The University of the State of New York

The State Education Department
State Review Officer
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No. 14-057

Application of the BOARD OF EDUCATION OF THE ARDSLEY 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:
Jaspan Schlesinger, LLP, attorneys for petitioner, Carol Melnick, Esq., of counsel

Littman Krooks, LLP, attorneys for respondent, Marion M. Walsh, 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 respondent's (the parent's) son for the 2013-14 school year was not appropriate. The parent cross-appeals from that portion of the IHO's decision which determined that the district offered the student a FAPE for the 2011-12 and 2012-13 school years. The appeal must be sustained. The cross-appeal must 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

At all times relevant to this appeal, the parties do not dispute that student was eligible for special education as a student with autism (see Dist. Exs. 14 at p. 1; 24 at p. 1; Parent Ex. J at p. 1; see also 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

On May 25, 2011, the CSE convened to conduct the student's annual review and to develop an IEP for 2011-12 school year (Parent Ex. J at p. 1). The May 2011 CSE recommended a 12-month school year program in a 12:1+2 special class placement (id. at p. 1). In addition, the CSE

recommended: a 42-minute 12:1 special "core" class for reading once per day; one 30-minute session of individual speech-language therapy per week; two 30-minute sessions of speech-language therapy per week in small group (5:1); one 30-minute session of parent counseling and training per quarter; four 60-minute individual sessions of home-based behavioral services with a teaching assistant per week; and two 30-minute sessions of a home-based behavioral services supervision consult per week (id. at pp. 1-2).[1, 2] The CSE also recommended supplementary aids and modifications/accommodations, which included: a 2:1 aide, continued reinforcement to remember to use appropriate classroom behavior, a reinforcement card, verbal and non-verbal prompts, and a behavioral intervention plan (BIP) (id. at pp. 6-7; see Dist. Ex. 3 at p. 2).[3]

On May 16, 2012 the CSE convened to conduct the student's triennial reevaluation and to develop an IEP for 2012-13 school year (Dist. Ex. 14 at pp. 1, 3). The May 2012 CSE recommended a special education program and related services similar to that recommended in the student's May 2011 IEP, except that the CSE decided against including the 12:1 special core class for reading (compare Dist. Ex. 14 at pp. 1-2, 9-10, with Parent Ex. J at p. 1). Supplementary aids and modifications/accommodations recommended in the May 2012 IEP included: a small teacher-to-student ratio program with minimal distractions; a 2:1 aide; a weekly occupational therapy (OT) and physical therapy (PT) consult; and a BIP (Dist. Ex. 14 at pp. 4, 10).

By email dated March 20, 2013, the parent requested that the district send the student's "educational packet" to four other school districts specified by the parent, as well as any other school district that had an "inclusion/co-taught model," prior to the end of the 2012-13 school year, so that the parent would be afforded ample opportunity to visit an appropriate alternative placement for the student while school was still in session (Dist. Ex. 19 at pp. 2-3). The district responded that no packets would be sent before the CSE convened to discuss the student's educational program (id. at p. 1).

On May 22, 2013, the CSE convened to conduct the student's annual review to develop an IEP for 2013-14 school year (Dist. Ex. 24 at pp. 1). In the resultant IEP, the May 2013 CSE increased the student-to-teacher ratio in the recommended special class to 12:1+4, omitted the 2:1 aide, and added one 30-minute session of small-group psychological counseling twice per month to the student's related services (id. at p. 1, 12-13). The CSE also recommended supplementary aids and modifications/accommodations in the IEP, which included: an intensive program with a small teacher-to-student ratio and minimal distractions, cues to focus, assignments broken down,

[1] The CSE also recommended one session per week of occupational therapy in a group as part of the student's educational program (Parent Ex. J at p. 2).

[2] The evidence in the hearing record reflects that the recommended special "core" class was a self-contained class comprised of students with disabilities that followed the curriculum used in sixth-grade general education classes in a manner that was modified and differentiated to meet the needs of the students (see Tr. pp. 709, 980-81). The CSE recommended this class for the student during both the 2010-11 and 2011-12 school years (Parent Exs. H at p. 1; J at p. 2). Throughout the hearing record this special core class is interchangeably referred to as a reading class and as an English language arts (ELA) class (see, e.g., Tr. pp. 976-77; Parent Ex. J at pp. 1, 2). Without making any determination as to the content of the class, as the student's IEP refers to the class as a reading class, this decision will do the same.

[3] The parent indicated that, while the student was in middle school, which included the 2011-12 school year, the student was mainstreamed for specials, which included art and music class (see Tr. p. 707).

directions clarified, scaffolding, practice and review, checks for understanding, and provision of wait time to process information (id. at pp. 7, 13). The CSE determined that the student did not require a BIP and that use of strategies, supports, and a classroom based behavioral support system would be sufficient to address the student's interfering behaviors during the 2013-14 school year (id. at p. 7). To provide the student with access to nondisabled peers, the May 2013 CSE further recommended that the student participate in mainstream art, music, lunch, school-wide assemblies and programs, and extracurricular activities (id. at pp. 2, 17). The CSE also recommended that the student participate in community-based instructional trips on a weekly basis and receive the support of a job coach at a work site in the high school setting (id. at pp. 2-3).[4]

At the May 2013 CSE meeting, the parent expressed interest in the student attending a general education social studies class with integrated co-teaching (ICT) services to further the student's social skills and overall socialization; however, after a discussion of whether ICT services would be an appropriate recommendation for the student, the CSE declined to recommend ICT services for the 2013-14 school year, given the intensive coursework that the student would face in the Regents curriculum, as well as the reading and writing demands, and in light of the student's significant academic needs (see Dist. Ex. 24 at p. 3). The CSE also expressed its view that an ICT setting would not present the student with "an opportunity to socialize given the focus on the rigors of the curriculum" (id.; see also Dist. Ex. 25 at p. 3). By prior written notice dated June 28, 2013, the district summarized the options considered by the May 2013 IEP and included an explanation of why specific recommendations were adopted or refused (see Dist. Ex. 25 at pp. 1-3).

By due process complaint notice dated July 18, 2013, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) in the least restrictive environment (LRE) for the 2012-13 and 2013-14 school years (see Parent Ex. O at pp. 9-12).

On September 16, 2013, the CSE reconvened at the parent's request following an incident that resulted in the student receiving a scratch on his arm and following the resolution meeting related to the parent's July 2013 due process complaint notice (Dist. Ex. 33 at p. 6). The resultant September 2013 IEP modified the educational program and services in the May 2013 IEP by providing for: completion of a functional behavioral assessment (FBA) and development of a BIP; addition of a social/emotional annual goal; and provision for the student's audit of a "special core social studies class" with the support of a teaching assistant (see Dist. Exs. 33 at pp. 4, 6, 10, 14-15, 20; 34 at pp. 1-2; see also Dist. Exs. 24 at pp. 11, 17; 35 at pp. 1-3).[5]

[4] The OT and PT consult were components of the special class program and recommended by the CSE to support the student on the job site (Dist. Ex. 24 at p. 3).

