



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 20-066

### **Application of the BOARD OF EDUCATION OF THE ALBANY CITY 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:**

Honeywell Law Firm, PLLC, attorneys for petitioner, by Michael W. Gadomski, Esq.

Getnick Livingston Atkinson & Priore, LLP, attorneys for respondents, by Patrick G. Radel, Esq.

### **DECISION**

#### **I. Introduction**

This proceeding arises under Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program in the least restrictive environment (LRE) to respondents' (the parents') son and ordered it to reimburse the parents for the costs of 1:1 aide and related services for the 2019-20 school year. The appeal must be dismissed.

#### **II. Overview—Administrative Procedures**

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law §3602-c). The task of creating an IESP is assigned to the same committee that designs educational programming for students with disabilities under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482), namely 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 related to IESPs, State law provides that "[r]eview of the recommendation of the

committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections of the IDEA and the analogous State law provisions 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[a]). 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

By way of background, the student has received a diagnosis of Down syndrome and is eligible to receive special education services as a student with multiple disabilities (Dist. Exs. 4 at p. 3; 6 at p. 2; 9 at p. 3).<sup>1</sup> Since at least the 2017-18 school year, the student received special education itinerant teacher (SEIT) services together with speech-language therapy, occupational therapy (OT), and physical therapy (PT) (Dist. Exs. 1 at pp. 21-22; 3 at p. 10).<sup>2</sup> The student's special education services were implemented at a private preschool program during the 2017-18 and 2018-19 school years (Dist. Exs. 3 at p. 10; 6 at p. 2).

A Committee on Preschool Special Education (CPSE) convened on April 11, 2018 for the student's annual review and to develop an IEP for the 2018-19 school year (see generally Dist. Ex. 1). The April 2018 CPSE determined that the student remained eligible for special education services as a preschool student with a disability and recommended five hours per week of SEIT services, four 30-minute sessions per week of individual speech-language therapy, two 30-minute sessions per week of individual OT, two 30-minute sessions per week of individual PT, and two 30-minute sessions per week of individual music therapy (id. at pp. 21-22). In addition, the April 2018 CPSE recommended that the student receive 12-month services in July and August 2018 due to "a chance of significant regression" (Tr. p. 37; Dist. Ex. 1 at p. 23).

A Committee on Special Education (CSE) convened on March 29, 2019 for the student's "CPSE to CSE transition" and to develop an IEP for the 2019-20 school year (Dist. Ex. 4 at p. 1). The March 2019 CSE determined that the student was eligible for special education services as a student with multiple disabilities and recommended a 12:1+1 special class placement and related services consisting of three 30-minute sessions per month of individual speech-language therapy, nine 30-minute sessions per month of speech-language therapy in a group, two 30-minute sessions per week of individual OT, two 30-minute sessions per week of individual PT, one 30-minute session per week of music therapy, and four one hour sessions per year of parent counseling and training (id. at pp. 3, 18-19). The meeting information summary attached to the IEP indicated that the parents were not in agreement with the recommendations and that they were interested in visiting two special class settings and a "[c]o-[t]eaching [p]rogram" (id. at p. 2).

In a letter dated May 14, 2019, the parent notified the district that the student would be attending a private school during the 2019-20 school year and requested to meet with the district to develop an IESP (Dist. Ex. 8).

The CSE reconvened on June 13, 2019, to formulate the student's IESP for the 2019-20 school year (see generally Dist. Ex. 9). The CSE continued to recommend a 12:1+1 special class placement together with two 30-minute sessions per week of individual OT, two 30-minute sessions per week of individual PT, and four one hour sessions per year of parent counseling and

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<sup>1</sup> The student's eligibility for special education as a student with multiple disabilities is not in dispute (34 CFR 300.8[c][7]; 8 NYCRR 200.1[z][8]).

<sup>2</sup> The hearing record refers to "SEIT" and special education itinerant services or "SEIS" interchangeably (see e.g. Tr. pp. 77, 135, 184; Dist. Exs. 1 at p. 2; 4 at p. 2; 6 at pp. 2-3).

training (compare Dist. Ex. 4 at pp. 18-19, with Dist. Ex. 9 at pp. 16-17). The CSE modified the student's speech-language therapy from the March 2019 IEP and recommended that he receive one 30-minute session per week of individual speech-language therapy, and two 30-minute sessions per week of speech-language therapy in a group (compare Dist. Ex. 4 at p. 18, with Dist. Ex. 9 at p. 18).<sup>3</sup> The meeting information summary attached to the IEP indicated that the parents had "advocate[d] for an integrated setting" (id. at p. 1).

According to a June 13, 2019 prior written notice, the parents were informed at the June 2019 CSE meeting that the special class and related services would be provided to the student at a district building (Dist. Ex. 10 at p. 1). In a letter dated August 5, 2019 the district acknowledged the parents' request for the district to furnish services to the student, who was enrolled in a private school, and notified them that, in accordance with their decision to send the student to a private school for the 2019-20 school year and "pursuant to the dual enrollment provisions of NY Education Law §3602-c," the district would provide the student with the special class and related services recommended in the June 2019 IESP at a particular district elementary school and provide transportation to and from the district's elementary school and private school (Dist. Ex. 14).

The parents disagreed with the recommendations contained in the June 2019 IESP and for the 2019-20 school year, the student attended the parentally-selected private school (Dist. Exs. 8; 10). The student received 1:1 aide services and related services at the private school at the expense of the parents (see Tr. pp. 466-70; Parent Ex. C).

#### **A. Due Process Complaint Notice**

In an amended due process complaint notice dated October 18, 2019, the parents alleged that the June 13, 2019 IESP did not meet the student's needs and failed to make programs and services available to the student on an equitable basis (Dist. Ex. 17 at p. 5).<sup>4</sup> Specifically, the parents claimed that the June 2019 IESP was deficient because it failed to: provide the student with appropriate support from a special education teacher in the private school; provide the student with support from a 1:1 aide at the private school; contain any educational goals; and provide the appropriate amount of individual speech-language therapy, OT, and PT (id.). Next, the parents argued that the district improperly conditioned the student's receipt of related services upon his attendance in the district's 12:1+1 special class program at the district public school (id.). The parents contended that the district's recommended program violated the LRE requirement as the student was capable of making meaningful educational progress with supports and services in a general educational setting (id.). Finally, the parents contended that the district violated their right to the free exercise of religion protected by the federal and State constitutions, by forcing them to choose from among options that would remove the student from his private religious school, require them to forgo or privately pay for necessary educational supports and services, or accept the district's plan which involved disruption to the student's education and well-being (id. at p. 6).

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<sup>3</sup> The June 2019 CSE did not recommend that the student receive music therapy during the 2019-20 school year (see Dist. Ex. 9 at pp. 18-19).

<sup>4</sup> The parents originally filed a due process complaint notice on August 21, 2019 (Dist. Ex. 15).

As relief, the parents requested that the IHO declare that the district violated the student's rights under applicable laws, direct the district to convene a CSE meeting to develop an IESP that remedies the stated deficiencies, and direct the district to provide reimbursement for expenses the parents incurred related to 1:1 aide and related services delivered to the student during the 2019-20 school year (Dist. Ex. 17 at p. 6).

## **B. Impartial Hearing Officer Decision**

An impartial hearing convened on December 4, 2019 and concluded on January 15, 2020 after three days of proceedings (Tr. pp. 1-522). In a decision dated March 4, 2020, the IHO determined that the district failed to offer the student an appropriate placement on an equitable basis in the LRE for the 2019-20 school year (IHO Decision at pp. 2, 36, 41). After summarizing the testimony of witnesses at the impartial hearing (id. at pp. 3-33), the IHO separately addressed arguments presented by the parties (id. at pp. 33-40).

