The University of the State of New York

The State Education Department
State Review Officer
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No. 14-020

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

Appearances:
Legal Services of Central New York, attorneys for petitioners, Susan M. Young, Esq., of counsel

Hogan, Sarzynski, Lynch, DeWind & Gregory, LLP, attorneys for respondent, Ed Sarzynski, 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 respondent (the district) recommended an appropriate program for the parents' daughter (student) for the 2013-14 school year in the least restrictive environment (LRE). The appeal must be sustained in part.

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

This matter presents a challenge to a placement recommended by the district for the student's 2013-14 school year. At the time that this placement was recommended, the student was six years old and described as a "little girl who has warmed our hearts" (Joint Ex. 76 at p. 4). The hearing record reflects that the student has received diagnoses including microcephaly, clubfeet, atrial septal defect, asthma, hip dysplasia, and bilateral hearing loss (Joint Exs. 34 at p. 2; 84 at p. 1). She underwent multiple surgeries including heel cord lengthening, a bilateral femoral osteotomy, ear surgery, and hip replacement and required the use of hearing aids, twister cables, AFOs,[1] a wheelchair, and a posterior walker (Joint Ex. 34 at p. 2). The student met most of her developmental milestones later than expected and presented with global developmental delays (Tr. p. 389; Joint Ex. 34 at p. 1).

[1] Although identified in the hearing record only as "an orthopedic device" that the student wore "on her legs" (Tr. p. 128), it appears that AFO refers to an ankle-foot orthosis.

To address her multiple needs, the student initially received services through the Early Intervention Program and later received services through the Committee on Preschool Special Education. The CSE initially met in Spring 2011 to develop the student's IEP for the 2011-12 school year, classified her as a student with an other health-impairment, and placed her in an integrated preschool classroom,[2] where she received audiological services, speech-language therapy, occupational therapy (OT), physical therapy (PT), a 1:1 aide, and many program accommodations, modifications, and assistive technology devices (Tr. pp. 95-96; Joint Exs. 14 at pp. 6-10; 34 at p. 1).[3] During the 2011-12 school year the student's cognitive abilities were deemed to be at the 33 month level (standard score 64), although the score was considered a low estimate of her ability due to her high distractibility, fluctuating ability to hear (inconsistently working hearing aids), and strong personal agenda (Joint Ex. 44 at p. 4). At the time, the student communicated using gestures, word approximations, some true words, sign language, and augmentative communication boards and devices and functioned at a prekindergarten level academically (id.).

In April 2012, the CSE convened to conduct an annual review and develop the student's IEP for the 2012-13 school year (Tr. pp. 65-66; Joint Ex. 44). The April 2012 CSE continued the student's classification as a student with an other health-impairment and recommended she attend a classroom providing integrated co-teaching (ICT) services (180 minutes per day) and receive audiology services, OT, PT, and speech-language therapy, and additional staffing services (Joint Ex. 44 at pp. 9-10). The April 2012 IEP included supplementary aids, program modifications, and accommodations to address the student's management needs, as well as assistive technology devices including provision of an FM system, Tech/Talk 8, an iPad, and communication boards (Joint Ex. 44 at pp. 10-11). The CSE reconvened to review the student's program in November 2012 (Joint Exs. 45 at p. 5; 60). The resultant IEP continued the student's then-current ICT placement and related services,[4] as well as her additional staffing, updated the student's present levels of performance and management needs, and reflected several new additional academic goals as well as two adapted physical education goals (Tr. p. 229; Joint Ex. 60 at pp. 4-7, 9, 10). The November 2012 IEP discontinued the recommendation for provision of a Tech/Talk 8 assistive technology device (compare Joint Ex. 44 at p. 11, with Joint Ex. 60 at p. 12).

On April 22, 2013, the CSE convened for the student's annual review and to develop her IEP for the 2013-14 school year (Joint Ex. 76). At the time of the April 2013 CSE meeting, the student continued to exhibit deficits in cognition, attention, academic achievement, social interaction, behavior (compliance), gross and fine motor development, and receptive and expressive language skills (id. at pp. 3-6, 8-13). The April 2013 CSE further continued the student's classification as a student with an other health-impairment[5] and recommended placement

[2] Although the student's IEP's for the 2011-12 and 2012-13 school years indicate that she was placed in a 6:1+1 special class for preschool, testimony by a district school psychologist explained that the IEPs were incorrect and that the student attended an integrated class with regular education and special education students (Tr. pp. 94-95; Joint Exs. 14 at p. 6; 44 at p. 9). She also explained that the CSE recommended the student for an extra year of preschool, in part because her age was close to the cutoff date (Tr. p. 95).

[3] The student attended the integrated preschool class for three years due to her intense level of need (Tr. pp. 65, 342, 367-68).

[4] The November 2012 CSE changed the location of certain of the student's individual OT, individual PT, and group speech-language therapy to the student's classroom with the remainder of the services to be delivered in a therapy room (compare Joint Ex. 44 at p. 10, with Joint Ex. 60 at p. 11).

[5] The student's eligibility for special education programs and related services as a student with an other health-

in a 12-month 12:1+1 BOCES special class outside of the district,[6] the provision of additional staffing, audiology services, OT, PT, and speech-language therapy, and modified the supplementary aids and services, modifications, and accommodations designed to address the student's management needs, including the discontinuance of all of the student's communication devices (id. at pp. 10-14; Joint Ex. 80; see Tr. pp. 80-83). The student attended the 12:1+1 program during the summer portion of the 2013-14 school year (Tr. pp. 153, 286, 303-04, 414-15).

A. Due Process Complaint Notice

By due process complaint notice dated August 16, 2013, the parents requested an impartial hearing (Joint Ex. 1). After a brief description of the student, her educational history, and the April 2013 CSE's recommendations, the parents asserted that the minutes of the April 2013 CSE meeting incorrectly state that the parents agreed with the "change" to a 12:1+1 special class placement, and that their only disagreement with such placement was with the specific public school site to which the student was assigned due to safety concerns (id. at pp. 4-5).[7] The parents further asserted that they did not agree with the change to a "more restrictive placement" (id. at p. 5). As relief the parents requested placement in a "similar program" to that recommended for the student's kindergarten program the previous year, specifically requesting placement in a classroom providing ICT services (hereinafter ICT class) daily for 180 minutes, adapted physical education, audiology services, speech-language therapy, PT, and OT (id.). In addition, the parents requested that the student receive additional support from a 1:1 aide with knowledge of sign language, rather than "additional staffing" (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened on October 16, 2013 and concluded on November 4, 2013, after three days of proceedings (Tr. pp. 1-494). In a decision dated December 23, 2013, the IHO determined, among other things, that the April 2013 IEP offered the student a "FAPE . . . in the least restrictive environment"(IHO Decision at pp. 37, 42).

