The University of the State of New York

The State Education Department
State Review Officer
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No. 12-012

Application of the BOARD OF EDUCATION OF THE GARDEN CITY 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:
Guercio & Guercio, LLP, attorneys for petitioner, Vanessa M. Sheehan, Esq., of counsel

Pamela Anne Tucker, PC, attorneys for respondents, Pamela Anne Tucker, 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. Petitioner (the district) appeals from a decision of an impartial hearing officer (IHO) which determined that the educational program recommended by its Committee on Special Education (CSE) for respondents' (the parents') son for the 2011-12 school year is not appropriate and ordered it to place the student in a 12:1+2 special class in a community school and provide the student with a 1:1 teaching assistant for the balance of the 2011-12 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 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 (FAPE) 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

The student received diagnoses of a pervasive developmental disorder-not otherwise specified in November 2007, and an autism spectrum disorder in January 2011 (Tr. p. 775; Dist. Exs. 19 at p. 4; 32 at p. 1; 49 at p. 3). During the 2010-11 school year, the student attended a 6:1+2 special kindergarten class in the district (see Tr. pp. 42, 59-60; Dist. Exs. 7 at p. 1; 32 at pp. 1-2).

The CSE convened on April 13, 2011 (Dist. Ex. 57), June 9, 2011 (Dist. Ex. 4), and June 30, 2011 (Dist. Ex. 3) to develop the student's IEP for the 2011-12 school year. The June 30, 2011 CSE recommended that the student be classified as a student with autism and developed a 12-

month educational program consisting of an 8:1+2[1] special class in a community school and related services (Dist. Ex. 3 at p. 1). The CSE also recommended parent counseling and training and 12-month extended school year (ESY) services consisting of an 8:1+2 special class in a community school and related services (id.).[2]

A. Due Process Complaint Notice

In a due process complaint notice filed with the district on or about July 11, 2011,[3] the parents alleged, among other things, that the CSE discussed the elimination of the 6:1+2 special class that the student attended during the 2010-11 school year in the district and the district's plan to place the student in an 8:1+2 special class Dist. Ex. 1 at p. 3). The parents asserted that the CSE failed to provide them with a class profile of the other students in the particular 8:1+2 special class during the CSE meeting in response to their request, that the CSE placed the student in the 8:1+2 class despite their request that he be placed in a 12:1+2 special class located in the same school, that the June 2011 IEP[4] does not offer the student a FAPE for the 2011-12 school year because the math and social/emotional goals contained therein are inadequate, and that the 8:1+2 special class is inappropriate for the student because it does not provide him with appropriate "social and language models" (id. at pp. 3-4). The parents sought an order from an IHO directing the district to place the student in the 12:1+2 special class in the school "with [the] support necessary in order for him to make progress within the classroom" and to provide him with a teaching assistant in the 12:1+2 special class (id. at p. 4).

B. Impartial Hearing Officer Decision

An impartial hearing convened on September 15, 2011 and concluded on October 21, 2011, after five days of proceedings. On December 7, 2011, the IHO issued a decision, finding, among other things, that none of the three IEPs developed for the student for the 2011-12 school year offered the student a FAPE in the least restrictive environment (LRE); that the 12:1+2 special class was an appropriate and less restrictive environment in which "the [s]tudent's overriding need to be exposed to verbal peers can be met;" that the parents are entitled to their request for a teaching

[1] The hearing record reflects that the student's 8:1+2 special class consists of six students, a special education teacher, and three aides because, according to the school psychologist, one of the other students in the class has a 1:1 aide (see Tr. pp. 200-02, 498, 604, 846-47; Dist. Ex. 52).

[2], The April 2011, June 9, 2011, and June 30, 2011 CSEs developed separate IEPs applicable to the student's 2011-12 school year, each of which recommended identical educational services with additional comments added to the student's present levels of performance sections in both June 2011 IEPs and modifications made to the student's annual goals in the June 9, 2011 IEP (compare Dist. Ex. 3, with Dist. Ex.4, and Dist. Ex. 57; see Tr. pp. 688-89). Because the June 30, 2011 IEP supersedes the April 13, 2011 and June 9, 2011 IEPs and embodies the final version of the student's 2011-12 IEP, I refer only to the June 30, 2011 IEP (hereinafter referred to as the "June 2011 IEP") in the decision.

