The University of the State of New York

**The State Education Department**
**State Review Officer**
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**No. 15-028**

**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 Bethlehem Central School District**

**Appearances:**
Getnick Livingston Atkinson & Priore, LLP, attorneys for petitioners, Patrick G. Radel, Esq., of counsel

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

## DECISION

### I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which determined that the educational program respondent's (the district's) Committee on Special Education (CSE) had recommended for their daughter for the 2014-15 school year was appropriate. The appeal must be dismissed.

### II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local 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

With regard to the student's educational history, the evidence in the hearing record reflects that the student received a diagnosis of Down Syndrome at birth (Dist. Exs. 4 at p. 1; 10 at p. 1, 11 at p. 1). The student received special education programs and services between July 2012 and August 2014 as a preschool student with a disability at a State-approved special education preschool program that included disabled and nondisabled students (Tr. pp. 75, 133-34; see Dist. Ex. 3).[1]

[1] The hearing record reflects that the student's special education preschool program was a "reverse mainstreaming" setting, whereby the majority of the student's class consisted of students with special education needs and a few nondisabled peers were integrated into the class (Tr. p. 75).

On May 15, 2014, the CSE convened to develop an IEP for the student for the 2014-15 school year (Dist. Ex. 7 at p. 1). Finding the student eligible for special education as a student with an intellectual disability, the CSE recommended placement in a 12:1+1 special class (Dist. Ex. 7 at pp. 1, 12).[2] The CSE additionally recommended the related services of speech-language therapy, occupational therapy (OT), and physical therapy (PT) (id. at pp. 1, 12).

In a prior written notice, dated May 19, 2014, the district summarized the 12:1+1 special class and the related services recommended in the May 2014 IEP (Parent Ex. D). The prior written notice indicated that the May 2014 CSE considered a "general education classroom" placement "with aide support" but determined that this placement would not meet the student's needs, even with accommodations and supports (id.).

In a letter, dated May 28, 2014, the parents informed the district that they disagreed with the May 2014 IEP's placement recommendation because it did not constitute the student's least restrictive environment (LRE) (Dist. Ex. 8 at pp. 1-2). The parents further expressed their interest in placing the student in a "typical [k]indergarten classroom in her neighborhood school" ("neighborhood school") (id. at p. 2). The parents requested that the CSE reconvene to review the parents' concerns and requested all documents the district had in its possession pertaining to the student (id. at pp. 1, 2). In response to the parents' concerns, the district scheduled a reconvene of the CSE for June 25, 2014 (Tr. pp. 373-74; see Dist. Ex. 9 at p. 1).

Prior to the June 2014 CSE meeting, the parents submitted a copy of a June 2014 report by a self-described "inclusion advocate" (Tr. pp. 453-54; see Tr. pp. 455-57, 552; Dist. Ex. 9 at pp. 1, 2). This report detailed an observation of the student in her preschool classroom and contained educational recommendations that were consistent with the parents' expressed wishes (see Dist. Ex. 9 at pp. 2-19). The report referenced a November 2013 neuropsychological evaluation report and an April 2014 developmental reevaluation report—reports obtained by the parents—of which the district was previously unaware (Tr. pp. 380-81; Dist. Ex. 9 at p. 2, see generally Dist. Exs. 10; 11).

On June 25, 2014, the CSE reconvened to consider the parents' concerns as well as the June 2014 report by the inclusion advocate (Tr. pp. 373-74, 472, 605). At the June 2014 CSE meeting, the parents requested that the CSE recommend a full-time 1:1 aide for the student (Tr. pp. 551-52, 605).[3] The district agreed to provide the student with a full-time 1:1 aide as a result of this request (Tr. p. 605; see Dist. Ex. 13 at p. 14). Subsequent to the June 2014 CSE meeting the district received copies of the November 2013 neuropsychological evaluation report and the April 2014 developmental reevaluation report (Tr. p. 381). After receiving these evaluation reports, the CSE reconvened on July 30, 2014 to finalize its recommendation for the 2014-15 school year (Dist. Ex. 13 at p. 1; see Tr. pp. 96, 384).

[2] The student's eligibility for special education programs and related services as a student with an intellectual disability is not in dispute in this appeal (Pet.¶ 1; Dist. Ex. 1 at p. 6; see 34 CFR 300.8[c][6]; 8 NYCRR 200.1[zz][7]).

[3] The hearing record does not include an IEP or prior written notice relative to the June 2014 CSE meeting. Instead, the hearing record reflects that a CSE meeting occurred on that date and that the inclusion advocate attended and participated in that meeting (Tr. pp. 88, 95, 472, 538, 551).

