



The University of the State of New York

The State Education Department

State Review Officer

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No. 23-296

Application of the BOARD OF EDUCATION OF ST. REGIS FALLS CENTRAL SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Honeywell Law Firm, PLLC, attorneys for petitioner, by Paul M. Aloy, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to provide the student with a specific special education program for the 2023-24 school year. The appeal must be sustained in part.

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 in detail here.

The student has received a diagnosis of mild intellectual disability and has been provided with special education services since preschool (Dist. Ex. 12 at pp. 1, 2). The CSE convened on March 23, 2023 and, finding the student continued to be eligible for special education as a student with an intellectual disability, conducted an annual review that included review of the student's related services reevaluations and discussion of life skills program options for the student for the

2023-24 school year (ninth grade) (Oct. 4, 2023 Tr. pp. 27-28; Dist. Exs. 10; 12 at p. 2).^{1, 2} At the conclusion of the meeting, the March 2023 CSE modified the student's special education service recommendations for the remainder of the 2022-23 school year but did not yet reach a determination regarding special education programming for the 2023-24 school year (see generally Dist. Ex. 10).

On May 9, 2023, the student, his parents, the CSE chairperson and other staff from the district visited a 12:1+3:1 life skills program located in a public school in another school district (Oct. 4, 2023 Tr. pp. 39, 235; Parent Ex. N at p. 2).³

The CSE reconvened on June 2, 2023, to develop the student's IEP for the 2023-24 school year (see generally Dist. Ex. 1). Due to the perceived lack of available programming within the district, the June 2023 CSE decided to place the student outside of the district in the 12:1+3:1 special class placement in the other school district with related services of one 30-minute session per six day cycle of speech-language therapy in a small group, two 30-minute sessions per week of individual occupational therapy (OT), and six 30-minute sessions per month of individual physical therapy (PT) with a projected implementation date in September 2023 (id. at pp. 1, 17, 21).⁴ The June 2023 CSE also recommended supplementary aids and services for the student consisting of a 1:1 aide, a copy of the class notes, an instrument for spacing during writing activities, modified curriculum, and refocusing and redirection (id. at p. 18).

The parents disagreed with the recommendation contained in the June 2023 IEP for a 12:1+3:1 special class, as well as with the determination to place the student in another school district for the 2023-24 school year, and by due process complaint notice dated August 2, 2023, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year (see Joint Ex. 1).

An impartial hearing convened on October 4, 2023 and concluded on October 20, 2023 after five days of proceedings (Oct. 4, 2023 Tr. pp. 1-321; Oct. 5, 2023 Tr. pp. 322-551; Oct. 11, 2023 Tr. pp. 231-366; Oct. 17, 2023 Tr. pp. 367-535; Oct. 20, 2023 Tr. pp. 536-583).⁵ In a decision

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 "Oct. 4, 2023 Tr. p. 1".

² The student's eligibility for special education and related services as a student with an intellectual disability is not in dispute (see 34 CFR 300.8[c][6]; 8 NYCRR 200.1[zz][7]).

³ The CSE chairperson also served as the district's seventh through twelfth grade principal.

⁴ The June 2023 CSE also recommended 12-month services for the student consisting of one 30-minute session per week of small group speech-language therapy during summer 2023 (Dist. Ex. 1 at pp. 1, 19).

⁵ The parties also convened for a prehearing conference on September 7, 2023 and a combined prehearing conference and pendency hearing on September 14, 2023 (see Sept. 7 2023 Tr. pp. 1-67; Sept. 14, 2023 Tr. pp. 1-42). The IHO issued an interim order on pendency on September 14, 2023, which determined that the student's pendency program consisted of a program within the district with a 1:1 aide, related services pursuant to the June 2023 IEP, three hours per week of resource room services with 5-7 students and a special education teacher, a special class for English and math, and for the student to be mainstreamed for lunch, life skills, science, and

dated November 6, 2023, the IHO determined that the district failed to offer the student a FAPE for the 2023-24 school year (IHO Decision at pp. 11-16). More specifically, the IHO determined that the evidence in the hearing record did not establish that a 12:1+3:1 special class was appropriate for the student (*id.* at p. 13). Further, the IHO determined that 12:1 or 15:1 special classes in the district would be an appropriate setting for the student, but that since such programs did not exist within the district, as relief, the IHO ordered the district to provide the student with 1:1 instruction with a special education teacher in all academic areas, a fulltime 1:1 aide, related services pursuant to the June 2023 IEP, and for the student to be in a general education classroom for all specials for the remainder of the 2023-24 school year (IHO Decision at pp. 15-17).

IV. Appeal for State-Level Review

The district appeals, arguing that the IHO erred in concluding that the 12:1+3:1 special class programming offered by the district for the 2023-24 school year was inappropriate and that the IHO ordered the district to create a 1:1 class with a special education teacher that was overly restrictive for the student and would deny him a FAPE. The parents did not file an answer to the district's request for review.