[3] The due process complaint notice contained in the hearing record indicates a date of "July 2011," but bears a stamp indicating that it was received by the district on July 11, 2011 (see Dist. Ex. 1 at pp. 2, 4).

[4] In the due process complaint notice, the parents alleged that "[t]he IEP developed on June 1, 2011 does not offer [a] FAPE," although the hearing record does not contain any IEP developed for the student on that date (Dist. Ex. 1 at p. 4). As discussed above, the IEP at issue in the instant case was developed on June 30, 2011 (compare Dist. Ex. 1 at p. 4, with Dist. Ex. 3 at p. 1).

assistant,[5] rather than a teacher aide,[6] to support their son's educational program; that the student "is entitled to be with [same] age peers in the general education setting" and that his verbal abilities and his abilities to function in small groups and to engage in social exchanges "could be naturally addressed even in a general education environment;" and that the parents were not denied the opportunity to meaningfully participate in the development of the student's June 2011 IEP "because they were able to make suggestions about the IEP, particularly relating to the goals and interventions that were adopted by the CSE" (IHO Decision at pp. 8-19).

The IHO further found that the student required access to same age peers in order to make educational progress, that he did not receive such exposure in the particular 8:1+2 special class offered by the district, and that he would receive such exposure in the 12:1+2 special class (IHO Decision at p. 10). The IHO determined that "[t]he exposure to verbal peers is the essence of the [s]tudent's right to an education in the [LRE] to address his needs" (id. at pp. 10, 15). The IHO also found that the 8:1+2 special class does not satisfy the two-pronged test for determining whether a student is placed in the LRE (id. at p. 12). The IHO directed the district to place the student in the 12:1+2 special class, provide the student with a teaching assistant for the balance of the 2011-12 school year, and reconvene the CSE to modify the student's IEP consistent with the decision (id. at p. 19).

IV. Appeal for State-Level Review

The district appeals the IHO decision, arguing, among other things, that he erroneously employed the LRE standard in finding that the student was not appropriately placed in the 8:1+2 special class; erred in finding that the student should be placed with nondisabled students to the maximum extent possible; exceeded his authority by directing the district to place the student in the 12:1+2 special class with a teaching assistant; and erroneously considered issues that were not raised by the parents in their due process complaint notice. The district seeks reversal of the IHO's decision.

The parents answer the petition, asserting that the IHO correctly employed the LRE standard in determining that the student is not appropriately placed in the 8:1+2 special class; the hearing record demonstrates that the 12:1+2 special class was the student's LRE and that a teaching assistant, rather than a teacher aide, is required; and that the student was not suitably grouped within the 8:1+2 special class because the hearing record lacks information describing the functional levels of the students in that class and because, according to the parents, the student's only opportunity for verbal interaction was during the 30 minutes per day he spent with typically developing peers. The parents seek that the IHO's decision be affirmed.

[5] State regulations authorize a certified teaching assistant to provide direct instructional services to students; however, he or she may do so only under the general supervision of a licensed or certified teacher (8 NYCRR 80-5.6[b][1][i]).

[6] State regulations authorize a teacher aide to perform non-instructional services when such services are determined and supervised by a licensed or certified teacher (8 NYCRR 80.5-6[a]; see "Guidelines for Determining a Student with a Disability's Need for a One-to-One Aide," Office of Special Educ. Mem. [January 2012], available at http://www.p12.nysed.gov/specialed/publications/1-1aide-jan2012.htm).

V. Applicable Standards

Two purposes of the IDEA 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 v. T.A., 129 S. Ct. 2484, 2491 [2009]; Bd. of Educ. 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; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is 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]; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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 v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). 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 P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). 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 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; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), establishes annual goals related to those needs (34 CFR 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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 M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Scope of Impartial Hearing

Turning first to the district's argument that the IHO improperly considered issues outside the scope of the parents' due process complaint notice, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Additionally, although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), it is impermissible for the IHO to raise issues that were not presented by the parties to the hearing and then base his or her determination on the issues raised sua sponte.