The July 2014 CSE recommended placement in a general education kindergarten class with integrated co-teaching (ICT) services for English language arts (ELA) and mathematics five times per week for two and one-half hours per day (Dist. Ex. 13 at pp. 1, 15). The CSE also recommended a 1:1 aide to support the student throughout the school day, including lunch and recess, related services, and special subjects (id. at p. 15). Additionally, the July 2014 CSE recommended the related services of individual and small group speech-language therapy, individual and small group OT, and individual PT (id.). Further, the July 2014 CSE recommended supports for the student's management needs, as well as 23 annual goals that addressed the student's needs in the areas of study skills, reading, writing, mathematics, speech-language, social/emotional/behavioral, and motor skills (Dist. Ex. 13 at pp. 10-16).

The July 2014 CSE also discussed the particular building where the district would implement the ICT and other services set forth in the July 2014 IEP (Tr. pp. 101). The particular school site identified by the district, which was identified on the IEP, was a different location within the district than the student's neighborhood school (Tr. pp. 87, 403, 592; Dist. Ex. 13 at p. 1). The hearing record reflects that the student's neighborhood school was located one-half mile from the student's home while the other school building where the district provided ICT services (ICT school) was located two and one-half miles away (see IHO Ex. 1). The parents consented to provision of the services in the July 2014 IEP and the IEP was implemented during the 2014-15 school year at the ICT school (see Tr. pp. 197-99, 322-24, 327).

**A. Due Process Complaint Notice**

In a due process complaint notice, dated August 7, 2014, the parents asserted that the district failed to offer the student a FAPE for the 2014-15 school year (see Dist. Ex. 1 at pp. 1-5). First, the parents argued that the ICT services recommended in the July 2014 IEP were inappropriate because the student could make progress in a general education environment with "other supplementary aids and services" (id. at p. 4). Second, assuming that a general education classroom with ICT services was appropriate for the student, the parents contended that the district violated the IDEA by implementing the July 2014 IEP at a school other than the student's neighborhood school (id.). Third, the parents averred that the district engaged in unlawful discrimination that violated Section 504 of the Rehabilitation Act, as well as the Americans with Disabilities Act (id. at p. 5).

For remedies, the parents sought declaratory relief, as well as amendment of the student's IEP to include "a 1:1 teaching assistant, consultant special education teacher services, and training and support for school personnel" within a general education classroom (id.). Alternatively, if ICT services were deemed appropriate to meet the student's needs, the parents sought an order directing the district to provide these services within the student's neighborhood school (id.).

**B. Impartial Hearing Officer Decision**

An impartial hearing convened on October 29, 2014, and concluded on November 10, 2014, after three days of proceedings (see Tr. pp. 1-644). In a decision, dated January 20, 2015, the IHO found that the district offered the student a FAPE for the 2014-15 school year and denied the parents' requested relief (IHO Decision at pp. 18-29).

First, the IHO found that the report submitted by the inclusion advocate, as well as her testimony at the impartial hearing, lacked credibility (IHO Decision at pp. 6-8). The IHO found that the inclusion advocate's testimony and report contained errors and offered generalized recommendations that were inapplicable to the student (id. at pp. 8-9). The IHO also declined to consider the testimony of district witnesses regarding additional services available within the student's classroom for the 2014-15 school year that were not included in the July 2014 IEP (id. at pp. 19-20).

Next, turning to the primary area of dispute between the parties, the IHO found that ICT services within a general education classroom were appropriate for the student (IHO Decision at p. 18). The IHO observed that the November 2013 neuropsychological evaluation report and the April 2014 developmental reevaluation report, as well as the student's preschool teacher's testimony, supported the student's need for a special education teacher within the classroom (id. at pp. 18-19). Further, the IHO found that none of these individuals "considered or suggested that [the student could] be placed in a general education class[] with only the support of a consultant teacher" (id.). The IHO also observed that the parents testified that ICT services within a general education classroom were appropriate for the student and met her needs (id. at p. 20).

