The University of the State of New York

The State Education Department
State Review Officer
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No. 23-228

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Law Offices of Lauren A. Baum, PC, attorneys for petitioners, by Kristen M. Chambers, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Brian Davenport, Esq. and Irene Dimoh Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which determined that respondent (the district) offered an appropriate educational program to their son and denied their request to be reimbursed for their son's tuition costs at the Marilyn David IVDU Upper School (IVDU) for the 2020-21 school year. 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 parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited here in detail. The CSE convened on March 26, 2020, to formulate the student's IEP for the 2020-21 school year (see generally Dist. Ex. 1). In a letter dated August 25, 2020, the parents disagreed with the recommendations contained in the March 2020 IEP, as well as with the particular public school site to which the district assigned the student to attend for the 2020-21 school year, and notified the district of their intent to unilaterally place the student at IVDU (Parent Ex. B; see Dist. Exs. 1-2).

In a due process complaint notice, dated March 25, 2022, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2020-21 school year (see Parent Ex. A). The parents raised claims related to evaluative information, the student's present levels of performance, management needs, annual goals, the program recommendations made in the March 2020 IEP, the lack of opportunities for integration with typically developing peers, behavioral concerns, transition planning, and the parents' participation in the CSE process, as well as concerns regarding the assigned public school (id.).

An impartial hearing convened on March 15, 2023 and concluded on August 3, 2023 after three days of proceedings (Mar. 15, 2023 Tr. pp. 1-10; April 27, 2023 Tr. pp. 11-57; Aug. 3, 2023 Tr. pp. 1-37).[1] The matter was originally assigned to an IHO (IHO I) who conducted the first two hearing dates held March 15, 2023 and April 27, 2023 (see Mar. 15, 2023 Tr. pp. 1-10; April 27, 2023 Tr. pp. 11-57). On May 31, 2023 an IHO with the Office of Administrative Trials and Hearings (IHO II hereinafter "the IHO") (OATH) was appointed to this matter and the IHO conducted and presided over the final hearing held August 3, 2023 (Aug. 3, 2023 Tr. pp. 1-37; see IHO Decision at p. 2).

In a decision dated September 13, 2023, the IHO determined that the district offered the student a FAPE for the 2020-21 school year, that IVDU was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parents' request for an award of tuition funding and reimbursement (IHO Decision at pp. 7-10). The IHO specifically addressed arguments related to the evaluative information considered by the CSE, the annual goals included in the March 2020 IEP, the recommended 12:1+1 special class and the student's least restrictive environment (LRE) including 12-month programming, and issues related to the assigned public school (id. at pp. 7-8). Because the IHO determined that the district offered the student a FAPE, the IHO denied the parents' requested relief (id. at. p. 10).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parents' request for review and the district's answer thereto is also presumed and, therefore, the allegations and arguments will not be recited in detail. The gravamen of the parties' dispute on appeal is whether the IHO erred in finding that the district offered the student a FAPE for the 2020-21 school year with the parents raising concerns related to the IHO's findings regarding the evaluative information considered by the March 2020 CSE and the 12:1+1 special class recommendation, particularly as to LRE, as well as concerns related to the assigned public school.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such

[1] The transcripts from the impartial hearing in this matter were not consecutively paginated throughout the impartial hearing; for clarity, transcript citations in this decision will refer to the date of the impartial hearing and the page number, such as "Mar. 15, 2023 Tr. p. 1."

students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir.

2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[2]

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

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

[2] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

VI. Discussion

A. Preliminary Matters

1. Burden of Proof

Woven into the parents' arguments on appeal are assertions that the IHO's decision was not sufficiently supported by the hearing record, that the IHO improperly weighed the credibility of the witness testimony, and that the district did not meet its burden.

Under the IDEA, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005] [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]). However, under State law, the burden of proof has been placed on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 76 [2d Cir. 2014]; R.E., 694 F.3d at 184-85). Ordinarily, however, which party bore the burden of persuasion in the impartial hearing becomes relevant only if the case is one of those "very few" in which the evidence is equipoise (Schaffer, 546 U.S. at 58; Reyes v. New York City Dep't of Educ., 760 F.3d 211, 219 [2d Cir. 2014]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 225 n.3 [2d Cir. 2012]; T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 933 F. Supp. 2d 554, 565 n.6 [S.D.N.Y. 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *5 [S.D.N.Y. Mar. 19, 2013]; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 4 [2d Cir. Jan. 8, 2014]).

Here, the district's presentation of evidence was not robust insofar as it offered scant documentary evidence during the impartial hearing and called a single witness who testified concerning the March 2020 CSE meeting and the March 2020 IEP, but not about the particular school the student was assigned to attend (see April 27, 2023 Tr. pp. 21-54; Dist. Exs. 1-3). The district's counsel presented an opening statement in which she argued that the district offered the student a FAPE for the 2020-21 school year (see April 27, 2023 Tr. pp. 17-21). While this bare presentation is not encouraged and, in some instances, may result in a finding that the district failed to meet its burden of proof, under the specific circumstances of this case and given the nature of the claims pursued by the parents on appeal, the district's evidence is sufficient to establish the appropriateness of the March 2020 IEP, as set forth below.[3]

[3] If a district intends to rest its case on documentary evidence alone, the district should offer into evidence all documentation pertaining to the evaluation of the student and the CSE's recommendations, including prior written notices (34 CFR 300.503[a]; 8 NYCRR 200.5[a]; see also L.O. v. New York City Dep't of Educ., 822 F.3d 95, 110-11 [2d Cir. 2016] [discussing the consequences of a CSE's failure to adequately document evaluative data, including that reviewing authorities might be left to speculate as to how the CSE formulated the student's IEP]). Here, the district offered the May 2020 prior written notice into evidence (Dist. Ex. 2). In addition, while the hearing record does not include CSE meeting minutes, the IEP itself memorializes the CSE's discussion and the rationale for its recommendation and the record also contains a CSE attendance page and a prior written notice (Dist. Ex. 1 at pp. 1-7, 28; see Dist. Exs. 2-3).