[5] While the student was permitted to audit a 12:1+2 special core social studies class, according to the district, the CSE did not include this recommendation "as part of the student's FAPE" (Dist. Ex. 33 at p. 6; see also Tr. p. 183). Rather, the CSE recommended that the student receive instruction in social studies within the 12:1+4 special class (Tr. pp. 355-56; Dist. Ex. 33 at pp. 6, 20). The 2013-14 special core social studies class was special class setting described as a "heavily modified" small class environment for students with learning disabilities who were going to take the Regents exam at the end of tenth grade (Tr. 183-84).

A. Amended Due Process Complaint Notice

By amended due process complaint notice dated September 26, 2013, the parent alleged that the district denied the student a FAPE for the 2007-08 through 2013-14 school years (IHO Ex. 3 at p. 10). Relative to the 2007-08 through 2011-12 school years, the parent generally alleged that, while enrolled in the district, the district failed to provide the student with an appropriate placement in the LRE; failed to conduct an appropriate FBA and to develop an appropriate BIP; and failed to provide the student with an appropriate amount of speech-language therapy services under the State regulations previously in effect (id. at pp. 10-11).

With regard to the 2012-13 and 2013-14 school years, the parent principally alleged that the student was denied a FAPE because the district failed to recommend an educational placement in the LRE that afforded the student with appropriate mainstreaming opportunities to the maximum extent possible (see IHO Ex. 3 at p. 10). The parent also alleged that the district failed to: address the student's social/emotional needs; recommend appropriate annual goals for the student in his May 2012 and May/September 2013 IEPs; conduct an FBA and develop an appropriate BIP for the student; provide the student with appropriate speech-language therapy services; provide the parent with appropriate levels of parent counseling and training; recommend appropriate transition and postsecondary goals for the student; and provide the student with an appropriate "class profile" (see id. at pp. 9-12).

As relief, the parent requested that the IHO order the district to: reconvene the CSE to develop an appropriate educational program in the LRE for the 2013-14 school year or, alternatively, a nonpublic school placement; fund an independent psychoeducational evaluation; and provide compensatory additional services consisting of 200 hours of speech-language therapy, 200 hours of unspecified services, 100 hours of counseling, and 50 hours of parent counseling and training (see IHO Ex. 3 at p. 12-13).[6]

B. Impartial Hearing Officer Decision

An impartial hearing convened on November 13, 2013, and concluded on January 30, 2014, after five days of proceedings (Tr. pp. 1-1020).[7] By decision dated March 25, 2014, the IHO found that the district offered the student a FAPE for the 2011-12 and 2012-13 school years but denied the student a FAPE for the 2013-14 school year (see IHO Decision at pp. 32-38).

With regard to the 2011-12 school year, the IHO found that the district offered the student a FAPE in the LRE because the CSE recommended a "less restrictive 12:1 [special] reading class with higher functioning students" and offered the student access to nondisabled peers for lunch,

[6] After the filing of the parent's amended due process complaint notice and during the impartial hearing, a private psychologist conducted an evaluation of the student and reported his findings and conclusions in a psychoeducational evaluation report, dated January 5, 2014 (see generally Parent Ex. AA).

[7] During the impartial hearing, the parties agreed, consistent with the IDEA's two-year statute of limitations provision that the scope of the impartial hearing would be limited to the two-year period preceding the filing of the parent's due process complaint notice (Tr. p. 4; see 20 U.S.C. § 1415[f][3][C]). In addition, the parent withdrew her request for compensatory additional services in the form of speech-language therapy and counseling (Tr. pp. 870, 891).

recess, music class, art class, and all specials (non-core academic classes) (IHO Decision at p. 32). Next, the IHO found that, because the student did not master the sixth-grade curriculum or make progress after having attended the 12:1 special core reading class two years in a row despite extensive curriculum modifications and the support of an aide, the May 2012 CSE appropriately modified its recommendation to a 12:1+2 special class without the 12:1 core reading class, for the student's 2012-13 school year (id. at p. 33).

For the 2013-14 school year, however, the IHO found that the recommended 12:1+4 special class placement inappropriately failed to offer the student a FAPE in the LRE (see IHO Decision at pp. 33-38). Specifically, the IHO found that, with appropriate classroom supports and modifications, the student could have made meaningful progress toward his annual goals in a Regents-level regular education social studies class with ICT services (id. at pp. 33-36).[8] With regard to the student's participation in a Regents-level, general education, English language arts (ELA) class, the IHO found that, even with supplementary aids and services and curriculum modifications and/or ICT services, the student would have received little educational benefit (see id. at pp. 36-37). The IHO found that the district was not required to place the student in a general education ELA class where the student, who had significant reading delays, would be receiving instruction under a different curriculum and where the only benefit that the student would receive would be to sit next to nondisabled peers (id. at pp. 36-37). Similarly, the IHO found that, while participation in a general education science classroom with ICT services would not be appropriate for the student, the CSE should have recommended participation in the laboratory portion of science class where the student could have had the opportunity to learn "hands-on" with nondisabled peers (id. at p. 37). Although finding a denial of a FAPE in the LRE, the IHO found that, with regard to all classes except for social studies and the laboratory portion of science class, "the student [was] appropriately grouped within his [12:1+4] special class for instruction" (id. at p. 37).

As a remedy for the 2013-14 school year, the IHO ordered the district to hire an inclusion consultant for a period of one year for the purpose of developing and implementing an educational program for the student in the LRE (see IHO Decision at pp. 39, 41). The IHO also ordered the CSE to reconvene to amend the student's IEP to recommend the student's participation in an ICT social studies class with a 1:1 aide for the 2014-15 school year and in a laboratory component of an ICT science class with a 1:1 aide (once per week) (id. at p. 42). In addition, the IHO found that the district should reimburse the parent for the costs of a January 5, 2014, private psychoeducational evaluation report, at the usual and customary rate, upon proof of payment (id. at p. 40-41).

