The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 22-010

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the Westhampton Beach Union Free School District

DECISION

Appearances:
Law Offices of Anne Leahey Law, LLC, attorneys for respondent, by Anne C. Leahey, Esq.

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 parent) appeals from the decision of an impartial hearing officer (IHO) which determined that the educational program and services offered by respondent's (the district's) Committee on Special Education (CSE) for the student for the 2021-22 school year was appropriate. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the

identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The student in this case has been the subject of 12 prior State-level administrative appeals (see Application of a Student with a Disability, Appeal No. 21-249; Application of a Student with a Disability, Appeal No. 21-181; Application of a Student with a Disability, Appeal No. 21-019; Application of a Student with a Disability, Appeal No. 20-135; Application of a Student with a Disability, Appeal No. 19-121; Application of a Student with a Disability, Appeal No. 19-021; Application of a Student with a Disability, Appeal No. 18-110; Application of a Student with a Disability, Appeal No. 18-075; Application of a Student with a Disability, Appeal No. 18-064; Application of a Student with a Disability, Appeal No. 17-079; Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040). Accordingly, because the parties are familiar with the facts and procedural history preceding this case, as well as the student's educational history, it is not necessary to repeat them in detail herein. Additionally, given the disposition of this matter on procedural grounds, a detailed recitation of the student's educational history is not necessary.

Briefly, however, the CSE convened on both June 9, 2021 and June 17, 2021, for the purposes of developing an IEP for the student for the 2021-22 school year (Joint Ex. III at p. 1; see Joint Exs. IV-VI). Finding that the student remained eligible for special education as a student with an intellectual disability, the June 2021 CSE recommended the following: a 12-month school year program in a 12:1+1 special class placement with related services, which included two 30-minute sessions per week of individual occupational therapy (OT), two 30-minute sessions per week of individual physical therapy (PT), three 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a small group, four 90-minute sessions per week of individual special instruction (delivered in the home and community), and two 60-minute sessions per month of parent counseling and training (delivered in the home and school) (Joint Ex. IV at pp. 1, 15-18).[1] The CSE also recommended the support of a 1:1 aide during transitions; additional supplementary aids and services, program modifications, and accommodations; assistive technology devices and services (an augmentative communication device, i.e., an iPad at home and at school, access to a computer during classwork, and access to audible books); and supports for school personnel on behalf of the student (id. at pp. 16-17). In addition, the June 2021 CSE developed annual goals with corresponding short-term objectives, and recommended strategies to address the student's management needs, a coordinated set of transition activities, measurable postsecondary goals, testing accommodations, and adapted physical education (id. at pp. 9-15, 18-21). The CSE specifically identified a nearby public school district—Eastport-South Manor Central School District (ESM)—as the location within which to implement the student's IEP (Joint Exs. III at p. 4; IV at p. 22).

During the June 17, 2021 CSE meeting, the parent disagreed with the recommendation for a 12:1+1 special class at ESM and indicated his intent to file a due process complaint notice challenging the IEP (see Joint Ex. III at p. 4).

A. Due Process Complaint Notice

In a due process complaint notice, dated June 17, 2021, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2021-22 school year (see IHO Ex. I). The parent argued that the "structure and composition of the June 2021 CSE was fundamentally compromised," committee members were "denied access to several forms of vital information," the CSE chairperson "acted 'unilaterally'" in determining the program and placement recommendation for the student, the CSE improperly predetermined the student's program and placement for the 2021-22 school year, the CSE chairperson refused to file for an "educational variance" for the district's 12:1+1 special class, and the CSE "failed to conduct a meaningful analysis" regarding placement of the student in the district and failed to recommend a placement for the student in the least restrictive environment (LRE) or an "appropriately ambitious" IEP (IHO Ex. I at pp. 1-2). As relief for the alleged violations, the parent requested an order directing the

[1] For summer 2021, the CSE recommended a 12:1+1 special class, along with one 30-minute session per week of individual OT, one 30-minute session per week of individual PT, two 45-minute sessions per week of individual speech-language therapy, and one 60-minute session per month of individual parent counseling and training (delivered in the home) (Joint Ex. IV at pp. 17-18). The IEP indicated that the student would receive the 12-month services at a Board of Cooperative Educational Services (BOCES) program (id. at p. 18; see Joint Ex. III at p. 4).