However, on January 10, 2024, the Office of State Review received a two-page handwritten letter from the parents asserting that they were not properly served in this matter, along with copies of email correspondence between the parents and district staff from November 29, 2023 through December 4, 2023. Generally, there are no pleadings permitted as part of a State level review "other than a request for review, answer, answer with cross-appeal, or answer to a cross-appeal . . . except a reply" under certain circumstances (8 NYCRR 279.6[a]). Accordingly, in this instance, the parents' letter was likely intended to function as their answer. However, the document does not comply with form requirements for filing a pleading with the Office of State Review. The parents' letter does not include written proof of service on the district, it was not served upon the district or filed with the Office of State Review within the applicable timelines, and it was not verified (*see* 8 NYCRR 279.5[a], [c], 279.7[a], [b], 279.8[a]). Accordingly, the letter does not meet the pleading requirements as prescribed in Part 279 of the State Regulations and must be rejected. Nevertheless, even if it were not rejected, the arguments raised in the answer—without being verified or submitted in affidavit form—are insufficient to overcome the proof of service submitted by the district. Based on the district's two affidavits of service, notarized December 1, 2023 and December 15, 2023, the parents were personally served pursuant to Part 279 of the State Regulations. The IHO's decision included a statement regarding the right of either party to appeal the decision and identified the separate timelines found in State regulation for the service of a notice of intention to seek review and distinguished it from the service of a request for review (IHO Decision at p. 18). The IHO's decision also identified the website of the Office of State Review where the procedural rules governing appeals can be accessed (*id.*). Although the parents submitted 10 pages of email correspondence between the parents and the district, the emails relate to service of the notice of intention to seek review only, rather than the request for review, and are an insufficient basis to exercise my discretion and dismiss the district's request for review for improper personal service (*see* 8 NYCRR 279.2[f]; *see* 8 NYCRR 279.4, 279.13).⁶ Although I

specials (art, music and physical education), and, if possible, social studies (IHO Ex. III at p. 3).

⁶ The email correspondence indicates that the district's attorney included copies of the notice of intention to seek

have declined to accept the parents' letter as a responsive pleading, the entire hearing record has been examined, and an independent decision based on the entire hearing record has been rendered as further described below (20 U.S.C. § 1415[g]; 34 CFR 300.510[b][2][i]).

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 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

review and accompanying affidavit of service from the process server in his email to the parents, but the parents' concerns were not mollified by the receipt of the documents via email.

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]).⁷

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).

⁷ 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).

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

VI. Discussion

Although the present levels of performance of the June 2, 2023 IEP are not in contention on appeal, a discussion of the student's needs is necessary as background context to determine whether the June 2023 CSE recommendations would have provided the student with an appropriate educational program for the 2023-24 school year.

A. Student's Needs

A CSE convened on June 2, 2023 for an annual review and to recommend a program for the student for the 2023-24 school year (Dist. Ex. 1). The CSE was composed of a district chairperson, a regular education teacher, a special education provider, an occupational therapist, an administrative assistant, a special education director for the out-of-district 12:1+3:1 program, a physical therapist, a speech-language therapist, a school psychologist, and a teacher aide in addition to the student, his parents, a family member, and a member from an outside agency who the parent identified as a "care manager" (id. at p. 1; see Oct. 4, 2023 Tr. p. 87). According to the July 2023 IEP and prior written notice, the CSE considered evaluative information, in addition to the student's progress on goals, current levels of performance, and parental input (Dist. Exs. 1 at p. 2; 2 at p. 1).

The June 2023 IEP indicated that at the time of the CSE meeting the student was attending eighth grade in the school district, and that he received 1:1 special instruction in English Language Arts (ELA) and mathematics and attended specials including art, library, chorus, technology, and physical education with his grade-level peers (see Dist. Ex. 1 at pp. 5-6). The IEP noted that the student had been receiving additional adult support in core general education classes of science and social studies, and for specials, hallway transitions, and transportation in order to assist him in staying on task, following directions, and ensuring his safety; however, the student had discussed his desire for more independence in eating lunch or walking to classes with his "buddies," without his 1:1 aide (Dist. Ex. 1 at p. 5). According to testing results, the student's basic cognitive, daily living, reading, writing and mathematics skills emerged in the well below average range (id. at pp. 5-6).⁸

With respect to reading, the June 2023 IEP reported that the student's ability to identify letters and words emerged as a personal strength (Dist. Ex. 1 at p. 5). The student read books at the third and fourth grade level, answered basic comprehension questions, targeted main ideas, made inferences, predicted outcomes and drew conclusions, and retained information over a weekend; although he struggled with rhyming, identifying information in passages, and making decisions regarding missing information (id. at pp. 5-6). The IEP noted the student's interest in reading and talking about World War II and animals and their habitats (id. at p. 6).

In the area of writing, the June 2023 IEP noted that the student's overall written language ability, including spelling and writing, fell in the well below average range, although the latter

⁸ The June 2023 IEP specified that the student rushed through testing as quickly as possible, whether provided a paper copy or Chromebook test, and that his scores did not always indicate his ability (Dist. Ex. 1 at p. 7).