IV. Appeal for State-Level Review

The district appeals, seeking to overturn the IHO's determination that the district failed to offer the student a FAPE for the 2013-14 school year. Specifically, the district argues that the May and September 2013 IEPs were appropriate for the student and that the 12:1+4 special class placement recommendation was reasonably calculated to enable the student to receive educational

[8] The IHO found that the September 2013 CSE's recommendation that the student to audit a special core social studies class was inappropriate because the student could not afford to give up one class period per day during which the student would not be working towards his annual goals in a special class (see IHO Decision at p. 34).

benefit in the LRE. In support of the placement recommendation, the district argues that the student made progress in a similar 12:1+2 special class placement during the 2012-13 school year but was unable to make progress in the highly modified special core reading class during the 2010-11 and 2011-12 school years even with differentiated instruction and a 1:1 aide. In addition, the district argues that the student required intensive instruction in a small special class setting to meet his annual goals, which addressed the student's need to improve functional and social skills. The district also argues that a general education placement with ICT services would be inappropriate because the student would be disruptive to the nondisabled students in the class, who would be receiving instruction in an entirely different and Regents-level curriculum. Further, the district contends that the student was afforded mainstreaming opportunities to the maximum extent appropriate because the student was offered access to nondisabled peers for lunch, recess, community and vocational activities, and art and music classes.

Consequently, the district argues that, because it offered the student a FAPE for the 2013-14 school year, no compensatory additional services should be awarded as relief and the IHO erred in ordering the district to hire an inclusion consultant. The district also argues that because its placement recommendation was appropriate, the IHO erred in ordering the CSE to reconvene to amend the student's IEP. Finally, the district argues that the IHO erred in ordering reimbursement of the parent's privately obtained psychoeducational evaluation report because the district had already agreed to reimburse the parent for the cost of that evaluation upon the submission by the parent of proof of payment.

In an answer and cross-appeal, the parent responds to the district's petition by admitting and denying the allegations raised and asserting that the IHO correctly determined that the district failed to offer the student a FAPE for the 2013-14 school year. The parent also interposes a cross-appeal, arguing that the IHO erred in finding that the district offered the student a FAPE for the 2011-12 and 2012-13 school years. In addition, the parent asserts that the IHO erred in finding that the district appropriately declined to recommend a general education classroom with ICT services for ELA for the 2013-14 school year. Specifically, with regard to the 2011-12 school year, the parent argues that the district made no effort to accommodate the student in general education classroom despite its determination that the 12:1 special core reading class would be appropriate. Relative to the 2012-13 school year, the parent argues that the IHO again erred in finding that the district's recommendation to place the student in a 12:1+2 special class and to discontinue its recommendation for the special core reading class offered the student a FAPE in the LRE. With regard to the 2013-14 school year, the parent cross-appeals the IHO's finding that the CSE appropriately declined to recommend a general education classroom placement with ICT services for ELA instruction because, according to the parent, the student would be able to make progress in a general education setting with supplementary aids and services and curriculum modifications. As relief, the parent requests that the CSE reconvene to recommend inclusion of the student in a general education classroom with ICT services for ELA instruction, in addition to social studies class and the laboratory component of science class.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and

independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. 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; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). '"[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP"' (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 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 procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 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, 142 F.3d at 130; 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 T.P., 554 F.3d at 254; 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 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; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; 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 includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also 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).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

In her cross-appeal, the parent challenges the IHO's finding that the district provided the student a FAPE in the LRE for the 2011-12 school year. For the reasons that follow, the IHO's finding relative to the 2011-12 school year is annulled because an inquiry into the appropriateness of the May 2011 IEP was beyond the appropriate scope of the impartial hearing. The IDEA requires that, unless a state establishes a different limitations period under state law, a party must request a due process hearing within two years of when the party knew or should have known of the alleged action that forms the basis of the complaint (20 U.S.C. § 1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 34 CFR 300.511[e]; 8 NYCRR 200.5[j][1][i]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 114 n.8 [2d Cir. 2008] [noting that the Second Circuit applied the same "knows or has reason to know" standard of IDEA claim accrual both prior to and after codification of the standard by Congress]; M.D. v. Southington Bd. of Educ., 334 F.3d 217, 221-22 [2d Cir. 2003]; G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *17 [S.D.N.Y. Mar. 29, 2013]; R.B. v. Dept. of Educ., 2011 WL 4375694, at *2, *4 [S.D.N.Y. Sept. 16, 2011]; Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669, 687-88 [S.D.N.Y. 2011]).[9]

In this instance, where the parent filed her due process complaint notice on July 18, 2013 and conceded at the impartial hearing that the scope of the impartial hearing was limited to the two-year period preceding the filing of the due process complaint notice, any of the parent's claims relating to the appropriateness of the May 2011 IEP were barred by the statute of limitations (see Tr. p. 4; IHO Ex. 9 at p. 4 n.4; Parent Ex. J at p. 1). Accordingly, to the extent that the IHO found that the May 2011 IEP was appropriately designed to address the student's needs, that finding must be vacated.[10]

B. Least Restrictive Environment

While the parties' arguments addressed related issues, discussed below, the crux of the parties' dispute is whether the CSE recommended a placement for the student that allowed sufficient access to nondisabled peers for the 2012-13 and 2013-14 school years. 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; 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

[9] New York State has not explicitly established a different limitations period.

[10] While it is arguable that a claim relating to a failure in the implementation of the student's May 2011 IEP during the 2011-12 school year remained viable (arising sometime after mid-July 2011), the parent failed to raise any such claim in her amended due process complaint notice (see IHO Exs. 3 at pp. 1-13). Moreover, even if properly raised, there is no evidence in the hearing record suggesting that the district failed to provide or the student did not receive the special education program and services set forth in the student's May 2011 IEP (see Dist. Exs. 6 at pp. 1-2; 7; 8 at pp. 1, 5; 9 at pp. 1-4; 10; 11 at pp. 1-2; 13; 14 at pp. 4-5; 16 at pp. 1-9).

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. N. Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobol, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 CFR 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 CFR 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 CFR 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; 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 J.S., 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also M.W. v. New York City Dep't of Educ., 725 F.3d 131, 144 [2d Cir. 2013]; 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 J.S., 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also M.W., 725 F.3d at 144; Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50).

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).

In fashioning a test to assess a student's placement in the LRE, the Court acknowledged that the IDEA's "'strong preference'" for educating students with disabilities alongside their nondisabled peers "'must be weighed against the importance of providing an appropriate

education"' to students with disabilities (Newington, 546 F.3d at 119, see Walczak, 142 F.3d at 122; Briggs v. Bd. of Educ., 882 F.2d 688, 692 [2d Cir. 1989]; see also Lachman v. Ill. State Bd. of Educ., 852 F.2d 290, 295 [7th Cir. 1988]). In recognizing the tension created between the IDEA's goal of "providing an education suited to a student's particular needs and its goal of educating that student with his non-disabled peers as much as circumstances allow," the Court explained that the inquiry must be fact specific, individualized, and on a case-by-case analysis regarding whether both goals have been "optimally accommodated under particular circumstances" (Newington, 546 F.3d at 119-20, citing Daniel R.R., 874 F.2d at 1044).[11]

C. May 2012 IEP

The parent argues in her cross-appeal that the IHO erred in finding that the CSE offered the student a FAPE in the LRE for the 2012-13 school year. Specifically, the parent argues that the CSE should not have discontinued the recommendation for the special core reading class and/or should have recommended placement of the student in a less restrictive general education classroom with ICT services. For the reasons that follow, the evidence in the hearing record supports the IHO's finding that the CSE appropriately recommended a 12:1+2 special class placement in the LRE for the student and appropriately declined to recommend the student's continued participation in the special core reading class.