student's placement in the LRE, removal of the district's CSE chairperson, and "back-end" compensatory education (id. at p. 2).[2]

In response, the district interposed an answer generally denying those allegations contained in the parent's due process complaint notice (see IHO Ex. II). In general, the district alleged that the CSE met during two separate meetings, which combined lasted approximately seven hours, to recommend an appropriate placement for the student for the 2021-22 school year (IHO Ex. II at pp. 1-2). In addition, the district made a motion to dismiss the due process complaint notice for the failure to state a cause of action for which relief could be granted (id. at pp. 5-6). In its motion to dismiss, the district further alleged that the district's Board of Education had the exclusive authority to remove the CSE chairperson, that the district had the right to have its attorney at the CSE meetings, the June 2021 IEP was developed in accordance with State regulations, and the recommended placement for the 2021-22 school year was the student's LRE (id. at pp. 6-11).[3]

B. Impartial Hearing Officer Decisions

After a prehearing conference on August 19, 2021, the parties continued to the impartial hearing on September 21, 2021, which concluded on December 21, 2021, after six days of proceedings (Tr. pp. 1-1164).

As further described in greater detail below, the IHO issued an interim decision directing the CSE to apply to State Education officials, over the district's objection, to seek a variance from State regulations to allow the student to attend a different 12:1+1 classroom within the district that consisted of younger students (IHO Ex. VIII). After State officials denied the variance request, the IHO issued a final decision finding that the district offered the student a FAPE, the CSE did not predetermine the student's programming, and the proposed 12:1+1 placement in the IEP satisfied the LRE requirement (IHO Decision at pp. 16-23). The IHO rejected the parent's arguments regarding the weight to be accorded to various aspects of opinion testimony from a private consultant and the district's transition coordinator (id. at pp. 23-25). Therefore, the IHO dismissed the parent's claims (id. at pp. 23-25).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO misapplied the principles of LRE and failed to consider evidence that the June 2021 CSE – and more particularly, the CSE chairperson – predetermined the recommendation for a 12:1+1 special class placement, as well as the location within which to implement the June 2021 IEP. The parent also argues that the 12:1+1 special class at ESM was not an "appropriately ambitious" program for the student in the LRE in that it did not offer science and social studies, failed to offer access to general education curriculum, and failed

[2] The issue of removal of the district's CSE chairperson was also the subject of an appeal to the Commissioner of Education, who found that she did not have the authority to grant the relief sought by the parent (see Appeal of C.K., 61 Ed. Dep't Rep., Decision No. 18,069 [2022], available at http://www.counsel.nysed.gov/Decisions/volume61/d18069).

[3] The IHO denied the district's motion to dismiss the due process complaint as insufficient and reserved a decision regarding the district's argument that the parent's due process complaint notice failed to state a claim upon which relief could be granted until a full hearing on the merits was held (IHO Decision at p. 6; Tr. pp. 29-32; IHO Ex. VIII at p. 5).

to differentiate instruction. As relief, the parent seeks to overturn the IHO decision and "effectuate" the relief requested in his due process complaint notice (Req. for Rev. at p.10).

Although the district served the parent with an answer to the request for review on February 14, 2022, it was not received by the Office of State Review until March 7, 2022. For its answer, the district denies each and every material allegation contained in the request for review. In addition, the district argues that the parent's request for review fails to comply with the practice regulations governing appeals to the Office of State Review for numerous reasons.

V. Discussion

A. Preliminary Matters—Compliance with the Practice Regulations

Initially, I note that neither party's efforts to comply with the practice regulations in 8 NYCRR Part 279 can be described as adequate, and both parties have a history of noncompliance over the course of the twelve prior State-level reviews, albeit the manner of noncompliance varies from case to case.[4]

First, State regulation requires that any party "who intends to seek review by [an SRO] of the decision of an [IHO] shall personally serve upon the opposing party, . . . , a notice of intention to seek review" in the form described therein (8 NYCRR 279.2[a]). In addition, an appeal from an IHO's decision to an SRO—whether the appeal is by a district or a parent—must be initiated by timely personal service of a verified request for review and other supporting documents, if any, upon respondent (8 NYCRR 279.4[b], [c]). Personal service on a school district is made "by delivering a copy thereof to the district clerk, to a trustee or member of the board of education of such school district, to the superintendent of schools, or to a person who has been designated by the board of education to accept service" (8 NYCRR 279.4[b]). The petitioner must personally serve the opposing party with the notice of intention to seek review no later than 25 days after the date of the IHO's decision and with the request for review no later than 40 days after the date of the IHO's decision (8 NYCRR 279.2[b]).