Relatedly, the parents contend that the IHO erred in finding that the district's special education teacher who participated in the March 2020 CSE meeting was a credible witness; in particular, the parent contends that the witness had no personal knowledge of the student or the recommended class placement (Req. for Rev. ¶16). Generally, an SRO gives due deference to the credibility findings of an IHO unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v City Sch. Dist. of New York, 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd, 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]). Here, the hearing record lacks a compelling reason to reverse the IHO findings on credibility of the district's witness as well as the parents' testimony (see IHO Decision at pp. 7; 8-10). To the extent that the parents assert that the IHO erred in weighing the evidence, including the testimony of the district's witness, I have conducted an independent and thorough review of the hearing record evidence as discussed below.

2. Scope of Review

Although the IHO found that the district offered the student a FAPE for the 2020-21 school year, the IHO made alternative findings to the effect that the parents' unilateral placement at IVDU was appropriate for the student and that equitable considerations favored tuition funding and reimbursement (IHO Decision at pp. 7-10). The district has not appealed either determination. As such, these finding have become final and binding on the parties and will not be reviewed on appeal (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]). Therefore, the only issue left to be resolved is whether the IHO erred in finding that the district offered the student a FAPE for the 2020-21 school year.

B. March 2020 IEP

1. CSE Process - Sufficiency of Evaluative Information

Although the three arguments set forth in the parents' request for review are somewhat inconsistently argued, the parents' primary argument on appeal is that the CSE lacked updated evaluations and did not have current and sufficient information to appropriately address the student's "[activities of daily living] ADL/Daily living skill" needs, vocational skills, and transition, occupational therapy (OT), and speech-language needs (Req. for Rev. ¶¶ 17-21). Additionally, the parents assert, as a corollary to their assertions regarding evaluations, that the IEP lacked annual goals for speech-language therapy and "ADL/Daily living skill needs" and that the IHO erred in relying on retrospective testimony that attempted to cure the IEP's lack of annual "goals concerning activities of daily living" (Req. for Rev. ¶¶ 20-21).

Turning to the dispute regarding the sufficiency of evaluative information before the March 2020 CSE, a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree

and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services' needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).[4]

In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). Furthermore, although federal and State regulations require that an IEP report the student's present levels of academic achievement and functional performance, those regulations do not mandate or specify a particular source from which that information must come, and teacher estimates may be an acceptable method of evaluating a student's academic functioning. When a student has not been attending public school, it is also appropriate for the CSE to rely on the assessments, classroom observations, or teacher reports provided by the student's nonpublic school (S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *10 [S.D.N.Y. Nov. 9, 2011] [indicating that based upon 20 U.S.C. § 1414 (c)(1)(A), a CSE is required in part to "'review existing evaluation data on the child, including (i) evaluations and information provided by the parents of the child; (ii) current classroom-based, local, or State assessments, and classroom-based observations; and (iii) observations by teachers and related services providers'"]).

Here, it appears that the district last conducted an evaluation of the student in December 2018, which, as of the March 2020 CSE meeting, fell within the three-year timeline for conducting a reevaluation of the student (see Dist. Exs. 1-2). However, even if the district did not conduct a triennial evaluation of the student leading up to the March 2020 CSE meeting, the evidence in the hearing record as discussed in more detail below reveals that the CSE had sufficient information

[4] While State regulations do not specify what assessments a district must complete in order to conduct a reevaluation, State regulations do list the required components of an initial evaluation: a physical examination, a psychological evaluation, a social history, a classroom observation of the student, and any other "appropriate assessments or evaluations" as necessary to determine factors contributing to the student's disability (8 NYCRR 200.4[b][1]).

before it to identify all of the student's special education and related services' needs and develop the student's IEP, such that any procedural error would not result in a denial of FAPE.

The March 2020 IEP reflected that the CSE relied on a December 2018 bilingual psychological evaluation, a March 2020 vocational assessment, a fall 2019 IVDU report, and information provided by the parent and the principal of IVDU who attended the March 2021 CSE meeting (Dist. Exs. 1 at pp. 1-7; 2 at p. 2; 3).[5] The May 2020 prior written notice also indicated that the March 2020 CSE relied on the same evaluative information, as did the CSE chairperson who testified that the March 2020 CSE would have relied on the most recent psychoeducational evaluation, a transition interview with the family, the IVDU report, and information provided by the parent and school during the CSE meeting (April 27, 2023 Tr. pp. 26-27, 35, 48; Dist. Exs. 1 at pp. 1-7; 2 at p. 2).[6] The district special education teacher, who attended the March 2020 CSE meeting, testified that she recalled reviewing the December 2018 psychoeducational evaluation and the fall 2019 IVDU progress report in conjunction with the March 2020 CSE meeting, although she did not recall the specifics of what was discussed, and she further testified that the CSE also relied on input from the parents and IVDU providers at the CSE meeting (April 27, 2023 Tr. pp. 35, 48-49; Dist. Ex. 3).

The March 2020 IEP included test scores from the December 2018 psychoeducational evaluation, including results of an administration of the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V) and the Vineland Adaptive Behavior Scales – Third Edition (Vineland-3), as well as narrative information from the fall 2019 IVDU report (see Dist. Ex. 1 at pp. 1-7). Additionally, a review of the IEP shows that information provided by the parent at the meeting was incorporated into the IEP (id.).