Specifically, the IHO first considered whether the April 2013 IEP was "reasonably calculated to confer an educational benefit" upon the student. In this regard, the IHO analyzed the evaluative information available to the CSE and determined that it had sufficient evaluative data to formulate the student's present levels of performance (IHO Decision at pp. 26-31). The IHO also determined that the parents' claims relating to the district's failure to conduct a functional behavioral assessment (FBA) and develop a behavioral intervention plan (BIP), as well as their claims regarding the use of an augmentative communication device, were not properly raised in the parents' due process complaint notice (id. at pp. 32-34), and that in any event the district's failure to incorporate them into the student's April 2013 IEP did not render the document

impairment is not in dispute in this appeal (34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

[6] Although not defined in the hearing record, BOCES refers to Board of Cooperative Educational Services. This placement shall hereafter be referred to as the 12:1+1 special class as described in the student's IEP (Joint Ex. 76 at p. 10).

[7] Multiple witnesses from the district testified that the parents' only stated concern was with the location of the district's proposed placement, which was located in close proximity to the student's biological father who, according to the student's mother, "overstepped certain laws" (Tr. pp. 80, 84, 116, 149, 212, 261, 282, 410). While the parents admit to having safety concerns with the location of the proposed placement (Tr. p 410; Petition at ¶ 99), their attorney represented in her opening argument that these concerns were "not [a] part of [their] case" (Tr. p. 48).

inadequate (id. at pp. 35-36). In reaching this latter determination, the IHO found that evidence in the hearing record "does not establish how the use of discrete, measurable, target-based criteria in a data-based format would significantly diminish the child's negative behaviors" (id. at p. 35). In addition, the IHO found that the parents' arguments related to an augmentative communication device were "speculative" because "although possibly useful, such a determination can only be made through the assessment of a duly qualified clinician" (id at pp. 35-36). The IHO also found that although the parents requested a 1:1 aide in their due process complaint notice, the hearing record supported the district's recommendation for additional staffing rather than a 1:1 aide (id. at pp. 36-37).

In addition, the IHO made specific findings with respect to whether the district's recommended program was the LRE for the student. In this regard, the IHO noted that since there was "no claim that a full-time regular education classroom is an appropriate placement for [the student]," the choice in this matter "lies between a community-based integrated classroom and a self-contained BOCES placement, both special education programs along the continuum" (IHO Decision at p. 38). With respect to these two options, the IHO determined that an ICT classroom would not have been an appropriate placement for the student for a number of reasons, including that the student struggled in an ICT classroom during the 2012-13 school year (id.), and although the student's standardized test scores were lower than her actual abilities, they indicated the student would not be able to function successfully within an ICT classroom even with the accommodations and supports sought by the parents (id. at p. 32). In addition, the IHO found that the student received little benefit from her placement in an ICT classroom due to her cognitive, social/emotional, and physical deficits (id. at 38-40), and the student's behavioral management needs prevented her from "reasonable participation" in the ICT class (id. at p 39). The IHO also held that the other students in the ICT classroom were more advanced than the student with regard to academic and social levels (id. at pp. 39-40). By contrast, the IHO found that the student would have been in the middle of the academic and social levels of the students in the recommended 12:1+1 special class (id. at pp. 39-41). In addition, the IHO determined the supports requested by the parents were insufficient in comparison to the supports available to the student in a 12:1+1 special class (id. at p. 42). Finally, the IHO found that the 12:1+1 special class offered the student mainstreaming opportunities to the maximum extent appropriate (id.).[8] Accordingly, the IHO denied the parents' request for relief, directed that the student be placed in the 12:1+1 special class for the 2013-14 school year, and urged the district to conduct an FBA and an assistive technology evaluation (id. at p. 43-44).

IV. Appeal for State-Level Review

The parents appeal the IHO's decision and in their petition set forth three bases to overturn her determination: (1) that the IHO erred in finding that the April 2013 IEP was "reasonably calculated to provide the student with an educational benefit in the LRE," (2) that the IHO's finding that the parents' due process complaint notice could not be reasonably read to include claims regarding an FBA, BIP, and an augmentative communication device "is factually and legally wrong and must be overturned," and (3) that the IHO's finding that the district's failure to use

[8] The IHO made additional findings as well, including that "equitable considerations" did not favor the parents' requested relief because their objections at the April 2013 CSE meeting were due more to the location of the specific 12:1+1 classroom in which the student would have been placed, rather than to the program recommendation itself (IHO Decision at p. 43). However, since this is not a case in which the parents are requesting to be reimbursed for tuition paid to a parentally placed private school, such "equitable considerations" need not be considered here.

"augmentative communication" or conduct an FBA did not render the IEP procedurally defective is "factually and legally wrong and must be overturned."

While the scope of the parents' claims are not entirely clear from their petition, they submit a Memorandum of Law for my consideration which provides further insights into them. Specifically, the parents set forth two "arguments" in their Memorandum of Law which primarily relate to placement in the LRE, namely that (1) the placement recommendation in the student's April 2013 IEP "is not the least restrictive environment appropriate to [her] needs," and (2) the district's proposed placement "does not provide mainstreaming to the maximum extent appropriate for [the student]." In support of these contentions, the parents explain, among other things, that they are not arguing that the April 2013 IEP should have included an FBA, BIP, and an augmentative communication device, and that the IHO "misunderstood" their position, and "ignored the law requiring that [d]istrict's [sic] take certain steps prior to removing students from a less restrictive environment." Accordingly, and with respect to the first of their two arguments, the parents generally argue that the district should not have removed the student from the regular education environment without first attempting to address the student's behavioral and communication needs through the use of supplementary aids and services, including certain supplemental aids and services (i.e., supplemental communication devices) that were listed on previous IEPs, but not provided to the student. In addition, the parents contend that the student would benefit more from placement in an ICT class versus the 12:1+1 special class recommended by the district. In this regard the parents argue, among other things, that the 12:1+1 special class would not have contained appropriate peers for the student and would have focused on activities of daily living (ADL) skills, which were not an appropriate emphasis for the student during the school day. Finally, the parents contend that the district's proposed placement did not "provide mainstreaming to the maximum exten[t] appropriate for [the student]" in that the April 2013 IEP did not specify any opportunities for mainstreaming, and that in any event, testimony regarding the recommended 12:1+1 classroom described only limited opportunities for mainstreaming. The parents, therefore, request that I overturn the IHO's decision, find that the April 2013 IEP "was not appropriate for the student," and "order the CSE to re-convene and recommend an appropriate integrated co-teaching program with supplementary aids and services in the student's district."

