Briefly, for the 2009-10 school year, the student attended first grade in a district 12:1+2 special education class with related services (Dist. Ex. 4). During the second half of the 2009-10 school year, the district began to mainstream the student with typically developing peers during music class and library (Tr. p. 908; Parent Ex. 57). The student repeated the first grade during the 2010-11 school year; however, by agreement of the parties, he attended an integrated co-teaching (ICT) class with a 1:1 aide and specified related services (Tr. p. 103; Dist. Exs. 14; 15). During the 2010-11 school year, the student was also pulled out for small group instruction by a special education teacher in a 6:1+1 environment (Dist. Exs. 14; 15).

A CSE subcommittee developed an IEP for the student for the 2011-12 school year on May 26, 2011 (Dist. Ex. 28). The subcommittee determined that the student remained eligible to receive special education services as a student with an other health-impairment and recommended extended school year services (ESY) in a 12:1+2 special class with related services (id. at p. 1). For the 10-month school year beginning in September 2011, the subcommittee recommended that the student attend a 12:1+1 special class and receive related services (id.).

A. Due Process Complaint Notice

In a due process complaint notice dated June 16, 2011, the parents requested an impartial hearing, alleging that the district denied the student a free appropriate public education (FAPE) for the 2011-12 school year (IHO Ex. 2). More specifically, the parents alleged, among other things, that the district's recommended program was predetermined; was not designed to allow the student to advance toward the academic goals in his IEP; and was not in the least restrictive environment (LRE) (id. at pp. 5-6). As relief, the parents requested, among other things, modifications to the May 2011 IEP, including that the student be placed in a regular education classroom; be provided with two 30-minute sessions with a literacy specialist, and one hour per day of individualized special education teacher services as well as the services of a full-time teaching assistant; and that the district fund a recently conducted independent evaluation (id. at p. 7).

B. Impartial Hearing Officer Decision

The impartial hearing convened on July 26, 2011 and concluded on September 9, 2011, after eight days of proceedings (Tr. pp. 1, 236, 418, 616, 786, 1051, 1306, 1461). In a detailed 61-page decision dated November 23, 2011, the IHO determined, among other things, that the district offered the student a FAPE in the LRE for the 2011-12 school year (IHO Decision at p. 61). The IHO also determined that the goals in the May 2011 IEP were measurable, contained evaluative criteria, and were "detailed and thorough," and that contrary to the parents' contention, the goals had not been repeated from the prior year (id. at p. 55). The IHO further found that the May 2011 IEP provided the student with mainstreaming opportunities in two specials, morning routine, lunch and recess, and therefore, the parents' claim that they were not included in discussions regarding mainstreaming failed (id.).

IV. Appeal for State-Level Review

The parents appeal, asserting that the IHO erred in determining the district offered the student a FAPE for the 2011-12 school year. Among other things, the parents assert that the IHO applied an incorrect legal standard in determining the student's LRE and improperly determined that the student's LRE was in a special class.

In its answer, the district asserts that the parents' petition is untimely and requests that it be dismissed. The district also asserts admissions and denials and includes two affidavits for consideration on appeal, with additional evidence attached to each affidavit. In response to the district's answer, the parents submitted a reply alleging, among other things, that the petition was timely and that one of the district's affidavits should not considered on appeal.

V. Discussion

A. Additional Evidence

The parents assert that the affidavit of the district's director of special education included with the answer should be rejected. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). I find that the director's affidavit is not necessary to render a decision in this case; therefore, this document will not be considered. I will, however, accept the affidavit of the district's attorney and the attached additional evidence included with the answer because the documents were unavailable at the time of the impartial hearing and they directly relate to my decision herein.