Specifically, the March 2020 IEP reflected WISC-V results which indicated that the student's full-scale IQ of 57 was in the extremely low range (Dist. Ex. 1 at p. 1). Additionally, the WISC-V domain composite scores, reflected in the IEP, ranged from very low to extremely low: verbal comprehension 76, visual spatial 72, and fluid reasoning 61 (id.). The IEP indicated that due to the student's extremely low full scale and specific scale composite scores in cognitive testing, the Vineland-3 was administered to the parent to rate the student's adaptive functioning (id. at p. 2). The Vineland-3 showed similar results to the student's cognitive scores indicating that the student was delayed in communication (SS-63), daily living (SS-61), socialization (SS-68), and adaptive behavior composite (SS-63) (id. at pp. 1-2).

According to the March 2020 IEP the student was considered to have had "considerable exposure to Yiddish," in that he understood and spoke Yiddish and it had been "a major instructional language for him in the schools he ha[d] attended" (Dist. Ex. 1 at p. 1). The IEP indicated that the student was "more likely to speak in English" at home, and therefore, he "must

[5] The March 2020 IEP indicated that the CSE reviewed a December 2018 bilingual psychological evaluation; however, it appears that this evaluation is referred to as a December 2018 psychoeducational evaluation in the May 2020 prior written notice and by the CSE chairperson's testimony; therefore, for the purpose of this decision, it will be referred to as a psychoeducational evaluation (Tr. pp. 26-27; Dist. Ex. 1 at p. 1; 2 at p. 2).

[6] It is noted that the hearing record contains the March 2020 IEP but does not include the December 2018 psychoeducational evaluation, the vocational interview, or the fall 2019 IVDU report.

be considered bilingual in Yiddish and English" (id.). With regard to the student's speech-language needs, the March 2020 IEP reflected information from the fall 2019 IVDU speech therapy report that the student required prompting to use reasoning skills to solve given scenarios and continued to have "difficulty continuing what he was saying after dysfluent speech" (id. at p. 3). Additionally, the IEP indicated that the student needed to improve expressive language and monitor conversational skills, and to improve his critical thinking skills (id. at p. 4).

According to the March 2020 IEP, the fall 2019 IVDU OT report indicated that the student could independently peel vegetables; however, he was too scared to use a knife to cut them and was learning safety techniques to ease his fears (Dist. Ex 1 at p. 6). Additionally, the IEP indicated that the student engaged in an exercise regime to increase his upper extremity and core muscle strength and noted that more frequent engagement would improve his results (id.). The March 2020 IEP indicated that the student had an interest in basketball and joined an afterschool team; however, he tired too easily for this sport although he "want[ed] to join in activities with others" (id.). Finally, the IEP indicated that the student needed to improve ADL skills, upper extremity strength and core muscle strength, and fine motor control (id.).

The district special education teacher testified that she conducted a transition interview the same day as the March 2020 CSE meeting, and it was discussed during the CSE meeting and then transcribed into the present levels of performance section of the IEP (April 27, 2023 Tr. pp. 35-36, 41; see Dist. Ex. 1 at p. 4). According to the IEP, vocational assessment results indicated that the student was going to take part in vocational training once he exited high school (Dist. Ex. 1 at p. 4). Additionally, it was reported that the student liked music, drawing, and animals, and the IEP noted that people liked him, "he d[id]n't have too many inhibitions," and he was sweet and caring (id.). Regarding job interests, the March 2020 IEP indicated that the student would benefit from a job that was social or involved people and that he liked to help others (id.). Additionally, the IEP indicated that in order to reach his potential the student needed to improve his reading, money, and conversational skills (id.). The vocational assessment indicated that after he completed high school the student would live at home and assist his family when asked (id.). According to the IEP, the student did not travel independently except for "walking down the block," and with regard to ADL skills, the vocational assessment indicated that the student needed reminders to brush his teeth and was developing a sense of "stranger danger" (id.). Finally, the vocational assessment reported that the student was affiliated with the Office for People with Developmental Disabilities and had a "ComHab worker" who went with him to music lessons, to visit the library, and to walk dogs at an animal shelter (id.).

The IEP indicated that although IVDU did not submit a vocational training progress report and that the student's job coach was not available to attend the CSE meeting, the student's teacher reported that the student went to a restaurant and completed "non-kitchen prep work such as preparing table settings" (Dist. Ex. 1 at pp. 3-4). Additionally, the IEP indicated that the student attended a culinary class, was learning to follow recipes, and completed grocery orders following a fax or email list (id. at p. 4). Further with regard to vocational skills, the March 2020 IEP reported that the student had developed "meet and greet skills," had an awareness of landmarks in the school building and vocational site, could ask for assistance with prompts and visuals, and could tune out extraneous noises in order to better focus on work tasks (id.). The IEP noted that the student would benefit from following multi-step directions, utilizing an appropriate interest inventory (with or without picture cues), problem solving to remain on task to completion, asking for assistance when

he had difficulty with a task, learning travel safety awareness skills, and improving peer relations at his vocational site (id.).

The March 2020 IEP present level of academic performance indicated that the student exhibited significant delays in reading, writing, and mathematics (Dist. Ex. 1 at pp. 2-6). The IEP indicated that the student was decoding at a 1st grade level, his reading comprehension was approximately at a 2nd to 3rd grade level, and his math skills were considered to be approximately at a 1st grade level (id. at p. 3). Additionally, the IEP indicated that the student "struggled greatly with retention" and required a lot of repetition to retain facts (id.).

With regard to the student's present level of physical performance, the March 2020 IEP indicated that, as a result of the student's medical condition, he experienced deficits in his cognitive, academic, communication, language, perceptual motor, attention, and behavioral skills (see Dist. Ex. 1 at pp. 1-6). Additionally, the student had received diagnoses of seizure disorder and attention deficit hyperactivity disorder (ADHD) (id. at p. 6). The IEP reflected the parents' concerns about having a school nurse in the building to monitor the student's seizure activity (id.). Additional parental concerns focused on the student's need to improve his handwriting skills, hand strength and fine motor dexterity, as well as ADL skills for cooking and understanding measurements (id.).