The district answers by generally denying the parents' allegations and repeating significant portions of the IHO's decision verbatim to support its position that the IHO's decision was correct. The district also alleges that the parents did not object to the recommended placement in a 12:1+1 special class during the April 2013 CSE meeting and enrolled the student in the recommended program for the summer portion of the 2013-14 school year. The district further asserts that the student was not receiving educational benefit in an ICT classroom, benefited from placement in the 12:1+1 special class during the extended school year, and would have benefited from a 12:1+1 special class during the 2013-14 10-month school year.

V. Applicable Standards—Least Restrictive Environment

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. v. Rowley, 458 U.S. 176, 206-07 [1982]).

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 Mr. and Mrs. 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. 2012]; Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 132 [2d Cir. 1998]; 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 regular education 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. 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; 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 a regular 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 regular class with supplementary 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).[9]

If, after examining the factors under the first prong, it is determined that the district was justified in removing the student from a regular 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 certain exceptions not applicable here, the burden of proof is generally on the school district during an impartial hearing (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; 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 Review

Before addressing the merits of the parents' appeal, I first address what issues are properly before me for review. After considering the parties' arguments, I agree with the IHO—and the parents concede—that the parents did not raise the district's failure to conduct an FBA, develop a BIP, or provide the student with an augmentative communication device in their due process complaint notice as a basis upon which to conclude that the district failed to offer the student a FAPE for the 2013-14 school year (IHO Decision at pp. 32-34; Joint Ex. 1; Parent Mem. of Law at pp. 5-6).[10] However, the parents assert that these arguments were raised during the hearing as support for the parents' arguments related to LRE.

The party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing and may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. §1415[f][3][B]; 34 CFR 300.508[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 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][i][b]; see N.K. v. New York City Dep't of Educ., 2013 WL 4436528, at *5-*7 [S.D.N.Y. Aug. 13, 2013]; B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at *6 [S.D.N.Y. May 14, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *9 [S.D.N.Y. Mar. 28, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012]; M.R. v. S. 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 [S.D.N.Y. Oct. 28, 2011]; C.D.

[9] 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).

[10] Specifically, the parent's due process complaint notice cannot reasonably be read to include an assertion that the district's failure to conduct an FBA, develop a BIP, or provide the student with an augmentative communication device, alone, renders the April 2013 IEP incapable of being "reasonably calculated to enable the student to receive educational benefits," which is generally the standard used for determining whether, in a substantive sense, an IEP is sufficient and a FAPE has been offered to a student (see, e.g., Rowley, 458 U.S. at 206-07; 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]).

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).

In this instance, while the parents' due process complaint notice cannot reasonably be read to include claims relating to an FBA, BIP, or augmentative communication device as reasons that the district failed to offer the student a FAPE for the 2013-14 school year in the sense noted above, those claims also relate to the parents' argument that the district's recommended program was not the LRE for the student. This latter claim was properly raised in the parents' due process complaint notice (Joint Ex. 1 at p. 5).[11] Additionally, a review of the parties' opening statements indicates the district understood that the parents' LRE argument included an assertion that the district should have provided additional supports to keep the student in a regular classroom (Tr. p. 44). The district also did not object when counsel for the parents raised the district's failures to ascertain the cause of the student's behaviors or provide an augmentative communication device as possible additional supports that were not attempted (Tr. pp. 49-51). The hearing record further shows that the district elicited testimony during direct examination relating to the supports, modifications, and accommodations the district provided in its program and did not object to the parents' cross-examination of district witnesses regarding the student's behaviors, an FBA/BIP, or the use of a communication device (Tr. pp. 75-77, 83-84, 103-04, 108, 111, 120-22, 136, 156-57, 167, 172-73, 212-13, 222-23, 225-26, 261-63, 264-65, 275, 277). Accordingly, even if the parents' arguments relating to an FBA/BIP and the use of a communication device could not be deemed to have been properly raised in the due process complaint notice, it would be unfair to prevent the parents from asserting those arguments to rebut the district's allegations that there were no other supports, modifications, or accommodations the district could have attempted to keep the student in the ICT classroom (see M.H. v. New York City Dep't of Educ., 685 F.3d 217, 250 [2d Cir. 2012] [holding that the parents were permitted to argue the student's need for a particular teaching methodology to rebut evidence presented by the district that its program was appropriate because it provided various teaching methodologies]).

However, the parents make a number of statements in their papers which, while related to their LRE claims, when broadly construed can also be read as raising additional reasons for relief. Examples of this include statements regarding the sufficiency of evaluative data in the record (Answer at ¶¶ 41-44; Parent Mem. of Law at p. 13), statements regarding the present levels of performance and/or goals in the April 2013 IEP (Parent Mem. of Law at p. 12), and statements regarding the functional levels of students in the district's proposed 12:1+1 special class (Answer at ¶¶ 108-115). Like the FBA, BIP and communication device issues discussed above, to the extent that these statements relate to the parents' LRE arguments, I will consider them in the context of such arguments. However, to the extent that such statements can be read as raising non-LRE claims related to the April 2013 IEP (including challenges to the sufficiency of evaluative data before the CSE, the present levels of performance and/or goals in the April 2013 IEP, and the functional grouping of the district's proposed 12:1+1 special class), I find that such issues are not properly before me and will not be considered.