"emerged as a significant strength" for the student (Dist. Ex. 1 at p. 6). The IEP reported that the student copied work from a SmartBoard during health class and needed extra time to do this, further noting he copied notes from his 1:1 aide if there was not enough time (id.). Additionally, according to the IEP the student did "not like using OT paper" or a slant board during class as he did not want to be viewed as "different" (id.).

The June 2023 IEP reported that the student received the mathematics curriculum presented at the first grade to second grade level addressing: counting to 120, recognizing paper bills and coins, days of the week, and months of the year, counting by fives and tens, using a calculator, telling time, and completing addition and subtraction problems (Dist. Ex. 1 at p. 6). The IEP stated that the student mastered counting by tens and ones using blocks; however, he would often look to staff for reassurance on "almost anything that he [wa]s asked to try independently" (id.). The IEP reported the student told time by the hour using an analog clock, was better at reading a digital clock, added and subtracted single digits using a number line or manipulatives, and had learned probability vocabulary such as "likely," "unlikely," "equally likely," "certain," and "impossible" using candy as a manipulative (id.).

The CSE determined that for the purpose of the June 2023 IEP, the student's participation in social studies and science classes was referred to as study skills, indicating that "[t]he purpose of [the student] attending these classes was inclusionary" (Dist. Ex. 1 at p. 6). The June 2023 IEP reported that the student came to class prepared with his Chromebook and binder, and a couple of times raised his hand and answered questions the other students did not attempt; although, "it [wa]s difficult to pinpoint the amount of information [the student] got out of these classes and what he retained" (id.). The IEP stated that the student did not follow multi-step directions during science, and needed "much guidance"; however, the student resourcefully watched his classmates and copied them at times (id. at p. 7). According to the IEP, the student completed projects with staff and presented a poster in social studies class (id.). The IEP reported that the student needed a "modified curriculum at his level of ability" in order to better meet his unique needs in the upcoming school year (id.).

The June 2023 IEP reported that standardized testing yielded results indicating significant delays in speech-language skills, with the student demonstrating a strength in receptive vocabulary (Dist. Ex. 6 at p. 7). The IEP noted that the student became excited when speaking with adults and peers which resulted in his fast rate of speech and decreased intelligibility; the student benefited from communication partners providing honest feedback in order for the student to repeat information at a slower rate (id. at p. 7). The IEP reported the focus of speech sessions was pragmatic language such as introductions, goodbyes, and making on topic comments (id.). The IEP noted gains in these areas with the student easily asking a peer an on-topic question if prompted and a then-current annual goal focused on making an on-topic comment to a peer or adult during a structured conversation (id.). The IEP stated the student perseverated on preferred topics; however, he followed set rules focusing on appropriate times to talk about specific topics (id.).

With respect to career, vocational, and transitional activities the June 2023 IEP stated the student wanted to work in a school environment, on a farm, or at home with his parent on machinery (Dist. Ex. 1 at pp. 7-8). The IEP included that the student needed to continue to increase his reading comprehension, math skills, and self-advocacy skills (id. at p. 8).

In the area of academic, developmental, and functional needs, the June 2023 IEP identified that the student needed prompting to stay on topic in social and academic settings, and repetition and small group instruction to retain academic concepts (Dist. Ex. 1 at p. 8). The IEP included that the student enjoyed being with peers and attending specials with his entire class, needed redirection to attend to instruction, and responded to behavioral reward systems (id.). In addition, the IEP reported that the student enjoyed cooking and cleaning and needed to develop general life skills to succeed in his daily life (id.).

Turning to the student's social development, the June 2023 IEP reported the student had positive social behaviors including greeting others, engaging in topics of interest, and joking around and he enjoyed being with peers at school (Dist. Ex. 1 at p. 8). The student engaged in topics of interest; however, he needed reminders as "he could get carried away" with preferred topics (id.). Further, the student continued to develop skills related to sequencing past events in order to accurately retell information to adults and peers, as well as making appropriate comments and asking relevant questions when conversing with peers and adults (id.).

In the area of OT, the June 2023 IEP reported areas of strength including the student's interest in drawing, and that his handwriting was considered legible; he continued working on scissor skills and learning how to use a keyboard to increase independence in the classroom setting (Dist. Ex. 1 at p. 9). He also worked on improving core strength, posture, bilateral and visual-motor integration, and attention to tasks during sessions (id.). With regard to PT, the IEP reported that standardized test results indicated the student was functioning overall in the first percentile for his age group, but that he had demonstrated significant improvement in all areas (id.). According to the IEP, the student's strength was in his ability to perform activities requiring increased strength, which "translat[ed] into continued improvement of bilateral coordination skills" (id.).

