



The University of the State of New York

The State Education Department

State Review Officer

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No. 19-106

Application of the BOARD OF EDUCATION OF THE PINE BUSH CENTRAL 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:

Thomas, Drohan, Waxman, Petigrow & Mayle, LLP, attorneys for petitioner, by Allison E. Smith, Esq.

Disability Rights New York, attorneys for respondent, by Andrea Clisura, Esq.

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 special transportation services recommended by its Committee on Special Education (CSE) for respondent's (the parent's) son for the 2018-19 school year were not 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

The student has received diagnoses of an attention deficit hyperactivity disorder (ADHD) and Asperger's disorder (Tr. pp. 96, 104; Dist. Ex. 4 at p. 3). The student attended a district middle school for the 2017-18 school year, during which time the student's IEPs called for a special class placement, receipt of related services of counseling and speech-language therapy, and, as of January 2018, the support of a 1:1 aide (Dist. Exs. 2 at pp. 1, 6, 8; 3 at pp. 1, 6, 8; 4 at pp. 1, 6, 9). The student's IEPs for the 2017-18 school year indicated that the student did not require special transportation (Dist. Exs. 2 at p. 8; 3 at p. 8; 4 at p. 8). In early 2018, the student was reevaluated (see Dist. Ex. 5 at p. 1).

For the student's transition to high school for the 2018-19 school year (ninth grade), a CSE convened on April 4, 2018 to develop the student's IEP (Dist. Ex. 5). On July 16, 2018, the CSE

reconvened and modified the student's program and placement recommendation (compare Dist. Ex. 6 at pp. 7-8, 11, with Dist. Ex. 5 at pp. 7-8, 11).¹ Finding that the student remained eligible for special education as a student with an other health-impairment, the July 2018 CSE recommended a 10-month Board of Cooperative Educational Services (BOCES) program consisting of a full-time 8:1+1 special class placement with one 30-minute session per week of individual psychological counseling, one 30-minute session per week of psychological counseling in a small group, and two 30-minute sessions per week of speech-language therapy in a small group (Dist. Ex. 6 at pp. 1, 7; see Dist. Exs. 4 at p. 1; 5 at p. 1).² The April and June 2018 CSEs determined that the student no longer required paraprofessional services called for in his previous IEP and, once again, his IEPs did not indicate the need for special transportation for the student (compare Dist. Ex. 4 at p. 6, with Dist. Exs. 5 at pp. 7-8, 11; 6 at pp. 7-8, 11).

The student attended the BOCES placement for the 2018-19 school year and received transportation from the district (Dist. Exs. 6 at p. 11; 8 at p. 3). A bus route was developed, which provided that, starting on September 5, 2018, the student would be picked up at the corner of his street (Dist. Ex. 7). However, during part of the 2018-19 school year, the student's bus driver altered the bus route to drop-off the student in front of his residence (Tr. pp. 19, 32, 34, 37).

A CSE convened on February 11, 2019 to develop the student's IEP for the 2019-20 school year (tenth grade) (Dist. Ex. 8). The February 2019 CSE recommended a program and placement consistent with that which the student received during the 2018-19 school year, with the exception of the delivery of speech-language therapy sessions (compare Dist. Ex. 6 at p. 7, with Dist. Ex. 8 at p. 8). Once again, the CSE did not recommend special transportation but provided that the student would receive transportation to and from the BOCES program (Dist. Ex. 8 at p. 12).

On May 16, 2019, the parent emailed BOCES staff, including the assistant principal, and requested an "[e]mergency IEP meeting" to "add something to [the student's] IEP in regards to transportation" (Dist. Ex. 9 at p. 1). The parent relayed that she "needed [the student] to be dropped off right at [her] driveway," and that she was "having a rough time with the bus company," but opined that "something c[ould] be done if it[] [was] mandated" on the student's IEP (id.). She further described that when the student returned from school "he ha[d] a long way to walk," and that, although he was "high functioning," she was "concerned for his safety" (id.). The BOCES assistant principal forwarded the email to a school psychologist at the district, who indicated that she would reach out to the parent (id.).

In a letter addressed to the district dated May 30, 2019, a family nurse practitioner who was the student's primary care provider recommended that the student's "transportation

¹ The April 2018 CSE had recommended a 15:1+1 special class placement for all academic subjects, a 15:1 special class for reading instruction, 25 40-minute sessions per year of psychological counseling in a small group, and 42 40-minute sessions per year of speech-language therapy in a small group (Dist. Ex. 5 at p. 7). The CSE had also recommended that the student attend his "Home Public School District" (id. at p. 11).

² The student's eligibility for special education as a student with an other health-impairment is not in dispute (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

arrangements be amended to have curbside pick-up and drop-off at his residence," citing concerns about the student's safety due to "his Asperger's" and distractibility (Parent Ex. C).