In this case, I note that the IHO concluded with respect to the 2011-12 school year, "an appropriate program could be provided to the [s]tudent in a more mainstreamed setting with sufficient supplemental aids and services" even after acknowledging that such relief was "not requested in the due process hearing request," and that the parents were not denied meaningful

participation in the development of their son's IEP (IHO Decision at pp. 9, 16).[7] The IHO also found that relative to the preceding school year, "[t]he inappropriateness of the [student's] 2010-11 placement on LRE grounds is moot" (id. at p. 17). Upon review, I find that the parents' due process complaint notice cannot be reasonably read to include claims that the student requires a general education placement for the 2011-12 school year, that they were denied meaningful participation in the development of the student's 2011-12 IEP, or that the student's 2010-11 placement violated the IDEA's LRE requirement (see Dist. Ex. 1). Furthermore, the hearing record is bereft of any indication that the parents requested, or that the IHO authorized, an amendment to the due process complaint notice to include these additional issues, and the parties do not dispute that the student requires a special class placement for the 2011-12 school year. Thus, the IHO should have confined his determination to the issues raised in the parents' due process complaint notice and erred in reaching these issues (see 20 U.S.C. § 1415[c][2]; [f][3][B]; 34 CFR 300.508[b], [d][3]; 300.511[d]; 8 NYCRR 200.5[i][1][iv], [i][7]; [j][1][ii]; B.P. v. New York City Dep't of Educ., 2012 WL 33984, at *4-*5 [E.D.N.Y. Jan. 6, 2012]; M.R. v. South Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *12 [Oct. 28, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at *8; Application of the Dep't of Educ., Appeal No. 11-156).

B. 8:1+2 Special Class

1. LRE Analysis

The district argues that the IHO erred by applying the LRE test set forth in Newington when he determined that the 8:1+2 special class was not the student's LRE and found it was inappropriate for the student for the 2011-12 school year. Although his analysis in the decision suggests that the IHO read the parents' due process complaint notice as challenging the 8:1+2 special class on LRE grounds, a review of the allegations set forth in the parents' due process complaint notice does not support the IHO's interpretation. In their due process complaint notice, the parents assert that during the April 2011 CSE meeting, they objected to their son's functional grouping for instructional purposes in the 8:1+2 special class with two of the same non-verbal students with whom he was grouped in his previous 6:1+2 special kindergarten class during the 2010-11 school year, having "made it very clear that [the student] had to be placed with verbal [students] who are social role models and who will engage with [the student] socially" (Dist. Ex. 1 at p. 3). In referencing the class profile of the 8:1+2 special class, which they had recently received from the district, the parents maintained that "[t]there are currently six [students] slated to be in [the 8:1+2 special] class. The [d]istrict states that these are verbal [students] but will not

[7] In this particular case, those findings rendered in favor of the district are of little consequence in this appeal. To the extent that the district seeks to annul the IHO's finding that the parents were not denied meaningful participation in the development of the student's 2011-12 IEP, I note that "[g]enerally, the party who has successfully obtained a judgment or order in his favor is not aggrieved by it, and, consequently, has no need and, in fact, no right to appeal" (Parochial Bus Sys., Inc. v. Bd. of Educ., 60 N.Y.2d 539, 544 [1983]; see Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 385 [N.D.N.Y. 2001] [holding that "[t]he administrative appeal process is available only to a party which is 'aggrieved' by an IHO's determination"]). In this case, even if this issue had been properly raised by the parents, the district is not aggrieved by the IHO's finding that the parents were not denied meaningful participation in the development of the student's 2011-12 IEP.

elaborate on the extent of their communication abilities" (id. at p. 4). They further contended that their son "is desperately in need of proper social and language models which would not be provided in the [8:1+2 special class]," and instead ask for the student to be placed in the district's 12:1+2 special class "which has a mix of disabilities within the classroom …" and, "[t]o the best of the [p]arents' knowledge," contains only verbal students (id.).