The IHO additionally addressed the feasibility of consultant teacher services within a general education environment, the placement recommended by the inclusion advocate (IHO Decision at pp. 20-22). The IHO found "no credible evidence" that these services were appropriate for the student (id. at p. 21). The IHO further found that there would have been "no grouping possible" for the student under such a configuration since, due to the makeup of this classroom during the 2014-15 school year, the student would be the only student requiring specialized instruction (id.). Further, the IHO found that the student required small group instruction, the "only structure in which [the student] ha[d] displayed the ability to learn" (id. at p. 22).[4]

The IHO next found, after discussing pertinent Second Circuit authority, that ICT services delivered in a general education environment constituted the LRE for the student (IHO Decision at pp. 22-25). The IHO found that, as in M.W. v. New York City Dep't of Educ., 725 F.3d 131, 145 [2d Cir. 2013], the student was not "removed" from the general education environment because she received ICT services within a general education class (IHO Decision at p. 24). Therefore, the IHO found that the district's offered placement comported with the LRE requirement (id.). In sum, the IHO found that "the district was not required to place [the student] in a regular classroom where [s]he [would be] the only IEP student" in order to satisfy the objective of placing the student in the LRE (id.).

Turning to the appropriateness of the ICT school selected by the district to implement the IEP, the IHO found that the district "weigh[ed] the importance of the [student] attending a neighborhood school against the academic benefit of attending the ICT class" and permissibly concluded that the ICT class was preferable (IHO Decision at p. 25). The IHO further stated that it was important for the student to receive specialized instruction, the social benefits of attending the neighborhood school notwithstanding (id. at p. 26). Addressing the parents' specific arguments, the IHO found that the student's IEP required "some other arrangement"; namely, ICT services (id.). Therefore, the district was not obligated to place the student in her neighborhood

[4] The IHO further found that the parent "misread[]" portions of State regulations "concerning consultant teacher services" (IHO Decision at p. 21).

school nor "show that [the student] require[d] a placement other than [the neighborhood school]" (id. [internal quotations omitted]). Moreover, the IHO found that the district was not obligated to create a classroom with ICT services in the student's neighborhood school (id. at pp. 26-27).

With respect to the relief sought by the parents', the IHO rejected their claim for a 1:1 assistant teacher (IHO Decision at p. 27). As for the parents' request for "training for school personnel," the IHO noted that the parents refused to consent to these "services offered by the district at the July 30, 2014 [CSE] meeting" but "subsequently agreed to" certain services after the due process complaint was filed (id. at p. 28).[5]

**IV. Appeal for State-Level Review**

The parents appeal, arguing that the IHO erred by finding that the district offered the student a FAPE for the 2014-15 school year. First, the parents contend that the IHO impermissibly shifted the burden of proof to the parents to prove that the location selected by the district to implement the July 2014 IEP was inappropriate. The parents further assert that the IHO impermissibly relied upon retrospective testimony in support of her conclusions. Additionally, the parents contend that that IHO erroneously rejected the testimony of the inclusion advocate who testified in support of the parents' position.

Turning to the substance of the IHO's decision, the parents contend that the IHO erred in finding that the student required small group instruction in a general education classroom with ICT services in order to achieve meaningful educational benefit. The parents further assert that the IHO applied an incorrect legal standard in order to reach her determination that the general education class placement with ICT services constituted the student's LRE on the continuum of special education placements. With respect to the location of the school, the parents also contend that one of the IDEA's implementing regulations created a "legal presumption" in favor of a neighborhood placement that, contrary to the IHO's analysis, the district was required to rebut. The parents additionally aver that the district's decision to implement the July 2014 IEP at the ICT school, which was not the student's neighborhood school, resulted in a denial of FAPE. The parents argue that the IHO failed to consider the social benefits the student would receive by being educated in her neighborhood school.

For relief, the parents seek an order compelling the district to generate an IEP recommending "direct and indirect consultant teacher services" and a "1:1 teaching assistant" among other services to be provided to the student at her neighborhood school. Alternatively, the parents request an order that directs the CSE to reconvene and "reconsider" the location where it will implement the student's educational program with "proper consideration" of whether the student could achieve meaningful benefit with consultant teacher services and the potential benefits of access to neighborhood peers.

[5] The IHO also made findings regarding alleged violations of Section 504 of the Rehabilitation Act and the Americans with Disabilities Act, which are beyond the jurisdiction of an SRO and will not be reviewed on appeal (see IHO Decision at p. 28; see also Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]; A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 n.17 [E.D.N.Y. 2012] ["Under New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"]).

In an answer, the district denies the parents' material assertions and argues that the IHO correctly concluded that the district offered the student a FAPE. The district requests that the IHO's decision be upheld in its entirety.

## 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, 180-83, 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).