B. 12:1+1 Special Class Recommendation and LRE Considerations

As a brief background, the student attended an ICT class during the 2012-13 (kindergarten) school year with related services including speech-language therapy, OT, PT, and audiology services, along with "additional staffing" support (Joint Ex. 44 at pp. 9-10; 60 at pp. 11-12). The

[11] As noted above, LRE claims are evaluated under a different standard than general FAPE claims.

district school psychologist described the student's kindergarten ICT classroom as an integrated program that "look[ed] like" a regular kindergarten classroom, but was staffed with both a regular education teacher and a special education teacher (Tr. p. 68). The special education teacher assisted in the kindergarten ICT class for half of the day and in the first grade ICT class for half of the day; however, when the special education teacher was not in the kindergarten ICT class, a special education aide provided support in the kindergarten class (id.). The kindergarten ICT classroom was also supported by a kindergarten classroom aide for the entire day as well as an additional staffing person (id.). The additional staffing person was in the room to assist the student but was also available to assist with other things, which allowed the various adults in the class to work with the student and ensured that there was always 1:1 support available to the student when needed (Tr. pp. 69-71, 98).[12] The student's instruction in the ICT class was provided in both individual and small group settings (Tr. pp. 124). New material was provided to the student by the special education teacher, typically in a 1:1 setting and later in a small group with the other special education students (id.). The special education aide worked with students on the reinforcement of skills using activities provided by the special education teacher (Tr. p. 198).

For the student's first grade year (the 2013-14 school year), the parents assert that the April 2013 CSE's recommended placement of the student in a 12:1+1 special class was not in the LRE for the student and request placement in an ICT classroom with supports. As an initial matter, the Second Circuit has noted that the LRE test adopted in Newington, which it described as a test to use "when a student is pulled out of a regular classroom and placed in a special education classroom all or some of the time," does not adequately address the LRE question involving a student's placement in a "general education environment with [ICT] services" which the Court described as "somewhere in between a regular classroom and a segregated, special education classroom" (M.W. v. New York City Dep't of Educ., 725 F.3d 131, 145 [2d Cir. 2013]). However, the Court also noted that Newington "does not compel a choice between a regular classroom and a special education classroom," and thus declined to decide whether the ICT classroom at issue was a "regular classroom" or a "special education classroom" (id. at 144). Rather, and in declining to analyze an ICT classroom placement as a placement in a "special class," the Court determined that the appropriate question focused on whether the "ICT services were appropriate supports for [the student] within a general education environment" (M.W., 725 F.3d. at 145-46).[13] Thus, in accordance with the Second Circuit's ruling in M.W., I need not (and do not) consider whether placement in an ICT classroom constitutes placement in a "regular class" or a "special education class." However, because in this instance the district's recommendation would move the student into a setting with less access to nondisabled peers (i.e., from a "general education environment with integrated co-teaching services" to a self-contained 12:1+1 special class), I will treat the ICT class as a "regular class" for purposes of the test adopted by the Second Circuit in Newington, and will analyze the LRE issues raised in this matter under both prongs of that test.

With regard to the first factor of the first prong of the Newington test, and whether the student could be educated satisfactorily in a regular class with supplementary aids and services, I am unable to find on the record before me that the district made reasonable efforts to accommodate

[12] The November 2012 IEP indicated that the student required "adult assistance at all times for health, safety, and participation" (Joint Ex. 60 at p. 7).

[13] In describing how LRE related to the continuum of service options, State guidance in 2008 indicated that ICT services were "directly designed to support the student in his/her general education class" ("Continuum of Special Education Services for School-Age Students with Disabilities," at pp. 3-4, VESID Mem. [Apr. 2008], available at http://www.p12.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf).

the student in the ICT classroom. The hearing record reflects that the April 2013 CSE recommended placement in a 12:1+1 special class for the 2013-14 (first grade) school year because the student made "minimal" progress in her kindergarten ICT class, it was the "best fit" for the student cognitively, and the student would be with peers at a similar academic level (Tr. pp. 88-89, 186, 209-10; Joint Ex. 80 at p. 1). However, while it is understandable that the CSE was concerned with the student's academic functioning and what the special education teacher described as a widening gap between the student and her typically developing peers (Tr. pp. 207, 214-15), a student with a disability must not be removed from education in age-appropriate regular classrooms solely because of needed modifications to the general education curriculum (see 8 NYCRR 200.4[d][4][ii][d]). While the IDEA does not require modification of the general education curriculum beyond recognition (Daniel R.R., 874 F.2d at 1048), the need for modification is "'not a legitimate basis upon which to justify excluding a child' from the regular classroom unless the education of other students is significantly impaired" thereby (Oberti, 995 F.2d at 1222, quoting Oberti v. Bd. of Educ., 801 F. Supp. 1392, 1403 [D.N.J. 1992]).

Further, and perhaps more importantly, a district must establish that it considered the full range of supplementary aids and services that could be provided to facilitate the student's placement in a regular classroom to enable students with disabilities to be educated with nondisabled students to the maximum extent appropriate (34 CFR 300.42, 300.114, 300.116; 8 NYCRR 200.1[cc], [bbb]; Placements, 71 Fed. Reg. 46588 [August 14, 2006]). Here, the hearing record reflects that the district was aware the student exhibited behaviors that interfered with her learning while in her kindergarten ICT classroom, yet it failed to conduct an FBA to determine the cause of the student's behaviors or develop a BIP to address them (Tr. pp. 172-73, 200, 203, 206, 213, 214-15, 224-26, 265-66; Joint Exs. 45; 71 at p. 7; 75). Further, and despite the district's knowledge that the student had successfully utilized a communication device in her preschool class, the district did not provide the student with a communication device to address her communication deficits while in the kindergarten ICT class (Tr. pp. 222-23; Joint Exs. 33 at pp. 2-3; 44 at p. 5; 60 at p. 4; 90 at p. 10).