Generally, the failure to comply with the practice requirements of Part 279 of the State regulations, including the failure to properly serve an initiating pleading in a timely manner, may result in the rejection of the submitted documents or the dismissal of a request for review by an SRO (8 NYCRR 279.8[a]; 279.13; see B.C. v. Pine Plains Cent. Sch. Dist., 971 F. Supp. 2d 356, 365-66 [S.D.N.Y. Sept. 6, 2013] [upholding an SRO's dismissal of a parent's appeal where, among other procedural deficiencies, the amended petition was not personally served upon the district]; Application of a Student with a Disability, Appeal No. 16-015 [dismissing a parent's appeal for failure to effectuate proper personal service of the petition upon the district where the parent served a district employee not authorized to accept service]; Application of a Child with a Disability, Appeal No. 06-117 [dismissing a parent's appeal for failure to effectuate proper personal service in a timely manner where the parent served a CSE chairperson and, thereafter, served the superintendent but not until after the time permitted by State regulation expired]; see also Application of a Student with a Disability, Appeal No. 12-042 [dismissing parent's appeal for failure to properly effectuate service of the petition in a timely manner where the parent served the

[4] In more recent cases a different attorney has appeared for the district and cured some deficiencies. The parent is also an attorney with ample experience in the impartial hearing and State-level review procedures.

district's counsel by overnight mail]; Application of a Student with a Disability, Appeal No. 11-013 [dismissing parent's appeal for failure to timely effectuate personal service of petition upon the district]; Application of a Student with a Disability, Appeal No. 11-012 [dismissing parents' appeal for failure to timely effectuate personal service of petition upon the district]; Application of a Student with a Disability, Appeal No. 09-099 [dismissing parents' appeal for failure to timely effectuate personal service of the petition upon the district]; Application of the Dep't of Educ., Appeal No. 05-082 [dismissing a district's appeal for failure to personally serve the petition upon the parent where the district served the parent's former counsel by overnight mail]; Application of the Dep't of Educ., Appeal No. 05-060 [dismissing a district's appeal for failing to timely file a hearing record on appeal]; Application of a Child with a Disability, Appeal No. 05-045 [dismissing a parent's appeal for, among other reasons, failure to effectuate proper personal service where the parent served a school psychologist]; Application of the Dep't of Educ., Appeal No. 01-048 [dismissing a district's appeal for failure to personally serve the petition upon the parent where the district served the parent by facsimile]).

In this matter, the parent failed to initiate the appeal in accordance with the procedures prescribed in State regulations (see 8 NYCRR 279.4[b]).[5] On January 31, 2022, the parent served a notice of intention to seek review upon the district by delivering the same to a "drop box" located at a district office (see Jan. 31, 2022 Parent Aff. of Service).[6] Thereafter, on February 4, 2022, counsel for the district filed with the Office of State Review a copy of the hearing record. Next, on February 7, 2022, the parent served the notice of request for review, request for review, and memorandum of law by delivering the documents to the same "drop box" referenced above (see Feb. 7, 2022 Parent Aff. of Service). On February 10, 2022, the Office of State Review received for filing the notice for request for review, request for review, and memorandum of law (see generally Req. for Rev.).

As noted on the Office of State Review's website, which describes the appeals process, State regulations do not preclude a school district and a parent from agreeing to waive personal service (see "Overview to Part 279 (as revised Effective January 1, 2017): Serve and File the Request for Review," Office of State Review, available at https://www.sro.nysed.gov/book/serve-and-file-request-review).[7] However, there is no indication that the district agreed to waive personal service in this instance. Rather, in the last appeal initiated by the parent on the student's

[5] As one court put it, the failure to "properly initiate [an] appeal to the SRO 'should be equated with failure to bring an appeal at all'"(B.C., 971 F Supp 2d at 367).