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. Preliminary Matters

First, the parents argue that the IHO inappropriately placed the burden of proof on the parents regarding the appropriateness of the district's recommended program. Under the IDEA, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005] [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]). However, as

noted above, under State law, the burden of proof has been placed 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., 2010 WL 3398256, at *7). Here, there is no evidence that the IHO misapplied the district's burden of proof (see IHO Decision at pp. 16-28). The IHO, instead, weighed the evidence adduced at the impartial hearing and resolved the primary disputed issues in the district's favor (see id.). The parents' protestations to the contrary, therefore, are without merit.[6]

Second, the parents argue that the IHO utilized retrospective testimony to support her conclusion that the July 2014 IEP offered the student a FAPE. The parents' argument is not supported by a review of the IHO's decision. In her decision, the IHO acknowledged that district witnesses testified regarding additional supports made available to the student during the 2014-15 school year that were not included in the July 2014 IEP (IHO Decision at p. 19). However, the IHO then proceeded to explain that this testimony was retrospective and expressly indicated that she would not rely on it in assessing whether the district offered the student a FAPE (id.). The IHO also explained this distinction during the impartial hearing, stating that testimony that explained or justified services identified in the IEP would be permissible, but evidence of the student's performance in the ICT class would not (see, e.g., Tr. pp. 275-77, 299; see also R.E., 694 F.3d at 193). A review of the IHO's decision reveals that she did not rely on such evidence in reaching her determination and did not err in this respect.

As the parents observe, the IHO relied upon the benefit the student received from small group instruction to find ICT services appropriate for the student and, further, the student's two current classroom teachers offered retrospective testimony as to the student's functioning in such a configuration (IHO Decision at p. 20; see, e.g., Tr. pp. 221-24, 232, 238, 246-47, 249, 263-65, 267-68, 270, 333-34, 337, 339-40, 344, 345). However, as further explained below, the student's success in small groups was known to the July 2014 CSE and incorporated into the July 2014 IEP (Dist. Ex. 13 at p. 8; see Tr. p. 156). While the IHO did not indicate precisely which sources she relied upon regarding the student's success in small groups, it appears that the IHO conducted a prospective analysis of the July 2014 IEP based upon the information available to the July 2014 CSE (IHO Decision at p. 20). Even assuming for purposes of argument that the IHO relied upon retrospective testimony in this instance, any such error would be harmless because permissible evidence nonetheless supports the IHO's conclusion (Tr. p. 156; Dist. Ex. 13 at p. 8; see K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 85, 2013 WL 3814669 [2d Cir. July 14, 2013] [recognizing that the inquiry was not whether impermissible retrospective evidence was relied upon but whether sufficient permissible evidence supported the conclusion that the IEP offered the student a reasonable prospect of educational benefits]; P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141, 2013 WL 2158587 [2d Cir. May 21, 2013] [removing "retrospective testimony from the balance" of the evidentiary analysis]).

[6] Even assuming for purposes of argument that the IHO allocated the burden of proof to the parents, the harm would be only nominal insofar as there is no indication that this was one of those "very few cases" in which the evidence was in equipoise (Schaffer, 546 U.S. at 58; Reyes v. New York City Dep't of Educ., 760 F.3d 211, 219 [2d Cir. 2014]; M.H., 685 F.3d at 225 n.3; A.D. v. New York City Dept. of Educ., 2013 WL 1155570, at *5 [S.D.N.Y. Mar. 19, 2013]).

Finally, the parents contend that the IHO erroneously discredited the testimony and report of the inclusion advocate. An SRO gives due deference to the credibility findings of an IHO unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v City Sch. Dist., 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd, 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]). Here, the evidence in the hearing record reveals no reason to overturn the IHO's credibility determination regarding the inclusion advocate. As the IHO stated, the inclusion expert's report contained no testing of the student and was "based on a single observation" of the student at her preschool classroom (IHO Decision at p. 6). Further, the inclusion advocate's factual observations contradicted the testimony of the student's preschool teacher, as well as the district special education teacher of the 12:1+1 special class (id. at pp. 6-7; see Tr. pp. 90-92, 159-63, 169-74, 185-86, 188-89). Moreover, the student's preschool teacher denied making statements attributed to her in the inclusion advocate's report (Tr. pp. 169-74, 186). Based upon this information, the IHO had the discretion to conclude that the inclusion advocate's testimony and report were not credible and, moreover, unhelpful to the issues presented at the impartial hearing (IHO Decision at pp. 6, 9). The IHO's credibility determination was explained in her decision and that explanation was supported by the evidence in the hearing record; accordingly, there is no reason to disturb this credibility determination on appeal.[7]

**B. Integrated Co-Teaching Services**

The parents next contend that the IHO erred by determining that ICT services within a general education classroom were appropriate to meet the student's needs. The IHO's conclusion is amply supported by the evidence in the hearing record.