With regard to an FBA/BIP, CSEs are generally required to consider the development of a BIP (which is based on the results of an FBA) where, among other things, a student exhibits persistent behaviors that "impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions" (8 NYCRR 200.22[b][i]; see also 8 NYCRR 200.l[mmm]). Here, it is clear from the record that the student exhibited such behaviors and, thus, the April 2013 CSE should have considered the development of a BIP. Testimony by the student's special education teacher and regular education teacher in the student's kindergarten ICT classroom, for example, reflected that the student exhibited behaviors that impeded her learning and inhibited her ability to participate in class (Tr. pp. 225-26, 265-66, 277). Their testimony indicated that the student would indicate that she was sick or request her mother as a way of avoiding activities; that tasks had to be presented to the student in a game-like fashion; that at times the student avoided activities by requesting a nap but would then crawl to her friends; that she was unable to stay for the entire class during library, art, music, or PE because she was uncooperative; and that at times, the student would "flat out refuse" to use her walker or wheelchair independently (Tr. pp. 200, 203, 206, 213, 214-15, 265-66). Their testimony also indicated that the student pulled her hearing aids out of her ears and pinched adults and peers when frustrated with an activity (Tr. pp. 203, 208-09, 267). In addition, the special education teacher reported in the 2012-13 progress report for IEP goals that the student demonstrated abilities on her own terms, such as when the activity presented was one that she liked or was on a topic that she enjoyed (Joint Ex. 71 at pp. 6-7). The district school psychologist testified that when the student had her own agenda or did not want to do a particular task, she exhibited a variety of responses, including

laughing, turning around, saying "nah-nah-nah," moving her wheel chair up and down, or grabbing at preferred items, and the school psychologist further testified that these behaviors effected the student's ability to learn and continued to impede her learning despite the accommodations provided by the teacher (Tr. pp. 106-08). In fact, even the district's special education coordinator who participated in the April 2013 CSE meeting, and who initially testified that the student did not demonstrate behaviors that impeded her learning (Tr. p. 172), indicated that she was aware that the student was known to refuse to comply with teacher demands, do the opposite of what was asked of her because she thought it was funny, act silly when asked to perform a task, and refuse to show the extent of what she knew, and she agreed that those behaviors impeded the student's learning (id.). Despite all of this, however, testimony by the district school psychologist and the special education coordinator indicated that conducting an FBA was not discussed at any of the student's CSE meetings (Tr. pp. 108, 173).

The failure of the April 2013 CSE to consider conducting an FBA and developing a BIP in this case is not insignificant. The student's April 2012 and November 2012 IEPs, for example, reflect that the cause of the student's noncompliant behavior was unclear as they indicate, with regard to following directions, "[i]t is difficult to determine when lack of follow through is due to [the student] wanting to follow her own agenda or a lack of understanding" (Joint Exs. 44 at p. 4; 60 at p. 4). In addition, the hearing record indicates that the student's behaviors were largely noncompliant and impacted the length of her instruction time (5-10 minutes), the delivery of her instruction (game like), and ultimately interfered with her overall academic success (Tr. pp. 200, 203, 206, 213, 214-15, 224-26, 265-66; Joint Ex. 71 at p. 7). Since, as noted above, the decision to remove the student from the ICT classroom was based, at least in part, on her academic performance, I find that failing to at least consider whether to conduct an FBA (which may have provided additional insights into the student's behaviors) and develop a BIP to be unreasonable. This is especially true where, as here, there is evidence to suggest that the student's cognitive and academic levels may have been underestimated and/or not fully known.[14]

To the extent that district staff believed that they had done everything to accommodate the student in the ICT class, I am unable to find that such is the case. I initially note that they could have conducted an FBA and developed a BIP to address the student's behaviors that impeded her learning.[15] Furthermore, while there is evidence that the student's inappropriate behaviors were successfully addressed during preschool by the implementation of a behavior program using numbered cards as a warning, the hearing record does not reflect that this or any other specific behavior program (as opposed to ad hoc attempts to accommodate the student's behaviors) was

[14] In a March 2012 progress report, for example, the student's special education teacher indicated that the student found it "entertaining to try and engage teachers and peers in silly ways during teacher directed activities" and that the student "[knew] much more than she want[ed] to show (Joint Ex. 71 at pp. 6, 7). Consistent with this, in an April 2011 neurodevelopmental evaluation report the student's evaluator noted that he had continued concerns that the student's cognitive potential may be underestimated (Joint Ex. 6 at p. 2). The April 2012 IEP also reflected that among other things, due to the student's strong personal agenda, the student's IQ was considered a low estimate of her ability (Joint Ex. 44 at p. 4). The April 2011 preschool report also reflected that the student's IQ was considered to be an underestimate of her abilities due to her physical and motor delays (Joint Ex. 5 at p. 3).

[15] Testimony by the student's special education teacher indicated that she did not request an FBA of the student because the school concentrated on attempting accommodations in the classroom first, and because some of the student's behaviors ceased and were replaced by different behaviors; for example, the student stopped pinching and began hair pulling (Tr. p. 226). The special education teacher further testified that they were "always trying to find what would work best for [the student]" (id.). Notably, the student's special education teacher's testimony acknowledged that one way to determine the causes of the student's behaviors could have been through an FBA (id.).

utilized to address the student's behavior in the kindergarten ICT classroom (Tr. pp. 102-03, 344-45; Joint Ex. 34 at p. 4).

Finally, I note the district special education coordinator testified that she thought an FBA would not have been appropriate due to the student's cognitive level and her developmental delays (Tr. pp. 172-73). I disagree. While a student's behavior may be affected by their particular cognitive or developmental levels, the particular cognitive or developmental level of a given student does not in any way prohibit the completion of an FBA. Rather, and as noted in State regulations, an FBA is simply the "process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" (8 NYCRR 200.1[r]) (emphasis added). Accordingly, this explanation is not a valid reason for not conducting an FBA.

The hearing record also contains evidence which suggests that, had the student been provided with the support of assistive technology for communication, she may have been more successful in her ICT classroom. In this regard I note that the hearing record reflects that the student previously demonstrated success in an integrated preschool setting using devices to assist her in communicating with adults and peers (Joint Exs. 33 at pp. 2-3; 44 at p. 5; 60 at p. 4; 90 at p. 10). Testimony by the student's special education preschool teacher indicated that in preschool, the student used an iPad for communication purposes, with various applications allowing the student to make choices or comments via voice output, and to help the student demonstrate her knowledge (Tr. p. 339). The preschool teacher also indicated that she used the iPad with the student to work on peer interaction and turn-taking and that the student was adept at using the iPad (Tr. pp. 339, 340-41). Testimony by the preschool teacher indicated that the preschool also utilized an eight button voice output device called a Tech/Talk 8 which could be programed with phrases such as, "turn a page; I like this book; I don't like this book" so that when looking at a book with a friend, the student could comment in the same way any student would (Tr. p. 340). Her testimony also reflected that during her time at the preschool, the student became more engaged, more attentive and more communicative (Tr. p. 342). The student's March 2012 speech and language evaluation and August 2012 preschool progress reports reflected similar information regarding the student's use of communication devices, including that the student utilized an iPad application and Tech Talk 8 to make choices and answer questions in learning activities and communicated through the use of gestures, word approximations, some true words, sign language, and augmentative communication boards and devices (Joint Exs. 33 at pp. 2-3; 90 at p. 10).