On June 3, 2019, the CSE convened (Dist. Ex. 11). The June 2019 CSE modified the student's IEP to include the need for special transportation, including a small bus or vehicle and special seating at the front of the bus but did not recommend curbside pick-up or drop-off for the student (Dist. Ex. 10 at p. 11; see Dist. Ex. 15).^{3, 4}

A. Due Process Complaint Notice

In a due process complaint notice dated June 6, 2019,⁵ the parent requested an impartial hearing, seeking "door-to-door special transportation" for the student (IHO Ex. III at pp. 1-2). The parent asserted that the bus stop at which the bus would pick up and drop off the student to transport him to and from the BOCES program was located "at the intersection of [their] cul-de-sac," which required the student "to walk with no sidewalks and wait on a busy road for the bus" (id. at p. 2). The parent also noted that the student had exhibited "behavioral issues on his current bus" and anxiety, distractibility and difficulty interpreting social cues in the school environment (id.). The

³ The hearing record contains two copies of the June 2019 IEP, both of which are described as "draft[s]" on the first pages (see Dist. Exs. 10; 11). With respect to transportation, both "drafts" include the June 2019 CSE's recommendations for special seating and a small bus, but exhibit 11 contains an additional "check box" notation under the special transportation section of the IEP providing that the student needed transportation to and from special classes or programs at another site, specifically the BOCES placement (compare Dist. Ex. 10 at p. 11, with Dist. Ex. 11 at p. 13). While there is no explanation in the hearing record for the two draft versions, based on the variable dates and content of each draft IEP, it may be that district exhibit 10 was a draft based on an IEP developed for the 2018-19 school year, whereas district exhibit 11 was a draft based on the February 2019 IEP (compare Dist. Ex. 10, with Dist. Ex. 6; compare Dist. Ex. 11, with Dist. Ex. 8). There is also no explanation in the hearing record for the lack of a "final" IEP, as opposed to a "draft." In any event, as the recommendations made by the February 2019 CSE, as well as the need to transport the student to BOCES, are undisputed, for purposes of this decision, district exhibit 11 is cited.

⁴ The hearing record includes a recording and an unofficial transcript of the June 2019 CSE meeting (Dist. Exs. 14; 15). The parent prepared a transcript of the CSE meeting, but the district objected to the introduction of the proposed transcript into evidence as it did not represent "an accurate or verbatim account of the June 3, 2019 CSE meeting" (IHO Ex. XII at p. 1). The district proposed that the parties obtain and split the cost of a transcript of the CSE meeting "prepared by a court reporter" (id.). The parent responded to the district's objection, noting that the recording itself was in evidence and expressing an unwillingness to "spend money on an 'official' transcript" (IHO Ex. XIII at p. 1). The district's objection to the parent's proposed transcript was not ruled upon on the record but the IHO included what appears to be a copy of the parent's proposed transcript as IHO exhibit VIII with a notation on the exhibit list appended to the IHO decision that the exhibit was "not entered" (IHO Decision at p. 18; IHO Ex. VIII). Additionally, a "revised transcript" was included in the hearing record, which appears to represent the transcript as prepared by the parent with interlineated additions and omissions made to the document by the district (compare Dist. Ex. 15, with IHO Ex. VIII; see IHO Decision at p. 17; Tr. pp. 115-16), and a black and white copy of district exhibit 15 was submitted by the district to the Office of State Review. Due to the inability to distinguish some of the interlineations, the Office of State Review directed the submission of a color copy of district exhibit 15, which was promptly submitted by the district. Since it appears the parties are in agreement that the "revised transcript" in evidence as district exhibit 15 is an accurate representation of the June 2019 CSE meeting, and an independent review of the same does not reveal any reason to find otherwise (compare Dist. Ex. 14, with Dist. Ex. 15), for purposes of this decision, the "revised transcript," rather than the audio of the June 2019 CSE meeting shall be cited when referencing the discussion held at the CSE meeting.

⁵ The due process complaint notice was stamped received by the district on June 11, 2019 (IHO Ex. III at p. 1).

parent alleged that, although the June 2019 CSE agreed to add a small bus and special seating to the student's IEP, the CSE chairperson "insisted that, in the absence of a physical or medical need, special transportation could not be door to door" (*id.*). The parent alleged that the CSE's transportation recommendation should be based on the student's needs, including his "behavioral and safety needs" (*id.*). For relief, the parent requested that the CSE be required to amend the student's IEP to include "door-to-door special transportation," as well as transportation instruction, if needed (*id.*).⁶ The parent also requested that the district create a policy to acknowledge that the general allocation to parents of the responsibility to assist their children to get to and from bus stops "does not apply equally to students with disabilities whose needs . . . should be considered on an individual basis with consideration to needs including behavior and communication" (*id.* at pp. 2-3).

B. Impartial Hearing Officer Decision

After a prehearing conference on July 19, 2019 (IHO Ex. I at pp. 1-2),⁷ an impartial hearing convened and concluded on August 20, 2019 (Tr. pp. 1-129). In a decision dated September 23, 2019, the IHO determined that the student required "door-to-door" special education transportation (IHO Decision at pp. 13-14).⁸

First, the IHO reviewed the relevant testimony, finding all five witnesses to have testified credibly (IHO Decision at p. 8). The IHO noted testimony of the BOCES social worker and special education teacher regarding instances where the student was able to follow adult instructions and walk in different environments without adult supervision (*id.* at pp. 8-9). The IHO further acknowledged the testimony of the district transportation supervisor that, on two occasions, he observed the student exit the bus and walk to his home; however, the IHO also noted that these observations took place in spring (as opposed to winter when the street would be more difficult to travel) and that the transportation supervisor did not witness anyone approach the student while he walked (*id.* at p. 9).

The IHO further reviewed the recording of the June 2019 CSE meeting and found it "illuminating with respect to its factual content . . . and the attendant assumptions of the participants" (IHO Decision at p. 9). In particular, the IHO noted the position the CSE chairperson expressed during the CSE meeting and in testimony that, unless a student had a physical or medical need for door-to-door transportation, it was a parent's responsibility to provide supervision while their child was getting to and from the bus stop (*id.* at pp. 9-10). Based on the CSE chairperson's

⁶ In a response to the parent's due process complaint notice, dated June 21, 2019, the district asserted that the student did not require door-to-door special transportation and described the information relied upon in making that determination (IHO Ex. IV at pp. 1-3).