In order to assess the appropriateness of the July 2014 CSE's placement recommendation, it is first necessary to review the student's present levels of performance. In developing the student's IEP, the July 2014 CSE reviewed available documentation, including the November 2013 neuropsychological evaluation report and the April 2014 developmental reevaluation report (Tr. p. 385; Dist. Exs. 13 at pp. 2-3, 6; 14 at p. 1; see generally Dist. Exs. 10; 11). The July 2014 IEP reported the results of the November 2013 neuropsychological evaluation, which found that the student's cognitive ability was in the mildly deficient range and her adaptive skills in the borderline range (Dist. Ex. 13 at p. 6; see Dist. Ex. 11 at pp. 3-4). At the time of the July 2014 CSE meeting, the student demonstrated significantly below average speech-language skills (at the one to two-year old level), with speech intelligibility that was difficult to understand at the word and phrase level when the context was unknown (Dist. Ex. 13 at p. 6). The student demonstrated improvement in her oral motor skills, but was a "messy eater," engaged in teeth grinding, and put non-food items in her mouth throughout the day (id.). Physically, she presented with fine motor and visual motor delays, as well as low tone and decreased strength throughout her upper body and trunk (id. at p. 7). Although she was making improvements in her overall strength, the student's distractibility

[7] While the parents contend that the IHO erred because the inclusion advocate's "credentials are impeccable," the IHO merely found that the inclusion advocate's testimony and report were inapposite to the instant proceeding (see IHO Decision at pp. 6-9). Nothing in this decision is intended to detract from the inclusion advocate's academic credentials.

and limited attention impeded her overall safety, especially on stairs and during motor play (id. at p. 8).

Socially, the July 2014 IEP indicated that the student liked to be a helper and made improvements in her ability to play alongside peers during group activities and in using toys and materials in the classroom (Dist. Ex. 13 at p. 7). The IEP stated that the student attended to preferred activities (i.e., dolls dress up, kitchen area) for longer periods, and generally sought and preferred adult attention to that of her peers (id.). The IEP reported that the student appeared confident in social situations and was affectionate, but often needed reminders to regulate her tendencies to be rough and unintentionally hurtful to others by grabbing and pushing peers, grabbing toys, or by giving excessive hugs (id.). The student required reminding to respect personal boundaries, keep her hands on her own body, use words to satisfy her wants and needs, ask for help when necessary, and follow classroom rules (id.). The student also needed adults to model language appropriate for the purpose of getting attention from peers and adults (id.). The student often showed jealously by aggressively pushing peers away when adults focused their attention on peers instead of her (id.). The IEP further stated that the student did not always seem to understand the consequences of her actions (id.). The IEP additionally noted that it was important to give the student additional adult attention when she was successful (i.e., hugs, praise, treats) (id. at pp. 6, 7).

Regarding the student's learning style and management needs, the July 2014 IEP indicated that the student needed visual supports with verbal instruction and repetition, as well as steps broken down for task completion (Dist. Ex. 13 at pp. 6, 8-9). The IEP further stated that the student learned best in "[o]ne to one or small groups" with limited materials in her space and reduced distractions (id. at pp. 6, 8). The student required positive peer models and adult support to facilitate in social situations with peers (id. at p. 9). The IEP also indicated that the student required "constant supervision" as she demonstrated limited safety awareness characterized by a tendency to follow adults out of the classroom before the door closed and to leave designated play areas within the school building (id. at pp. 6, 8). The student tended to touch and interact with off-limit materials if such materials were left within her reach (id. at p. 6). Although she showed a desire to independently complete self-help tasks, the student required assistance with fine motor tasks related to dressing (id.). Due to a medically-based instability, caution was needed to limit activities that would hyper flex or hyper extend the student's neck (id. at p. 9). Although she was toilet trained, the student required close supervision/prompting when washing hands after toileting (id. at p. 6). The student also needed close supervision and monitoring of her pace while eating (id.).

After ascertaining the student's present levels of performance and developing annual goals to address these needs, the July 2014 CSE recommended placement in a regular education classroom with ICT services in mathematics and ELA (Dist. Ex. 13 at pp. 1, 15). State regulations define ICT services as "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). The number of students with disabilities receiving ICT services within a class may not exceed 12 (8 NYCRR 200.6[g][1]). In addition, State regulations require that an ICT class must be staffed, at a minimum, with a special education teacher and a regular education teacher (8 NYCRR 200.6[g][2]).