In developing the student's May 2012 IEP, the CSE reviewed several evaluative reports as part of the student's triennial review, which reflected the student's significant delays in the areas of cognition, academic achievement, language functioning, and adaptive behavior (see Dist. Ex. 14 at pp. 2-4; see generally Dist. Exs. 6-11). The student scored at or below the first percentile on all composite scores on the Wechsler Intelligence Scales for Children - Fourth Edition (WISC-IV) (Dist. Ex. 8 at p. 2). The school psychologist noted that the student had difficulty with attention and focus during testing, as well as in the classroom; however, he was able to be redirected (see id. at pp. 1-3). The results of the Wechsler Individual Achievement Test - Third Edition (WIAT-III), reflected that, academically, the student was functioning in the extremely low range across all areas, including reading, mathematics, and spelling skills, with standard scores ranging from 9 to 49 (Dist. Ex. 11 at p. 1). The student benefitted from visual cues when listening to stories or directions, used graphic organizers to help recall details and write ideas in a logical order, and required a "significant amount of support" from a teaching assistant to answer comprehension questions (Dist. Ex. 14 at p. 4). Support from an aide was also needed by the student to write grammatically correct paragraphs, complete math problems, and to participate in class (Dist. Exs. 11 at pp. 1-2; 14 at p. 5; see Dist. Ex. 7). The student was described in the May 2012 IEP as friendly, kind, and caring; however, it was also noted that he exhibited immature behavior and needed to work on problem solving and social skills (Dist. Ex. 14 at p. 5). The student also benefitted from cues to initiate and maintain conversations with appropriate social phrases (Dist. Ex. 6 at p. 2). The student had a BIP to help him focus and manage interfering behaviors, such as speaking with inappropriate language (Dist. Exs. 3 at p. 2; 14 at p. 6). Based on the evaluative data before the CSE, the May 2012 CSE determined that the student required a program with a

[11] 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).

small teacher-to-student ratio and minimal distractions in order to make academic progress (Dist. Ex. 14 at pp. 2, 6).

For the 2012-13 school year, the CSE recommended a 12:1+2 special class notwithstanding the parent's desire to have the student continue to receive instruction in a special core reading class and/or to receive academic instruction in a less restrictive setting (Dist. Ex. 14 at pp. 1, 9). Given the student's significant academic and social delays, the IHO correctly found that a general education classroom, with supplemental aids and services, would not be an appropriate setting in the LRE to provide special education and services needed by the student during the 2012-13 school year (see IHO Decision at p. 33). According to the parent, the May 2012 CSE discussed academic mainstreaming but did not recommend it for the student's 2012-13 school year, finding that the student "was not ready" for a mainstream setting (see Tr. pp. 730-31).

During the 2010-11 and 2011-12 school years, the CSE had addressed the parent's desire to have the student participate in a general education class curriculum for at least one academic subject by recommending the sixth-grade special core reading class (Tr. p. 914; Parent Ex. J at p. 2). While the parent characterizes the special core reading class as a "less restrictive" placement than the 12:1+2 special class recommended by the May 2012 CSE, due perhaps in part to the core class's use of a modified sixth-grade curriculum and its inclusion of students in the class who functioned at higher cognitive and reading levels (see Tr. pp. 709, 980-81), the special core reading class was a special class comprised wholly of students with educational disabilities and, therefore, for purposes of LRE, provided no greater access to nondisabled peers and was no less restrictive than the 12:1+2 special class (see 20 U.S.C. § 1412[a][5][A]; see also 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).[12]

Moreover, LRE considerations notwithstanding, the hearing record does not support that the special core reading class was appropriate for the student for the 2012-13 school year. During the 2010-11 school year, all work completed by the student in the core reading class required the assistance of an aide, and the student needed consistent prompts and reminders to stay on task (Parent Ex. J at p. 2). The student's special education teacher for the special core reading class for both the 2010-11 and 2011-12 school years indicated that the sixth-grade curriculum was modified

[12] As explained recently by the Second Circuit, differences in the level of support offered in one special class setting versus another does not implicate the LRE requirement when each class is comprised entirely of students with disabilities (R.B. v. New York Dep't of Educ., 2015 WL 1244298, at *3 [2d Cir. Mar. 19, 2015]). The parents concern between these two special classes is one of grouping among his disabled peers (addressed below), not LRE.

and differentiated to meet the needs of the students in the classroom (Tr. pp. 979-981).[13] Other students in the class were functioning at approximately a fourth-grade reading level (Tr. p. 982). Due to the fact that the student was reading on approximately a second-grade level, assignments were modified even further for the student; however, even with the extensive modifications, the core reading teacher opined that the class was "quite challenging" for the student, and she was not sure that the student was able to understand very much of the curriculum (Tr. pp. 979-83). Thus, although the student "achieved" or "progress[ed] satisfactorily" toward achieving annual goals in the area of reading, the hearing record indicates that, in the core reading class, the student's aide supplied a "great deal" of assistance to him (see Tr. p. 983; Dist. Ex. 16 at pp. 2-3; Parent Ex. L at p. 2). According to the special education teacher of the special core reading class, when she asked questions of the student, she made sure that the questions were concrete so that he would have a better chance of answering correctly; however, she reported that the student was not able to participate independently and often repeated out loud the questions asked of him, instead of responding to those questions, or, at other times, would repeat answers, which his aide helped him locate on the page (Tr. pp. 983-85). Further, according to the parent, the reading books assigned to the student to read at home were too difficult (Tr. p. 915). Based on the student's performance in the special core reading class during the 2010-11 and 2011-12 school years, the teacher of the special core reading class did not recommend that the student participate in the class for a third consecutive year or move up to a seventh-grade core reading class for the 2012-13 school year because she did not feel he was able to make meaningful progress in that setting (Tr. pp. 986, 990).[14]

Although the parent introduced evidence in the form of a letter from the student's home-based ABA provider that recommended the student be placed in a less restrictive setting due to academic and social progress observed at home over the course of the 2011-12 school year, the vast majority of the evidence before the May 2012 CSE did not support such a view of the student's progress (compare Parent Ex. M, with Dist. Exs. 6; 7; 8; 10; 11). The home-based ABA provider noted that the student's greatest progress was in reading comprehension; however, according to the

[13] To the extent that parent argues that the teacher's testimony was outdated and not relevant to the May 2012 CSE's recommendations for the 2012-13 school year, this argument is without merit. A student's progress under a prior IEP—or, as in this case, the student's lack of progress in the special core reading class during the 2010-11 and 2011-12 school years—is a relevant area of inquiry for purposes of determining whether a subsequent or future IEP (i.e., the May 2012 IEP) has been appropriately developed, particularly if the parents express concern with respect to the student's rate of progress (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66, 2013 WL 3155869 [2d Cir. June 24, 2013]; Adrianne D. v. Lakeland Cent. Sch. Dist., 686 F.Supp.2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, *14-*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ., at p. 18 [December 2010]). Furthermore, "if a student had failed to make any progress under an IEP in one year," at least one court has been "hard pressed" to understand how the subsequent year's IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch., 62 F.3d at 534 [noting, however, that the two IEPs at issue in the case were not identical as the parents contended]). Thus, the IHO, appropriately relied upon the student's lack of progress in the special core reading class during the 2010-11 and 2011-12 school years (see IHO Decision at p. 33).