[6] This address appears to be the "district office" for the district (see Joint Ex. III).

[7] In light of the COVID-19 pandemic, alternate service had been automatically authorized through a series of general orders issued by the undersigned throughout the pandemic; however, the last general order expired on July 30, 2021 and was not renewed thereafter (see "Sixteenth Revised General Order Regarding Coronavirus Disease 2019 and Recommencement of Timelines under 8 NYCRR Part 279," at pp. 3-4, Office of State Rev. [July 8, 2021], available at https://www.sro.nysed.gov/common/sro/files/16th-revised-general-order-7.8.21_0.pdf). In any event, the parent's purported service of the request for review via drop box was not compliant with the alternate service requirements set forth in the general order, which permitted a petitioner to serve the notice of intention to seek review, review for review, and supporting papers to the respondent's last known address by certified mail, return receipt requested.

behalf, the parent utilized the same method of serving the district via "drop box."[8] In its answer in that matter, the district took issue with the parent's failure to effectuate personal service, and in the decision, the undersigned noted the allegation but indicated that it was unnecessary to address the service issue since the parent's appeal was, in any event, untimely (Application of a Student with a Disability, Appeal No. 21-249). To the extent the parent was under the misimpression that the district consented to waive personal service prior to that time, the district's answer in Application of a Student with a Disability, Appeal No. 21-249, should have cured the parent of that illusion and put the parent on notice that the district did not consent to the use of the drop box as an alternative method of service.[9]

Initially, no answer was filed with the Office of State Review within the prescribed timelines, and given the absence of any showing that the parent had personally served the district with the request for review, obtained an agreed upon waiver of personal service, or obtained permission from an SRO for service by means other than personal service upon the district, I was inclined to determine that the parent failed to effectuate proper service in this matter and dismiss the appeal on that basis.[10]

However, an answer in this proceeding eventually arrived after the undersigned nearly completed and issued this decision. The filing of the answer was delayed due to the fact that the envelope containing the answer was addressed to "Office of State Review, New York State Education Department, Albany, NY 12205" with no particular street address, and, therefore, it was unsurprisingly mis-delivered to the postal service's best guess, the State Education Department's historic main building, rather than with the Office of State Review, which is situated in a different municipality. At some point in time, unknown State employees identified the materials as intended for the Office of State Review and forwarded the material in the original mailing envelope which was received in the afternoon of March 7, 2022. To make matters worse, the accompanying transmittal letter identified the answer as being filed in SRO Appeal No. 21-249, initially leading

[8] It appears that the parent additionally used this method of service in Application of a Student with a Disability, Appeal No. 21-181, and Application of a Student with a Disability, Appeal No. 21-019. The parent's appeals in both of these prior matters were dismissed for the parent's failures to comply with other provisions of Part 279 of the regulations. Prior to those matters, the parent personally served pleadings in several appeals, including Application of a Student with a Disability, Appeal No. 20-135; Application of a Student with a Disability, Appeal No. 19-121; Application of a Student with a Disability, Appeal No. 19-021; Application of a Student with a Disability, Appeal No. 18-110; Application of a Student with a Disability, Appeal No. 18-075; Application of a Student with a Disability, Appeal No. 18-064; Application of a Student with a Disability, Appeal No. 17-079; and Application of a Student with a Disability, Appeal No. 17-015; and Application of a Student with a Disability, Appeal No. 16-040).

[9] This method of service via "drop box" would not be an advisable form of alternative service in any event, as it does not offer the assurances that the respondent received the documents, such as a return receipt in the case of certified mail.

[10] These concerns with respect to the parent's failure to comply with the practice regulations are not new. The parent has been repeatedly cautioned that his failures to comply with the practice regulations could result in dismissal or rejection of his pleadings and, currently, four of the parent's appeals were dismissed (Application of a Student with a Disability, Appeal No. 21-249; Application of a Student with a Disability, Appeal No. 21-181; Application of a Student with a Disability, Appeal No. 21-019 and Application of a Student with a Disability, Appeal No. 19-021) for the failure to comply with the practice regulations, as well as on alternative grounds.

the staff of the Office of State Review to believe it was a duplicate filing in that proceeding. The filing is late due to noncompliance with dictates of Part 279.