Notably, although the April 2012 and November 2012 IEPs recommended supports to allow the student to communicate better with peers and adults in the classroom, specifying a Tech Talk 8,[16] an iPad, and communication boards, testimony by the student's special education teacher

[16] Although the IHO found that the minutes from the April 2012 CSE meeting indicated the Tech/Talk 8 was removed from the student's IEP because the educational audiologist recommended that the student rely upon "oral communication first," I note the Tech/Talk 8 was not removed from the student's IEP until November 2012, and the minutes of the April 2012 CSE meeting indicate that the educational audiologist reported the student "uses sign; but should use speech first," which does not support the conclusion that the student should no longer utilize the Tech/Talk 8; but rather, indicates the student should attempt communication using speech before using sign language (IHO Decision at p. 36; Joint Ex. 45 at p. 8; compare Joint Ex. 44 at p. 11 with Joint Ex. 60 at p. 12). Furthermore, given that both the April and November 2012 IEPs reflected that "[g]iven appropriate supports and assistive technology for communication, [the student] can initiate and respond to peers," and that "[w]ithout appropriate supports and planful strategies for interaction, [the student] will resort to silly/annoying or aggressive acts to engage her peers," it is unlikely that it was the intention of the audiologist to remove the Tech/Talk 8 device from the student's IEP (Joint Ex. 44 at p. 4; 60 at p. 5). Furthermore, this evidence also permits the reasonable inference that some portion of the student's interfering behaviors may have been a result of her inability to communicate during her kindergarten year because of the removal of her communication device; another reason

indicated that the student did not use or have available to her a Tech/Talk 8; an iPad with either a communication application or a voice output device for communication;[17] nor any kind of communication board during the 2012-13 school year (Tr. pp. 222-23; Joint Exs. 44 at p. 11; 60 at p. 12). Notably, however, she further testified that a communication device could have prompted the student to be more independent (Tr. p. 248). In addition, the student's preschool teacher indicated that based on what she knew of the student in preschool, probable explanations as to why the student did not use any communication device in kindergarten would be either because she had made so much progress that she was now communicating by speaking and through sign or because the benefits of communication devices were not being noticed or understood (Tr. p. 346). Based on the student's prior success with the Tech/Talk 8, the communication boards, and the iPad and given the student's continued communication deficits,[18] it is reasonable to conclude that the student's academic and social participation in the ICT class during kindergarten may have been enhanced by the provision of a communication device.

As to the second factor set forth in the first prong of the Newington test—the educational benefits available to the student in a general education class compared to the benefits provided in a special education class—the parties disagree as to whether the student can benefit from or make progress in an ICT class. The district contends that the student had failed to make more than minimal progress in her kindergarten ICT class and remained at a prekindergarten level academically, while the parents assert that the student made progress towards her IEP goals in her kindergarten ICT class and benefited socially from interacting with her non-disabled peers.

Although the student's progress, or lack of progress, in her kindergarten ICT class during the 2012-13 school year is not determinative (see, e.g., M.W., 725 F.3d. at 146 [holding that a district moving a student from a setting where the student made some progress into a "more restrictive setting" did not necessarily warrant tuition reimbursement]), it is a factor to consider in analyzing whether the student would have gained an educational benefit from attendance in an ICT class during the 2013-14 school year (G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 577 [S.D.N.Y. 2010] ["One way of measuring the benefits of a placing a particular child in an integrated class is to look at the progress he or she in fact made in such classes"]; see Warton v. New Fairfield Bd. of Educ., 217 F. Supp. 2d 261, 275-76 [D. Conn. 2002]) Additionally, it cannot be expected that the student would progress at the same rate as her nondisabled peers; a more appropriate analysis of the student's progress is to measure whether the student was making progress toward meeting her IEP annual goals (Mavis, 839 F. Supp. at 988 [educational progress should be measured in terms of a student's abilities as set forth in the annual goals included in the student's IEP]; see G.B., 751 F. Supp. 2d at 275-76; Daniel R.R., 874 F.2d at 1049 [test for educational benefit focuses on the goal of the particular program]).

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an FBA could have assisted the district in determining the causes of, and best ways to address, the student's behaviors that impeded her instruction.

[17] Testimony by the student's special education teacher indicated that the district had iPads which were utilized only for academics and for motivation (Tr. p. 222).

[18] At the time of the April 2013 CSE meeting, although the student had made progress on her speech-language goals and her listening comprehension had improved such that she was able to answer "who" and "what" questions appropriately and follow one-step directions three out of four times, she continued to require modeling in order to interact verbally with peers during a directed task, was beginning to maintain slightly longer interactions but frequently lost interest in activities before completion, and with regard to articulation and speech intelligibility, she continued to use approximations when repeating words and phrases (Joint Ex. 71 at pp. 4-5).