B. Procedural Issues – Timeliness of Appeal

In the present case, the IHO transmitted his decision to the parties via e-mail and private express delivery service (in this case, Federal Express) on November 23, 2011 (Dist. Aff. Ex. A; see Dist. Aff. ¶ 2). The IHO proceeded to issue a "corrected" decision via e-mail and Federal Express on November 26, 2011 (Dist. Aff. Ex. B; see Dist. Aff. ¶ 3; IHO Decision at p. 61). IHOs are appointed by a board of education in accordance with a specific rotational selection process (Educ. Law § 4404[1]; 8 NYCRR 200.2[e][1], 200.5[j][3][i]). An IHO's jurisdiction is limited by statute and regulations and there is no authority for an IHO to reopen an impartial hearing, reconsider a prior decision, or retain jurisdiction to resolve future disputes between the parties (see Application of a Student with a Disability, Appeal No. 11-117; Application of the Dep't of Educ., Appeal No. 11-014; Application of a Student with a Disability, Appeal No. 10-118; Application of a Student Suspected of Having a Disability, Appeal No. 10-021; Application of the Dep't of Educ., Appeal No. 08-024; Application of the Bd. of Educ., Appeal No. 07-081; Application of the Dep't of Educ., Appeal No. 06-133; Application of a Child with a Disability, Appeal No. 06-021; Application of a Child with a Disability, Appeal No. 05-056; Application of the Bd. of Educ., Appeal No. 02-043; Application of the Bd. of Educ., Appeal No. 98-16; see also Application of the Dep't of Educ., Appeal No. 08-041). An IHO's decision is final unless timely appealed to an SRO (20 U.S.C. § 1415[i][1][A]; 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). Here, an IHO was appointed, presided at a hearing, and issued a written decision on November 23, 2011, which ended his jurisdiction over the matter. Second, as the IHO explained in an e-mail to the parties, his "corrected" decision contained nothing more than corrections related to "scrivener's errors" and there were "no substantive corrections" made (Dist. Aff. Ex. B). Therefore, contrary to the parents' assertion on appeal, the time to initiate the parents' appeal began to run on November 23, 2011, the date that the IHO issued the underlying decision, notwithstanding any clerical errors that may have been corrected thereafter.

An appeal from an IHO's decision to an SRO is initiated by timely personal service of a verified petition for review and other supporting documents upon a respondent (8 NYCRR 279.2[b], [c]; Application of a Student with a Disability, Appeal No. 11-052; Application of a Student with a Disability, Appeal No. 11-012; Application of a Student with a Disability, Appeal No. 10-119; Application of a Student with a Disability, Appeal No. 10-081; Application of the Bd. of Educ., Appeal No. 10-044; Application of the Dep't of Educ., Appeal No. 09-062; Application of the Dep't of Educ., Appeal No. 09-033; Application of a Student with a Disability, Appeal No. 08-142; Application of the Dep't of Educ., Appeal No. 08-056; Application of the Dep't of Educ., Appeal No. 05-082).

As to the time period for initiating an appeal, a petition must be personally served within 35 days from the date of the IHO's decision to be reviewed (8 NYCRR 279.2[b]). State regulations expressly provide that if the IHO's decision has been served by mail upon the petitioner, the date of mailing and four days subsequent thereto shall be excluded in computing the period within which to timely serve the petition for review (8 NYCRR 279.2[b], [c]).[1] The party seeking review shall file with the Office of State Review the petition, and notice of intention to seek review where required, together with proof of service upon the other party to the hearing, within three days after service is complete (8 NYCRR 279.4[a]). If the last day for service of a notice of intention to seek review or any pleading or paper falls on a Saturday or Sunday, service may be made on the following Monday; if the last day for such service falls on a legal holiday, service may be made on the following business day (8 NYCRR 279.11). State regulations provide an SRO with the authority to dismiss sua sponte a late petition (8 NYCRR 279.13; see Application of a Student with a Disability, Appeal No. 08-113; Application of a Child with a Disability, Appeal No. 04-003). An SRO, in his or her sole discretion, may excuse a failure to timely seek review within the time specified for good cause shown (8 NYCRR 279.13). The reasons for the failure to timely seek review must be set forth in the petition (id.).