The parent did not file a reply to the district's answer and the procedural defenses asserted therein and frankly, it is too late at this juncture to return to the drawing board to fully address the parties' respective accusations. Fortunately, it is unnecessary as I fully examined the hearing record and found the IHO's ultimate determination was supported by the evidence. Although I will not dismiss the appeal outright or reject the answer outright, both sides are warned that my patience has been exhausted and future filings from either side may be rejected as a sanction if noncompliance with Part 279 continues.

B. Impartial Hearing Officer Determinations

As for the merits of the appeal, the IHO conducted a lengthy proceeding in this matter, and to a great extent it covered ground that had been addressed in previous school years involving the student. In an interim decision, dated September 14, 2021, the IHO granted the parent's request for an interim decision requiring the district to apply to the New York State Education Department (NYSED) for a variance from State regulations pertaining to age range grouping requirements for the district's 12:1+1 special class (see IHO Ex. VIII; see also 8 NYCRR 200.6[h][5]-[6]).[11] The IHO was unpersuaded by the district's conclusory arguments relating to what the district characterized as the "excessively" large age discrepancy of 73 months between the student and the youngest student in the 12:1+1 special class (IHO Ex. VIII at pp. 10-14). The IHO noted that, unlike the prior administrative proceeding pertaining to the 2020-21 school year where a special class had been unavailable at the district's high school, in this instance, the district had a 12:1+1 special class available in its high school (id. at p. 14). The IHO further noted that the June 17, 2021 CSE recommended a 12:1+1 special class for the student, which "all" members of the CSE "agreed was the most appropriate special class ratio to address the student's academic, social, physical and management needs and goals" (id. at pp. 6, 14). Accordingly, the IHO held there was a "compelling educational justification to apply for an age variance" based upon LRE considerations for the student (id. at p. 14). Therefore, the IHO directed the district to make an application to NYSED for a variance for the district's 12:1+1 special class (id. at pp. 14-15).[12]

In a final decision dated January 28, 2022, the IHO determined that the district offered the student a FAPE for the 2021-22 school year (IHO Decision at p. 26). The IHO first addressed the parent's claim that the district predetermined recommendations for the student and found that the two CSE meeting transcripts reflected that both parents actively and meaningfully participated in the CSE process, were able to express their concerns and compose questions to the other committee

[11] The IHO acknowledged that this is not the first time the district has been made to go through the variance process and that another IHO already visited that topic and that State officials previously denied a variance. The district challenged that IHO's directive to seek a variance in Application of a Student with a Disability, Appeal No. 18-110, but that aspect of the appeal was dismissed as moot due to the State's denial of the variance request.

[12] Pursuant to the directive of the IHO, the district applied to NYSED for the variance, and on October 14, 2021 the NYSED Office of Special Education, Special Education Quality Assurance, denied the request based on the district's representation that "the discrepancy of the ages that would result from this variance [would] not [be] in the best educational interests of any of the involved students," as well as "the lack of an educational justification that supports exceeding the age range" (IHO Ex. X). According to the IHO, the parent has challenged the district's application and NYSED's decision in an Article 78 proceeding (IHO Decision at p. 7 n.2).

members, and participated in the development of the June 2021 IEP, and that the CSE fully reviewed the continuum of special education programs and considered alternatives before settling on the recommendation that the student attend a 12:1+1 special class at ESM (id. at pp. 16-19). Therefore, the IHO found that parents meaningfully participated in the CSE process and that the district did not predetermine the student's IEP recommendations (id. at p. 19).

Next, the IHO addressed the parent's claim that the CSE failed to recommend the LRE for the student, which the parent argued was the district's high school (IHO Decision at pp. 20-26). The IHO analyzed the issue applying the two-prong test established in P. v. Newington Board of Education, 546 F.3d 111, 118-19 (2d Cir. 2008): "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" (id. at pp. 21-26). The IHO pointed out that the CSE reviewed the continuum of programs available at the district's high school and whether the student could be educated in a general education class "with appropriate supplementary aids and services" (id. at p. 22). The IHO noted that the CSE's conclusion that the student's "primary instruction should be a special class 12:1+1" was based on a consideration of the student's present levels of performance in reading, math, writing, and speech, and a determination that, even with modifications, it was not in the student's best interests to be in a class "where he would be taught a totally separate curriculum" and unable to "attain his goals" (id. at pp. 22-23). Further, the IHO relied on the testimony of the district's CSE chairperson who testified that a regular education teacher would not be able to "'slow down the pace of the class'" for the student because the teacher must teach the "entire curriculum" to the regular education students who must show mastery of the content (id. at p. 23). Based upon the foregoing, the IHO found that the CSE met both prongs under Newington and offered the student a FAPE in the LRE (id. at p. 23).