For purposes of an impartial hearing, it is permissible for a party to demonstrate age ranges or similarity of abilities and needs through the use of a class profile or by the testimony of a witness who is familiar with the children in the classroom in question (see Application of the Bd. of Educ., Appeal No. 08-018; Application of a Child with a Disability, Appeal No. 07-068). The issue of grouping is further discussed below. Distinguishable from a grouping analysis, the purpose of an LRE analysis is to assess the extent to which a student will have access to nondisabled peers or whether the student can be educated in a school that he or she would otherwise attend if not disabled (34 CFR 300.116[c]; 8 NYCRR 200.4[d][4][ii][b]; Newington, 546 F.3d at 112, 120-21). In this case, as discussed above, it is undisputed by the parties that the student required a special class placement, thereby rendering an LRE analysis unnecessary.

The parents' claims, as framed in their due process complaint notice, can be reasonably read to challenge the extent to which the student in a special education setting is grouped with students having similar individual needs, rather than the extent to which the student was afforded access to nondisabled peers in a general education setting. Consequently, I find that the IHO incorrectly applied the Newington standard to analyze the parents' claims set forth in their due process complaint notice. Accordingly I will examine whether the student was suitably grouped for instructional purposes in the 8:1+2 special class under State regulations.

2. Functional Grouping

The IDEA contains no requirements that special education students be grouped in a particular manner. However, State regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii], 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [approving an IEP that placed a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]; Application of the Dep't of Educ., Appeal No. 11-066; Application of a Student with a Disability, Appeal No. 09-082; Application of the Dep't of Educ., Appeal No. 08-095; Application of the Dep't of Educ., Appeal No. 08-018; Application of a Child with a Disability, Appeal No. 07-068; Application of a Child with a Disability, Appeal No. 05-102). State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to: levels of academic or educational achievement and learning characteristics; levels of social development; levels of physical development; and the management needs of the students in the classroom (8 NYCRR 200.6[h][2]; see 8 NYCRR 200.1[ww][3][i][a]-[d]). The social and physical levels of development of the individual students shall be considered to ensure beneficial growth to each student, although neither should be a sole basis for determining placement (8 NYCRR 200.6[a][3][ii], [iii]). Further, the management needs of students may vary and the modifications, adaptations and other resources are to be provided to students so that they do not detract from the opportunities of the other students in the class (8 NYCRR 200.6[a][3][iv]). State regulations also require that a "district operating a special class wherein the range of achievement levels in reading

and mathematics exceeds three years shall, . . . , provide the [CSE] and the parents and teacher of students in such class a description of the range of achievement in reading and mathematics, . . . , in the class, by November 1st of each year" (8 NYCRR 200.6[g][7]). However, State regulations do not preclude a grouping of students in a classroom when the range of achievement levels in reading and math would exceed three years (see Application of the Dep't of Educ., Appeal No. 08-018; Application of the Bd. of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 01-073).

Here, a review of the hearing record supports a finding that the student was suitably grouped in the 8:1+2 special class with students having similar needs with respect to academic achievement, social development, physical development, and management needs (see 8 NYCRR 200.6[a][3]; Dist. Ex. 52).[8] Specifically, the class profile contained in the hearing record indicates that the 8:1+2 special class is comprised of six students, one of whom falls in the low range, two of whom fall in the average range, and three of whom (including the student) fall in the low average range in academic performance (Dist. Ex. 52).[9] With regard to social development, the class profile indicates that, similar to four of his classmates, the student performs in the low range of functioning, and that one student functions in the low average range (id.). In the area of physical development, the class profile reflects that two students, including the student, function in the average range, while four students function in the low range (id.). Relative to management needs, the class profile places three students in the low average range of functioning and three others, including the student, in the low range (id.).