The June 2023 IEP identified strategies for addressing the student's management needs including providing seating options to increase core strength, using visual and verbal prompts to support speaking and listening, and focusing on conversational topic supports with peers and adults (Dist. Ex. 1 at p. 10). The IEP indicated that the student would continue to benefit from using adaptive writing paper, and that movement breaks, deep pressure, heavy work and fidgets to support increased attention may be useful; however, the IEP also noted that the student "no longer need[ed] or desire[d] the use of the following: [f]idgets, OT paper for writing, and the slant board for writing" (id. at pp. 5, 10). In the area of PT, identified strategies included use of verbal cues and visual reinforcement for gross motor activities (id. at p. 10). Further supports included providing a visual schedule of expectations for the school day, and using a chair with movement during classes (id.). Additional strategies identified included fostering increased independence with less reliance on a 1:1 aide depending on the academic program for the 2023-24 school year, and the IEP noted the student also requested more independence in the hallway when transitioning from one place to another (id.). To address the student's above identified needs, the June 2023 CSE included 16 annual goals with short-term objectives in the areas of reading, writing, mathematics, speech-language, social/emotional-behavioral, motor, and basic cognitive and daily living skills (id. at pp. 12-17).

With respect to the effect of the student's needs on his ability to be involved in and make progress in a general education curriculum, the June 2023 IEP identified the student's ability to access the general education curriculum as being compromised by his cognitive functioning (Dist. Ex. 1 at p. 10). The June 2023 CSE recommended a hybrid model of material and instruction

presented at the student's level of ability (*id.*). The IEP reported the student to be "very successful" when provided 1:1 instruction "as he [wa]s not distracted by others" (*id.*).

B. Educational Placement - 12:1+3:1 Special Class

The district argues that the IHO erred in her determination that the June 2023 CSE's 12:1+3:1 special class placement recommendation for the student for the 2023-24 school year was not appropriate. In support of the argument that the IHO erred by finding that the district failed to offer the student a FAPE, the district asserts that because of "the [s]tudent's growing need for a program that would prepare him to function in society," the CSE sought an educational program with comprehensive instruction in all areas of need, and that the recommended out-of-district 12:1+3:1 alternate assessment life skills program with supplementary services, annual goals, and interaction with students without disabilities specified in his IEP was reasonably calculated to meet the student's unique needs and make progress toward his goals in the LRE. According to the district, "the IHO excessively relied on the parent's self-serving adaptive behavior rating scale, the [s]tudent's two highest standardized testing measures, and the testimony of only one witness" and, in doing so, "disregarded the credible, substantial testimony of knowledgeable witnesses and disregarded the results of other standardized testing." The district further asserts that it was irrational for the IHO to credit the testimony and opinion of the student's district special education teacher who visited the out-of-district program once, for a very short amount of time, and that the IHO should have given greater weight to the testimony of the director of special education of the recommended out-of-district 12:1+3:1 program (program director) who had worked with students in the program for approximately sixteen years.

Additionally, the district alleges that the IHO decision included factual errors, asserting that the IHO incorrectly determined that the student's June 2023 IEP did not include attendance in mainstream classes, since, as written, the June 2023 CSE recommended that the student participate in the regular physical education class and that the student could receive speech-language therapy with nondisabled students. Further, the district alleges that the IHO disregarded the program director's testimony that once the student established himself in the program, there would be more opportunities for him to participate in general education classes, inclusive of academic class and special classes, and work-based learning opportunities.

Also, the district argues that the IHO erred in finding that the student did not have severe multiple disabilities which required a 12:1+3:1 special class placement focused on habilitation. The district argues that the student's "medical diagnosis" of developmental language disorder, the fact he receives speech-language therapy services as well as OT and PT, and that his most recent IQ was less than 40 shows the student has "multiple and severe disabilities" such that "he needs instruction in skills and functioning for daily living," which the district contends is what habilitation is.

After a review of the hearing record, I have determined that the evidence does not support the district's argument that the 12:1+3:1 special class was appropriate for the student.

With regard to the 12:1+3:1 special class in this case, State regulation provides that "[t]he maximum class size for those students with severe multiple disabilities, whose programs consist primarily of habilitation and treatment, shall not exceed 12 students. In addition to the teacher, the staff/student ratio shall be one staff person to three students. The additional staff may be teachers,

supplementary school personnel and/or related service providers."(8 NYCRR 200.6[h][4][iii]). Thus, when the maximum number of students attend such a setting, State guidance has at times referred to it nominally as a 12:1+4 special class (see, e.g., "Questions and Answers on Individualized Education Program (IEP) Development, The State's Model IEP Form and Related Documents," at p. 4, Office of Special Ed. [October 2023], available at https://www.nysed.gov/sites/default/files/programs/special-education/questions-answers-iep-development_0.pdf). However, if less than the maximum number of students attend such a special class, in addition to the teacher, State regulation makes clear that the staff/student ratio shall minimally be one staff person to three students (id.). It has become more common in recent years to refer to a 12:1+4 special class setting as a 12:1+ 3:1 setting and specify the minimum required ratio of additional staff to students rather than the theoretical maximum number of students that could be placed with the special education teacher. The additional staff may be teachers, supplementary school personnel, and/or related service providers (id.). The Second Circuit has recently observed that "[i]n the continuum of classroom options, the [12:1+3:1 special class recommendation] is the most supportive classroom available" (Navarro Carrillo v. New York City Dep't of Educ., 2023 WL 3162127, at *3 [2d Cir. May 1, 2023]).