With respect to whether the recommended 12:1+1 special class was appropriate or represented the student's LRE, the IHO rejected the district's assertion that the student needed to be educated with "developmentally appropriate peers," noting the lack of evidence that the district's proposed classroom offered such a grouping and the testimony of the parent's educational consultant specializing in inclusive classrooms (the educational consultant) that the student would benefit from exposure to nondisabled peers (IHO Decision at pp. 33-34). The IHO found that the recommended 12:1+1 special class was not the student's LRE, citing testimony of the educational consultant and evidence that the June 2019 CSE "did not consider the possibility of having [the student] placed in a less restrictive environment as it was required to do," including the possibility of providing special education services delivered at the private school (id. at pp. 36-37). The IHO further determined that the student could make progress in a general education setting with the assistance of a direct consultant teacher, full time 1:1 aide, and related services (id. at pp. 2, 34-40). In so finding, the IHO rejected the district's argument that a 1:1 aide was too restrictive, noting evidence that the student needed frequent refocusing and redirection (id. at pp. 34-35). The IHO also found no merit to the district's positions that the student did not have prerequisite skills or the capacity to follow the general education curriculum and that, therefore, the student needed a special class (id. at pp. 35-36). The IHO agreed with the district that the class size of a general education classroom in the district would be too large for the student to receive benefit even with integrated co-teaching (ICT) services but did not find the small class size of the recommended 12:1+1 special class to be determinative of its appropriateness given that the student's class in the private school was also small (id.). The IHO noted evidence in the hearing record that the student received benefit during preschool receiving SEIT and related services and, therefore, found "no reason why such services delivered at the [private school] would not also be beneficial and meet [the student's] needs" (id. at pp. 36, 38, 40). The IHO also cited evidence that the student "ha[d] managed satisfactorily in the [private school] class setting" during the 2019-20 school year (id. at pp. 39-40). Based on all of the foregoing, the IHO concluded that the district failed to demonstrate that the June 2019 CSE's recommendation for a 12:1+1 special class was an appropriate placement that satisfied the district's "responsibility under the dual enrollment statute" or represented the LRE for the student (id. at pp. 36, 37).

Specific to the district's recommendation that the special education program and services be delivered at the district public school, the IHO considered the parents' assertion that the "lengthy withdrawal from [the private school] . . . would be unnecessarily disruptive and harmful to [the student]" and found, given the "burdens to relocation" and the deference due to "the parents' choice of education for their child," withdrawing the student did not result in sufficient "advantage" (IHO Decision at pp. 38-39).

Lastly, the IHO stated that he was not addressing the issues relating to religion raised by both parties—i.e., the parents' claim that removing the student from his private religious school for so large a portion of the day deprived him of his free exercise of religion and the district's argument that religion is so "interweaved" into the entire curriculum that any assistance to the student violates the principle of separation of church and state—as they were "arguably" not within his jurisdiction and further that he did not believe that the district's proposal actually interfered with the student's or his family's ability to practice their religion or that "neutral" assistance to the student transgresses constitutional restrictions (IHO Decision at p. 40).

As for the 1:1 aide and related services funded by the parents and delivered to the student at the private school during the 2019-20 school year, the IHO noted the student's progress at the private school and "conclude[d] that there [we]re sufficient indications in the record that [the student] [wa]s managing satisfactorily in his current context at [the private school] and [wa]s benefiting from the special education and related services provided for him there at the expense of his parents" (IHO Decision at pp. 39-40). With respect to equitable considerations, the IHO found that the parents had "timely sought" equitable services from the district and "had been willing to look at the District's programs notwithstanding their noted disagreement[s]" (*id.* at p. 41). In contrast, the IHO noted that the district had "perhaps [been] excessively adamant that the parents accept its recommended program" (*id.*).

As relief for the district's failure to offer the student an appropriate program and services on an equitable basis in the LRE, the IHO ordered the district to reimburse the parents for the expenses of the 1:1 aide and related service providers for the 2019-20 school year and for any extended school year period (IHO Decision at p. 41).

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

The district appeals, contending that the IHO erred in determining that the district did not recommend an IESP that offered the student an educational program in the LRE. Specifically, the district argues that the IHO erred in determining that the student could make educational progress in a general education setting with the support of a special education consultant teacher, and further alleges that the student does not need a 1:1 aide. The district also argues that the IHO erred in finding that the district's recommended educational placement and corresponding transportation between the student's private school and the public school would place an unwarranted burden on the student. Ultimately, the district seeks a reversal of the IHO's decision and requests that the SRO vacate the IHO's reimbursement award to the parents for the private provision of a 1:1 aide and related services at the student's private school.

In their answer, the parents respond to the district's allegations and argue that the IHO decision should be upheld in its entirety.

## V. Applicable Standards

A board of education must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. § 1412[a][1][A]; Educ. Law § 4402[2][a], [b][2]). However, the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (see 34 CFR 300.137[a]). Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, such students are not individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]).

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).<sup>5</sup> "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (*id.*).<sup>6</sup>

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

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<sup>5</sup> State law provides that "services" includes "education for students with disabilities," which means "special educational programs designed to serve persons who meet the definition of children with disabilities set forth in [Education Law § 4401(1)]" (Educ. Law § 3602-c[1][a], [d]).

<sup>6</sup> State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007—Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 at p. 11, VESID Mem. [Sept. 2007], available at <http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf>). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (*id.*).

the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]).

## **VI. Discussion**

### **A. Scope of Review**

Before turning to the merits, it is necessary to determine which claims are properly before me on appeal.

Initially, the parents have not cross-appealed from the IHO's failure to address several claims raised in their amended due process complaint notice (see generally, 8 NYCRR 279.4[f]). In particular, the IHO did not address the parents' claim that the June 2019 IESP failed to contain academic goals or that the amount of related services recommended in the IESP was inappropriate. The regulations governing practice before the Office of State Review require that "[a] respondent who wishes to seek review of an impartial hearing officer's decision may cross-appeal from all or a portion of the decision by setting forth the cross-appeal in an answer. A cross-appeal shall clearly specify the reasons for challenging the impartial hearing officer's decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate the relief sought by the respondent" (8 NYCRR 279.4[f] [emphasis added]). Furthermore, the practice regulations specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][4]). Accordingly, the claims identified above have been abandoned and will not be further discussed.

Further, neither party has appealed the IHO's determination that he lacked jurisdiction over the issues related to free exercise of religion or separation of church and state or his findings that the services (1:1 aide, speech-language therapy, OT, and PT) obtained by the parents for the 2019-20 school year were appropriate or that equitable considerations weighed in favor of the parents' requested relief (see IHO Decision at pp. 39-41). Therefore, these determinations have become final and binding on the parties and will not be addressed herein (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*6-\*7, \*10 [S.D.N.Y. Mar. 21, 2013]).

### **B. June 13, 2019 IESP**

On appeal, the district argues that the IHO erred in finding that the June 2019 IESP failed to offer the student a program in the LRE and in concluding that the CSE should have recommended consultant teacher services with 1:1 aide services in lieu of the recommended 12:1+1 special class.