The March 2020 CSE also identified the following management needs for the student: functional academics and life skills instruction; tasks analysis; program with boundaries, consistency in routines/schedules and structure; class size and related services as specified on the recommendation page; use/monitoring of daily planner; visual and verbal prompting; travel training assessment by school when needed; written/visual schedules; 1:1 teaching of new skills or remediation as needed; multisensory approach to learning; class wide token economy with behavior plan of rewards and consequences; time management/study skills support; graphic organizers; and vocational opportunities/training (Dist. Ex. 1 at pp. 6-7).

In order to further support the student's identified needs, the March 2020 CSE recommended approximately 10 annual goals with 66 corresponding short-term objectives designed to improve the student's academic, gross and fine motor, communication, vocational and ADL, and interpersonal skills (Dist. Ex. 1 at pp. 9-19). Contrary to the parents' allegation on appeal that the CSE failed to develop annual goals to address the student's needs addressed by OT and needs related to ADL skills, the March 2020 CSE developed an annual goal with short-term objectives designed to improve the student's upper extremity and core strength and fine motor skills by improving, among other things; activities of daily living skills such as peeling and chopping, mastering knife skills, improving balance between flexor and extensor musculature for improved postural control, improving handwriting legibility, using visualization and verbalization strategies to increase copying speed and accuracy, improving self-help skills for buttoning, zippering and maintaining neat appearance throughout the day, measuring ingredients, preparing a food item independently given a recipe or directions, reading garment labels to determine appropriate care, and folding a variety of clothing items (id. at p. 9-10).[7] Accordingly, and in light

[7] As an aside, I will briefly address the parents' claim that the IHO erred in relying on retrospective testimony to rehabilitate the IEP. The parents contend that the district special education teacher who participated in the March 2020 CSE testified that although the IEP did not contain an annual goal addressing the student's ADL skills, she

of the March 2020 IEP recommendation that the student receive OT services, I decline to find that the March 2020 CSE lacked sufficient evaluative information to address the student's needs related to OT and ADL skills or that the March 2020 IEP failed to contain an annual goal to address the student's ADL skills (see Dist. Ex. 1 at pp. 9-10, 21).[8]

Next, regarding the student's transition to post-secondary activities, the March 2020 IEP contained measurable post-secondary goals designed to support living, working and learning as an adult, which included education, employment and independent living skills (Dist. Ex. 1 at p. 8). The IEP specified that the student would participate in a vocational training program, become employed with support in a field yet to be determined, noting that he would benefit from a job that is social and involves helping others and that he will live at home, take part in community activities that are of interest to him, continue to develop his ADL skills, manage his personal space with assistance and assist his family with regard to household chores (id.). As a coordinated set of transition activities, the student's IEP described the student's post-school activities and transition services, and the agency responsible for implementation of those activities and services (id. at pp.

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stated that those needs would be addressed in OT (Req. for Rev. ¶21). In the parents' view this testimony retrospectively materially altered the IEP by establishing that the student would have received services or addressed needs beyond those listed in the IEP. The Second Circuit has made clear that parents are entitled to rely on an IEP "as written when they decide to [unilaterally] place" their child before the beginning of a school year (Bd. of Educ. of Yorktown Cent. Sch. Dist. v. C.S., 990 F.3d 152, 173 [2d Cir. 2021]; see R.E., 694 F.3d at 187-88 [indicating that "[a]t the time the parents must decide whether to make a unilateral placement . . . [t]he appropriate inquiry is into the nature of the program actually offered"]). Generally, R.E. stands for the proposition that a district cannot rely on after the fact testimony to rehabilitate a deficient IEP (see R.E., 694 F.3d at 186-88). In grappling with the permissibility of retrospective evidence in R.E., the Second Circuit squarely held that the question of whether an IEP was reasonably calculated to enable the student to receive education benefits "must be evaluated prospectively as of the time [the IEP] was created" (R.E., 694 F. 3d at 184-88 [explaining that with the exception of amendments made during the resolution period, the adequacy of an IEP must be examined prospectively as of the time of its drafting and that "retrospective testimony" regarding services not listed in the IEP may not be considered]). Although the Second Circuit has held that a district cannot rely on after-the fact testimony in order to "rehabilitate a deficient IEP," testimony that "explains or justifies the services listed in the IEP" is permissible and may be considered (R.E., 694 F.3d at 186-88; see also E.M. v. New York City Dep't of Educ., 758 F.3d 442, 462 [2d Cir. 2014] [explaining that "[b]y way of example, we explained that 'testimony may be received that explains or justifies the services listed in the IEP,' but the district 'may not introduce testimony that a different teaching method, not mentioned in the IEP, would have been used'"] [internal citations omitted]; P.C. v. Rye City Sch. Dist., 232 F. Supp. 3d 394, 416 [S.D.N.Y. 2017] [noting that the "few additional details" about the CSE's recommendations described in testimony did not materially alter the written plan or prevent the parents from making an informed decision]). Here, as opposed to the testimony of the district special education teacher who participated in the March 2020 CSE meeting, the March 2020 IEP did contain an annual goal addressing the student's ADL skills, and it also provides the student with OT services with the recommendation for those services clearly linked to the student's ADL needs (see Dist. Ex. 1 at pp. 6, 9-10, 23). Thus, her testimony, while mistaken as to whether the IEP contained an ADL goal, did not add to or materially alter the content of the IEP but rather, at most, explained and justified the services listed in the IEP (see Tr. pp. 43-44).