State regulation defines multiple disabilities as "concomitant impairments (such as intellectual disability-blindness, intellectual disability-orthopedic impairment, etc.), the combination of which cause such severe educational needs that they cannot be accommodated in a special education program solely for one of the impairments. The term does not include deaf-blindness." (8 NYCRR 200.1[zz][8]).

With respect to the student in this case, the evidence reflects that past CSEs convened by the district have determined that the student was eligible for special education, first as a student with a speech or language impairment and then as a student with an intellectual disability (see e.g. Dist. Exs. 1 at p. 2; 11 at p. 2; 12 at pp. 1, 2). While the district is correct that the student has exhibited language delays and received a diagnosis of intellectual disability (i.e. "concomitant impairments"), the evidence in the hearing record shows that during the 2022-23 school year, the student attended his district school with general education grade-level peers for specials including art, library, chorus, technology, and physical education, in addition to core general education classes for science and social studies, with adult support as detailed above (Dist. Exs. 1 at p. 5; see Dist. Exs. 11 at pp. 1-2; 12 at pp. 1-2). The adult support provided for in the IEP was to assist the student with staying on task, following directions, and ensuring his safety (Dist. Ex. 1 at p. 5). Further, the IEP reported that the student had discussed his desire for more independence throughout his school day such as eating his lunch and walking to classes with his "buddies" without a 1:1 aide (id.). Directly after that, the IEP reported that "[i]n essence, he [wa]s behaving like an 8th grade student" (id.). Additionally, the student's March 2023 IEP shows that, just a few months prior to the June 2023 CSE meeting, the CSE had recommended a 15:1 special class placement for the student for ELA and math instruction for the latter portion of the 2022-23 school year (Dist. Ex. 10 at p. 1). According to State regulation, a 15:1 special class placement derives from the provision which states that "[t]he maximum class size for those students whose special education needs consist primarily of the need for specialized instruction which can best be accomplished in a self-contained setting shall not exceed 15 students, or 12 students in a State-operated or State-supported school" (8 NYCRR 200.6[h][4][i]).

Whereas State regulation defines a 12:1+3:1 special class program as focusing primarily of habilitation and treatment, review of the student's IEP shows that the majority of the June 2023

IEP annual goals addressed academic skills such as reading, writing, and mathematics, and skills needed for vocation such as social communication and attention (Dist. Ex. 1 at pp. 12-16). Specifically, in the area of academics the student had annual goals addressing reading fourth grade level multi-paragraph text and identifying the main idea for each paragraph by completing a graphic organizer, and reading and following a list of procedures/steps; an annual goal focused on writing sentences using upper case letters and the pronoun "I" when given written assignments; annual goals that addressed completing two-digit math problems, correctly identifying place value, and identifying bills and coins; and a social communication annual goal addressing engaging in conversational turn-taking for multiple turns with topics initiated by himself and others (id. at pp. 12-14, 17). The CSE developed an annual goal for the student to improve his ability to copy texts using a typing program or word processor, and improve "pre-vocational skills" by placing papers in folders labeled in alphabetical order (id. at pp. 15-16). Additionally, the IEP provided an annual goal that the student order a meal at a restaurant by stating his order and using eye contact; as well as an annual goal for the student to participate in and follow classroom routines that included raising his hand, listening to peers, listening to adults and participating cooperatively in groups with peers by dividing and completing responsibilities, sharing materials and exchanging opinions (id. at pp. 14-15). Further, the IEP included an annual goal to improve the student's "independence in the classroom setting" by improving functional attention to task with limited adult support (id. at p. 15).

To address the student's gross motor needs, the June 2023 IEP included annual goals to improve completion of three-step gross motor activities and the ability to jump with opposite arm and leg in coordinated fashion (Dist. Ex. 1 at pp. 16-17). I note that the majority of the annual goals as listed above focus on increasing the student's academic and social communication skills, rather than a focus on "habilitation and treatment" (see id. at pp. 12-17).

The CSE chairperson testified that at the March 2023 CSE meeting, the CSE discussed looking into other districts for programming options because the district "did not have a program at the high school level for students who [were] needing a [l]ife [s]kills [p]rogram," and as the student was entering high school, he needed to have skills related to the workplace and social skills (Oct. 4, 2023 Tr. pp. 27-28). With regard to programming, the CSE chairperson testified that the March 2023 CSE wanted to find and recommend a life skill and alternate assessment program for the student upon conclusion of the March 24, 2023 CSE meeting (Oct. 4, 2023 Tr. pp. 30, 36).⁹

The director of special education of the recommended out-of-district 12:1+3:1 program (program director) testified that there were two 12:1+3:1 programs at his public school: one for students in kindergarten through fifth grade, and the other for students in sixth through twelfth grade (Oct. 4, 2023 Tr. pp. 215, 230). The program director testified that "oftentimes in the [12:1+3:1 program] settings you will have students that have multiple disabilities" noting that none of the students in the program had emotional disabilities and that those students infrequently pushed into the general education setting (Oct. 4, 2023 Tr. pp. 226, 227-28). The 12:1+3:1 program description for grades six through twelve indicated that it consisted primarily of "life skill