As an initial matter, the evidence upon which the IHO based his determinations must be discussed. The IHO determined that the hearing record did not support a finding that the student could not benefit from the general education setting. As support, the IHO cited evidence in the hearing record, including information that post-dated the June 2019 CSE meeting. For example, the IHO found that the student was "managing satisfactorily in his current context at [the private



school]" (IHO Decision at p. 40).<sup>7</sup> The IHO also relied heavily on the testimony of the parents' educational consultant regarding her opinions that were based, at least in part, on observations of the student at the private school on November 1, 2019 and her report dated November 25, 2019 (id. at pp. 34-40; see generally Tr. pp. 332-408; Parent Ex. B). Further, the IHO relied on testimony regarding observations of the student by district staff conducted after the June 2019 CSE meeting and testimony from the student's then-current kindergarten providers and the head of the private school (IHO Decision at pp. 37-40; see Tr. pp. 223-54, 258-330, 408-16, 421-62). However, this documentary and testimonial information was not available to the June 2019 CSE and therefore cannot be used to evaluate the adequacy of the IESP (see C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at \*13 [S.D.N.Y. Dec. 23, 2013] [finding that "a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events . . . that seek to alter the information available to the CSE"]; J.M. v New York City Dep't of Educ., 2013 WL 5951436, at \*18-\*19 [S.D.N.Y. Nov. 7, 2013] [holding that a progress report created subsequent to the CSE meeting may not be used to challenge the appropriateness of the IEP]; F.O. v New York City Dep't of Educ., 976 F. Supp. 2d 499, 513 [S.D.N.Y. 2013] [refusing to consider a subsequent school year IEP as additional evidence because it was not in existence at the time the IEP in question was developed]).

Notwithstanding the IHO's reliance, in part, on retrospective evidence, the IHO also cited permissible evidence, and an independent review of the entire hearing record as a whole supports the IHO's conclusion that the district failed to meet its burden to show that the June 2019 CSE offered the student an appropriate educational placement on an equitable basis in the LRE. While the hearing record contains evidence that was available to the June 2019 CSE regarding the student's significant cognitive, communication, social, motor, and self-help needs, and his need for one-on-one assistance throughout the day and a modified curriculum (see Dist. Exs. 4 at pp. 3-16; 6; see also Dist. Exs. 12; 13), other reports revealed that the student's needs were "adequately addressed" by and he "benefitted" from the SEIT services he had received at his private preschool program in a general education setting during the 2017-18 and 2018-19 school years, where reports also indicated that he had a "successful year" and had "made progress" (see Tr. pp. 76-78; Dist. Exs. 3 at pp. 10-12, 18; 4 at pp. 1-2; 6 at p. 9; 9 at p. 1; see also G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 577 [S.D.N.Y. 2010] ["One way of measuring the benefits of a placing a particular child in an integrated class is to look at the progress he or she in fact made in such classes."], aff'd 486 Fed. App'x 954 [Oct. 18, 2012]). Taking into account the student's needs and progress in his preschool program, there is insufficient evidence in the hearing record that the district made reasonable efforts to accommodate the student in the general education classroom with supplementary aids and services.

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<sup>7</sup> The IHO seemed to rely on evidence of the student's progress in the private school during the 2019-20 school year, not only to support the proposition that the student could receive benefit in a general education setting, but also to conclude that the private services funded by the parent were appropriate (see IHO Decision at pp. 39-40). The reliance on this evidence of the latter purpose is entirely appropriate as the parent sought reimbursement for the costs of those services and progress is a relevant factor to consider when evaluating whether a unilateral placement is adequate (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522; Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]).

## 1. Student's Needs

Before reviewing the CSE's recommended program and placement, it is necessary to consider the student's needs as described in the present levels of performance of the June 2019 IESP, which are not being challenged on appeal. According to the June 2019 IESP, the student had been previously evaluated using the Bayley Scales of Infant and Toddler Development-Third Edition (Bayley-III), the Peabody Developmental Motor Scales-Second Edition (PDMS-2), the Developmental Assessment of Young Children-Second Edition (DAYC-2), the Preschool Language Scales-Fifth Edition (PLS-5), and the Vineland Adaptive Behavior Scales-Third Edition (Vineland-3) (Dist. Ex. 9 at pp. 10-11). In addition, the March and June 2019 CSE considered February 2019 progress and evaluative updates provided by the student's then-current teachers and therapists (see Tr. pp. 58-64, 71, 99-104; Dist. Exs. 4 at pp. 3-16; 6; 9 at pp. 3-16).

The June 2019 IESP reflected results of administrations of the DAYC-2 to the student in March 2018 and February 2019 (Dist. Ex. 9 at pp. 10, 13). In March 2018, measures of the student's cognitive development yielded a standard score of 75 (5th percentile); in February 2019, the student's cognitive development standard score was 56 (1st percentile) (*id.* at p. 10).<sup>8</sup> The February 2019 DAYC-2 results reflected in the IESP indicated that the student was able to spontaneously name five or more objects, match five or more objects to corresponding pictures, understand the concept of "one," build bridges with blocks, and understand "more" versus "less" (*id.* at p. 13). The IESP present levels of performance also indicated that the student loved books, pointed out familiar characters, repeated common story phrases, knew how to hold a book, and "read" from left to right (*id.*). Additionally, the IESP reflected that the student knew common shapes and colors, completed a 24-piece jigsaw puzzle with little assistance, and stacked 7-8 blocks independently (*id.*). The student's ability to draw a face was emerging, in that he drew in a circular motion and at times, added two to three facial characteristics (*id.*). The student also was familiar with classroom rules and attempted to complete tasks without assistance (*id.* at p. 14). Regarding the student's academic needs, the IESP indicated that the student was "currently unable to count by rote to five, count up to five objects, recognize letters, sort objects by physical characteristics or identify objects that do not belong in a group" (*id.*). The IESP stated that the student required a "high level of prompting throughout the school day to transition between activities" and stay on task, and "extra time and patience" to allow him to complete tasks independently (*id.* at pp. 13, 14).

Turning to the student's communication skills, the June 2019 IESP reflected the February 2018 results of an administration of the PLS-5, which indicated that the student's auditory comprehension standard score of 76 was at the fifth percentile, and his expressive communication and total language standard scores of 74 fell at the fourth percentile (Dist. Ex. 9 at p. 10). According to the IESP, results of an administration of the PLS-5 reported in February 2019 indicated that the student's receptive and expressive language standard scores of 62 were at the first percentile (*id.* at p. 11). Specifically, the student had difficulty understanding pronouns, negation, spatial concepts, quantitative concepts, and inferences (*id.*). Results of a language sample indicated that the student spoke in primarily one to two-word utterances and had difficulty

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<sup>8</sup> The June 2019 IEP reflected the February 2019 special education teacher report that the student "resist[ed] teacher-led 'testing' and instructions," which "may have affected his DAYC-2 score" (Dist. Ex. 9 at p. 14).

naming objects based on a description and answering wh- questions (id.). Communication strengths reflected in the IESP were that the student used two-three word utterances, he knew colors, actions, and some basic spatial concepts, exhibited a good receptive single word vocabulary, followed one-step directions, and at times used nouns, verbs, modifiers, and pronouns in two-word combinations (id. at p. 13). The student's articulation was "characterized by numerous sound distortions, omissions, and substitutions" and results of an administration of the Goldman Fristoe Test of Articulation-Third Edition yielded a standard score of 55 at the second percentile (id. at p. 12). Additionally, the IESP indicated that the student's speech intelligibility was "poor" as only "about 50%" of his speech was "understood by a familiar listener" (id.).