⁷ Additional "status teleconferences" were held on July 26 and August 1, 2019 (IHO Ex. I at p. 2).

⁸ The parties and the IHO seemed to share an understanding that the phrase "door-to-door" as used in this case meant to the end of the student's driveway; however, that location is more aptly described as the "curb." Transportation disputes have erupted over curbside delivery versus delivery to the door of a student's house (*see, e.g., Anchorage Sch. Dist. v. N.S.*, 2007 WL 8058163 [D. Alaska Nov. 8, 2007]). While delivery at the "curb" is the best description of what the parent sought in this case, the phrase "door-to-door transportation" is used throughout the hearing record and in the parties' submissions on appeal and, therefore, at times appears within this decision, notwithstanding that it is not the most accurate way to describe the parties' dispute.

stated position, the IHO found that, in declining to recommend door-to-door transportation, the district relied on State "general education transportation law, while ignoring the fact that State special education transportation [wa]s a component of [the student's] special education program, and of his attendant IEP" (*id.* at pp. 11-12). In contrast to general education transportation law, the IHO indicated that special education law required the district to provide the student with suitable transportation (*id.*).

Turning to whether the student's unique needs required door-to-door transportation, the IHO noted the student's diagnoses of Asperger's and ADHD, as well as notation in the February 2019 IEP that the student exhibited distractibility and difficulty interpreting social cues, and found that the testimony at the impartial hearing "amplified" these areas of need (*id.* at p. 12). In particular, the IHO noted testimony from the BOCES social worker and special education teacher, as well as the parent, regarding the student's difficulty focusing and tendency to wander (*id.* at pp. 12-13). The IHO found that the evidence "paint[ed] a picture of an 'easily distracted' child with autistic traits and an [other health-impairment] classification, who has difficulty connecting with others, and at any moment will disappear into his own mind and wander off to unknown places because he may just feel like walking" (*id.* at p. 13). The IHO "seriously wonder[ed] how [the student] would be able to safely walk up by himself on [his street] to his driveway, in the presence of vehicles and passing strangers" (*id.*).

Accordingly, the IHO found that the student required door-to-door transportation and ordered the district to, within three days, amend the student's IEP to include door-to-door transportation (IHO Decision at pp. 13-15).⁹

IV. Appeal for State-Level Review

The district appeals, asserting that the IHO erred in finding that the student required door-to-door special education transportation services and exceeded his authority by requiring the district to amend the student's IEP within three days of the date of the IHO's decision.

Specifically, the district asserts that, in examining the testimony of the district transportation supervisor about his observations of the student, the IHO made assumptions regarding facts not in evidence when he opined that the street would be more difficult to travel in winter. The district also alleges that the IHO failed to cite "transportation regulations" to which he referred and erred in stating that the CSE chairperson ignored special education law in favor of general education transportation law. The district further argues that the IHO did not understand the district's argument that the inquiry into the student's need for door-to-door transportation due to his disability should be separate from the question of the student's need for adult supervision at the bus stop. The district next asserts that the IHO's finding that the student was in danger of wandering off while walking between the bus stop and his home was speculative and not based on the evidence in the hearing record. As for other evidence cited by the IHO, the district argues that the IHO erred in relying on the testimony of the BOCES special education teacher that the student needed reminders to move to the right if a bike was coming to support a finding that the student was incapable of safely walking between the bus stop and his home and erred in relying on the student's need for a 1:1 paraprofessional in middle school without taking into account the reasons

⁹ The IHO issued a "corrected" decision on September 30, 2019, to clarify that the district was directed to amend the student's IEP to include door-to-door transportation within three school days from the date of the decision.

for that support as stated in the IEPs or the fact that the CSE determined that the student no longer needed that support.

With regard to the timeframe set by the IHO for the district's compliance with the decision, the district argues that the IHO exceeded his authority since the deadline was far shorter than the time allotted for an appeal of the IHO's decision.

In an answer, the parent responds to the district's appeal by asserting general admissions and denials, and requests that the SRO uphold the IHO's decision in its entirety.¹⁰

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. of Hendrick Hudson Cent. Sch. Dist. 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; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; 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. Fla. 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]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. ___, 137 S. Ct. 988, 999 [2017]). 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

¹⁰ To the extent that the parent's statement in her answer that "upon information and belief [the student] should have a disability classification of autism" (Answer ¶ 4) could be viewed as a challenge to the student's eligibility classification, such a challenge would fail since the parent did not raise such an issue at the impartial hearing. The IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][III]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Accordingly, since the parent did not raise the issue in her due process complaint notice (see IHO Ex. III) or otherwise seek the district's agreement to expand the scope of the impartial hearing to include these issues or file an amended due process complaint notice, I decline to review the issue for the first time on appeal.

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. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). 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).

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 adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). 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]). 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 Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

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]), 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]).¹¹

¹¹ The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately

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).