[8]An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

8-9). Additionally, the CSE developed an annual goal designed to improve the student's ability to transition to post high school by developing his vocational and ADL skills, including that he improve his ability to: follow a one to three step directive by a person in authority with no more than two verbal or visual prompts; utilize an appropriate interest inventory in order to investigate work areas that may be of interest to him; as a way to problem solve, ask an adult or manager for assistance with a task that he deemed too difficult; demonstrate an understanding of one to two safety strategies that could be utilized when traveling by foot; and demonstrate appropriate work site behaviors (i.e., using polite, helpful speech, arriving on time, respecting others and individual differences etc.) (id. at pp. 15-16). As such, review of the March 2020 IEP does not support the parents' claim that the CSE lacked evaluative information regarding the student's vocational and post-secondary needs, or that the IEP failed to address those needs (id. at pp. 4-8, 15-16).

Turning to the student's speech-language needs, the March 2020 CSE developed an annual goal and short-term objectives designed to improve the student's communication skills, by improving his ability to: use reasoning and critical thinking skills; increase speech fluency; increase focus on problem solving to ask for help; use conversation starters to initiate appropriate conversations; explore different topics of interest to others to discuss rather than monopolize conversations; comprehend, recall and act upon spoken directions of increasing length and complexity; demonstrate appropriate speaker/listener responsibilities to maintain eye contact, acknowledge appropriate social boundaries/distance, utilize reciprocal exchange skills, attend to topic and use respectful tone of voice; improve expressive language skills; relate information sequentially to summarize a text or personal event; improve written expression to devise a grocery list, complete a variety of forms and applications and write a variety of social communications; initiate a conversation across settings and remain on topic for 10 minutes; recognize and sound out blended sounds and diagraphs and all long and short vowel sounds; and apply rules of syllabication and phonological processing for vowel teams and "magic-e" (Dist. Ex. 1 at pp. 10-11). Furthermore, the CSE developed an annual goal with short-term objectives designed to improve the student's interpersonal skills by: increasing his emotional vocabulary; identifying when he's feeling annoyed and tolerating annoyances by employing coping skills such as "blinders," asking for help from staff, and breathing in order to self-regulate; increasing frustration tolerance by demonstrating understanding of the concept of personal responsibility, consequences, and each peer's right to have their own opinions in a situation; filtering his own comments, questions and information he shares to be more appropriate; and demonstrating a willingness and respectfulness to listen to the opinions and interests of others rather than 'police' his peers (id. at p. 12). Accordingly, and in light of the IEP recommendation for individual and group speech language therapy, I decline to find that the March 2020 CSE lacked sufficient evaluative information to address the student's speech-language needs or that the March 2020 IEP failed to contain annual goals to address the student's speech-language needs (id. at p. 21).

Based on the foregoing, the evidence in the hearing record does not support the parents' allegation that the evaluative information available to the March 2020 CSE was insufficient for the CSE to develop the student's IEP for the 2020-21 school year. Taken as a whole, the March 2020 IEP included sufficient evaluative information by which to develop an appropriate IEP, which contained adequate annual goals and postsecondary activities to provide guidance to the teachers and related service providers who were to implement the IEP.

2. Educational Placement - 12:1+1 Special Class – Least Restrictive Environment

Turning to the parents' concerns with the 12:1+1 special class in a special school recommended by the March 2020 CSE, the parents' primary claim is that the recommended class was not the student's LRE (see Req. for Rev. ¶¶ 14-16). Additionally, the parents assert that the IHO erred by failing to "distinguish between the characteristics of specialized classrooms" and appeared to "conclude that all specialized classrooms [we]re the same" (Req. for Rev. ¶ 22-24). In finding that the March 2020 IEP offered the student a FAPE, the IHO concluded that the student required placement in a special class, noting that both the CSE and the unilateral placement selected by the parents recommended placing the student in a "special" class without nondisabled peers (IHO Decision at p. 7). The district asserts that the IHO did not err in finding that the recommended 12:1+1 special class was consistent with an offer of FAPE, contending that a 12:1+1 special class placement was appropriate because of the student's global delays and need for vocational training, and further that the CSE considered other placements, finding that a 15:1 special class in a community school would have been "too academic in nature" and an 8:1+1 special class would not have provided the student with appropriate social models or peers (Answer ¶¶17-18).

The March 2020 CSE recommended the student attend a 12-month program in a 12:1+1 special class in a specialized school with the related services of one 40-minute session per week of individual counseling, one 40-minute session per week of counseling in a group, one 40-minute session per week of OT in a group, one 40-minute session per week of individual speech-language therapy, and one 40-minute session per week of speech-language therapy in a group (Dist. Ex. 1 at pp. 20-21, 22).[9] Additionally, the CSE recommended the student participate in three periods of adapted physical education per week and receive 30-minute sessions of individual nonskilled services as needed in the nursing office (id. at pp. 20-21). Further, the CSE recommended four 60-minute sessions per year of parent counseling and training (id. at p. 21).

Concerning the March 2020 CSE's recommendation for a 12:1+1 special class, State regulation provides that "the maximum class size for special classes containing 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, shall not exceed 12 students, with one or more supplementary school personnel assigned to each class during periods of instruction" (8 NYCRR 200.6[h][4][i]; "Continuum of Special Education Services for School-Age Students with Disabilities," at pp. 15-16, Office of Special Educ. [Nov. 2013], available at http://www.p12.nysed.gov/specialed/publications/policy/continuum-schoolage-revNov13.pdf). By way of comparison, State regulation also indicates that the maximum class size for special classes containing students whose management needs are determined to be intensive or highly intensive and requiring a significant or high degree of individualized attention and intervention shall not exceed eight or six students, respectively, with one or more supplementary school personnel assigned to each class during periods of instruction" (8 NYCRR 200.6[h][4][ii][a]-[b]).