Next, regarding the student's social development, the June 2019 IESP contained results from administration of the DAYC-2 social-emotional development measures from March 2018 (standard score 71) and February 2019 (standard score 60) (Dist. Ex. 9 at p. 10). The IESP present levels of performance reflected reports that the student greeted peers and adults by name and with eye contact, showed confidence in social situations, had a strong attachment to teachers and was affectionate with others, and engaged in make-believe play mainly with adults (id. at p. 14). The CSE identified the student's social/emotional needs as requiring "teacher-directed assistance to engage [the student] with peers throughout the school day" noting that, without assistance, the student preferred to watch peers rather than engage with them and that his ability to socialize with them was "greatly affect[ed]" by their inability to understand his speech (id.). According to the IESP, the student also needed to maintain personal space with peers and increase pretend play with them (id.). Although at times the student asked for help when frustrated, the IESP indicated that at other times the student "act[ed] out" by throwing toys, pushing peers, or yelling, and also that he needed to use words or pictures to express emotions, and increase focus on teacher-led activities and his ability to transition to non-preferred activities (id.). However, the CSE determined that the student did not require positive behavioral interventions or a behavioral intervention plan (id. at p. 16).

Regarding the student's fine motor skills and needs, the June 2019 IESP included results of a March 2018 administration of the PDMS-2 that indicated the student's fine motor quotient and grasping scores were at the first percentile and his visual-motor integration score fell at the fifth percentile (Dist. Ex. 9 at pp. 6-7, 10).<sup>9</sup> According to the IESP, although the student required step-by-step directions and repetition to complete fine-motor and table-top activities, he displayed more interest in them, a more consistent right hand preference, an emerging grasp pattern to hold markers, and the ability to complete large interlocking puzzles with minimal support (id. at p. 15). He also recognized his name, which he traced with hand-over-hand support, and he had made progress in his ability to imitate and copy a circle, and vertical/horizontal strokes (id.). The IESP indicated that the student demonstrated low muscle tone and decreased strength throughout his hands, trunk and extremities, but also that he exhibited improved upper extremity bilateral coordination skills including the ability to stabilize one hand and manipulate with the other hand with cues, and use scissors with support (id.). The occupational therapist's report reflected in the IESP indicated that the student had "improved with his ability to process sensory information

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<sup>9</sup> The February 2019 OT annual review summary indicated that although the student "continues to be making steady progress with fine motor, sensory processing and self-help skills" he also continued to demonstrate a fine motor delay according to the PDMS-2 and the therapist's clinical judgement (Dist. Ex. 6 at p. 9).

within his environment," including that he actively explored and did not withdraw from certain sensory media, manipulated sensory table items, explored swings, slides and other equipment, and tolerated upper extremity weight-bearing activities (id.). He was also "easily distracted by external visual and auditory stimulation and require[d] cues to redirect to tasks" (id.). In the area of self-help skills, the IESP indicated that at school the student independently sat and ate his lunch, consistently used a utensil, was successful with self-feeding using his fingers, drank from an open cup, and independently used a straw (id. at p. 13). The student was not independent in using the toilet at school, and he required assistance to put on his coat and persist when washing his hands (id.).

Turning to the student's gross motor skills, similar to the March 2018 results, the February 2019 administration of the PDMS-2 reflected in the June 2019 IESP indicated that the student's stationary and object manipulation scores fell at the fifth percentile, his locomotor score was at the second percentile, and his gross motor quotient was in the first percentile (Dist. Ex. 9 at pp. 3-4, 8-10). The IESP present levels of performance indicated that the student walked independently throughout his environment, ran, jumped with beginning propulsive movement, ascended and descended stairs holding a rail with improved pattern, control, and speed, and sat on the floor (id. at p. 15). He exhibited a "slightly slowed" speed of transition from the floor to standing as compared to his peers, "postural compensations," and decreased weight shifting while standing and "postural endurance" (id. at pp. 15-16). Management needs included in the IESP indicated that the student's "motor delays require[d] him to need additional support to complete motor and self-help activities successfully and safely throughout his environments" (id. at p. 16).

Regarding the effect of the student's needs on his involvement and progress in the general education curriculum, the June 2019 CSE determined that the student's "significant delays" in cognitive, language, social, and motor skills interfered with his ability to participate in age-appropriate activities (Dist. Ex. 9 at p. 16). Specifically, the IESP indicated that, as the student continued to grow and mature, his below average receptive, expressive, and pragmatic language skills would "negatively impact his ability to communicate effectively across all settings, including social interactions with peers, and in the classroom environment" (id.). Additionally, per standardized testing results, the student demonstrated gross and fine motor delays that required continued OT and PT services, and his weaker grasping, motor coordination and planning skills impacted his functional performance related to fine-motor and self-care skills (id.).

## **2. 12:1+1 Special Class**

For the 2019-20 school year, the June 2019 CSE continued to recommend a 12:1+1 special class placement (composed of 12 students, 1 special education teacher and 1 teaching assistant) for "core academic instruction" with related services, which it considered to be "the least restrictive and the most appropriate educational setting based on the data and [the student's] presenting needs" (Tr. pp. 47, 123, 128-29, 131; Dist. Ex. 9 at pp. 18-19; see Dist. Ex. 4 at pp. 18-19). State regulations provide that a 12:1+1 special class placement is designed for students "whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students" (8 NYCRR 200.6[h][4][i]). Management needs for students with disabilities are defined as "the nature of and degree to which environmental modifications and human or material resources are required to

enable the student to benefit from instruction" (8 NYCRR 200.1[ww][3][i][d]). In addition to the special class placement, the CSE recommended one 30-minute session per week of individual speech-language therapy, two 30-minute sessions per week of speech-language therapy in a group, two 30-minute sessions per week of individual OT, two 30-minute sessions per week of individual PT, and four one-hour sessions per year of parent counseling and training (Dist. Ex. 9 at pp. 18-19).

According to the assistant director of special education, who served as the CSE chairperson of the June 2019 CSE meeting (June 2019 CSE chairperson), the 12:1+1 special class was "a program for students with the skill deficits" that included developmental, fine motor and gross motor delays, and cognitive and communication deficits (Tr. pp. 93-94, 123; Dist. Ex. 9 at p. 1). The June 2019 CSE chairperson stated that the classroom teaching assistant in the 12:1+1 special class worked with all students under the direction of the special education teacher (Tr. p. 145). The March 2019 CSE chairperson indicated that in the 12:1+1 special class there existed greater opportunity for adult facilitation, scaffolding, and support for students' communication and social deficits, and to modify or change the pacing and presentation of curriculum than in a general education or "co-taught" classroom (Tr. pp. 45, 47, 62-63). The June 2019 CSE chairperson stated that in a district 12:1+1 special class the curriculum was modified, lessons were designed with "multiple points of entry" in order to accommodate the students' different abilities, instruction was adapted based on students' goals, and tasks were broken down and presented in a way that allowed the students to "access the curriculum" (Tr. pp. 103-04, 145-47). The special class also provided modeling, "a lot of visual supports, a lot of scaffolding" and a "language-enriched" setting where there was embedded "language support throughout the day via the special ed teacher as well as the therapists" (Tr. pp. 47, 92-93, 107-08, 128-29, 134-35). District staff testified that students in the "smaller classes" including the 12:1+1 special class exhibited similar levels of need as the student including similar academic and motor functioning (see Tr. pp. 64, 140-41, 518).