VI. Discussion—Special Transportation

The IDEA specifically includes transportation, as well as any such developmental, corrective, and other supportive services necessary in order to assist a student to benefit from his or her special education, in its definition of related services (20 U.S.C. § 1401[26]; see 34 CFR 300.34[a], [c][16]). In addition, State law defines special education as "specially designed instruction . . . and transportation, provided at no cost to the parents to meet the unique needs of a child with a disability," and requires school districts to provide disabled students with "suitable transportation to and from special classes or programs" (Educ. Law §§ 4401[1]; 4402[4][a]; see Educ. Law § 4401[2]; 8 NYCRR 200.1[ww]). Transportation as a related service can include: travel to and from school and between schools; travel in and around school buildings; and specialized equipment, such as special or adapted buses, lifts, and ramps (34 CFR 300.34[c][16]). Special transportation must be included on a student's IEP if required to assist the student to benefit from special education (Application of a Child with a Disability, Appeal No. 03-053; see Questions and Answers on Serving Children with Disabilities Eligible for Transportation, 53 IDELR 268 [OSERS 2009]; Letter to Smith, 23 IDELR 344 [OSEP 1995]). If a CSE determines that a student with a disability requires transportation as a related service in order to receive a FAPE, the district must ensure that the student receives the necessary transportation at public expense (Transportation, 71 Fed. Reg. 46,576 [Aug. 14, 2006]; see 8 NYCRR 200.1[ww]). The decision of whether to transport a student from his or her home or from a bus stop must be made on an individual basis in the process of drawing up a student's IEP (Letter to Smith, 211 IDELR 191 [OSEP 1980]).

In its published guidance, the State Education Department has indicated that a CSE should consider a student's mobility, behavior, communication, physical, and health needs when determining whether or not a student requires transportation as a related service, and that an IEP "must include specific transportation recommendations to address each of the student's needs, as appropriate" ("Special Transportation for Students with Disabilities," VESID Mem. [Mar. 2005], available at <http://www.p12.nysed.gov/specialed/publications/policy/specialtrans.pdf>). Relevant considerations may also include "(1) [the student's] age; (2) the distance he or she must travel; (3) the nature of the area through which the child must pass; (4) his or her access to private assistance in making the trip; and (5) the availability of other forms of public assistance in route, such as crossing guards or public transit" (Donald B. v. Bd. of Sch. Commrs., 117 F.3d 1371, 1375 [11th Cir. 1997]; see Malehorn v. Hill City Sch. Dist., 987 F. Supp. 772, 781-82 [D.S.D. 1997]). When reviewing the transportation provisions made for a student by a district, the relevant question is whether the transportation arrangements are appropriate to meet the student's needs (Application of a Child with a Disability, Appeal No. 03-054).

In this case, the CSE convened on June 3, 2019 at the parent's request to discuss the student's need for special transportation (Tr. pp. 103-04; Dist. Exs. 9; 14; 15; see Dist. Ex. 11).

ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Andrew F., 137 S. Ct. at 1000).

Attendees at the June 2019 CSE meeting included the CSE chairperson, a social worker and a special education teacher from BOCES, the parent, and the parent's lay advocate (Dist. Ex. 15 at p. 1). After the discussion, the June 2019 CSE determined that the student required special transportation in the form of a "small bus with preferential seating" (Dist. Exs. 11 at p. 13; 15 at p. 3). However, the June 2019 CSE did not recommend door-to-door or curb-side transportation for the student as the parent had requested (Dist. Ex. 15 at p. 4; see Dist. Ex. 11 at p. 13). The impasse that the parties reached during the CSE is reminiscent of another case in which the parties did not dispute that the student required special transportation but differed over the extent of the special transportation that was required. To borrow the from the words of the court in that case, "there is no question that [the student] cannot benefit from his special education if he is not transported to and from school, because, regardless of the cause, the plain fact is that he cannot otherwise get to school. The real issue is where does the transportation obligation end, at the curb or at the door" —or in this case, the bus stop at the end of the cul-de-sac (Anchorage Sch. Dist. v. N.S., 2007 WL 8058163, at *8 [D. Alaska Nov. 8, 2007] [emphasis added] [resolving a dispute over the need for curb-to-curb versus door-to-door special transportation]).

The district's analysis during the CSE meeting, over the objection of the parent, leaned heavily on the stated belief that the need for door-to-door transportation requires a finding of physical or medical limitations and that, if the issue falls in the area of the adequacy of supervision, it falls to a parent to provide any necessary supervision that a student may require. In particular, the CSE chairperson stated that:

It's based on the child physically being able to get to and from the bus stop or some other environmental, medical reason that they can't be in the conditions such as the cold weather or the hot weather * * * It's very clearly stated in the transportation regulations that the parents are responsible for getting the child to and from the bus stop safely. That is absolutely in the regulations. And so it's not discrimination because that's what's expected of all parents whether the child has a disability or not

(Dist. Ex. 15 at p. 5). Thus, the district listened to the concerns of the parent but was not willing to consider factors other than a physical or medical disability as determinative of the student's need for "door-to-door" special transportation. If this were a nondisabled student, I would tend to agree with the CSE chairperson's view of the requirements regarding parental supervision. When interpreting Education Law § 3635, the Court of Appeals explained that:

The duty owed by a school to its students, however, stems from the fact of its physical custody over them. As the Restatement puts it, by taking custody of the child, the school has "deprived [the child] of the protection of his parents or guardian. Therefore, the actor who takes custody of *** a child is properly required to give him the protection which the custody or the manner in which it is taken has deprived him." The school's duty is thus coextensive with and concomitant to its physical custody of and control over the child. When that custody ceases because the child has passed out of the orbit of its authority in such a way that the parent is perfectly free to reassume control over the child's protection, the school's custodial duty also ceases.