In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the dismissal of a petition by an SRO (8 NYCRR 279.8[a], 279.13; see, e.g., Application of a Student with a Disability, Appeal No. 11-013 [dismissing parent's appeal for failure to timely effectuate personal service of petition upon the district]; Application of a Student with a Disability, Appeal No. 11-012 [dismissing parents' appeal for failure to timely effectuate personal service of petition upon the district]; Application of a Student with a Disability, Appeal No. 09-099 [dismissing parents' appeal for failure to timely effectuate personal service of the petition upon the district]; Application of the Dep't of Educ., Appeal No. 08-006 [dismissing a district's appeal for failing to properly effectuate service of the petition in a timely manner]; Application of the Bd. of Educ., Appeal No. 07-055 [dismissing a district's appeal for failure to personally serve the petition upon the parents and failure to timely file a completed record]; Application of the Dep't of Educ., Appeal No. 05-082 [dismissing a district's appeal for failure to personally serve the petition upon the parent where the district served the parent's former counsel by overnight mail]; Application of the Dep't of Educ., Appeal No. 05-060 [dismissing a district's appeal for failing to timely file a hearing record on appeal]; Application of the Dep't of Educ.,

[1] As a general rule, in the absence of evidence in the hearing record identifying the date of mailing, the date of mailing is presumed to be the next day after the date of the decision (see Application of a Student with a Disability, Appeal No. 08-065). In this case, there is evidence showing that the IHO's decision was transmitted via a private express delivery service on the same day it was rendered – November 23, 2011 (Dist. Aff. Ex. A).

Appeal No. 01-048 [dismissing a district's appeal for failure to personally serve the petition upon the parent where the district served the parent by facsimile]).

In the present case, the IHO's decision was transmitted to the parties via a private express delivery service (Dist. Aff. Ex. A.). The parents assert on appeal that the use of the private express delivery service constituted regular mail, as defined by the regulations, and therefore, they were entitled to the additional four days as provided for in 8 NYCRR 279.2(b). As discussed below, I disagree.[2]

It does not appear that the issue of whether the use of a private express delivery service to transmit an IHO decision should be treated the same as regular "mail" (and consequently subject to the four-day exclusion) has been previously addressed. Part 279 of State regulations pertaining to appeals to an SRO do not define the term "mail" (see 8 NYCRR 279.2[b]). However, section 279.1(a) provides that the provisions of Parts 275 and 276 shall govern the practice on such reviews, except as provided in Part 279 (8 NYCRR 279.1[a]). Part 275 clearly distinguishes between the terms "United States mail" and "private express delivery service" (see 8 NYCRR 275.8[b]). That regulation provides that service of all proceedings subsequent to the petition shall be made by United States mail, by private express delivery service or by personal service (id.). The regulation further specifies that service by private express delivery shall be complete upon delivery of the pleading or paper enclosed in a properly addressed wrapper to an employee or agent of such private express delivery service or by deposit of such pleading or paper, properly addressed and wrapped, in a depository of such private express delivery service (id.). Accordingly, State regulations governing the appeals to SROs distinguish between mail via the United States postal service and a private express delivery service such as Federal Express. One appellate court addressing a similar issue found that "[t]he word 'mailed' is not the same as delivery by an overnight courier" in a case in which similar statutory language was at issue (Blaich v. West Hollywood Rent Stabilization Dept., 195 Cal.App.4th 1171, 1177 [Cal.App. 2 Dist. 2011]).