After finding that the CSE offered the student a FAPE in the LRE, the IHO went on to weigh contrary evidence and consider the parent's specific arguments (see IHO Decision at pp. 23-24). The IHO acknowledged the testimony of the private educational consultant that the student could be educated in the general education setting with supplementary aids and services, but also noted her testimony that the student first needed to learn foundational skills to participate in a general education class (id. at p. 23). Similarly, the IHO noted that, while the student's transition coordinator testified that the student could be included in a general education class because he did not have behavior needs, he later testified that a 12:1+1 special class addressed "his intensive learning needs in English, math, technology, things that would be much more practical for work experience" (id.). Additionally, the IHO recognized the parent's argument that the district failed to consider the student's placement in a 12:1+1 special class with only the student in attendance, but found that, in previous State-level administrative review decisions involving the student, SROs had found that the district was not required to create a special class solely for the student (id., citing Application of a Student with a Disability, Appeal No. 19-021). In addition, the IHO noted case law and State and federal regulations providing that, as part of its continuum of special education placements, a district may offer free public placements at programs operated by other districts or private schools, and that, while proximity to a student's home was a factor, the needs of a student with a disability might require some other arrangement (IHO Decision at pp. 23-24).

The IHO further relied on the testimony of the student's transition coordinator that the 12:1+1 special class at ESM was "a nice model" as it had students in the age range of 18 to 21 and offered the type of program for students who were preparing to "age-out" of school just as the

student in this case, with an emphasis on English language arts (ELA) and math and the option for electives and work experiences, situated in a public-school setting with "access to typical peers" (IHO Decision at p. 25). The IHO noted the transition coordinator's testimony that the only negative about the ESM 12:1+1 special class was that it was not in the student's "home community," which was a priority for the parents (id.).[13] The IHO also acknowledged that the ESM program did not offer science and social studies as part of the curriculum, but noted testimony of the transition coordinator, as well as the special education consultant that, despite this drawback, the ESM program "would be appropriate to meet the student's needs and goals" (id.).

Ultimately, the IHO found that NYSED's denial of the age variance left the district without a 12:1+1 special class for the student, and held therefore, that the district provided "sufficient evidence" that the June 2021 IEP offered the student a FAPE in the LRE (IHO Decision at pp. 25-26).

With the exception of the IHO's rationale for directing the CSE to seek a variance of State regulations and subsequent reliance thereon in his final decision, after careful review, I agree with the remainder of the conclusions reached by the IHO and adopt such findings of fact and conclusions of law as my own.[14] That is, the evidence does not support the conclusion that the CSE predetermined the student's special education programming in the IEP and the CSE did not violate the IDEA's LRE requirements when fashioning the student's IEP. There is insufficient basis in the evidence to overturn the IHO determination that the district offered the student a FAPE in the LRE.

VI. Conclusion

Having concluded that the there is insufficient basis to overturn the IHO's decision that the district offered the student a FAPE in the LRE, the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
March 11, 2022

JUSTYN P. BATES
STATE REVIEW OFFICER

[13] However, as noted by the IHO, student is a resident of a different school district that is located in-between ESM and the district (Westhampton) and which lacks a high school of its own, thus students in the district of residence attend the either district or ESM as a result.

[14] The variance issue has, once again, been rendered moot by a State determination denying the request a second time (IHO Ex. X). Arguably, the matter may fall into one of the exceptions to mootness, now that the parents have repeatedly asked for the same variance relief in multiple proceedings. School districts can be held accountable to compliance with both with State regulations and the IDEA's LRE requirement. At this juncture I am not convinced that a school district can be forced to seek a variance from State regulations, which is a discretionary determination. My determination that the CSE complied with the LRE requirement does not hinge on the fact that the CSE was forced to seek a variance over the district's objection or that the variance was ultimately denied.