In the present case, when the school district undertook to offer the busing it did, it extended its control over its pupils from the school door to the bus stop only. At that point, the children having been set down in a safe spot, and nothing untoward having occurred in the course of their disembarkation, its transportation program no longer substituted for parental control and, thus, it bore no further duty to the child on the basis of its special role as custodian.

(Pratt v. Robinson, 39 N.Y.2d 554, 560 [1976] [internal citations omitted] [alternations in the original]; see also R.L. v. New York City Dep't of Educ., 175 A.D.3d 477, 478 [2d Dep't 2019]). At the same time, "[s]chools are not insurers of safety, . . . for they cannot reasonably be expected to continuously supervise and control all movements and activities of students" (Mirand v. City of New York, 84 N.Y.2d 44, 49 [1994]; see Stephenson v. City of New York, 19 N.Y.3d 1031, 1033-34 [2012]).

However, this is a student with a disability and the district has conceded that the student requires special transportation. In the context of special education and the requirements of the IDEA, the orbit of a school district's responsibilities to assist the student is also measured by that statute (as interpreted by binding and persuasive court authorities), as well as the factors identified in State and federal guidelines, examples of which are identified above. And if the student requires certain characteristics in special transportation in order to receive a FAPE, the CSE must recommend the same, regardless of its view of the parent's responsibilities.¹² To the extent that the student required supervision, the district's general contention that it was the parent's responsibility and not the district's is not dispositive of the issue. Thus while it was appropriate for the CSE to consider the presence of physical or medical limitations (or lack thereof), its inquiry was also required to cover other relevant factors such as the student's behavior, his communication skills (and cognition related thereto), his age, the distance he must travel, the nature of the road upon which he traversed, his access to private assistance, and the availability of other forms of public assistance (see Donald B., 117 F.3d at 1375; "Special Transportation for Students with Disabilities," at p. 1, VESID Mem.).

As relevant to the student's needs, the February 2019 IEP reported the results of evaluations of the student, which showed that the student's abilities fell in the low average range of cognitive functioning with a full-scale IQ of 84 (Dist. Ex. 8 at pp. 1-2). The IEP indicated that the student was able to participate in all physical activities and that there were no physical developmental needs of concern at that time (id. at p. 4). With regard to his communication skills, the IEP stated that the student was currently taking Regents level English, algebra, living environment, and global history, and was "struggling with comprehension and recall in all core subjects" (id. at p. 3). The February 2019 IEP described the student as "very pleasant and social" and "always on-time and prepared for classes" and indicated that he "work[ed] to form appropriate social relationships with

¹² On appeal, the district argues that the IHO misunderstood its contention "that whether the student's disability requires door to door transportation is separate from whether a student needs adult supervision at his bus stop" (Req. for Rev. ¶11.c). In its opening statement at the impartial hearing, the district framed it as such: "the consideration should be whether, despite adult supervision, the student's disability requires door-to-door transportation" (Tr. p. 12). However, a student's need for supervision may overlap with a student's need for transportation and there is no authority to support the proposition that these areas of need can or should be treated exclusive from each other.

peers" and "generally transition[ed] independently to speech and language sessions," where he was "an active participant in activities" (*id.*). According to the IEP, the student preferred 1:1 teacher assistance and responded well to redirection both academically and socially (*id.*). Further, the student reportedly had made a good adjustment to the BOCES program and environment, sought "positive relationships with his peers and staff," was "able to follow school and social norms," and consistently "maintain[ed] appropriate behavior" (*id.* at p. 4). The student also displayed improved "willingness to ask for help when he need[ed] it" (*id.*). The student reportedly "demonstrate[d] and cultivate[d]" strong interpersonal skills with adults, exhibited "good eye contact," and "engage[d] easily with adults" (*id.*).

However, for management needs, the IEP indicated that the student was "easily distracted and ha[d] difficulty interpreting social cues" (Dist. Ex. 8 at p. 4). The student required management strategies including individual prompting and reteaching to complete assignments, reminders to remain on task during academic activities, prompting and redirection to remain organized for each class, and redirection to interact appropriately with peers (*id.*). The IEP also included testing accommodations, as well as modifications and accommodations to be provided in the classroom and/or in the student's home, such as the provision of an additional set of books, tasks broken down into manageable units, extended time to complete classwork, checks for understanding, use of a positive reinforcement plan, and provision of student guide outlines of key concepts (*id.* at pp. 8-10). The IEP featured transition needs for the student including completing post-secondary education application forms, completing job application forms, developing independent travel skills, self-advocacy skills, work skills, and independent living skills (*id.* at pp. 5-6).

During the June 2019 CSE meeting, the parent shared her concern that the student's distractibility affected his ability to navigate the distance from the bus stop to his home, noting observations by bus drivers and recordings from cameras on her home that, when the student got off the bus, he "look[ed] different ways" and took a long time "to get up and move along" (Dist. Ex. 15 at p. 1). She indicated that cars tended to travel through their cul-de-sac at a speed in excess of the posted limit and that she was concerned for the student's safety (*id.*). The parent and the parent's advocate also noted concern that the student would accompany a strange adult if approached (*id.* at p. 3).¹³