[14] The special education teacher of the special core reading class did not attend the May 2012 CSE meeting; however, she testified that she had many conferences with the student's case manager during the 2010-11 and 2011-12 school years and, due to his lack of progress, recommended that the student not continue in the core special class setting (see Tr. pp. 986-87; Dist. Ex. 14 at p. 14).

special education teacher of the special core reading class, the student was functioning at a second grade level in reading comprehension (compare Parent Ex. M, with Tr. p. 981). The home-based ABA provider's report of the student's ability to "initiate and carry on relevant conversations with peers and adults" must also be weighed against the speech-language pathologist's report indicating that the "student benefit[ed] from cues to initiate and maintain conversations with appropriate social phrases" and the parent's report that the "student ha[d] difficulty relating to his age group" (compare Parent Ex. M, with Dist. Exs. 6 at p. 2; 10).[15]

With regard to LRE considerations, while the parties failed much of the time to focus on relevant points related that topic during the impartial hearing or on appeal, the available evidence in the hearing record sufficiently demonstrates, in addition to the reasons provided by the IHO, that the 12:1+2 special class placement recommended by the May 2012 CSE constituted the LRE for the student (see IHO Decision at p. 33). As discussed above, despite the district's attempts to accommodate the student with supplemental aids and services as well as extensive modification of the curriculum in the special core reading class, the student continued to have difficulty and failed to make progress during the 2010-11 and 2011-12 school years (see IHO Decision at p. 33). Thus, when the student had not progressed with more intensive services, the CSE had an appropriate basis to conclude that the student could not have been satisfactorily educated or in a less restrictive general education class with only supplemental aids and services, even if it had continued to blended in the special core reading class, which combination had proven unsuccessful (Newington, 546 F.3d at 119-20; see J.S., 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). Further, given the student's significant delays, difficulty with reading comprehension, need for a significantly modified curriculum, and need for a small teacher-to-student ratio program with minimal distractions in order to make progress, placement of the student in a 12:1+2 special class was reasonably calculated to provide the student with educational benefits than placement in a less restrictive setting that would provide inadequate opportunity to work meaningfully towards the functional-oriented goals in the student's May 2012 IEP (see Dist. Ex. 14 at pp. 4-10; see also Newington, 546 F.3d at 119-20). Finally, although the CSE's recommendation would not have the student participate in general education setting for his academic classes, the May 2012 CSE recommended that the student be mainstreamed for lunch, recess, chorus, and all specials (i.e., art and music), and, therefore, the evidence in the hearing record shows that the CSE mainstreamed the student to the maximum extent appropriate for the 2012-13 school year (see Dist. Ex. 14 at p. 12; see also Newington, 546 F.3d at 119-20).

Based on the foregoing, I find no reason to disturb the IHO's finding that the May 2012 CSE's recommendation of a 12:1+2 special class with related services and home-based services was reasonably calculated to meet the student's needs in the LRE for the 2012-13 school year.

[15] To the extent that the home-based ABA provider recommended that the student continue to receive home-based ABA services, the May 2012 CSE incorporated this recommendation in the May 2012 IEP, which included behavioral services at home for four hours per week in addition to two hours per week of consultant supervision of the behavioral services (Dist. Ex. 14 at pp. 1, 9).

D. May/September 2013 IEP

On appeal, the district argues that the IHO erred in finding that the May and September 2013 IEP recommendations for a 12:1+4 special class placement for the 2013-14 school year were not appropriate for the student, were not in the LRE, and did not afford the student with appropriate mainstreaming opportunities.[16]

As an initial matter, although it is axiomatic that the appropriateness of a CSE's recommendations after each annual review are examined independently in light of the student's progress, the same evaluative data—including data that identified the student's the needs, standardized scores, functioning levels, and skills of the student—was appropriately relied upon by the CSEs in this case—to wit, the May 2012 CSE (triennial reevaluation) and the May and September 2013 CSEs (annual and requested reviews) (see Dist. Ex. 14 at pp. 2-5; see generally Dist. Exs. 24; 33). Thus, in this case, where the placement recommendations made by the May 2012 and May and September 2013 CSEs all consisted of special classes, the IHO should have provided a rationale for why a 12:1+2 special class was appropriate and in the LRE for the student's 2012-13 school year but a 12:1+4 special class was neither appropriate nor in the LRE for the student's 2013-14 school year for social studies and the laboratory component of science class (see IHO Decision at pp. 33-38).

When the May 2013 CSE convened, it considered the evaluative reports from 2011 and 2012 (the student's triennial review), as well as annual goal progress reports dated April 2013 from the student's teacher, speech-language pathologist, and behavioral consultant (Dist. Ex. 24 at pp. 4-5; see Dist. Ex. 23 at pp. 1-4). The May 2013 CSE acknowledged the progress that the student made toward his goals during the 2012-13 school year but determined that he continued to require a small, highly structured program with intensive supports and interventions in light of his significant language, social, and cognitive delays (Tr. p. 24-25; Dist. Ex. 24 at pp. 2-3, 5; see Dist. Ex. 23 at pp. 1-4). The student was reported to be functioning on a third-grade level in reading and math (Tr. pp. 25, 30). While the student was able to decode written text at a third or fourth-grade level, the student's reading comprehension level was at a second-grade level, and the student continued to struggle with comprehension, retelling what he had read, and drawing inferences (see Tr. pp. 25-27, 30; Dist. Exs. 24 at pp. 9, 22; 33 at p. 9). With regard to the parties' dispute regarding whether the 12:1+4 special class constituted the student's LRE, the evidence in the hearing record reflects that the May 2013 CSE discussed the parent's request for a general education social studies class with ICT services to support socialization; however, given the intensive coursework required in the Regents curriculum, the reading and writing demands, the lack of opportunities to socialize

[16] Under State regulations, 12:1+4 special classes, in general, are designed to accommodate up to a maximum of 12 students with the assistance (assuming the maximum enrollment of 12 students) of five adults, including a teacher and four "additional staff," which can be teachers, supplementary school personnel and/or related service providers (8 NYCRR 200.6[h][4][iii]). As such, 12:1+4 special classes provide a nearly 2:1 student-to-adult ratio, and as such offer a significant amount of support to students. In fact, and as envisioned by regulation, 12:1+4 classes are considered appropriate for students with "severe multiple disabilities, whose programs consist primarily of habilitation and treatment" (id.). In this case, while the student has not been classified by the district as being multiply disabled, he does present with cognitive, academic, and adaptive functioning deficits, which the record reflects were the primary reasons for the CSE's recommendation of a 12:1+4 class for the student (see, e.g., Dist. Exs. 33 at pp. 5-10; 34 at pp. 1-2).

in class due to the focus on the curriculum, and the student's significant academic needs, this option was rejected (Dist. Ex. 24 at p. 3).