[9] The March 2020 IEP indicated that the student's 12:1+1 special class instruction, counseling, and speech-language therapy would be provided in Yiddish, and his OT services in English (Dist. Ex. 1 at pp. 20-21).

The district special education teacher who attended the March 2020 CSE meeting testified that due to the student's global delays and medical needs, the CSE felt a more restrictive environment (12:1+1) would be able to meet his needs and allow him to have the vocational training he needed (April 27, 2023 Tr. pp. 30-31). The March 2020 IEP indicated that, due to the student's intellectual disability and epilepsy, the CSE did not feel the student would be successful in the general education curriculum and further that, due to the "significant gap between his academic skill level (1-2nd grade) and his chronological age/grade level (16 yrs/11th grade) [he] require[ed] specially designed instruction" (Dist. Ex. 1 at p. 7). The CSE further indicated that the student required "a program that would provide a functional academics/life skills curriculum and occupational training opportunities" (id.).

The IEP relates that the CSE considered other options on the placement continuum for the student including a less restrictive option in a community school and a smaller class in a specialized school (Dist. Ex. 1 at p. 28). A 15:1 class in a community school was considered but rejected because such a placement would be "too academic in nature for [the student] as he [wa]s not able to work at the level of Regents track classes and require[d] functional academics [and] he require[d] 12 month programming and an opportunity for occupational training" (id.). An 8:1+1 special class in a specialized school was considered but rejected because such a class would "not provide [the student] with appropriate social models and peers [and] [the student] need[ed] support in an occupational training center school that would provide him with supervised coaching and training opportunities" (id.).

The principal at IVDU expressed his belief that the student would not have received the level of individual instruction he required in a 12:1+1 special class setting in the district, as opposed to the 8:1+1 special class the student was attending at IVDU (Parent Ex. K ¶¶ 15; 40). However, districts are not required to replicate the identical setting used in private schools (see, e.g., M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *28 [S.D.N.Y. Sept. 28, 2018]; Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at *6 [N.D.N.Y. June 19, 2009]; Watson, 325 F. Supp. 2d at 145). Further, review of the evaluative information available to the March 2020 CSE, as discussed in detail above, does not suggest that the student required some specific lower student-to-staff ratio in order to receive an educational benefit. Additionally, the IVDU principal's opinion testimony did not seem to take into account the additional supports included in the March 2020 IEP, including the related services of OT, counseling, and speech-language therapy, management needs, and, as needed, individual nonskilled services (see Parent Ex. K at ¶ 40; Dist. Ex. 1 at pp. 6-7, 20-21). Based on the above, I decline to find that the IHO erred in finding that the recommended special class was reasonably calculated to offer the student a FAPE on substantive grounds.

With respect to the parents' contention that the recommended 12:1+1 special class was not the student's LRE, the following standards apply:

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., 752 F.3d at 161-67; Newington, 546 F.3d at 111; Gagliardo, 489 F.3d at 105; Walczak, 142 F.3d at 132; Patskin v. Bd. of Educ. of Webster Cent. Sch. Dist., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]). 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 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).

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).

With regard to the parents' argument that the student benefitted from mainstreaming opportunities including school sports, games and training, participation in a triathlon, working and going to summer camp to further develop social/emotional skills, it appears that the opportunities the parents suggest are more community-based types of activities rather than access to nondisabled peers in the classroom. Review of the March 2020 IEP shows that although the student would have been in a special class throughout the school day, the student would have had similar community opportunities had he attended the district program (see Dist. Ex. 1 at pp. 6-7, 23, 25). Specifically, the March 2020 IEP indicated that the student required occupational training opportunities as well as vocational opportunities and training, he was to be assessed for travel training, and the district CSE witness testified that the 12:1+1 special class in a specialized school would have provided him with the vocational training he needed (April 27, 2023 Tr. pp. 30-31; Dist. Ex. 1 at pp. 6-7, 23). Furthermore, the March 2020 IEP indicated that the student was affiliated with OPWDD through which he received "ComHab" services, and the "ComHab worker" supported the student three times per week, including with activities in the community such as music lessons, visiting the library, and walking dogs at an animal shelter (Dist. Ex. 1 at pp. 4, 9). Relatedly, although the parents assert that the recommendation for 12-month services was not appropriate because the student would be better served by attending summer camp, I note that there is no requirement that a student attend a 12-month services program and the parents would have been free to make other summer program choices had the student attended the program recommended in the March 2020 IEP.

In light of the above, I do not find that the recommended program failed to offer the student a FAPE in the LRE nor do I find that the IHO erred by failing to distinguish between the characteristics of specialized classrooms.

3. Assigned Public School Site

The parents contend that the district did not produce evidence or testimony that the assigned school could have implemented the student's March 2020 IEP and assert that the parents attempted to obtain information and visit the assigned school but were unable to do so due to the district's failure to respond to the parents' requests. Specifically, the parents wanted information about the assigned school in terms of a class profile, the curriculum, a remote learning and Covid-19 reopening plan, and the availability of Yiddish instruction.

The district contends that the IHO correctly determined that any issues arising from the lack of a visit to the assigned school did not significantly impede the parents' right to participate in the development of the student's recommended program or cause a denial of FAPE.