During the CSE meeting, the CSE chairperson stated that special transportation was "determined based on the needs" of the student, was "typically based on" a student's physical ability or medical needs, and that, unless the student required door-to-door transportation due to his disability, it was the parents' responsibility to get their child to and from the bus stop safely (Dist. Ex. 15 at pp. 1, 3, 4, 5). The BOCES personnel shared their views of the student's needs at the CSE meeting (*id.* at p. 1). The special education teacher shared that the student was "very, very easily distracted" in school and needed a lot of "reminders" and "prompting" to begin work and to transition between classes (*id.* at pp. 1-2). The social worker described the student as "impulsive" and shared examples of "a couple" instances "at the beginning of the school year"

¹³ The example given by the advocate and parent during the CSE meeting was that if an adult approached the student and stated "I have a lost puppy, would you come help me?" then the student would "definitely" accompany the adult (Dist. Ex. 15 at p. 4).

where the student wandered from the lunchroom to a hallway or classroom when he had requested to use the restroom (id. at p. 2).¹⁴ The social worker opined that, given his impulsivity and need for direction, "getting off the bus" could be "problematic" for the student (id.). However, the social worker also indicated that the student was able to independently walk from the school to the bus (which was right outside) at the end of the day (id. at p. 5). The social worker deferred and stated that he could not "really offer an opinion" with respect to whether the student needed door-to-door transportation (id. at pp. 4-5).

According to the parent's reference thereto during the June 2019 CSE meeting, it appears that an official for the district had "someone observe" the student on two occasions (Dist. Ex. 15 at p. 4); however, the results of such observations were not described during the CSE meeting and there is no indication that a written description of the observations was made available to the CSE. During the impartial hearing, the district transportation supervisor testified that he observed the student on two occasions in May and June 2019, during which times the student was able to successfully and independently get off the bus and walk towards his house (Tr. pp. 20-21, 24-26).¹⁵

With respect to other information allegedly available to the CSE, the parent obtained a letter from a nurse practitioner, dated May 30, 2019, stating that the student required door-to-door transportation due to his Asperger's diagnosis, which caused him to be distracted (Parent Ex. C; see Tr. pp. 95-96). During the June 2019 CSE meeting, the parent referenced a letter from the student's "doctor," as well a letter from a "cognitive behavior specialist," with respect to the student's need for door-to-door transportation for safety reasons (Dist. Ex. 15 at pp. 4, 5). However, the CSE chairperson indicated that such concerns reflected the student's need for

¹⁴ During the impartial hearing, the social worker likewise described two incidents at the start of the 2018-19 school year when the student had "wandered" when going from the cafeteria to the bathroom and been found within the school in a different location to "look around" without permission (Tr. pp. 49-50; see Parent Exs. B1; B2). The social worker testified that, after the incidents, he informed the parent, who then spoke with the student (Tr. p. 50). In addition, the social worker addressed the events directly with the student, who then indicated that he understood the rules (Tr. pp. 51-52). As a result of these events, the student received detention and was escorted when he needed to go to the bathroom for about two weeks (Tr. pp. 52- 53; see Parent Exs. B1; B2).

¹⁵ In considering the district transportation supervisor's observations of the student, the IHO noted that the observations occurred in the spring, with no observations in the winter when the street would be more difficult to travel (IHO Decision at p. 9). On appeal, the district asserts that the IHO erred when he made assumptions about the student's ability to navigate the distance between his house and the bus stop during the winter when snow and ice would be present, given that the hearing record lacked evidence or testimony about wintery conditions. Initially, the IHO, without developing an evidentiary record, was free to take notice of general fact that when alighting from the bus the student would face the changing seasons in a state such as New York including the fact that it snows and becomes icy at times during the winter—that general notion cannot be reasonably questioned. Further, a review of the IHO's decision shows that the IHO appeared to reference the idea of the student walking to and from the bus stop during the winter to highlight the limited scope of the district transportation supervisor's observations of the student and, therefore, the limited weight such observations would be accorded, and not as an independent basis upon which to conclude that the student required door-to-door transportation. With respect to the weight accorded the district transportation supervisor's observations, while the observations took place prior to the June 2019 CSE meeting, absent any evidence that the results thereof were communicated to the CSE, the transportation supervisor's testimony about his view of the student's ability to travel from the bus stop to his home is indicative of the sort of after-the fact evidence that may not be used to retrospectively evaluate the sufficiency of the program offered by the CSE (see R.E., 694 F.3d at 186-88).

"supervision," which she conceded the student required, but indicated that it was the parent's responsibility to provide it (*id.*).¹⁶ Upon debating the parent's responsibility to get the student to and from the bus stop, the CSE chairperson also indicated that the student "absolutely listens to adults," and that, therefore, the parent would be able to manage the student's travel to and from the bus stop (*id.* at p. 3); however, it is unclear on what source the CSE chairperson relied upon in making this assessment, since it does not appear that she had previously met the student (*see id.* at p. 4).

In addition to the discussion had at the June 2019 CSE, in finding that the student required door-to-door transportation, the IHO also relied on testimony of the BOCES social worker and special education teacher (*see* IHO Decision at pp. 8-9, 12-13). The BOCES social worker who participated in the June 2019 CSE meeting testified that he worked with the student during his counseling sessions on interpersonal skills and social interaction, and described the student as "well-engaged" and sensitive (Tr. pp. 44-45). During the impartial hearing, in addition to the two instances when the student wandered from the cafeteria, which the social worker had shared during the June 2019 CSE, the social worker also described two trips during which he observed the student outside of the school environment and in the community with his class (Tr. pp. 53-59). The two outings consisted of walking on a maintained path with three to four staff members and an excursion to a bowling alley in which the students were picked up and delivered within 10 feet of the door of the destination (Tr. pp. 53-60). The social worker confirmed that the student was able to independently navigate both environments and did not require assistance during either trip (Tr. pp. 55-56, 57-59). The social worker also stated that the student complied with directives related to navigating his environment and was more likely to seek out help than to elope when he was upset (Tr. pp. 67-68, 69-70). With respect to getting from school to the bus, the social worker testified that "sometimes," due to the student's "sensitiv[ity] and "an ongoing conflict with a friend . . . on the bus," the student would request that the social worker walk with him "to the curb" (Tr. p. 64).