Assuming for the sake of argument that private express delivery service had not been distinguished from mail in State regulations, courts examining the issue have often treated the two forms of delivery differently. In Magnuson v. Video Yesteryear, 85 F.3d 1424 (9th Cir., 1996), the Court rejected the notion that Federal Express (or other overnight carrier) was the same as mail, indicating that it should be defined consistently within the applicable rules of procedure (id. at 1430-31). Similarly, in Audio Enterprises, Inc. v. B & W Loudspeakers of America, 957 F.2d 406 (7th Cir. 1992), the Seventh Circuit Court of Appeals rejected, for purposes of personal jurisdiction, that service by Federal Express constituted service by "first class mail, postage prepaid" (id at 409; see also Prince v. Poulos, 876 F.2d 30, 32 n.1 [5th Cir. 1989]). Several non-appellate courts to consider this issue have also rejected Federal Express delivery as constituting service by mail (see Kissel v. DiMartino, 1993 WL 289430, at *10 n. 2 [E.D.N.Y. July 1993]; see also Kim v. United States, 461 F. Supp. 2d 34, 40 n. 5 [D.D.C. 2006]; cf. Cachet Residential Builders, Inc. v. Gemini Insurance Co., 547 F. Supp. 2d 1028 [D.Ariz. 2007]).

Lastly, the need that underlies the purpose of four-day exclusionary rule is not present in the circumstances of this case. I note that State regulations exclude four days from the 35-day

[2] I note that the Fifth Circuit has heeded that "[t]he bar should be aware of the danger that service by Federal Express may not be service by mail." (Transco Leasing Corp. v. U.S., 992 F.2d 552, 554 n.2 [5th Cir. 1993]).

time line for initiating an appeal from an IHO decision when the decision was transmitted to the parties by mail in order to generally account for variations in regular mail service and avoid needless factual disputes regarding actual receipt. However, these concerns are generally absent when using private express delivery services. As a practical matter, private express delivery services are used with the understanding that the package sent will be delivered the next day with tracking services, and therefore, the four-day exclusion for computing the timeliness of a petition based on an IHO decision transmitted by a private overnight delivery service is not necessary. Moreover, in this case, the IHO actually sent the decision to the parties via e-mail, which rendered any need for the four-day exclusion even more remote.

In summary, based on the above, I find that since the IHO transmitted his decision via a private express delivery service and e-mail to the parties, the district correctly asserts that the parents were not entitled to the additional four-day exclusion for mailing when computing the time to serve their petition on the opposing party. As discussed above, the hearing record shows that the IHO transmitted his decision to the parties on Wednesday, November 23, 2011. Therefore, the last day upon which the parents could have timely served the district with their petition was Wednesday, December 28, 2011. The district was served with the petition on Friday, December 30, 2011 (Parent Aff. of Service; see Parent Reply at p. 3). The parents did not assert good cause for their failure to seek timely review in their petition.[3]

Thus, based upon the parents' failure to timely initiate the appeal and in the absence of good cause for the untimely service of the petition for review, I will exercise my discretion and dismiss the petition for review as untimely (8 NYCRR 279.13; see 8 NYCRR 279.2[b], [c], 279.11; Kelly v. Saratoga Springs City Sch. Dist., 2009 WL 3163146, at *5 [N.D.N.Y. 2009]; Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *5 [N.D.N.Y. 2006] [upholding dismissal of a late petition for review where no good cause was shown]; Keramaty v. Arlington Cent. Sch. Dist., 05 Civ. 00006 [S.D.N.Y. Jan. 24, 2006] [upholding dismissal of a petition for review that was served one day late]; Application of a Student with a Disability, Appeal No. 11-052; Application of a Student with a Disability, Appeal No. 11-013; Application of a Student with a Disability, Appeal No. 11-012; Application of a Student with a Disability, Appeal No. 10-081; Application of the Bd. of Educ., Appeal No. 10-044; Application of a Student Suspected of Having a Disability, Appeal No. 10-021; Application of a Student with a Disability, Appeal No. 09-099 [noting that attorney miscalculation of the pleading service requirements does not constitute good cause]; Application of a Student with a Disability, Appeal No. 08-148; Application of a Student with a Disability, Appeal No. 08-142; Application of a Student with a Disability, Appeal No. 08-114; Application of a Student with a Disability, Appeal No. 08-113; Application of a Student with a Disability, Appeal No. 08-039; Application of a Student with a Disability, Appeal No. 08-031; see also Jonathan H. v. Souderton Area Sch. Dist., 2008 WL 746823, at *4 [E.D. Pa. 2008], rev'd in part on other grounds 562 F.3d 527 [3d Cir. 2009] [upholding a review panel's dismissal of a late appeal from an IHO's decision]; Matter of Madeleine S. v. Mills, 12 Misc. 3d 1181[A] [Sup. Ct., Alb. County 2006] [upholding a determination by the Commissioner of Education to dismiss an appeal as untimely]).