To meet its legal obligations, a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323 [a]; 8 NYCRR 200.4 [e][1][ii]; Cerra, 427 F.3d at 194; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *13 [S.D.N.Y. Aug. 23, 3012], aff'd, 530 Fed. App'x 81, 2013 WL 3814669 [2d Cir. July 24, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp.2d 605, 614 [E.D.N.Y. 2012]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [stating that "[a]n education department's delay does not violate the IDEA so long as the department 'still ha[s] time to find an appropriate placement . . . for the beginning of the school year in September'"], quoting Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *8 n.26 [S.D.N.Y. Nov. 20, 2007]). Thereafter, and once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401 [9][D]; 34 CFR 300.17 [d]; see 20 U.S.C. § 1414 [d]; 34 CFR 300.320). When determining how to implement a student's IEP, the assignment of a particular school is an administrative decision, provided it is made in conformance with the CSE's educational placement recommendation (see M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244-45 [2d Cir. 2015]; K.L.A. v. Windham Southeast Supervisory Union, 371 Fed. App'x 151, 154 [2d Cir. Mar. 30, 2010]; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009]; White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 [5th Cir. 2003]; see also Veazey v. Ascension Parish Sch. Bd., 121 Fed. App'x 552, 553 [5th Cir. Jan. 5, 2005]; A.W. v. Fairfax Co. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]; Tarlowe, 2008 WL 2736027, at *6; Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]). There is no requirement in the IDEA that an IEP name a specific school location (see, e.g., T.Y., 584 F.3d at 420).

Moreover, while parents are entitled to participate in the determination of the type of placement their child will attend, the IDEA confers no rights on parents with regard to school site selection (C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. Mar. 4, 2014]; see Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at *5 [E.D.N.Y. Mar. 21, 2013], aff'd, 556 Fed. App'x 1 [2d Cir Dec. 23, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *10 [S.D.N.Y. Feb. 20, 2013]; see also *R.E.,* 694 F.3d at 191–92 [finding that a district may select a specific public school site without the advice of the parents]; *F.L. v. New York City Dep't of Educ.,* 2012 WL 4891748, at *11 [S.D.N.Y. Oct. 16, 2012] [noting that parents are not procedurally entitled to participate in decisions regarding public school site selection], aff'd, 553 Fed. App'x 2 [2d Cir. Jan. 8, 2014]). On the other hand, there is district court authority indicating that a parent has a right to obtain information about an assigned public school site (see H.L. v. New York City Dep't of Educ., 2019 WL 181307, at *9 [S.D.N.Y. Jan. 11, 2019] [noting that "[i]n light of M.O., courts have found that parents have the right to obtain timely and relevant information regarding school placement, in order to evaluate whether the IEP can be implemented at the proposed location"]; F.B. v New York City Dep't of Educ., 2015 WL 5564446, at *11-*18 [S.D.N.Y. Sept. 21, 2015] [finding that the parents "had at least a procedural right to inquire whether the proposed school location had the resources set forth in the IEP"]; V.S. v New York City Dep't of Educ., 25 F. Supp. 3d 295, 299-301 [E.D.N.Y. 2014] [finding that the "parent's right to meaningfully participate in the school selection process" should be considered rather than the "parent's right to determine the actual school selection"]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16 [S.D.N.Y. May 27, 2014] [holding that "parents have the procedural right to evaluate the school assignment" and "acquire relevant information about" it]).

With respect to the parents' opportunity to tour the assigned public school site, the May 2020 school location letter stated that the parent could visit the school and provided a phone number and address for an individual to contact to arrange for a tour (Dist. Ex. 2 at p. 5).[10] In testimony, the student's mother related that after she received the May 2020 school location letter she telephoned the school trying to make an appointment to see the school, but wasn't able to reach anyone and instead "left a bunch of messages" but never received a response (Aug. 3, 2023 Tr. pp. 18-20). She further testified that she sent a letter to the district indicating that she needed information about the school location, including a classroom profile, and to speak to someone about the curriculum, to know if the school was providing instruction in Yiddish, and to know about the remote learning program (id.; see Parent Ex. B at p. 2).

The district is not required to allow a parent to visit an assigned school (see J.B. v. New York City Dep't of Educ., 242 F. Supp. 3d 186, 195 [E.D.N.Y. 2017]; J.C. v. New York City Dep't of Educ., 2015 WL 1499389, at *24 n.14, aff'd 643 Fed. App'x 31 [2d Cir. Mar. 16, 2016]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012]; S.F., 2011 WL 5419847, at *12). However, as noted above, a district's failure to accommodate a parent's inquiries concerning an assigned school could, under certain circumstances, constitute a procedural violation that could either contribute to a finding that FAPE was denied to a student or in itself rise to the level of a FAPE denial. Although the hearing record supports a finding that a school visit ultimately was not scheduled and the district did not respond to the parents' request for information, any such procedural violation did not result in a denial of FAPE. Initially, it does appear in this instance that the information sought by the parents concerned the district's ability to implement the IEP. In particular, the parents wanted information about the availability of instruction in Yiddish as is called for in portions of the March 2020 IEP (Aug. 3, 2023 Tr. p. 20; Parent Ex. B at p. 2; Dist. Ex. 1 at pp. 20-21). However, as noted by the IHO, the timing of the parents' request for information is not entirely clear from the hearing record (see IHO Decision at p. 8). Specifically, as noted above, in response to a question as to what the parents did after receiving the school location letter (which was dated May 29, 2020), the parent testified that she called the school to try to set up an appointment (Aug. 3, 2023 Tr. p. 18). Additionally, as the parent testified, in an August 25, 2020 letter to the district, the parents requested an opportunity to discuss the program with a representative from the school and "a class profile, program curriculum, reopening plan, confirmation that instruction will be provided in Yiddish, and remote learning program for the 2020-2021 school year" (Parent Ex. B at p. 2). However, rather than indicating that the parent was unable to get in touch with a representative from the school, the letter indicated "the parents will visit the program in September, if permitted" (id.). Additionally, at that time, the parents had already entered into a contract for the student to attend IVDU for the 2020-21 school year (Parent Ex. I) and there is insufficient basis in the hearing record to show that the parents were waiting to hear back from the assigned school prior to making their decision as to where to place the student for the 2020-21 school year.[11] Accordingly, the IHO's decision on this point is upheld as the timing of the parents' inquiry makes it appear more likely that the lack of information did not impede the

[10] Each of the three district exhibits in the hearing record bear the exhibit number "1"; however, for the sake of clarity I will refer to the exhibits by number in the order they were admitted.