Consistent with the class profile, the school psychologist testified that the student is "on par" academically with two of the students in the 8:1+2 special class in the low average range of functioning, adding that four of the six students (including the student in this case) are verbal, and that one other student possesses language skills similar to the student's (Tr. pp. 107-108, 225-26). The student's special education teacher in the 8:1+2 class, who also taught the student during the 2010-11 school year (see Tr. pp. 498, 546), testified that the student "is definitely not the lowest … he is not the highest … he is definitely in the middle" of the ranges of functioning in the 8:1+2

[8] As discussed above, the parents alleged in their due process complaint notice that the district failed to provide them with a class profile of the 8:1+2 special class or to advise them "how many non-verbal [students] would be in [the 8:1+2 special] class" pursuant to their request made during the April 2011 CSE meeting, alleging that "the CSE repeatedly stated that they did not know and would not know until the middle of the summer [2011]" (Dist. Ex. 1 at p. 3; see Tr. pp. 823, 827). As noted above, a class profile may be a useful tool for demonstrating how a student has been grouped; however, the Second Circuit has determined that, unlike an IEP, districts are not expressly required to provide parents with class profiles (Cerra, 427 F.3d at 194). However, even assuming for the sake of argument that the district was required to provide the parents with the class profile, I note that the hearing record reflects that the CSE offered to reconvene once class rosters for the 2011-12 school year were finalized, and that the district ultimately provided the parents with class profiles for both the 8:1+2 special class and the 12:1+2 special class and discussed them with the parents during the June 30, 2011 CSE meeting (see Tr. pp. 110, 827, 832-33, 908; Dist. Exs. 52-53).

[9] The school psychologist testified that the academic performance levels reflected in the class profiles are based on the students' classroom performance, educational testing, progress toward goals, and teacher reports, and that the 8:1+2 special class is comprised of three kindergarten and three first grade students (see Tr. pp. 199, 247-48, 574).

special class with regard to academic[10] and social development, and that he is the highest functioning student in the 8:1+2 special class with regard to physical development (Tr. pp. 575-76).

The hearing record also demonstrates that in the 8:1+2 special class, the student is suitably grouped with students having management needs and requiring program modifications and supports similar to those on his IEP. The student's June 2011 IEP notes that the student requires, among other things: 1:1 instruction in mathematics, reading, writing, and basic cognitive/daily living skills; daily revisitation of reading skills, including blending sounds to read words, sight words for retention, and daily revisitation of literature in order to answer comprehension questions; verbal and visual cues, including pictorial representations in order to answer "what" and "where" questions; repeated practice of abstract questions and language concepts; repetition and prompting in order to generalize learned vocabulary, scripts, requests and concepts; prompting to respond, request and comment in peer groups; facilitation of play behaviors with a peer during interactive and symbolic play activities using modeling, verbal and visual cues, and scripts; a visual schedule to transition between activities and therapy sessions; refocusing throughout the day in small and large group settings; and introduction of new concepts and skills through 1:1 instruction followed by revisitation (Dist. Ex. 3 at pp. 4-6, 10-11). The IEP also reflects that the student requires a behavioral intervention plan (BIP) to decrease interfering self-stimulatory behavior and increase attention skills (id. at pp. 1, 6-7, 11).

The school psychologist testified that the district "set up the [special education] classroom so that the students [having] similar profiles based on how they can learn best in that classroom" are grouped together, and noted that consistent with the student's June 2011 IEP, the students in the 8:1+2 special class require data driven 1:1 instruction, 1:1 instruction in academic content areas, revisitation and repetition, and, in the case of one student, social scripts (Tr. pp. 106-07, 110, 227, 253). The student's special education teacher indicated that the class also provides introduction of task concepts in a 1:1 setting, opportunities for the practice of and generalization of skills, use of visual schedules, independent work bins, communication devices and scripts to aid in communication, and facilitation of social opportunities and exchanges, and that students in the 8:1+2 special class "function within the behavior modifications that are placed within the classroom" (Tr. pp. 564-67, 576).[11] The student's speech-language therapist testified that the

[10] With regard to grouping and the students' IQs, the student's special education teacher indicated that the student's IQ is the lowest among the students in the 8:1+2 special class; however, the school psychologist explained that a student's IQ is not "something that is taken into much consideration overall when creating classes," and that for students with profiles similar to that of the student, standardized testing does not always yield valid results (see Tr. pp. 66-68, 102, 574). Consistent with the school psychologist's testimony, the private psychologist who evaluated the student in January 2011 (see Dist. Ex. 19 at p. 1), noted that during his "attempted" administration of the Kaufman Brief Intelligence Test 2 (KBIT-2) to the student, he demonstrated interfering and perseverative behaviors, it was difficult to focus the student, and that his response to test items "was not reliable," prompting the private psychologist to administer the Peabody Picture Vocabulary Test – Fourth Edition (PPVT-4), which the private psychologist believed would produce less ambiguous results; the private psychologist indicated that the student achieved a score "within the typical range" on the PPVT-4 (see id. at pp. 1-2).