[3] Inasmuch as the parents' reply can be read to assert good cause, the regulations provide that the reasons for the failure to timely seek review must be set forth in the petition (8 NYCRR 279.13).

C. Merits of the Appeal

Even if the parents' appeal was not dismissed as untimely, it would not have lead to a different outcome. Upon review of the entire hearing record, and on due consideration thereof, I note that the parents were provided an opportunity to be heard at the impartial hearing, which was conducted in a manner consistent with the requirements of due process (see 20 U.S.C. § 1415[g]; 34 CFR 300.514[b][2][i], [ii]; Educ. Law § 4404[2]; 8 NYCRR 200.5[j]). I also note that the May 2011 CSE had ample information in the form of classroom observations, assessments and evaluations, from which to determine the student's present levels of performance, and that based on his needs, the CSE created measurable annual goals to assess the student's progress (Tr. pp. 136-37, 302-04, 811; Dist. Exs. 16; 18; 28; Parent Exs. 9; 54; 55). Furthermore, as discussed below, the hearing record supports the IHO's finding that the district's recommended program was in the LRE.

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 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see P. v. Newington Bd. of Educ., 546 F.3d 111 [2d Cir. 2008]; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105 [2d Cir. 2007]; Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 132 [2d Cir. 1998]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti, 995 F.2d at 1215; J.S. v. North 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. Sobel, 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; and the continuum 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 (Newington, 546 F.3d at 119-20; see North Colonie, 586 F. Supp. 2d

at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti v. Bd. of Educ., 995 F.2d 1204, 1217-18 [3d Cir. 1993]; 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 North 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).[4]

If, after examining the factors under the first prong, it is determined that the district was justified in removing the student from the general education classroom and placing the student in a special class, the second prong requires consideration of whether the district has included the student in school programs with nondisabled students to the maximum extent appropriate (Newington, 546 F.3d at 120).

With regard to the first prong of the Newington test, the district made reasonable efforts to educate the student within a general education setting by placing him in an ICT class during the 2010-11 school year with the support of a 1:1 aide and extensive related services and accommodations (Tr. pp. 537-38, 843; Dist. Exs. 17 at pp. 11, 26-27; 22 at pp. 1-3, 14). Prior to attending the ICT class for the 2010-11 school year, the student demonstrated academic achievement levels at the kindergarten and emerging first grade levels (Tr. pp. 388-89, 796). The hearing record indicates that the student's academic skills continued to be at the kindergarten and emerging first grade levels at the end of the 2010-11 school year (id.). Additionally, I note that the student was retained and continued in the first grade for the 2010-11 school year (Tr. pp. 109, 1553). I find it difficult to conclude on this evidence that the education of the student would have been achieved satisfactorily in an ICT class during his second grade year. I note that the student was not able to access the general education curriculum even with supports to warrant a placement in an ICT class for the 2011-12 school year (Tr. pp. 543-44, 700-01).

I also find with respect to the second prong of the Newington test that during the 2011-12 school year, the student would be provided with several opportunities throughout the school day to interact with nondisabled peers such as during morning routine, music class, library class, lunch, and recess (Tr. pp. 773-78, 1565-66; Dist. Ex. 28 at p. 14). Therefore, I find that the evidence

[4] The Second Circuit left open the question of whether costs should be taken into account as one of the relevant factors in the first prong of the LRE analysis (Newington, 546 F.3d at 120 n.4).

supports the conclusion that the district mainstreamed the student to the maximum extent appropriate.

VI. Conclusion

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

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
February 6, 2012

JUSTYN P. BATES
STATE REVIEW OFFICER