⁹ The CSE chairperson noted that the March 2023 IEP intended to recommend a special class for the student in a "Life Skills Alternate Assessment Program" but did not make a specific class size recommendation as the other districts' life skills programs did not have "streamlined" ratios; for example one program was a 12:1+1, whereas, another was a 12:1+3:1 (see Oct. 4, 2023 Tr. pp. 36-37).

training habilitation treatment" for students with moderate to severe disabilities in the age range of 10-18 years of age (Dist. Ex. 13 at p. 1).¹⁰ The program description stated outcomes were designed around successful achievement of IEP goals, all students in the program met the criteria for alternate assessment, and students received direct instruction in ELA through "Heggerty phonics, Edmark Reading Program, life skills math, and life skills such as cleaning, cooking, and personal hygiene" (Dist. Ex. 13 at p. 1).¹¹ The program director described the Edmark reading program as "essentially for non-readers or for emerging readers and described the students within the 12:1+3:1 program as "probably reading at the kindergarten level or they're non-readers" testifying upon further questioning that "most of [the students] w[ere] in the kindergarten range" (Oct. 4, 2023 Tr. pp. 224, 304-305, 309). Although the student's reading skills were at a fourth grade level, the program director testified that the student would receive instruction "on his instructional level" in the 12:1+3 program (Oct. 4, 2023 Tr. p. 309). The program director did not clarify what would be used for the student in place of the Edmark program for nonreaders or emergent readers.

The program director additionally described an opportunity for the student to be "part of the school store" and that students in the 12:1+3:1 program had the opportunity to start "their school based work experience day one" (Oct. 4, 2023 Tr. pp. 229, 258). It is not clear whether the store activities are encompassed within the terms of the IEP or not. The program director prefaced the statements about the store by saying "I'm just going to say this broad statement, all students have access to all settings in the high school if it's appropriate in the least restrictive environment for that student and if it's – if it's a good fit." (Oct. 4, 2023 Tr. at p. 228). He also testified that opportunities for students to "get to go out into the community to do their work studies" began in eleventh grade for students in the "CDOS" program; the testimony did not clarify whether students in the 12:1+3:1 alternate assessment program had opportunities to participate in community-based work studies programming (see Oct. 4, 2023 Tr. pp. 229, 257-258; see Tr. pp. 105-06).

Here, components of the 12:1+3:1 program touched on addressing some vocational and daily living goals that would relate to life skills such as following procedures and steps during cleaning and cooking activities, identify dollar amounts of items, and improving the pre-vocational goal of alphabetizing papers when working with his occupational therapist or classroom teacher (see Oct. 4, 2023 Tr. pp. 229; Dist. Exs. 1 at pp. 12, 13, 16; 13 at p. 1). However, while the focus of a 12:1+3:1 program according to State regulation addressed "habilitation and treatment," the student, in addition to working on life skills, had many academic goals that addressed working on identifying fourth grade level multi-paragraph informational text, identifying the main idea of

¹⁰ The 12:1+3:1 program description included classroom staff information noting four staff assigned to the classroom, in addition to service providers including a speech-language pathologist, an occupational therapist, a physical therapist, and adaptive physical education providers (Dist. Ex. 13 at p. 2). The classroom staff included two classroom aides and one certified teacher assistant and the description noted the classroom teacher was a "certified teacher assistant with over 20 years' experience," who was serving as the substitute teacher until the program hired "a qualified teacher" (*id.*).

¹¹ The student's June 2023 IEP did not identify adaptive needs or annual goals related to hygiene, grooming, dressing, or eating (see generally Dist. Ex. 1 at pp. 12-17). The CSE chairperson testified that the student was able to wash his hands, go to the bathroom independently, and put regular clothing on independently; however, he needed help in getting his socks on for soccer games (Oct. 4, 2023 Tr. pp. 72-73). The student's teacher aide reported helping to put the student's shin guards on a couple of times for soccer, noting he changed his clothes on his own (Oct. 5, 2023 Tr. p. 485).

paragraphs by completing fill in the blank graphic organizers, completing writing assignments using capital letters at the sentence level, and copying texts using a typing program or word processor to increase the student's success in producing written information with efficiency and legibility (Dist. Ex. 1 at pp. 12, 13, 16). Further, the student's IEP had multiple annual goals that focused on the student's social communication that addressed initiating varied appropriate topics, and initiating communicative interactions by asking questions as well as engaging in three to four conversational turn-taking exchanges with topics initiated by self or others (*id.* at pp. 13, 14, 15). Additionally, the IEP addressed improving social pragmatic abilities with peers in part by including an annual goal for the student to ask a question about a peer's area of interest and engage in on-topic conversations (*id.* at p. 14). Further, other annual goals addressed participating and appropriately listening during classroom activities, and "participat[ing] cooperatively with groups of students in classroom activities" that for example included "divid[ing] and complet[ing] responsibilities, shar[ing] materials, [and] exchang[ing] opinions" (*id.* at pp. 14-15).