The BOCES special education teacher who participated in the June 2019 CSE meeting described the student as "very friendly" but easily distracted and noted that he had difficulty focusing during lessons (Tr. pp. 79, 89). The teacher stated that the class had gone for a walk "four to five" times on the nearby trail, and that the student had needed reminders to move over to the right when a bicycle was coming (Tr. p. 82). The teacher confirmed that, during the trip, the student did not require one-to-one supervision or other assistance, nor did he leave the trail without permission during the hike (Tr. pp. 82-83). The testimony of the BOCES personnel provided anecdotal descriptions of the student's abilities but, given that the anecdotes were not shared with the CSE and are only peripherally related to a finding that the student could independently navigate the distance between his home and the bus stop, the descriptions of the student shared by the same BOCES personnel at the June 2019 CSE meeting at the time the committee made its recommendations are accorded more weight.

During the impartial hearing, the parent also testified and, in addition to reiterating the concerns she shared with the CSE, she also noted that the student's prior receipt of support from a 1:1 aide was due to his distractibility and wandering incidents (Tr. p. 98). As noted above, for

¹⁶ The CSE chairperson testified that she had not seen the letter from the nurse practitioner (Tr. pp. 109-10, 111-12).

middle school, the CSE recommended that the student receive support from a full-time one-to-one aide "to address his distractibility and behavior issues" for at least a portion of the 2017-18 school year (Dist. Exs. 3 at pp. 3, 6; 4 at p. 3, 6; see Dist. Ex. 2 at p. 3, 6). However, the CSE did not continue this recommendation for the student for the 2018-19 and 2019-20 school years (see Dist. Exs. 5 at p. 7; 6 at p. 7; 8 at p. 8; 11 at p. 8), demonstrating the CSE's view that the student did not require that level of support in the supervised school environment; however, without more, this is insufficient to support the proposition that the student did not require support in an unsupervised context.

The foregoing demonstrates that the student exhibited needs in the area of behavior and communication that may have warranted door-to-door transportation, notwithstanding that the student did not present with mobility, medical, or physical needs. Turning to other relevant considerations, along with the lack of physical needs, the student's age of approximately 15 years is likely the strongest factor supporting the district's position, since a student of high school age would typically possess the skills to independently travel the distance to and from the bus stop at issue in this case (see Dist. Ex. 11 at p. 1). However, like his physical status, the student's age in this case is not dispositive.

The next factor is the distance to be traveled by the student with the special transportation provisions of his IEP. The hearing record reflects that the need to travel any distance to and from a bus stop was a new circumstance for the student. With respect to the student's transportation during prior school years, the parent explained to the CSE that, before the family moved to a new residence (which she testified occurred in August 2018), the student had been provided with "curbside" transportation at her former home by virtue of the home's location and, therefore, the student had not required special transportation to achieve this proximity (Dist. Ex. 15 at p. 2; see Tr. p. 97). In addition, while it is unclear whether or not the circumstances were known to some or all of the members of the June 2019 CSE, testimony revealed that during the 2018-19 school year there was "some confusion" regarding where the student was supposed to be dropped off and that the regular driver "took it upon" him or herself to drop the student off in front of his house (at the new residence), which was not "approved by the school" (Tr. pp. 32, 37). The district transportation supervisor testified that he was "notified that there was . . . inconsistency" when a substitute driver began dropping the student off at the school-approved bus stop, which was not in front of his house (Tr. p. 32). The hearing record is unclear with respect to exactly when and for how long the student was being dropped off in front of his house during the 2018-19 school year (Tr. pp. 36-37). The change in circumstances appears to have contributed to the dispute between the parties.¹⁷ With respect to the physical distance, the district transportation supervisor testified that the distance the student needed to walk from the bus stop to the home was ".08, seven-tenths of a mile" (Tr. p. 25). In the decision, the IHO directly quoted this testimony, while also referencing two maps placed into evidence (IHO Decision at p. 5, citing Tr. pp. 21-22, 25; Dist. Exs. 12; 13). A review of one of the maps in evidence reflect that the distance between the student's house and the bus stop was ".0875" of a mile that is approaching one tenth of a mile, not the "seven-tenths of a mile" reflected in the transcript (Dist. Ex. 12; see Tr. p. 22). It is unclear the extent to which the IHO may have been under the impression that the distance that the student needed to

¹⁷ For example, during the CSE meeting, the parent's advocate indicated that the change in circumstances was part of the concern because "all of a sudden it's this way and [they] ha[d]n't really prepared" the student (Dist. Ex. 15 at p. 4).

traverse was over one half of a mile instead of a shorter distance of less than one-tenth of a mile. In any event, while a short distance, the location of the bus stop represented a distance that, relatively speaking, exceeded the prior circumstances for this student.