[11] The parent did testify that she would have sent the student to the assigned school if she believed it was appropriate for the student (Aug. 3, 2023 Tr. pp. 22-23).

parents in their decision making process regarding the student's placement for the 2020-21 school year.

With respect to the assigned school's capacity to implement the March 2020 IEP, the Second Circuit has explained that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see E.H. v. New York City Dep't of Educ., 611 Fed. App'x 728, 731 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 40 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting T.Y., 584 F.3d at 419; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]). However, a district's assignment of a student to a particular public school site must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (M.O., 793 F.3d at 244; R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 419-20; see C.F., 746 F.3d at 79). The Second Circuit has held that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (M.O., 793 F.3d at 245; see Y.F. v. New York City Dep't of Educ., 659 Fed. App'x 3, 5-6 [2d Cir. Aug. 24, 2016]; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. Mar. 16, 2016]; B.P. v. New York City Dep't of Educ., 634 Fed. App'x 845, 847-49 [2d Cir. Dec. 30, 2015]). Such challenges must be "tethered" to actual mandates in the student's IEP (see Y.F., 659 Fed. App'x at 5). Additionally, the Second Circuit indicated that such challenges are only appropriate if they are evaluated prospectively (as of the time the parent made the placement decision) and if they were based on more than "mere speculation" that the school would not adequately adhere to the IEP despite its ability to do so (M.O., 793 F.3d at 244). In order for such challenges to be based on more than speculation, a parent must allege that the school is "factually incapable" of implementing the IEP (see M.E. v. New York City Dep't of Educ., 2018 WL 582601, at *12 [S.D.N.Y. Jan. 26, 2018]; Z.C. v. New York City Dep't of Educ., 2016 WL 7410783, at *9 [S.D.N.Y. Nov. 28, 2016]; L.B. v. New York City Dept. of Educ., 2016 WL 5404654, at *25 [S.D.N.Y. Sept. 27, 2016]; G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at *15 [S.D.N.Y. Sept. 19, 2016]; M.T. v. New York City Dep't of Educ., 2016 WL 1267794, at *14 [S.D.N.Y. Mar. 29, 2016]). Such challenges must be based on something more than the parent's speculative "personal belief" that the assigned public school site was not appropriate (K.F. v. New York City Dep't of Educ., 2016 WL 3981370, at *13 [S.D.N.Y. Mar. 31, 2016]; Q.W.H. v. New York City Dep't of Educ., 2016 WL 916422, at *9 [S.D.N.Y. Mar. 7, 2016]; N.K. v. New York City Dep't of Educ., 2016 WL 590234, at *7 [S.D.N.Y. Feb. 11, 2016]).

Here, although the parents sought information from the assigned school regarding the availability of Yiddish instruction at the location and were unable to obtain it, there is no allegation that Yiddish instruction was not available or could not have been provided to the student by the assigned school.[12] The other requested information would not implicate the assigned school's

[12] With respect to the parents' request for a "class profile" from the assigned school, presumably this information would have been of use in ensuring that there would be an appropriate age and functional grouping for the student at the assigned school. However, deficiencies in functional grouping when a student has not yet attended the proposed classroom at issue tend to be speculative in nature (J.C. , 643 Fed. App'x at 33 [finding that "grouping evidence is not the kind of non-speculative retrospective evidence that is permissible under M.O." where the

capacity to implement the March 2020 IEP. Accordingly, here the challenge is based on speculation that the school would not adequately adhere to the IEP, which is insufficient to overturn the IHO's finding that the district offered the student a FAPE for the 2020-21 school year.

As a result, because the IEP was appropriate to meet the student's needs for the reasons set forth above, any conclusion regarding the district's ability to implement the IEP at the assigned public school site based on a class profile, the curriculum, a remote learning and Covid-19 reopening plan, and the availability of Yiddish instruction would necessarily be based on impermissible speculation, and the district was not obligated to present retrospective evidence at the impartial hearing regarding the implementation of the student's program at the assigned public school site or to refute the parent's claims related thereto (M.O., 2015 WL 4256024, at *7; R.B., 589 Fed. App'x at 576; F.L., 553 Fed. App'x at 9; K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 187 & n.3).

To be sure, the district would have stood on much firmer ground had it responded to the parents' request for a tour and information about the assigned school and presented evidence at the impartial hearing demonstrating the assigned school's capacity to implement the March 2020 IEP. Nonetheless, there is insufficient basis to disturb the IHO's determination that due to the concerns with timing of the parents' attempt to visit the assigned school and obtain information, any failure on the part of the district, in this instance, did not significantly impede the parents' decision making process regarding the placement of the student for the 2020-21 school year and did not constitute a denial of FAPE.

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determinations that the district offered the student a FAPE for the 2020-21 school year, the necessary inquiry is at an end.

school possessed the capacity to provide an appropriate grouping for the student, and plaintiffs' challenge is best understood as "[s]peculation that the school district [would] not [have] adequately adhere[d] to the IEP"], quoting R.E., 694 F.3d at 195). Various district courts have followed this precedent post M.O. (G.S., 2016 WL 5107039, at *15 [same]; L.C. v. New York City Dep't of Educ., 2016 WL 4690411, at *4 [S.D.N.Y. Sept. 6, 2016] ["Any speculation about which students [the student] would have been grouped with had he attended [the proposed placement] is just that—speculation. And speculation is not a sufficient basis for a prospective challenge to a proposed school placement"], citing M.O., 793 F.3d at 245). Therefore, questions presented by the parents which related to other students in the classroom at the public school were speculative.

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
December 18, 2023

CAROL H. HAUGE
STATE REVIEW OFFICER