The June 2023 IEP reflected that the student would not participate in "general education class" when he received OT, PT, or special class instruction for 6 hours and 15-minutes per day (Dist. Ex. 1 at pp. 1, 21). The IEP did not include restrictions to the student's participation in general education physical education classes or when he "push[ed] into" general education classes as part of the group speech-language therapy sessions (*see id.* at pp. 1, 17, 21).¹² To the extent that the student would be able to engage in and work towards some of his academic and social/communication annual goals at the school store, during physical education, or during one 30-minute speech-language session per six day cycle, for most of the school day the student would be receiving instruction in a 12:1+3:1 special class and the IEP did not otherwise describe potential opportunities, including mainstream settings, for the student to address these annual goals (*id.* at pp. 17, 21). The hearing record did not show that the student would be provided learning opportunities with peers working on similar goals in areas of reading, writing, math, or social communication within the 12:1+3:1 special class.

As reviewed in detail above, the student's present levels of performance in his June 2023 IEP identified his abilities that included: advocating for himself such as stating he wanted to walk independently to classes and each lunch without a 1:1 aide, advocating for peers stating "that's not right" when he saw students making fun of someone, reading at the third and fourth grade level, recalling information from chapter books over a weekend, enjoying reading and talking about preferred topics such as World War II, copying notes onto paper from a SmartBoard, learning basic math such as single digit addition and subtraction, raising his hand and answering questions within his general education class, creating a poster project for his general education social studies class with aide support, and presenting the poster in class (Dist. Ex. 1 at pp. 5-8). The student's June 2023 IEP continued to support his development by providing annual goals that focused on

¹² The statement in the June 2023 IEP that the student's group speech-language therapy would be conducted in the general education classroom seems strained insofar as there are no opportunities for the student to participate in the general education environment on the IEP except for physical education. Further, the program director testified that the student would not attend any mainstream classes including physical education; however, upon further questioning clarified that the IEP indicated that the student would be participating in a regular physical education class (Oct. 4, 2023 Tr. pp. 284, 310-11; *see* Dist. Ex. 1 at p. 21). The program director testified that opportunities for mainstreaming for classes such as music or art class could be made at a future CSE meeting (Oct. 4, 2023 Tr. p. 278); however, such testimony, even if true, was impermissibly retrospective to justify the IEP at issue in this proceeding.

academics and social communication in addition to life skills; however, a 12:1+3:1 special class placement for more than six hours per day would not have provided the student with the academic, social/emotional or communication opportunities to meet his unique needs (see Dist. Ex. 1 at pp. 12-17; 8 NYCRR 200.6[h][4][iii]).

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., 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., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. N. Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobol, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 CFR 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 CFR 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 CFR 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; the continuum also makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 CFR 300.115[b]).

To apply the principles described above, the Second Circuit adopted a two-pronged test for determining whether an IEP places a student in the LRE, considering (1) whether education in the general classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given student, and, if not, (2) whether the school has mainstreamed the student to the maximum extent appropriate (T.M., 752 F.3d at 161-67 [applying Newington two-prong test]; Newington, 546 F.3d at 119-20; see N. Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048-50 [5th Cir. 1989]). A determination regarding the first prong, (whether a student with a disability can be educated satisfactorily in a general education class with supplemental aids and services), is made through an examination of a non-exhaustive list of factors, including, but not limited to

- (1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom;
- (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the

benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class

(Newington, 546 F.3d at 120; see N. Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50). The Court recognized the tension that occurs at times between the objective of having a district provide an education suited to a student's particular needs and the objective of educating that student with nondisabled 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).¹³

If, after examining the factors under the first prong, it is determined that the district was justified in removing the student from the general education classroom and placing the student in a special class, the second prong requires consideration of whether the district has included the student in school programs with nondisabled students to the maximum extent appropriate (Newington, 546 F.3d at 120).

In this instance, as discussed above, the June 2023 CSE was planning on recommending that the student move from a program that included special classes, as well as instruction in general education classes with 1:1 support, to a special class setting for the entirety of the school day with the exception of physical education as he transitioned from middle school to high school during the 2023-24 school year. Although there was some indication that the student's life skills needs would have been better met in a special class setting, the lack of consideration of the second factor of the Newington test is concerning. The reason the district initially looked for out of district placements for the student was that the district did not have a program at the high school level for students who needed a life skills program (Oct.4, 2023 Tr. p. 27). This meant that the district was reliant on finding a program outside of the school district; however, this circumstance did not absolve the district from considering the student's LRE and the decision to substantially increase the student's exclusion from nondisabled peers after removal from the general education setting was not sufficiently explained. As the Second Circuit determined, in T.M. v. Cornwall, the nonexistence of an in-district integrated summer program did not alleviate the district from the LRE requirements (T.M., 752 F.3d at 166). Instead, the Court instructed that if the Cornwall Central School District did not wish to create an integrated program, it was not required to, but it

¹³ The Second Circuit left open the question of whether costs should be considered as one of the relevant factors in the first prong of the LRE analysis (Newington, 546 F.3d at 120 n.4).

was required to place the student in an integrated public program elsewhere (*id.*).^{14, 15, 16} Under the circumstances presented here, more care needed to be taken in addressing the second part of the Newington standard prior to recommending complete removal from general education.