The June 2019 CSE chairperson testified that, based on the data available about the student's needs, the CSE determined that a 12:1+1 special class placement was appropriate for the student (Tr. pp. 98-99). In addition to the present level of performance information from the June 2019 IESP described above, the CSE chairperson testified specifically about reports that showed the student was struggling to meet the preschool learning standards, including that he exhibited difficulty with basic number sense, counting, phonemic awareness, letter identification, and producing written work, the latter which was also affected by his fine motor delays (Tr. pp. 99-100, 167-78; see Dist. Ex. 12). The student also demonstrated the need for adult support during social interactions and exhibited significant communication deficits (Tr. pp. 100-02, 162-63; see Dist. Exs. 4 at pp. 10-12; 12). Additionally, according to the CSE chairperson, the student demonstrated management needs including "extreme distractibility" that required "a high level of prompting and adult support," and difficulty with transitions (Tr. pp. 102, 166-67, 189; see Dist. Ex. 12).

As such, the CSE determined that the student required specially designed instruction, which the June 2019 CSE chairperson stated was "adapting as appropriate based on the needs of an eligible student, a content, methodology or delivery of instruction so that [the] student can

access the learning standards and the curriculum" (Tr. pp. 98-99, 103-04, 145-46).<sup>10</sup> According to the June 2019 CSE chairperson, specially designed instruction can only be delivered by a certified special education teacher, and not a 1:1 aide or general education teacher (Tr. p. 129). She testified that the June 2019 CSE considered special class placements: settings where students are removed from the general education environment and provided instruction only with students who receive special education services (Tr. pp. 122-23). Given the student's significant special education needs, his struggle within his preschool class of only eight other students, his need for a modified curriculum, and his need for a special education teacher to provide specially designed instruction and adapt instruction "in the moment," the June CSE recommended a 12:1+1 special class placement as being appropriate to meet his needs (Tr. pp. 100-04, 114-15, 123, 166, 201, 208-09).<sup>11</sup>

The June 2019 CSE chairperson testified that, in addition to the smaller class size of the 12:1+1 special class, the student needed "the ability for teachers to adapt . . . the instruction in the moment" when the student was not grasping it, scaffolding, and pacing of the curriculum (Tr. p. 209). The student also needed "the support of a certified special education teacher providing the specialized instruction through multiple modalities" including visual supports, tailored directions, and helping the student read the social landscape, accurately identify others' emotions, and interpret social cues (Tr. p. 211). According to the CSE chairperson, the student required "that explicit instruction in the moment before the opportunity is lost and that is provided in a special class setting, not in a mainstream classroom" (Tr. pp. 211-12). She further testified that those adaptations "cannot" be provided in a general education class, and that the student could not be "properly supported" in a general education kindergarten class because he could not access or meet the kindergarten learning standards (Tr. pp. 212-14). Therefore, the June 2019 CSE had not recommended a general education classroom placement for the student due to the "multiple data points" and his "developmental needs across all domains and areas," which indicated that "the level of specially designed instruction he needs goes above and beyond that of a general education classroom" (Tr. pp. 214-15).

Based on the student's needs, it is understandable that the June 2019 CSE recommended a 12:1+1 special class; however, the CSE's responsibilities did not end there and further discussion was necessary in order to determine whether the special class represented the student's LRE.

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<sup>10</sup> State regulation defines specially-designed instruction as meaning "adapting, as appropriate to the needs of an eligible student under this Part, the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability; and to ensure access of the student to the general curriculum, so that he or she can meet the educational standards that apply to all students" (8 NYCRR 200.1[vv]).

<sup>11</sup> The June 2019 CSE chairperson stated that the student did not need a 1:1 aide if he attended the 12:1+1 special class "since supports are embedded in the classroom environment" and they did not want the student to become "prompt dependent" (Tr. pp. 131-33). Visual aids, modified presentation of directions, and adapted instruction were some of the "embedded supports" provided in a 12:1+1 classroom that in her opinion, eliminated the need for a 1:1 aide for the student (Tr. pp. 134-36). Similarly, the district director of special education testified that the student did not require 1:1 teaching assistant services if he attended a 12:1+1 special class because that would have been "a more intensive level of support than he would need" (Tr. p. 508).

### 3. Least Restrictive Environment

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 300.107, 300.114[a][2][i], 300.116[a][2], 300.117; 8 NYCRR 200.1[cc], 200.6[a][1]; see T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 161-67 [2d Cir. 2014]; P. v. Newington Bd. of Educ., 546 F.3d 111, 113 [2d Cir. 2008]; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 132 [2d Cir. 1998]; Patskin v. Bd. of Educ. of Webster Cent. Sch. Dist., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]). Further, the New York Court of Appeal has indicated services for a parentally-placed nonpublic school student with a disability pursuant to § 3602-c should be determined based on what is appropriate to address the individual educational needs of the student, with consideration given to LRE principles (Bd. of Educ. of Bay Shore Union Free Sch. Dist. v. Thomas K., 14 N.Y.3d 289, 293-94 [2010]; Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder, 72 N.Y.2d 174, 183-88 [1988]).

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. of Borough of Clementon Sch. Dist., 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; the continuum also 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 (T.M., 752 F.3d at 161-67 [applying Newington two-prong test]; Newington, 546 F.3d at 119-20; see N. Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036,

1048-50 [5th Cir. 1989]). A determination regarding the first prong, (whether a student with a disability can be educated satisfactorily in a general education class with supplemental aids and services), is made through an examination of a non-exhaustive list of factors, including, but not limited to:

(1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class.

(Newington, 546 F.3d at 120; see N. Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50). The Court recognized the tension that occurs at times between the objective of having a district provide an education suited to a student's particular needs and the objective of educating that student with non-disabled peers as much as circumstances allow (Newington, 546 F.3d at 119, citing Daniel R.R., 874 F.2d at 1044). The Court explained that the inquiry is individualized and fact specific, taking into account the nature of the student's condition and the school's particular efforts to accommodate it (Newington, 546 F.3d at 120).<sup>12</sup>

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).

Applying the first prong of the Newington test, the hearing record does not support a finding that the student could not be satisfactorily educated in the general classroom, with the use of supplemental aids and services. The district focuses on the student's program in preschool to establish that it made reasonable efforts to accommodate the student in a general education classroom before recommending a special class. As noted above, this student, as a preschool student with a disability attended "'mainstream' general education classrooms with non-disabled students" for preschool, much like the student at issue in T.M. (752 F.3d at 153-54; see Dist. Exs. 1 at pp. 21-22; 3 at p. 10). However, similar to the facts weighed and considered by the Court in T.M., the evidence in the hearing record reflects that the student made progress and "was able to achieve a satisfactory education" while attending the general education preschool classroom (T.M., 752 F.3d at 162-63; see Tr. pp. 76-78; Dist. Exs. 3 at pp. 10-12, 18; 4 at pp. 1-2; 6 at p. 9; 9 at p. 1). Therefore, as the Court concluded in T.M., the facts in this case "clearly demonstrate[] that [the student] could succeed" in a full-day general education setting with supplementary aids and services (T.M., 752 F.3d at 162). In addition and also consistent with T.M., the hearing record does not contain sufficient evidence indicating that the student would "obtain greater educational

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<sup>12</sup> 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).



benefits from a more restrictive setting" (T.M., 752 F.3d at 162). In light of these facts, it is reasonable to conclude from the first prong of the Newington test that a full-day general education setting with supplementary aids and services should have been considered first as the least restrictive placement that could address the student's needs (see T.M., 752 F.3d at 162).