As for the nature of the area, during the June 2019 CSE meeting and in the due process complaint notice, the parent described her concerns that the student would have to wait on a "busy road" for the bus and walk home from the bus on their street "with no sidewalks" and with drivers who tended to exceed the speed limit (Dist. Ex. 15 at p. 1; IHO Ex. III at p. 2). In addition, at the intersection at the end of their street, where the bus was assigned to pick up and drop off the student, the cross-road was described by the nurse practitioner as "a major road" (Parent Ex. C). The district transportation supervisor stated that the student did not have to cross the road to walk to his home, although the parent asserted that this was untrue (Tr. pp. 26, 96).

With regard to the factor of availability of private or public assistance, the parent appeared to seek the door-to-door transportation for the student, at least in part, due to her work schedule (see Dist. Ex. 15 at p. 2). During the June 2019 CSE meeting, the parent explained to the other members of the CSE that she dropped the student off at the bus stop in the morning as that is what her work scheduled allowed but that, if she was "not there, he would have to walk down," which was a circumstance with which she was not comfortable (id.). She indicated that, if the student was required to walk to the bus stop, she "wouldn't be able to work" (id.). The hearing record does not otherwise indicate that other private assistance was available to help the student get to and from the bus stop. Further, there was no evidence that public assistance was available to aid the student in accessing the transportation, such as a crossing guard, and, therefore, it is not a factor that supports the district's position in this instance.

Having examined the evidence in the record related to the foregoing factors, I find that the district was operating under a mistaken impression during the June 2019 CSE meeting that the student's physical or medical needs must be a predominate factor for him to be eligible for special transportation to the curb (Dist. Ex. 15 at pp. 1, 3-5). However, the parent was able to participate in the meeting, along with her advocate, to explain her concerns related to the student's distractibility and wandering, her unavailability due to her work, and the nature of the streets in which the student would have to walk and wait for the bus (id. at pp. 1-3). The BOCES personnel who worked with the student on a regular basis described both his strengths and weaknesses in terms of his willingness to follow directions and his distractibility and, while hesitant to render an opinion on the matter, indicated that it could be "problematic" to leave the student at the bus stop at the end of his street (id. at pp. 1-2, 4-5). While the examples of trips outside the school building about which the BOCES personnel testified were relevant, each of the outings described depicted the student traveling to a destination in close proximity (i.e., from the bowling lanes to the bathroom) and always in the presence of school personnel (see Tr. pp. 40-73, 76-92). Although the CSE chairperson was confident that the student would listen to adults (Dist. Ex. 15 at p. 3), that does not resolve the question of what happens when the student is on his street after the bus leaves the stop. Indeed, the CSE chairperson conceded that the student required supervision but took the position that the parent must provide the necessary supervision (id. at p. 4). The district's position was consistent with Education Law § 3635 and general State guidance applicable to all students, but it placed too much emphasis on those general provisions requiring parents to provide any necessary supervision and insufficiently considered the IDEA requirements and State guidance specifically applicable to students with disabilities (Anchorage Sch. Dist., 2007 WL 8058163, at *9 [holding that the district was required to complete the transportation transaction, even if a

disabled child's parents always could complete, or hire somebody to complete, the entire transportation transaction]). Consequently, I find insufficient reason to disturb the IHO's determination that the student required door-to-door, or more accurately stated, curb-to-curb special transportation.

Going forward, it may be possible that the student can learn the skills necessary to get on and off the bus at the bus stop at the end of the street, thus that may be a matter worth pursuing in his IEP. As it is, the IEP acknowledges the student's post-secondary transition-related need to develop independent travel skills (Dist. Ex. 11 at p. 6). The CSE should elaborate on the student's needs in this area as relevant to the high school and post-secondary timeframe and possibly pursue evaluative information relevant to this end. As for addressing the need, when the CSE next convenes, it may also wish to consider memorializing in the IEP the CSE chairperson's suggestion made at the June 2019 CSE meeting that the student's counseling sessions could address concerns relative to his independent travel needs and ability to follow directions when exiting the bus (see Dist. Ex. 15 at p. 4). Other options the CSE could consider include adding travel training and/or annual goals relevant thereto to the student's IEP (see 34 CFR 300.39[a][2][ii], [b][4]; 8 NYCRR 200.1[ggg]). Further, the CSE may want to explore other special transportation strategies to address the student's behavior and communication-related needs instead of curbside pick-up and drop-off, such as assignment of a "bus stop monitor," described by the United States Office of Special Education and Rehabilitative Services as a strategy effective "[f]or students who may need assistance with 'going' to the bus stop or 'waiting' at the bus stop independently" (Questions and Answers on Serving Children with Disabilities Eligible for Transportation, 53 IDELR 268). There may come a time when it will suffice to simply formalize the bus driver's provision of prompts to the student to go straight home from the bus at the end of the street (see Tr. p. 33).

As a final matter, to the extent the district expressed concern over the IHO's order that the district implement the door-to-door transportation in three school days, the district is reminded that the student's special transportation must continue to be provided in accordance with the pendency provisions of the IDEA and its implementing regulations, from the date that the district was obligated to do so until the matter reaches its finality (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4], 4410[7][c]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 445, 452 [2d Cir. 2015]; M.R. v. Ridley Sch. Dist., 744 F.3d 112, 118-19 [3d Cir. 2014]; T.M., 752 F.3d at 170-71).

VII. Conclusion

A review of all of the evidence in this case shows that there is no reason to disturb the IHO's determination that the student required curbside special transportation.

I have considered the parties' remaining contentions and find that I need not address them in light of my decision herein.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
December 4, 2019**

**JUSTYN P. BATES
STATE REVIEW OFFICER**