[11] The hearing record indicates that the student is the only member of the 8:1+2 special class with an individualized BIP (see Tr. pp. 124-25, 576).

students in the 8:1+2 special class exhibit, to varying degrees, deficits in joint attention and imitation skills (Tr. p. 343).

The school psychologist and the district's educational consultant concurred that the student requires 1:1 instruction in academic content areas, including discrete trial instruction, and the educational consultant acknowledged that the student "is successful in that setting for his academics" and "does well in small group instruction for calendar time … [and] an arts and crafts activity" (Tr. pp. 251, 437).[12] The educational consultant further testified that written scripts have been developed for the student to use in the classroom to assist him in peer interactions, including, for example, during snack time, and that the 8:1+2 special class provides sufficient supervision to allow for the facilitation of interaction between the student and his typical peers (Tr. pp. 125-26, 427, 440). The student's special education teacher testified that in the class, "concepts can be lengthened for an individual['s] needs" and that the student requires the use of visuals, a visual schedule, timed breaks, and independent work bins. (Tr. pp. 562-63). The special education teacher further testified that the student "requires the structure of a smaller setting where things can be practiced or mastered in a small one-to-one environment and then we have the ability to manipulate or facilitate those skills and generalize them with our peers" (id.).

With respect to the IHO's finding that the district failed to offer the student a FAPE, based in part upon his conclusion that the 8:1+2 special class does not afford the student access to same age verbal peers sufficient to enable him to receive educational benefits (IHO Decision at p. 10), the evidence does not support this conclusion. The student's special education teacher testified that currently, in the 8:1+2 special class, the student "has a nice combination of verbal students coming into his classroom now and outside of the classroom," and that within the 8:1+2 special class, "there are appropriate role model[s]. There are exchanges being had. We are able to facilitate success with social opportunities and with exchanges within the classroom" (Tr. p. 566).

In consideration of the foregoing, I find that the evidence in the hearing record demonstrates that the student is suitably grouped in the 8:1+2 special class for instructional purposes with other students having similar individual needs, and there has been no violation of State regulations in this regard. Accordingly, the IHO's determination must be reversed. With regard to the parents' desire that the student have access to verbal students, the evidence described above also supports the conclusion that the student has been afforded access to same age verbal peers sufficient to provide him with the opportunity to receive educational benefits.

3. LRE

Although, as discussed above, I have found that the IHO erred in characterizing the parents' claims as alleging LRE violations, assuming for the sake of argument that the parents had challenged the student's IEP on LRE grounds, the evidence in the hearing record nevertheless shows that the 8:1+2 special class satisfied the requirement that the student be educated in the LRE for the 2011-12 school year. 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 Newington, 546 F.3d at 111; Gagliardo, 489 F.3d at 105;

[12] During the impartial hearing, the student's father testified that "I know from … all reports [the student is] doing great academically" in the 8:1+2 special class (Tr. p. 912).

Walczak, 142 F.3d at 132; Patskin, 583 F. Supp. 2d at 428). 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., 995 F.2d 1204, 1215 [3d Cir. 1993]; 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, 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 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 nondisabled peers as much as circumstances allow (Newington, 546 F.3d at 119, citing Daniel R.R., 874 F.2d at 1044). The Court explained that the

inquiry is individualized and fact specific, taking into account the nature of the student's condition and the school's particular efforts to accommodate it (Newington, 546 F.3d at 120).[13]

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 discussed previously, the parties in this case do not dispute that the student requires a special class placement rather than placement in a general education setting and, therefore, an analysis of the first prong of the Newington test to the facts of this case is unnecessary.