In this instance, the hearing record reflects that at the time of the April 2013 CSE meeting, the student was making progress toward her IEP annual goals in the kindergarten ICT class (Joint Ex. 71).[19] The student's 2012-13 progress report reflected that during the school year, with regard to academics, the student progressed in her ability to use first, next, and last to sequence an event on a topic that she enjoyed; had made continued progress on her knowledge of number concepts and recognition for math computation and had demonstrated an increased interest in learning her numbers; and had learned to identify the letters in her name as well as 15 upper case letters (id. at pp. 6-7). The progress report also reflected that the student had increased her focusing skills necessary to attend to a provided task; was becoming a more active participant when completing activities; loved interacting with her friends; and was more engaged in activities when partnered with a peer (id. at p. 6). With regard to speech-language goals, the progress report indicated that the student's attention span and listening skills had improved, including that she could answer "who" and "what" questions appropriately and follow one-step directions three out of four times, that she had increased her functional communication with peers and adults including increasing her length of utterance to using two to three- word expressions with more clarity, initiating conversations and responding to others more consistently, requiring less direct modeling to interact verbally with peers during a directed task, had increased her ability to imitate language models to help her communicate with her classmates, and was starting to maintain slightly longer interactions (id. at pp. 4-5). The report also reflected that the student had improved her oral motor skills and articulation and was using closer approximations when repeating words and phrases (id. at p. 4). With regard to fine motor skills, the progress report reflected that the student had made gains in bilateral hand skills and required less hand over hand assistance, continued to improve her imitation of prewriting strokes, and had begun to unfasten snaps, buttons, and zippers, although she continued to need improvement with both fastening and unfastening (id. at p. 2). The report also indicated that the student's attention to task during small group OT had improved and that she had made "some gains" in her ability to attend to and participate in adapted physical education (id.).[20] Additionally, teacher comments on the student's report card for the second and third quarters of her kindergarten year (2012-13) further reflected that the student made "many gains" with the modified kindergarten curriculum in both large and small group instruction (Joint Ex. 72 at p. 3). Thus, since the student had already demonstrated the ability to make progress toward her IEP goals in an ICT setting, given appropriate behavioral supports there is a real possibility that she could continue making progress towards her goals, as well as increase her success in other activities. In this regard, participation in the ICT class would allow the student to benefit from exposure to all activities in addition to her modified curriculum in the ICT setting (Tr. p. 207; Joint Ex. 71 at p. 6). However, without an appropriate plan in place to address the student's behavioral needs, it is difficult to determine whether the student would have been able to continue to make progress academically in an ICT classroom.

Further, integration in a regular classroom also provides the unique benefit to a student of allowing for the development of social and communication skills through interaction with

[19] Although the student's kindergarten teachers described the student's progress in the kindergarten ICT class as "minimal" during testimony, the student's progress reports all indicate that the student made progress toward her IEP goals throughout the year (Tr. pp. 213, 260; Joint Exs. 59 at pp. 3-4; 68 at pp. 4-5; 71 at pp. 4-7). The district special education coordinator testified that she considered the student's progress towards one of the goals as "minimal" because as a kindergarten student the student "should be" working on more difficult goals (Tr. p. 174). However, she also conceded that the student's progress should have been measured based on her IEP goals rather than in comparison with her peers (Tr. pp. 174-75).

[20] The March 25, 2013 progress report did not report the student's progress on her PT goals (Joint Ex. 71).

nondisabled peers (Oberti, 995 F.2d at 1216; Daniel R.R., 874 F.2d at 1049 [noting that a student may benefit enormously from language models provided by nondisabled peers]). In this instance, the student has benefited and would likely continue to benefit from access to her regular education peers as models of appropriate classroom behavior and social interaction. With regard to attending to teacher directed activities, for example, the student's special education kindergarten teacher reported that she was "much more engaged in activities when partnered up with a peer" (Joint Ex. 71 at p. 6). The special education teacher also noted in the progress report that the student had made progress in the social domain in her ICT class, in that she was making progress with sharing especially when it came to activities on the iPad (id.). The student's November 2012 IEP indicated that the student had begun to seek out friends to share a book and given appropriate communication supports, she could initiate and respond to her peers in the ICT setting (Joint Ex. 60 at p. 5). Additionally, according to the student's April 2013 IEP, the student "enjoys being around her peers," "will engage in a simple conversation" with adult supervision, will frequently join a conversation if it is a topic of interest, and "is beginning to interact with her classmates" (Joint Ex. 76 at pp. 4-5). The student's preschool teacher testified that the student was a skilled imitator and watched her peers closely and modeled their performance on classroom tasks (Tr. pp. 341-42). Furthermore, the student was motivated by her peers and "would want to do what her peers were doing" (Tr. pp. 343-44; see Joint Ex. 32 at p. 3). This is not the description of a student that is "divorced academically, socially and even physically from her peers" as described by the IHO (IHO Decision at p. 42), but of a student who benefited from interacting with her peers in the ICT classroom.

Finally, contrary to the district's belief that the student would be more appropriately placed in the 12:1+1 special class with less of an academic emphasis, I am unable to find that a class with "less" of an academic emphasis is necessarily required. This is especially true since, as discussed above, the student's academic and cognitive abilities may not have been fully known, and it is possible that her academics may have improved with proper behavior management.[21]

In considering the third factor set forth in the first prong of Newington, there is insufficient evidence in the hearing record to indicate that the inclusion of the student in the ICT classroom would have had a negative effect on the education of the other students in the class. Although the hearing record reflects that the student exhibited disruptive behaviors at times, such as interrupting her friends, silly, annoying, or aggressive acts (pinching peers when she was frustrated) in order to engage her friends, the hearing record is not clear regarding the extent to which they may have impacted the other students in the class. Moreover, and notably, during the time that these behaviors were exhibited by the student, they were not addressed either by an FBA or a BIP (Tr. p. 203; Joint Exs. 44 at p. 4; 60 at p. 5). Thus, since the student's behavior may have been better

[21] I also note that it does not appear from the hearing record that the student would necessarily have received a greater amount of support in the 12:1+1 special class. For example, the hearing record reflects that the student received instruction in her kindergarten ICT class in both individual and small group settings, and that the student received 1:1 assistance from a variety of staff including the special education teacher, the regular education teacher, a kindergarten aide, a special education aide, and in accordance with the student's IEP, an "additional staffing" person which allowed the student to have 1:1 attention at all times (Tr. pp. 68, 124, 197, 202, 204-06). By comparison, the hearing record indicates that in the 12:1+1 special class, the student would receive instruction to address her goals, and accommodations as per her April 2013 IEP, individually and in small groups (Tr. pp. 324-25), and that similar to the ICT class, the 12:1+1 class would utilize a team approach with a variety of staff (Tr. pp. 324-25). Further, and although the hearing record reflects that the first grade ICT class would not include a staff member equivalent to the kindergarten ICT classroom aide, the student would still receive 1:1 support throughout the school day via the additional staffing services as per her April 2013 IEP (Tr. p. 234; Joint Ex. 76 at p. 11).

controlled had an FBA and BIP been done, it is possible that the student would not have had any behaviors that negatively affected other students (see Oberti, 995 F.2d at 1223 [student would not have had such severe behavior problems had he been provided with adequate supplementary aids and services]; Warton, 217 F. Supp. 2d at 277 [the district's obligation to provide supplementary aids and services to accommodate the student is relevant in considering the possible negative effects on other students in classroom]). Accordingly, I am unable to find that the student's behaviors, alone, are enough to justify a placement outside of an ICT classroom.