Here, there is little evidence in the hearing record to establish that the CSE engaged in any meaningful LRE considerations that were individualized to the student when making its recommendation to remove the student from his nondisabled peers for the majority of the instructional time envisioned under the student's plan for the 2019-20 school year. Further, on appeal the district does not point to evidence that contradicts the IHO's determination that the June 2019 CSE "did not consider the possibility of having [the student] placed in a less restrictive environment as it was required to do," including the possibility of providing special education services delivered at the private school (IHO Decision at pp. 36-37). When at issue in an impartial hearing, a district must establish that it considered the full range of supplementary aids and services that could be provided to facilitate the student's placement in the general education classroom to enable students with disabilities to be educated with nondisabled children to the maximum extent appropriate (34 CFR 300.42, 300.114, 300.116; 8 NYCRR 200.1[cc], [bbb]; Placements, 71 Fed. Reg. 46588 [August 14, 2006]). Moreover, a student with a disability must not be removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum (see 8 NYCRR 200.4[d][4][ii][d]). While the IDEA does not require modification of the curriculum beyond recognition (Daniel R.R., 874 F.2d at 1048), the need for modification is "not a legitimate basis upon which to justify excluding a child' from the regular classroom unless the education of other students is significantly impaired" (Oberti, 995 F.2d at 1222, quoting Oberti v. Bd. of Educ., 801 F. Supp. 1392, 1403 [D.N.J. 1992]).

Consistent with the IHO's determination on this point, there is no indication in the meeting information summary attached to the June 2019 IESP or the prior written notice documenting the CSE's recommendations that the June 2019 CSE considered either consultant teacher services or 1:1 aide services for the student or any other placement on the continuum other than the 12:1+1 special class placement that it ultimately recommended, as well as the possibility of ICT services delivered in a general education classroom in a district public school (see Dist. Exs. 9 at pp. 1-2; 10).

According to the June 2019 prior written notice, the June 2019 CSE considered ICT services as a recommendation for the student (Dist. Ex. 10 at p. 2).<sup>13</sup> The June 2019 CSE chairperson stated ICT services are provided in a regular education classroom that is taught by both a certified general education teacher and a certified special education who are responsible for the delivery of instruction, including specially designed instruction, to all of the 20-25 students in the class (Tr. pp. 118-19). However, the June 2019 CSE rejected ICT services due to concerns about the large class size, the level of the student's need for prompting, and the grade-level learning

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<sup>13</sup> 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 the class in which students receive ICT services must be staffed, at a minimum, with a special education teacher and a regular education teacher (8 NYCRR 200.6[g][2]).

standards that exist in the regular education kindergarten class (*id.*). The June 2019 CSE chairperson reiterated that a regular education classroom was not appropriate for the student because in his preschool class of eight other students, he struggled with the grade level standards and required a modified curriculum (Tr. pp. 119-121, 220-21). Specifically, she stated that "the curriculum within a co-teaching setting would not be able to be paced enough and scaffolded enough in order to appropriately meet [the student's] needs" (Tr. p. 120). The IHO agreed with the district's position that ICT services in a general education class setting in a district school would not be appropriate for the student due to the size of the classes in the district schools (*see* IHO Decision at pp. 35-36). However, the CSE's consideration of this lone option on the continuum was insufficient to fulfill the CSE's LRE obligation.

While the hearing record does not reflect that the CSE discussed consultant teacher services as an option for the student, the June 2019 CSE chairperson testified that she considered such services for the student, which she described as being at the "very top of the continuum" and provided in general education classrooms (Tr. pp. 114-15, 118, 193).<sup>14</sup> State regulations provide that consultant teacher services are for the purpose of providing direct services to students with disabilities who attend general education classes, or indirect services to the regular education teachers (*see* 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]). District staff testified that "[a] consultant teacher is a certified special education teacher who pushes into the classroom and provides specially-designed instruction to those students who have IEPs or who have education plans" and provides the student's accommodations or program modifications pursuant to the IEP (Tr. pp. 115, 486). The CSE chairperson averred that a consultant teacher model, whether direct or indirect, would not be appropriate for the student because, although less restrictive, the "rigorous" pacing, and "grade level" learning standards remained in that setting since it was a general education class (Tr. pp. 114-115). She testified that based upon the data presented, the student's needs were "so significant" that he required a higher level of service, more specially designed instruction, a whole environment that was language rich, and modified pacing of the curriculum (Tr. pp. 114, 117-118).<sup>15</sup>

When asked hypothetically if the student were to be placed in a district general education classroom, the June 2019 CSE chairperson indicated that "at the very least" he would need

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<sup>14</sup> The June 2019 CSE chairperson referred to some instructional settings on the continuum of special education as both "general" education and "regular" education interchangeably (*see* Tr. pp. 114-22).

<sup>15</sup> According to the June 2019 CSE chairperson, resource room services require removal of the student from the general education setting to receive "specially designed, supplemental instruction from a certified special education teacher," which could be provided in combination with consultant teacher services (Tr. pp. 121-22). However, she stated that "resource room in conjunction with consultant teacher [services] wouldn't be appropriate because, again, the data warrants the need for a modified curriculum for significant supports to create a language rich environment and to create that environment we would be looking at a smaller setting" (Tr. p. 122). She continued that "resource room both by itself and resource room in conjunction with a consultant teacher model was rejected" (*id.*).

consultant teacher services (Tr. p. 193). The district's director of special education (director) stated that if a consultant teacher were to provide services to the student at the private school, the teacher "would be working off of the general education curriculum" developed by the regular education teacher, and that there was "an expectation that the students have the prerequisite skills to be able to participate in the general education curriculum," such as a knowledge base that allowed students to learn at a similar rate as the other students in the classroom (see Tr. pp. 481-82, 485-87, 514-15).<sup>16</sup> According to the director, students with disabilities would work on the same material as their nondisabled peers, and although if recommended a consultant teacher may have worked "side by side" with this student at the private school, the person who had the "primary responsibility for instruction" in the private school program would be the regular education teacher (Tr. p. 486). She stated that otherwise, if the consultant teacher pulled the student to the side to "do something different" than the rest of the class, that would become a "one to one special class program" (Tr. p. 486).

Therefore, the June 2019 CSE did not recommend consultant teacher services to be provided at the private school because it determined that the student did not have the prerequisite skills to participate within the general education curriculum in order for him to make meaningful gains in the skills that he had yet to develop without adapting the curriculum itself (Tr. p. 489; see Tr. p. 514). The director further testified that "the prerequisite skills in order to participate in the general education programming" were a "requirement" for recommending consultant teacher services, and that consultant teachers could only provide support to students who were "moving toward mastery of grade level goals" (Tr. pp. 514-15).<sup>17</sup> According to the director because the student did not have the prerequisite skills, "he would not be moving toward mastery of the grade level curriculum" which she opined was "not able to be modified to his instructional level" (Tr. pp. 514-15).

However, in addition to the related services recommended to improve the student's communication and motor skills, the June 2019 IESP provided the student with supplementary aides and program modifications/accommodations including a multisensory approach, pre-sets for changes in routines and/or transitions, refocusing and redirection, a self-care schedule, and use of a picture schedule, and the present levels of performance, as detailed above, reflect that the student had some pre-academic skills including his knowledge of colors, shapes, actions, receptive vocabulary, name identification, and a beginning understanding of quantity (see Dist. Ex. 9 at pp. 13, 17-20). Additionally, the director testified that her understanding of the student in this matter

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<sup>16</sup> In this vein, the IHO determined that "the proper objective for a classified student is not to require that student to be able to keep up with his nondisabled classmates but to provide an educational setting that permits progress toward the specific goals for that student" (IHO Decision at p. 35). Although not an issue on appeal or dispositive in this matter, I note that despite the district's concern about the student's lack of prerequisite skills related to the general education curriculum, review of the June 2019 IESP shows that it did not include any academic or pre-readiness goals for the student (compare Tr. pp. 114-15, 212-14, 485, 487, 514-15, with Dist. Ex. 9 at pp. 17-18).