The director, as well as the two teachers within the student's ICT classroom for the 2014-15 school year, testified that the structure of an ICT classroom facilitated small group instruction,

which was frequently utilized (Tr. pp. 197-99, 207-08, 232-33, 355, 359, 389-90).[8] The July 2014 IEP indicated that the student required the support of "[o]ne to one or small groups for learning" (Dist. Ex. 13 at p. 8). Moreover the student's preschool special education teacher, who attended the July 2014 CSE meeting, testified that the student "did best in small groups where she had an adult that could sit by her and support her" (Tr. p. 156).

In addition to the supports available within the ICT classroom, the CSE also recommended that the student receive the services of a full-time 1:1 aide throughout the day, including lunch and recess, related services, and special subjects (Dist. Ex. 13 at pp. 1, 15). This aide addressed the student's need for "constant supervision" as documented in the July 2014 IEP and described above (id. at pp. 6, 8). The CSE also recommended the following related services in 30-minute intervals on a weekly basis: three sessions of individual speech-language therapy in the classroom; one session of small group (3:1) speech-language therapy in the therapy room; two sessions of individual OT, one in the therapy room and one in the classroom; one small group (5:1) session of OT in the classroom; and one individual session of PT in the classroom (id. at pp. 1, 14).

The CSE further recommended supports for the student's management needs, including: visual supports for transitions; modified curriculum in reading, writing, and mathematics; special seating arrangements; extended time to process information and respond; breaks as needed throughout the school day in the classroom and during specials; the use of visuals and manipulatives; paired reading and writing opportunities; modification of directions; refocusing and redirection; and the use of cooperative learning groups during academic lessons (Dist. Ex. 13 at pp. 15-16). The July 2014 CSE also recommended one 60-minute assistive technology consultation at the beginning of the school year (id. at pp. 1, 15, 16). In light of the above, the evidence in the hearing record supports the IHO's determination that ICT services in a general education class offered the student a FAPE for the 2014-15 school year (see IHO Decision at pp. 27-28).

Significantly, the parents testified at the impartial hearing that ICT services were appropriate for the student and that their real concern was with the location where these services would be delivered (Tr. pp. 611-13). However, in challenging the appropriateness of ICT services in a general education classroom, the parents argue that many of the benefits associated with ICT services and small group instruction could have been accomplished with consultant teacher services delivered within a general education classroom. State regulations provide that consultant teacher services are designed to provide services to students with disabilities who attend regular education classes, or to their regular education teachers (8 NYCRR 200.6[d]). "Direct consultant teacher services means specially designed individualized or group instruction provided by a certified special education teacher, to a student with a disability to aid such student to benefit from the student's regular education classes" (8 NYCRR 200.1[m][1]). While both ICT and consultant teacher services are delivered in a general education classroom, the State Education Department has issued a guidance document, which describes the difference between the services (see "Continuum of Special Education Services for School-Age Students with Disabilities," VESID Mem., p. 14 [Apr. 2008], available at http://www.p12.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf). The

[8] In contrast to testimony offered as to how the student actually benefited from small group instruction during the 2014-15 school year, this testimony "explains or justifies the services listed in the IEP" and, thus, may be considered (R.E., 694 F.3d at 186).

guidance document notes that "[ICT] services means students are intentionally grouped together based on similarity of need," whereas consultant teacher services are intended for an individual student with a disability (id.). In addition, primary instruction is delivered by the special education and regular education teachers in the ICT class, whereas the consultation teacher services aim to adapt "content, methodology, or delivery of instruction" to the student (id.).

The evidence in the hearing record shows that the parents discussed consultant teacher services during the July 2014 CSE meeting and that this option was rejected by the July 2014 CSE as insufficient to meet the student's needs (Dist. Ex. 14 at p. 1; see also Tr. pp. 103-05, 113-14, 115-16, 125-29, 183, 407). The director of special education services testified that she agreed with the July 2014 CSE's recommendation because the ICT services would provide the student with more support than the consultant teacher services (Tr. p. 407). Further, the district special education teacher, who attended the July 2014 CSE meeting, and the director of special education services testified as to the practical difference between ICT services and consultant teacher services for this student and indicated that, with consultant teacher services, the student "would be an island [u]nto herself" as the only student receiving special education in the general education classroom and, further, would not benefit from the small group instruction with other students with disabilities that could be delivered in an ICT setting (Tr. pp. 127-30, 404-05). Given the student's needs as described in the July 2014 IEP, including her need for small group instruction, as well as her need related to cognitive, developmental, speech-language, and attentional deficits, the hearing record supports the appropriateness of ICT services within a general education classroom (see Dist. Ex. 13 at pp. 6-8).