Subsequently, after reviewing the evaluative data from the student's triennial evaluation, discussed above, and considering the input from those present at the CSE meeting, including the student's then-current special education teacher in the 12:1+4 special class, the September 2013 CSE continued the recommendations of the May 2013 CSE (see Dist. Ex. 33 at pp. 6-9, 20; see also Tr. p. 16). The September 2013 CSE, convened after the a resolution meeting related to the parent's July 2013 due process complaint notice (see 20 U.S.C § 1415[f][1][B]), also addressed the parent's request for increased mainstreaming opportunities for the student (see Dist. Ex. 33 at p. 6). The CSE agreed to permit the student to audit a special core social studies class; however, the CSE recommended that the student would continue to participate in social studies in his 12:1+4 special class with instruction at his functional level so that he could continue to work towards the annual goals and corresponding short-term objectives in his IEP (id.). As described above with regard to the special core reading class, as the "core" classes were composed wholly of students with disabilities, the September 2013 CSE's modification of the student's IEP does not alter the LRE analysis (R.B., 2015 WL 1244298, at *3).

Applying the standards articulated in Newington, first, the evidence in the hearing record, supports the May 2013 CSE's determination that education in the general education setting, with the use of supplemental aids and services could not be achieved satisfactorily for the student (Newington, 546 F.3d at 120). For example, given the student's deficits and the focus of his individualized annual goals and short-term objectives—many of which targeted functional and social skills—the educational benefit of placing the student in a special class setting far outweighed any benefit that the student might have received in a general education classroom (see Dist. Ex. 33 at pp. 5-15). In particular, the annual goals in the student's IEP targeted, among other things, daily living skills, such as making purchases using money and traveling on a bus or train, and social/emotional goals, such as avoiding repetitive speech and interacting in a socially appropriate manner (i.e., using eye contact, listening to the person speaking to him, and responding appropriately to someone during a conversation) (see id. at pp. 14-15).[17] Unlike in the student's special class, where the student was pursuing a Skills and Achievement Commencement Credential, the acquisition of functional skills were not the focus of the district's special core class or general education classes, in which the students pursued a Regents diploma (Tr. pp. 183-84, 191, 198-204; Dist. Ex. 33 at p. 4). Indeed, placement of the student in a general education classroom would diminish the amount of time that the student could spend during each school day participating in his special class environment and community and vocational-based opportunities, which were designed to support the development of the student's functional skills (see, e.g., Tr. p. 87). Acquisition of functional daily living skills to promote the student's independence was an important focus of the student's IEP (see Dist. Ex. 33 at pp. 8-9, 13-15, 18-19; see also Tr. pp. 88-89).

[17] Further, the hearing record shows that, in the special class, the student would receive vocational training with a job coach, instruction in work-related skills, and community-based instruction, which would involve trips into the community, travel training, and the use of appropriate vocabulary, functional skills, and money (see Dist. Ex. 33 at pp. 5-6; see also Tr. pp. 84-85).

To the extent that the parent argues that placement of the student in a less restrictive general education classroom with ICT services would have exposed the student to "richer language" and appropriate peer modeling, the CSE appropriately rejected these rationales for placement of the student in a less restrictive setting. Despite the progress that the student made during the 2012-13 school year, the student continued to function at a pre-social skills level (see Tr. pp. 50-53). Specifically, the evidence reflects that the student continued to require "intensive prompting" to initiate basic conversation with his peers in the special class, was unable to convey basic needs or wants, and required adult assistance to engage in conversation of age-appropriate subject matter (see Tr. pp. 50, 53-54, 85-88, 502, 504, 507, 509-10). The student's speech-language pathologist opined that it would be difficult for the student to extract meaning from language that was above his level and he would not be able to process the information, which would cause him to become distracted (Tr. pp. 297-98). The speech-language pathologist indicated that the student's speech-language needs included initiating, conversations, turn-taking, topic maintenance, attention, listening skills, vocabulary development, comprehension, problem-solving, and inferencing (Tr. p. 270). The high school teacher opined that the language of the academic classes, even with modifications and supports, would not be appropriate to meet the student's IEP goals (Tr. pp. 42-43). In addition, the special education teacher of the student's 12:1+4 special class stated that limited socialization occurred in high school academic classes due to the rigor and pace of the work (Tr. p. 42). The pupil personnel director testified that putting the student in academic classes to gain exposure to typical peers would not be a meaningful use of the student's time, and the student could not independently make meaningful conversation with typical peers (Tr. pp. 459, 461; see also Tr. pp. 234, 237, 523, 548-49).[18]

Although the IHO determined that the student required instruction in a special class for reading, writing, and mathematics and that the student would not benefit from participation in Regents level English or science classes, she concluded that the student would have derived benefit from participating in a general education social studies class, as well as the laboratory portion of science class (see IHO Decision at pp. 33-36). There is no evidence in the hearing record to support this determination, given evidence that that the educational benefits attendant to the recommended special class placement for academics far outweighed the limited benefits the student could have gained in an ICT academic class (see Tr. pp. 982-886, 1011-12; see also Pachl v. Seagren, 453 F.3d 1064, 1069 [8th Cir. 2006] [upholding the district's rejection of the parent's request for full inclusion of the student in a general education setting where the student's service providers believed that the functional skills that the student would need to develop personal independence could not be fully addressed in a mainstream environment]). Even though the September 2013 CSE allowed the student to audit the core social studies class, the CSE determined that the student needed to participate in social studies in the special class at an appropriate instructional level due to his significant cognitive, academic, and language delays (Dist. Ex. 33 at p. 6). Several members of the CSE indicated that the student would not be able to work toward his annual goals in an academic mainstream setting (see Tr. pp. 130, 152-53, 199-205, 295-97, 412-13, 416, 478, 526-28, 580, 1008-12). Moreover, the evidence does not support a conclusion that the student could succeed in the general education social studies or science laboratory class, even with extensive

[18] To the extent that the parent relies on the testimony of the student's psychiatrist, the psychiatrist testified that the September 2013 IEP was appropriate and some students require a self-contained setting to meet their most basic goals and expectations (Tr. pp. 833-34, 840-41). However, the student's psychiatrist was not present at the May 2013 or September 2013 CSE meetings.

supplemental services, given the pace at which the classes moved and the higher instructional level employed, which was beyond the student's abilities and functioning levels (see Tr. pp. 294-98, 412-13, 416-18, 420, 528-30, 993, 1008, 1012; Dist. Ex. 8 at pp. 2-5).