<sup>17</sup> The director testified that guidance from the New York State Education Department regarding consultant teacher services "specifically identifies the students must have prerequisite skills in relation to grade level material" in order to receive consultant teacher services (Tr. p. 515).

was that his prerequisite skills were at a pre-K level (Tr. p. 487).<sup>18</sup> The student also demonstrated other skills appropriate for a kindergarten setting including the ability to follow one-step directions, feed himself independently, show confidence in social situations, and engage with peers with support, and the June 2019 CSE chairperson testified that the student would benefit from access to typical peers (Tr. p. 195; Dist. Ex. 9 at pp. 13-14). Therefore, despite the student's significant special education needs, the evidence in the hearing record supports a finding that the student had made some progress in an inclusive preschool program with 1:1 SEIT and related services support and was demonstrating some pre-K level skills, such that the district was required to more fully engage in the discussion at the June 2019 CSE meeting as to whether education in the general classroom, with the use of supplemental aids and services—such as consultant teacher services—could be achieved satisfactorily for this student (Tr. pp. 76-78; Dist. Exs. 3 at pp. 10-12, 18; 4 at pp. 1-2; 6 at p. 9; 9 at pp. 1, 19-20).

Turning to the parties dispute about the "restrictiveness" and appropriateness of 1:1 aide or teaching assistant services provided in conjunction with individual consultant teacher services, the June 2019 CSE chairperson testified that to have a special education teacher in a general education classroom would be "highly restrictive" because the student would be the only one the teacher would be delivering services to, which would not "facilitate that student's immersion into the whole classroom environment" (Tr. pp. 215-16). The director opined that implementing 1:1 teaching assistant and consultant teacher services was not an appropriate model for the student as "his needs can be met in a less restrictive environment" such as the 12:1+1 special class, where he would not become "dependent" on an individual for his daily supports and instruction (Tr. pp. 507-08).<sup>19</sup> The CSE chairperson agreed that in a general education kindergarten class in the district, the student would require 1:1 aide support for the times when the consultant teacher was not providing direct services to him in the class, although she opined that would be "overly restrictive for him" (Tr. pp. 194-95).<sup>20</sup> On the topic of 1:1 aide support for the student, the CSE chairperson testified that guidance from the New York State Education Department was "very clear that a 1:1 [aide] could be overly restrictive," and that it was "really the most restrictive recommendation and support we can provide" (Tr. pp. 132-134, 216).<sup>21</sup> However, contrary to this blanket proposition, State

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<sup>18</sup> When asked for examples of appropriate inclusive opportunities for a student with needs such as the student in this matter, the director testified that one way would be to identify subjects or topics in which the student could "be prepared for meaningful participation" through meeting preset and pre-instructional needs in a special class setting before mainstreaming (see Tr. pp. 489-90, 503-05). The evidence in the hearing record does not reflect that the June 2019 CSE identified the student's strengths and contemplated possible subject areas or activities he could have successfully participated in a general education environment.

<sup>19</sup> The director described the role of a teaching assistant as supporting a student's instruction through the provision of accommodations but not developing the instruction, which is the role of the general education teacher (Tr. pp. 506-07). She continued that the regular education teacher provides that instruction "to the teaching assistant, who then supports the delivery to the student who is receiving instruction along with all of their peers at the same time in that classroom" (Tr. p. 507).

<sup>20</sup> However, the CSE chairperson also testified that the student would need 1:1 aide support in a general education classroom with only a general education teacher, but if in a general education class "that had a level of consultant teacher support that may not be necessary" (Tr. pp. 193-94).

<sup>21</sup> Other factors for the CSE's consideration, as noted in State regulation, include: the student's management needs,

regulation specifically states that a CSE must consider a number of factors before recommending a 1:1 aide on a student's IEP, including how the support of a 1:1 aide may enable the student to be educated with nondisabled peers (8 NYCRR 200.4[d][3][vii]). Thus, rather than amounting to an overly restrictive service on the continuum, State regulation specifically contemplates that a 1:1 aide could, under certain circumstances, help achieve a student's LRE. Since the June 2019 CSE failed to consider how a 1:1 aide—or for that matter other supplementary aids and services—could allow the student to attend a general education classroom, the CSE again failed to sufficiently engage in the Newington analysis.

Overall, testimonial evidence elicited at the impartial hearing, while providing some insight into the CSE's decision-making process when selecting the student's placement, was insufficient to establish that the CSE appropriately considered or applied the two-prong Newington test. Based on the foregoing, the evidence in the hearing record supports a finding that the June 2019 CSE did not meaningfully engage in the Newington analysis to determine whether the student could be satisfactorily educated in a general education classroom with the use of supplementary aids and services.

Even assuming that the district satisfied the first prong of the LRE inquiry, the evidence in the hearing record is also insufficient to show that the June 2019 IESP reflected the district's efforts to mainstream the student to the maximum extent appropriate (see Newington, 546 F.3d at 121). The June 2019 IESP provided that the student would receive 12:1+1 special class instruction for four and half hours per day in ELA, mathematics, social studies, and science (Dist. Ex. 9 at p. 18). The June 2019 CSE chairperson testified that within the four and a half hours per day the student was at the district's school he would also receive his related services (Tr. p. 140). She further stated that the school day is approximately six to seven hours, which would allow the student to pursue religious studies at the private school (Tr. pp. 138-39).

District staff testified that students transition out of the 12:1+1 special class throughout the day for mainstreaming opportunities (Tr. pp. 130-31, 491).<sup>22</sup> The June 2019 CSE chairperson explained that students in the 12:1+1 special class "have cafeteria time with other students" as well as "specials" such as gym, art, music, library and also "school-wide assemblies" (Tr. p. 130). She continued that "for a portion of [the student's] day he is with other students because this was deemed the level of specially-designed instruction and the type of environment he needs, but he has access to general education peers throughout the day in his non-core instruction areas or his

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goals for reducing the need for 1:1 support, the specific support the 1:1 aide would provide, other supports or accommodations that could meet the student's needs, the extent (e.g., portion of the day) or circumstances (e.g., transitions between classes) the student needs the 1:1 aide, staffing ratios, any potential harmful effect of having a 1:1 aide, and training and support that will be provided to the aide to help the aide understand and address the student's needs (8 NYCRR 200.4[d][3][vii]). Further, a State guidance document, dated January 2012, contemplates that a "goal for all students with disabilities is to promote and maximize independence," and provides examples of student needs that may require a CSE to consider a recommendation for the services of a one-to-one aide ("Guidelines for Determining a Student with a Disability's Need for a One-to-One Aide," Office of Special Educ. Field Advisory [Jan. 2012], at p. 1 & Attachment 2, available at <http://www.p12.nysed.gov/specialed/publications/1-1aidejan2012.pdf>).

<sup>22</sup> The parent testified that opportunities for inclusion with general education students for students in a 12:1+1 special class was "not something that's ever been discussed" with them (Tr. p. 481).

electives" (Tr. pp. 130-31). However, it is entirely unclear from the hearing record how this integration would occur for the student in the present case given his dual enrollment status. If it is the district's position that the student would be engaging in all of the foregoing activities in the district public school, this would seem to directly contradict its position that the student would have opportunity during the school day to travel to and attend the private school for at least religious instruction.