### C. Least Restrictive Environment

#### 1. Placement on the Continuum

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 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., 725 F.3d at 144; 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).[9]

The parents contend that the IHO improperly construed Second Circuit authority regarding the appropriate legal standard for determining whether the ICT services recommended in the July 2014 IEP represented the LRE for the student. The hearing record reflects that the IHO, in a well-reasoned and well-supported discussion, correctly set forth the proper legal standard to determine

[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).

whether the district offered the student a FAPE in the LRE for the 2014-15 school year and applied that standard to the facts at hand (IHO Decision at pp. 22-25). Thus, the IHO's determination that ICT services in a general education classroom represented the LRE for the student on the continuum of alternative placements for the 2014-15 school year is hereby adopted.

I note briefly that placement in a general education classroom with ICT services provided the student with ample access to nondisabled peers. To the extent that the parents argue that a consultant teacher services model of instruction could be deemed less restrictive than an ICT setting due to the inclusion of fewer students with disabilities, the Second Circuit has declined to adopt such reasoning, noting instead that, in order to satisfy its LRE obligations, a district would not be "required to place [the student] in a regular classroom where he was the only . . . student" with an IEP (M.W., 725 F.3d at 146). This case is sufficiently analogous and, therefore, the IHO's findings and discussion upholding the district's placement as the LRE are hereby affirmed.

**2. Location of the School**

Next, the parents argue that the district's decision to implement the July 2014 IEP at the ICT school, instead of the student's neighborhood school, resulted in a denial of FAPE to the student. A review of the evidence in the hearing record supports the IHO's conclusion that the district offered the student a FAPE.

The parents' argument that the district improperly chose to implement the July 2014 IEP at the ICT school hinges upon the language of 34 CFR 300.116(c). This regulation provides that a district must "ensure" that a student attend his or her neighborhood school "[u]nless the IEP . . . requires some other arrangement" (34 CFR 300.116[c]; see 8 NYCRR 200.4[d][4][ii][b]). Contrary to the parents' position, numerous courts have held that this provision does not confer an absolute right or impose a "presumption" that a student's IEP will necessarily be implemented in his or her neighborhood school (see White v. Ascension Parish Sch. Bd., 343 F.3d 373, 380-82 [5th Cir. 2003]; Lebron v. N. Penn Sch. Dist., 769 F. Supp. 2d 788, 801 [E.D. Pa. 2011] [finding that "though educational agencies should consider implementing a child's IEP at his or her neighborhood school when possible, [the] IDEA does not create a right for a child to be educated there"]; Letter to Trigg, 50 IDELR 48 [OSEP 2007]; see also R.L. v. Miami-Dade Cnty. Sch. Bd., 757 F.3d 1173, 1191 n.10 [11th Cir. 2014]; AW v Fairfax Cnty. Sch. Bd., 372 F.3d 674, 682 [4th Cir 2004]; McLaughlin v. Holt Pub. Sch. Bd. of Educ., 320 F.3d 663, 672 [6th Cir. 2003]; Kevin G. v. Cranston Sch. Comm., 130 F.3d 481, 482 [1st Cir. 1997]; Flour Bluff Ind. Sch. Dist. v. Katherine M., 91 F.3d 689, 693-94 [5th Cir 1996]; Urban v. Jefferson Cnty. Sch. Dist. R–1, 89 F.3d 720, 727 [10th Cir. 1996]; Murray v. Montrose Cnty. Sch. Dist. RE-1J, 51 F.3d 921, 929 [10th Cir 1995]; Schuldt v. Mankato Indep. Sch. Dist. No. 77, 937 F.2d 1357, 1361–63 [8th Cir. 1991]; Barnett v. Fairfax Cnty. Sch. Bd., 927 F.2d 146, 151 [4th Cir. 1991]; H.D. v. Cent. Bucks Sch. Dist., 902 F. Supp. 2d 614, 626 [E.D. Pa. 2012]). However, a district remains obligated to consider whether a student's IEP may be implemented at his or her neighborhood school (34 CFR 300.116[c]; 8 NYCRR 200.4[d][4][ii][b]; see Lebron, 769 F. Supp. 2d at 801).