Based in part on the parent's description of the student's strengths, including memory skills, reading fluency, decoding, memorizing places on maps, and calendars (i.e., telling you the day of the week your birthday will fall on three years from now), the IHO determined that the student could have derived significant benefit in a general education social studies class with ICT services because he was able to answer questions and retain concrete information; however, the hearing record shows that these particular strengths did not translate in the academic environment in any sort of functional way or make it possible for the student to make meaningful progress in a less restrictive setting (see IHO Decision at p. 36; Tr. pp. 319, 726-27; see also J.S., 586 F. Supp. 2d at 84-85 [stating that a "student's passing grades in mainstream courses is far from a controlling factor in the determination of whether [a student] was provided a FAPE in the [LRE]" and acknowledging the evidence of a functional cost of placing the student in a mainstream setting where the student would not be able to increase his level of independence]). Thus, given the modification that would be necessary in a general education setting, the student would receive instruction in a very different curriculum, the goal of which would be other than pursue a Regents diploma (see Tr. pp. 153-54, 258, 410-11, 418, 586, 994, 1004, 1011-12; see also V.M. v. North Colonie Cent. Sch. Dist., 954 F. Supp. 2d 102, 122 [N.D.N.Y. 2013] [stating that "mainstreaming would be pointless if we forced instructors to modify the regular education curriculum to the extent that the . . . [student] is not required to learn any of the skills normally taught in regular education" and that, in such an arrangement, the only educational benefit that the student might receive is to sit next to a nondisabled student], quoting Daniel R.R., 874 F.2d at 1048-49).

In addition, to the extent that the IHO relied upon the January 2014 private psychoeducational evaluation report in finding that the student should have been placed in a Regents level or general education classroom with ICT services for social studies or science laboratory instruction, such reliance was in error (see IHO Decision at pp. 35-38). The January 2014 private evaluation post-dated and, therefore, was not available at the time that the CSE convened in May and September 2013 to develop the student's educational program for the 2013-14 school year (see Dist. Exs. 24 at p. 1; 33 at p. 4; Parent Ex. AA at p. 1). Therefore, this evidence may not be used to challenge the appropriateness of the CSE's recommendations (see R.E., 694 F.3d at 187 ["In 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"]; see also C.L.K. v Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [an IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE]; D.A.B. v New York City Dep't of Educ., 973 F. Supp. 2d 344, 361-62 [S.D.N.Y. 2013] [same]). Furthermore, even if considered, the January 2014 private psychoeducational evaluation report, which included a description of the student's deficits in verbal communication, social language, vocabulary knowledge, and reading comprehension, does not support the parent's contention that the student could have received educational benefit in a high school general education social studies or science class, as it reflected that the student's overall performance on cognitive tasks was much lower than other students his age and fell "below the

first percentile to the second percentile" (Parent Ex. AA at pp. 2-3at p. 3; see also Tr. pp.67-69; Parent Ex. Y at pp. 8-15).[19]

The IHO also erred in relying upon retrospective testimony provided by the student's special education teacher regarding how the student functioned in the special core social studies class (see IHO Decision at p. 36; see also R.E., 694 F.3d at 185-87). However, assuming again for the sake of argument that this information was available to the May or September 2013 CSE, testimony that the student received a grade of 60 on a quiz in the special core social studies class with an extreme level of differentiation, explanation, and guidance, to such a degree that the student had at least a 50 percent chance of guessing each answer correctly, does not support a finding that the student required more academic mainstreaming (see Tr. pp. 248-49).

Next, an inquiry into the possible negative effects of the inclusion of the student on the education of the other students in the class reveals that, while the student was generally "kind and considerate of his peers and adults," there is some evidence that the student could be a disruption to other students in a general education classroom (Newington, 546 F.3d at 120). For example, due to the student's "significant language, social, and cognitive delays," the student engaged in self-vocalization (i.e., talking out loud to oneself), repetition of speech (repeating what is said to him), and required instruction in an entirely different curriculum as compared to his peers in a general education classroom—all of which could reasonably be expected in this instance to detract from the instruction provided to the other students in a general education classroom given the extraordinarily high degree to which the instruction would necessarily differ (Dist. Ex. 33 at p. 5; see also Tr. pp. 34, 593-94). Evidence in the hearing record that supports a different conclusion, including the private psychoeducational evaluation report and testimony from the teacher of the student's special core social studies class, is, as noted above, impermissibly retrospective because it was not available to the May or September 2013 CSE and post-dated the development of the student's IEPs (see Tr. pp. 253, 398, 482; Parent Ex. AA; see also R.E., 694 F.3d at 185-87).

Finally, the evidence in the hearing record establishes that the district mainstreamed the student to the maximum extent appropriate by recommending that the student continue to receive instruction in a general education setting for art and music (chorus), in addition to being afforded an opportunity to participate in lunch and extra-curricular activities with nondisabled peers (Dist. Ex. 24 at p. 2, 14; see Tr. pp. 48, 378-79, 926; see also Newington, 546 F.3d at 119-20). In view of the foregoing, the May 2013 adequately considered the student's social, academic, emotional, and management needs in the development of an appropriate IEP for the 2013-14 school year (see V.M., 954 F. Supp. 2d at 123 [concluding that the limiting of the student's mainstream opportunities was appropriate where the student "struggled significantly in her mainstream classes, even when the curriculum was modified and extra consultant teacher services were provided"; the mainstream curriculum "was well beyond the student's learning capabilities"; the student "did not have the ability to earn a Regents diploma and would benefit from specialized instruction

[19] The student was observed in his high school special science class by the private evaluator in fall 2013 (Parent Ex. AA at p. 1; see also Tr. pp. 66-67). The class was working on a lesson from an elementary-level biology book, and the special education teacher testified that the student required re-instruction, modeling, additional breaking down of information, and questions that were specifically geared and tailored toward him so that he could attempt to participate (see Tr. pp. 67-69).

contained in the IEP"; and there was "significant discrepancy in the [student's] skill level and the level of material presented in a mainstream classroom setting"]).