In summary, the hearing record supports the IHO's determination that the district failed to meet its burden to demonstrate that the June 2019 CSE offered the student a placement in the LRE for the 2019-20 school year.

#### **4. Location of § 3602-c Services**

Given the conclusions above, it is unnecessary to make a determination regarding the issue of the location at which the services in the IESP were to be delivered. Briefly, the IHO found that "removing and transporting [the student] from [the private school] to the District for attendance at the District for four and a half hours a day is an unwarranted burden on [the student] and not attended with a showing that it would be to his educational or social benefit" (IHO Decision at p. 3). On appeal, the district argues that the IHO erred in this finding and points to evidence that there would be "practical difficulties" and a lack of "environmental supports" associated if services were delivered to the student at the private school (Req. for Rev. at pp. 7-8).

Under federal law, all districts are required by the IDEA to participate in a consultation process with nonpublic schools located within the district and develop a services plan for the provision of special education and related services to students who are enrolled privately by their parents in nonpublic schools within the district equal to a proportionate amount of the district's federal funds made available under part B of the IDEA (20 U.S.C. § 1412[a][10][A]; 34 CFR 300.132[b], 300.134, 300.138[b]). Pertinent to the parties' claims in this proceeding, part of the consultation process is supposed to include a discussion of "how, where, and by whom special education and related services will be provided . . . including a discussion of types of services, including direct services and alternate service delivery mechanisms, how such services will be apportioned if funds are insufficient to serve all children, and how and when these decisions will be made" (20 U.S.C. § 1412[a][10][A][iii][IV]). The services plan provisions under federal law also clarify that "[n]o parentally-placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school" (34 CFR § 300.137 [a]).

Separate from the services plan envisioned under the IDEA, the Education Law in New York has afforded parents of resident students with disabilities with a State law option that requires a district of location to review a parental request for dual enrollment services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). For requests pursuant to § 3602-c, the CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as

compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district" (*id.*).<sup>23</sup>

In interpreting a prior version of § 3602-c, the New York Court of Appeals addressed the question of whether a district must provide special education programs and services to a student with a disability at the nonpublic school a student attends, and found that the location in which services are provided to a parentally-placed nonpublic school student with a disability pursuant to § 3602-c should be determined based on what is appropriate to address the individual educational needs of the student, with consideration given to LRE principles (*Thomas K.*, 14 N.Y.3d at 293-94; *Wieder*, 72 N.Y.2d at 183-88).<sup>24</sup> In *Wieder*, the Court of Appeals held that the prior version of Education Law § 3602-c neither mandated that all services for children with disabilities be provided on location in public schools, nor contained a "general compulsion" that those services be provided in every case on location at a private school in which a student is voluntarily enrolled (72 N.Y.2d at 187-88). In holding that the school district was required to provide the services of a 1:1 aide at the student's nonpublic school, the Court of Appeals in *Thomas K.* emphasized that the determination should be made on a case-by-case basis guided by the student's needs but noted that, "[a]s a practical matter" in that case, if the services were not provided at the nonpublic school, "it would be necessary for the child to withdraw from the school his parents selected for him in order to receive the required services" (14 N.Y. 3d at 293-94).

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<sup>23</sup> State guidance provides that:

The manner (how, where and by whom) special education and related services will be provided to students is determined by the district of location based on the consultation process and in consideration of the individual needs of the student. The final decision with respect to services provided to individual students is made by the CSE of the district of location. Services provided to parentally placed students may be provided on the site of the private school or at another location.

("Chapter 378 of the Laws of 2007—Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 at p. 5, VESID Mem. [Sept. 2007], [available at http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf](http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf)).

<sup>24</sup> The statutory language that the Court was interpreting was amended in 2007, striking the language directing the CSE to follow the process "in accordance with the provisions of section forty-four hundred two" (i.e., the statutory provision that describes how a board of education is responsible for and selects services for a public school student) and adding language directing the CSE to "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district" (N.Y. Session Laws, L.2007 c.378). State guidance issued shortly after the amendments indicates that "[t]he new State legislation is intended to maintain the level of services provided to NYS nonpublic students with disabilities through IEPs under the former provisions of Education Law section 3602-c" ("Chapter 378 of the Laws of 2007—Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 at p. 11, VESID Mem. [Sept. 2007], [available at http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf](http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf)).

Here, since the evidence in the hearing record does not demonstrate that the district offered the student an appropriate program and services on an equitable basis in the LRE, the location at which the district recommended the student receive the program is not determinative. Briefly, however, and as alluded to above, the totality of the recommendations in the June 2019 IESP were such that it is not entirely clear how the student's schedule was going to permit him to also attend the private school for more than a small portion of each school day, if that. According to the June 2019 CSE chairperson, the head of the private school who attended the June 2019 CSE meeting expressed "concern[] with the location . . . of services" (Tr. pp. 202-03). As discussed above, the June 2019 IESP provided that the student attend a 12:1+1 special class program at the district public school for approximately four and a half hours out of the six to seven hours that constitute a normal school day (see Tr. pp. 124, 139; Dist. Ex. 9 at p. 18). On top of the 12:1+1 special class, the IESP provided that the student would receive related services in the district public school for 3.5 hours per week (Dist. Ex. 9 at pp. 18-19).<sup>25</sup> Also not included in the four and a half hours per day, the student would have to travel back and forth between the private and the public schools, although, according to the June 2019 CSE chairperson, the distance between the public school and the private school only amounted to "about five to eight minutes" travel one way (Tr. pp. 139-40). To the extent the recommended program contemplated that the student would attend lunch and recess and possibly specials at the district public school as well (see Tr. pp. 130-31), it would leave a very small window for the student to attend the private school during the week. The June 2019 CSE chairperson indicated that this schedule would permit the student to engage in religious studies at the private school (Tr. pp. 138-39); however, the head of the private school testified that the student "would absolutely not be able to receive the benefits" of the religious day school education since he would be in the private school building "for a maximum of two hours a day" (Tr. pp. 295-96).

While generally it may be permissible for a CSE to recommend that special education services be delivered in a location other than a private school, it is less clear that it would be consistent with the § 3602-c statutory scheme and the case law discussed above if the recommendations were made in such a way as to cause the student's attendance at the private school placement to become negligible. Ultimately, given the determinations herein, I decline to further opine on this issue.

## **VII. Conclusion**

Based on the foregoing, the evidence in the hearing record supports the IHO's conclusion that the district failed to meet its burden to show that it offered the student an appropriate program and services on an equitable basis in the LRE. As to the relief that the IHO awarded, the district did not directly appeal the IHO's determination that the 1:1 aide and related services that the parents funded during the 2019-20 school year were appropriate for the student or that equitable considerations weighed in favor of the parents' request for relief. Accordingly, these aspects of

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<sup>25</sup> The IESP provided that the delivery location for the related services would "vary in the school building based on [the] student[s] instructional needs in relation to the activities being utilized in accordance with individual IEP goals, progress and student generalization of skills" (Dist. Ex. 9 at pp. 18-19). Testimony indicated that some of the related services may have been delivered within the 12:1+1 special class (see Tr. pp. 140-41).



the IHO's determination are final and binding on the parties, and the relief the IHO awarded shall not be disturbed.

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
May 13, 2020**

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**SARAH L. HARRINGTON  
STATE REVIEW OFFICER**