Here, the evidence in the hearing record demonstrates that the district permissibly selected the ICT school to implement the July 2014 IEP because, unlike the student's neighborhood school, it was capable of implementing the ICT services recommended in the IEP (Tr. pp. 398-400). It is undisputed that the district did not offer kindergarten ICT services within the student's neighborhood school (see Tr. p. 398; Dist. Ex. 13 at p. 1). Thus, the student's IEP required the

"other arrangement" of ICT services, which, in turn, justified placement in a school other than the student's neighborhood school (R.L., 757 F.3d at 1191 n.10; White, 343 F.3d at 380 [finding that "it was not possible for [the student] to be placed in his neighborhood school because the services he required are provided only at the centralized location, and his IEP thus requires another arrangement"]); Lebron, 769 F. Supp. 2d at 801; (see, e.g., Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006] [noting that districts need not place students in the closest public school to the student's home if "the services identified in the child's IEP require a different location"]; Letter to Trigg, 50 IDELR 48).

Moreover, the evidence in the hearing record reveals that the district utilized a reasonable procedure to determine the location of the kindergarten ICT classroom within the district. The district's director of special education services offered a detailed explanation of how the district decides where to locate the ICT services it offers (Tr. pp. 398-400, 412-13). As a preliminary matter, there were five elementary schools within the district (Tr. p. 398). The district operated one ICT classroom for every grade level from kindergarten through fourth grade, and two for fifth grade (Tr. pp. 398-99). The director, in conjunction with CSE chairpersons and principals of the district's elementary schools, determined within which elementary school these ICT classrooms would be located (Tr. p. 399). The district generally selected the location of an ICT classroom based upon which elementary school represented the neighborhood school for the greatest number of students (id.). The intention behind this approach was that, once a class was established, the students would advance from grade to grade in the same location (Tr. pp. 412-13). This would result in the greatest number of students attending their neighborhood school (id.). The district does not offer an ICT classroom for every grade level in each elementary school because it does not have a large enough student population to justify that many classrooms (Tr. pp. 399-400). The evidence in the hearing record, therefore, reveals that the district employed a reasonable approach to assign the student to the ICT school that did not conflict with the requirement to provide the student's services in the LRE.

On appeal, the parents contend that the district could have offered consultant teacher services in a classroom within the student's neighborhood school. This argument, however, pertains to the appropriateness of the services recommended in the July 2014 IEP, not the location where these services would be implemented (see S.H. v. State-Operated Sch. Dist. of City of Newark, 336 F.3d 260, 272 [3d Cir. 2003] [noting that parties "cannot bootstrap the meaningful educational benefit with the LRE requirement"]). Additionally, as previously detailed above, ICT services in a general education classroom were the special education services that were reasonably likely to adequately address the student's needs.

In any event, as noted above, the evidence in the hearing record shows that the July 2014 CSE considered placement in a general education class with consultant teacher services but rejected this placement as insufficiently supportive to meet the student's needs (Dist. Ex. 14 at p. 1; see also Tr. pp. 103-05, 113-16, 125-29, 183, 407; Parent Ex. D). Moreover, the student's preschool teacher, who attended the July 2014 CSE meeting, testified that the CSE discussed the possibility of enrolling the student in her neighborhood school (Tr. p. 101). Therefore, the hearing record demonstrates that the July 2014 CSE considered assigning the student to her neighborhood school but permissibly rejected such an assignment based upon the availability of services necessary to implement the IEP and, thus, meet the student's needs (Lebron, 769 F. Supp. 2d at 801 ["The record shows that the District fulfilled its legal obligations by considering placing [the student] at his neighborhood school before deciding to implement his IEP elsewhere"]).

Finally, I sympathize with the parents' argument that the student's interest in interaction with neighborhood peers justified placement in her neighborhood school. While this is no doubt a legitimate area of parental concern, courts have held that such concerns are not germane to a question of appropriate school assignment (see White, 343 F.3d at 379 ["It is also undisputed that the parents' request that [the student] attend his neighborhood school was primarily social—they wanted him to be able to attend school with other neighborhood children; this concern is beyond the scope of the 'educational benefit' inquiry courts make under the IDEA."]). By no means, however, is this to diminish the parents' legitimate interest in enrolling their daughter in her neighborhood school. But consideration must also be given to the practical recognition that public school districts often cannot offer every kind of class and service at each neighborhood school within its system.

**VII. Conclusion**

A review of the evidence in the hearing record demonstrates that the district offered the student a FAPE in the LRE for the 2014-15 school year. I have considered the parties' remaining contentions and find them without merit.

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York**
**April 1, 2014**

**JUSTYN P. BATES**
**STATE REVIEW OFFICER**