In light of the above, I am unable to find that the district has established under the first prong of the Newington test that education in an ICT classroom with the use of supplemental aids and services could not be achieved satisfactorily. However, even assuming that such had been shown, I would still be unable to find that the placement recommended by the April 2013 CSE (i.e., the 12:1+1 special class) constitutes a placement of the student in the LRE. Specifically, and irrespective of the first prong of the Newington test, upon review of the hearing record in this matter, I am unable to find that the second prong of the Newington test—whether the district included the student in school programs with nondisabled students to the maximum extent appropriate (Newington, 546 F.3d at 120)—has been met.

As noted above, the IHO in her decision indicates that since neither party claims that education of the student in a non-ICT regular class would be appropriate, the "choice" in this matter "lies between a community-based integrated classroom and a self-contained BOCES placement, both special education programs along the continuum" (IHO Decision at 38). However, such is not the case. Rather, a district should consider the continuum of related services and options to fit the student's needs (M.W., 725 F.3d. at 145-46). This includes, for example, considering whether resource room programs (or other types of "pull-out" services) could be used to supplement a regular class, or whether a student can be "pulled-out" of a special class and mainstreamed with regular education students for a portion of the day.

I am unable to find on the record before me that the April 2013 CSE gave adequate consideration to the full continuum of services and options in this matter. For example, in discussing the possibility of mainstreaming, the district school psychologist indicated simply that "if it were to be deemed appropriate, that [the student] could go into a kindergarten class for a circle time or into specials with regular education students" (Tr. p. 81). Moreover, and without regard to the student's abilities and the strong preference for educating students alongside their nondisabled peers, the April 2013 IEP indicates that the student would have received all of her instruction and related services outside of the general education setting, and does not describe how the student would have been mainstreamed, or for how much of the school day she would have been included in school programs alongside her nondisabled peers (Joint Ex. 76 at pp. 10-11, 15). This is concerning since, even taking into account the district's concerns regarding the perceived widening gap between the student and her peers, as discussed above evidence in the hearing record indicates that the student benefited from access to regular education peer models in developing appropriate social skills (Tr. pp. 118, 188, 341-43, 393). In particular, the student's preschool teacher described her as having "great imitation skills" and that being around typically developing peers motivated the student (Tr. pp. 342-43). In fact, the student's April 2012 IEP notes that the student "imitates models of two and three word expressions" (Joint Ex. 60 at p. 4).

In order to make up for this deficiency in the April 2013 IEP, the district presented testimony indicating that there were opportunities for students in the 12:1+1 special class to be mainstreamed (Tr. pp. 81, 282, 284, 480-81). However, "[i]n determining the adequacy of an IEP, both parties are limited to discussing the placement and services specified in the written plan and

therefore reasonably known to the parties at the time of the placement decision" (R.E., 694 F.3d at 187). Therefore, in reviewing the program offered to the student, the focus of the inquiry is on the information that was available at the time the April 2013 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] [same]). 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).

Further, while testimony by the assistant director of BOCES indicated that there were always opportunities for the students in the 12:1+1 class to be mainstreamed in the general education classrooms based on the student's ability and the goal of the mainstreaming opportunity, either social or academic (Tr. pp. 282, 284), the BOCES program director also testified that in order for a student to take advantage of the opportunity for mainstreaming, that opportunity must be specified on the student's IEP (Tr. p. 481). Accordingly, and putting all "retrospective evidence issues" aside, I am unable to find with any certainty that the hearing record supports a finding that the student would, in fact, have been mainstreamed to the maximum extent appropriate.

VII. Conclusion

Based on the above, I find that although the district provided the student with a number of supplementary aids and services, the district failed to establish under the first prong of the Newington test that it considered appropriate supplementary aids and services that may have allowed the student to remain in the ICT classroom prior to recommending that she be placed in a special class (546 F.3d at 120). In addition, the district failed to meet the second prong of the Newington test, as the district did not show that it adequately considered any less restrictive options on the continuum of services that may have been available, nor did it describe the extent to which the student would be included in school programs alongside her nondisabled peers in the April 2013 IEP (id.; J.G., 777 F. Supp. 2d at 654-55). Accordingly, I cannot find that the district has provided the student with a placement in the LRE.

However, considering the amount of time that has passed since the April 2013 CSE meeting, as well as the inability on this record to assess the appropriateness of an ICT classroom with the use of appropriate supplemental aids and services for the student, rather than direct that the student be placed in an ICT classroom going forward, and unless the parties are able to reach an agreement between them, I remand this matter to the CSE to discuss whether placement in an ICT class could be satisfactorily achieved with the use of supplementary aids and services and, if not, to consider the extent to which the student can be mainstreamed alongside her nondisabled peers in accordance with my determinations above.[22] As did the IHO, I strongly encourage the district to consider conducting an FBA, as such an assessment may provide insights into the causes of the student's interfering behaviors and possible means to address them profitably.

[22] I note that the projected April 2014 date for the student's annual review is rapidly approaching, at which time the parties must meet to consider the degree to which the student is capable of receiving educational benefits in a classroom with typically developing peers. Until the CSE reconvenes and recommends a placement for the student after consideration of the aforementioned factors, and provides the parents with prior written notice explaining the basis for such recommendation, the district shall maintain the student's placement in her current ICT classroom.

In light of the above, I need not consider the parties' remaining contentions, including whether the district's proposed 12:1+1 special class would have been an appropriate placement for the student.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated December 23, 2013, is modified, by reversing that portion which found that the district offered the student a FAPE in the LRE; and

IT IS FURTHER ORDERED that, unless the parties agree otherwise, the CSE shall reconvene within 30 days of this decision to determine whether it is necessary to conduct an FBA of the student and the degree to which she can be educated with nondisabled peers.

Dated: **Albany, New York**
February 28, 2014

HOWARD BEYER
STATE REVIEW OFFICER