Turning to the second prong of the Newington test, the school psychologist testified that during the June 30, 2011 CSE meeting, the parents were provided with a "sample schedule" for the 8:1+2 special class, applicable to the 2011-12 school year, which reflected that mainstream opportunities would be afforded the student between four to six times per day (Tr. p. 112; see Dist. Ex. 54). The student's special education teacher in the 8:1+2 special class testified that the student currently has access to typical peers on a daily basis, explaining that the student participates in snack time in the general education first grade classroom for 30 minutes each day, and is accompanied by another student from his 8:1+2 special class and an aide, who facilitates the implementation of the student's social scripts and social exchanges, including use of peers' names and greetings (Tr. pp. 571-72). She added that the student attends lunch and recess with the first grade mainstream class, where interactions with his typical peers are encouraged through sitting with his general education peers and playing with them either on the playground or, on rainy days, in the classroom, and that together with his first grade special education classmates from the 8:1+2 special class, the student also attends a 40-minute "special" each day with the first grade general education class consisting of either library, gym, music, or art (Tr. pp. 572-73; see Dist. Ex. 54). During a daily 30-minute social skills group, she advised that kindergarten general education students enter the student's 8:1+2 special class and utilize "play books" and scripts with the special education students (Tr. pp. 573; see Tr. pp. 372-73; Dist. Ex. 54).

In addition to the mainstreaming opportunities discussed above, the hearing record reflects that the student also receives access to nondisabled peers via his related services, some of which are delivered in a general education setting (see Tr. pp. 235-37). The student's June 2011 IEP mandates that the student receive two 30-minute individual speech-language therapy sessions per week in a general education setting, which is corroborated by the impartial hearing testimony of the student's special education teacher and the sample schedule provided by the CSE to the parents (Tr. pp. 572, 629; Dist. Exs. 3 at p. 10; 54 at pp. 1, 3).[14] The school psychologist testified that the

[13] 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).

[14] With regard to the student's speech-language therapy, the school psychologist testified that some of the peers to which the student is afforded access in the general education setting may have IEPs, while others may be speech improvement students, whose social and communication abilities are such that the student would be able to learn from these peers through communication in the forms of reciprocal conversations and questions that these peers would pose to the student (Tr. pp. 235-37).

delivery of some of the student's speech-language therapy services within a general education setting is based upon the recommendation of the student's private psychologist (Tr. pp. 115-16; see Dist. Ex. 19 at p. 4). Additionally, the sample schedule contained in the hearing record provides for the student to receive one session of OT per week with a general education peer in the school's therapy room; the school psychologist testified that typically, the peer with whom the student would receive OT "would tend to be more of a student who has an IEP but [is] from the general education class" (Tr. p. 236; Dist. Ex. 54 at p. 1; see Dist. Ex. 3 at p. 1). I also note that the parents testified during the impartial hearing that the topic of the student's exposure to typical peers was discussed during the course of the CSE meetings, and their testimony describing the student's mainstreaming opportunities is consistent with that of the district staff as discussed above (Tr. pp. 792-93, 909-10).

In consideration of the above, I conclude that, had the parents alleged an LRE violation, the hearing record demonstrates that the 8:1+2 special class provided by the district allowed the student to access school programs with nondisabled students to the maximum extent appropriate (Newington, 546 F.3d at 120), and therefore, contrary to the IHO's finding, it satisfies the LRE requirement for the 2011-12 school year.

VII. Conclusion

In summary, I find that the IHO's determination that the district has failed to offer the student a FAPE for the 2011-12 school year must be reversed. I find that the hearing record demonstrates that the student is suitably grouped for instructional purposes in the 8:1+2 special class with students having similar individual needs and is afforded access to same age verbal peers to enable him to make educational progress, and that the June 2011 IEP, recommending the 8:1+2 special class with related services, is reasonably calculated to enable the student to receive educational benefits, and thus, the district has offered the student a FAPE in the LRE for the 2011-12 school year (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192).

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

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO decision dated December 7, 2011, is modified by reversing those portions which found that the district failed to offer the student a FAPE for the 2011-12 school year, ordered the district to place the student in the 12:1+2 special class, ordered the district to provide the student with a teaching assistant for the balance of the 2011-12 school year, and ordered the district to reconvene the CSE.

Dated: **Albany, New York**
March 7, 2012

JUSTYN P. BATES
STATE REVIEW OFFICER