E. Grouping

Although, as noted above, the parties have at times labeled their entire dispute as one related to whether the student was placed in the LRE for the 2013-14 school year, to the extent that parent contends that the district's recommended placement did not offer the student "an appropriate peer group" (Answer ¶ 75), the parent's assertions and the evidence adduced in the hearing record center on whether or not the student was appropriately grouped with other students with disabilities.[20] The evidence in the hearing record, however, does not support such a claim.

State regulations require that students with disabilities placed together for purposes of special education be grouped according to similarity of individual needs (8 NYCRR 200.6[a][3]). State regulations require that the "curriculum and instruction provided to such groups shall be consistent with the individual needs of each student in the group, and the instruction required to meet the individual needs of any one student in the group shall not consistently detract from the instruction provided [to] other students in the group" (8 NYCRR 200.1[ww][3][ii]).

For purposes of grouping a student in a special class with other special education students with similar needs, a CSE is required to consider the (1) range of academic or educational achievement of such students, including the learning characteristics of the students, to assure that the special education instruction provides each student in the class with appropriate opportunities to achieve his or her annual goals; (2) social development of each student to assure that the interaction within the special class is beneficial to each student, contributes to the student's social growth and maturity, and does not interfere with the instruction being provided; (3) physical development of each student in the special class to assure that each student is provided with appropriate opportunities to benefit from the instruction; and (4) management needs of each student to assure that the "environmental modifications, adaptations, or human or material resources required to meet the needs of any one student in the group are provided and do not consistently detract from the opportunities of other students in the group to benefit from instruction" (8 NYCRR 200.6[a][3][i]-[iv]).[21]

In this case, the evidence in the hearing record reflects that the student's cognitive abilities and individual needs were, for grouping purposes, similar to the other students in the 12:1+4 special class that the CSE recommended for the student for his 2013-14 school year (see Dist. Ex. 26; see also Tr. pp. 92, 517, 520). The special class was comprised of ten students, four females,

[20] As noted above, the IHO found that the student was appropriately grouped in his 12:1+4 special class for the 2013-14 school year (IHO Decision at p. 37 [emphasis added]). While the parent does not assert a cross-appeal of this portion of the IHO's decision, given the differing interpretations that could be applied to the IHO's finding and the parents' arguments, I will address it out of an abundance of caution.

[21] Neither a student's "social needs" nor "physical needs" may be the "sole determinant" or "basis" for determining an appropriate "placement" for purposes of grouping (8 NYCRR 200.6[a][3][ii], [iii]). In this case, the student's needs were primarily related to his academic and social development, and therefore grouping considerations should focus especially on the other students' range of academic achievement and social development.

and six males, ranging in age from 15-20 (see Dist. Ex. 26 at p. 1).[22] With regard to the learning characteristics of the students in the 12:1+4 special class, like the student in this case, five of the students were found to be eligible for special education and related services as students with autism (id.). Of the remaining students in the class, four were identified with multiple disabilities, and one was identified with a speech or language impairment (id.). With regard to the range of academic achievement of the other students in the student's class, the student was grouped with other students of comparable cognitive functioning, as the students in the 12:1+4 special class also scored extremely low, with full scale intelligence quotients (IQ) ranging from 40-64—similar to the student in this case who had a full scale IQ of 49 (id.). The students in the 12:1+4 special class also obtained standard scores ranging from 40-94 on word reading and reading comprehension, compared to the student's standard score of 49 on word reading (a reading comprehension subtest was attempted, but a score was not determined for the student), and standard scores ranging from 38-86 on numerical operations and math problem solving, compared to the student's standard scores of 26 on numerical operations and 28 on problem solving (id.).

With regard to the social development, the students in the 12:1+4 special class had adaptive behavior composites ranging from 25-93, compared to the student's standard score of 79 (Dist. Ex. 26 at p. 1). The social development of the students in the special class was described as: caring toward classmates, enjoy participating with peers in structured groups, seeking out people that share similar interests, making good strides in ability to socialize with peers; however, the students needed to develop appropriate social skills, communication skills, and self-confidence (id. at p. 2). The student was also described as kind and considerate of others and participated in structured groups in class, but he, like his classmates, needed to develop appropriate social skills, communication skills, and assertiveness (id.). The May/September 2013 CSEs also recommended that the student be provided with speech-language therapy, which all of the other students in the special class received, and recommended that the student be provided with counseling services, which six other students in the special class were provided with (id. at p. 1). In view of the foregoing, the evidence in the hearing record supports a finding that the student was appropriately grouped in the 12:1+4 special class for the 2013-14 school year.[23]

VII. Conclusion

Having determined that the evidence in the hearing record supports a finding that the parent's claims relating to the 2011-12 school year were barred by the statute of limitations and that the district offered the student a FAPE in the LRE for the 2012-13 and 2013-14 school years, the necessary inquiry is at an end and there is no need to reach the issue of whether the parent is entitled to any of the relief requested. In addition, the parent's request for an independent educational evaluation need not be addressed because, per the district's agreement prior to the filing of the parent's amended due process complaint notice to reimburse the parent for the cost of

[22] There are no chronological age-range limitations for groups of students placed in 12:1+4 special classes (8 NYCRR 200.6[h][5]).

[23] In contrast, according to the class profile of incoming ninth graders, the other students in the special core social studies class were identified as students with learning disabilities or speech-language impairments, with cognitive functioning ranging from 75-92 full scale IQ, reading comprehension standard scores ranging from 64-97, and who were noted to be largely age appropriate with respect to social-emotional skills (see Dist. Ex. 26 at p. 3).

the privately obtained psychoeducational evaluation report, dated January 5, 2014, the parent need only submit proof of payment (see Dist. Ex. 33 at p. 6; see generally Letter to Baus, 115 LRP 8855 [OSEP Feb. 23, 2015] [opining that a parent has the right to request an independent educational evaluation at public expense where the parent disagrees with an evaluation because it was not sufficiently comprehensive or where the district failed to assess a specific area of the student's needs]). I have considered the parties' remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated March 25, 2014, is modified, by vacating those portions which reached the issue of whether the district offered the student a FAPE for the 2011-12 school year;

IT IS FURTHER ORDERED that the IHO's decision, dated March 25, 2014, is modified, by reversing those portions that found that the district failed to offer the student a FAPE in the LRE for the 2013-14 school year and directed the district to hire an inclusion consultant and reconvene the CSE to amend the student's IEP to include the student in a general education classroom with ICT services for social studies and the laboratory component of science class; and

IT IS FURTHER ORDERED that, because the district has agreed to reimburse the parent for the cost of the privately obtained psychoeducational evaluation report, dated January 5, 2014, the parent shall submit proof of payment to the district within 30 days of the date of this decision.

Dated: **Albany, New York**
March 31, 2015

JUSTYN P. BATES
STATE REVIEW OFFICER