As such, review of the hearing record supports the IHO's determination that there was no evidence that the student had severe multiple disabilities requiring the intensive staffing ratio or that his program should consist primarily of habilitation and treatment, such as in the

¹⁴ According to the Court in *T.M.*, the pervasiveness of the LRE requirement required the application of the two-prong *Newington* test to the "entire proposed educational program" (see *T.M.*, 752 F.3d at 162-65 [finding specifically that the LRE requirement applies to the summer component of the student's recommended 12-month school year program]; see also 34 CFR 300.107; 300.114; 300.117; 8 NYCRR 200.4[d][2][v][a][1]-[3]). In *T.M.*, the Court rejected the district's assertion that the "LRE requirement [was] necessarily limited, in the ESY context, by what programs the school district already offer[ed]" (*T.M.*, 752 F.3d at 163). Significantly, the Court explained that a "disabled child should not be forced into a special classroom if he or she can be appropriately educated in a mainstream classroom" (*T.M.*, 752 F.3d at 163).

¹⁵ The Court held that "[w]e therefore agree with both parties that the IDEA does not require a school district to create a new mainstream summer program from scratch just to serve the needs of one disabled child. * * * Instead, the school district may choose to place the child in a private mainstream summer program, or a mainstream summer program operated by another public entity" (*T.M.* 752 F.3d, at 166). Assuming that the parents are correct and that the district should have offered the student a full-day integrated setting with appropriate supports (a contention that the district has not refuted in this case under a *Newington* analysis), it does not follow that the district must be the entity that creates such a program or that it be created exactly as the parents wish. But the district may be called on to find such an all-day integrated program. The Second Circuit went on to reject several of Cornwall's additional arguments: "Cornwall responds that it had no way to offer T.M. a placement in a mainstream ESY program operated by another entity, because (1) no public mainstream ESY programs existed in the area and (2) New York law prohibited it from offering T.M. a placement in a private mainstream ESY program. But even assuming those facts are true, they do not change Cornwall's obligation under the IDEA to consider a full continuum of alternative placements and then offer T.M. the least restrictive placement from that continuum that is appropriate for his needs" (*T.M.* 752 F.3d, at 166).

¹⁶ In determining a student's educational placement, State and federal regulations provide that a district must "ensure" that a student attend a placement "as close as possible to the [student's] home" and "[u]nless the IEP of a [student] with a disability requires some other arrangement, the [student] is educated in the school that he or she would attend if nondisabled" (34 CFR 300.116[b][3], [c] [emphasis added]; see 8 NYCRR 200.1[cc], 200.4[d][4][ii]). Numerous courts have held that, while a district remains obligated to consider distance from home as one factor in determining the school in which a student's IEP will be implemented, this provision does not confer an absolute right or impose a presumption that a student's IEP will be implemented in the school closest to his or her home or in his or her neighborhood school (see *White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 380-82 [5th Cir. 2003]; *Lebron v. N. Penn. Sch. Dist.*, 769 F. Supp. 2d 788, 801 [E.D. Pa. 2011] [finding that "though educational agencies should consider implementing a child's IEP at his or her neighborhood school when possible, [the] IDEA does not create a right for a child to be educated there"]; *Letter to Trigg*, 50 IDELR 48 [OSEP 2007]; see also *R.L. v. Miami-Dade Cnty. Sch. Bd.*, 757 F.3d 1173, 1191 n.10 [11th Cir. 2014]; *A.W. v. Fairfax Cnty. Sch. Bd.*, 372 F.3d 674, 682 [4th Cir. 2004]; *McLaughlin v. Holt Pub. Sch. Bd. of Educ.*, 320 F.3d 663, 672 [6th Cir. 2003]; *Kevin G. v. Cranston Sch. Comm.*, 130 F.3d 481, 482 [1st Cir. 1997]; *Flour Bluff Ind. Sch. Dist. v. Katherine M.*, 91 F.3d 689, 693-95 [5th Cir. 1996]; *Urban v. Jefferson Cnty. Sch. Dist. R-1*, 89 F.3d 720, 727 [10th Cir. 1996]; *Poolaw v. Bishop*, 67 F.3d 830, 837 [9th Cir. 1995]; *Murray v. Montrose Cnty. Sch. Dist. RE-1J*, 51 F.3d 921, 929 [10th Cir. 1995]; *Schuldt v. Mankato Indep. Sch. Dist. No. 77*, 937 F.2d 1357, 1361-63 [8th Cir. 1991]; *Barnett v. Fairfax Cnty. Sch. Bd.*, 927 F.2d 146, 152-53 [4th Cir. 1991] [holding that a district must "take into account, as one factor, the geographical proximity of the placement in making these decisions"]; *H.D. v. Cent. Bucks Sch. Dist.*, 902 F. Supp. 2d 614, 626 [E.D. Pa. 2012]; *Straube v. Florida Union Free Sch. Dist.*, 801 F. Supp. 1164, 1177-79 [S.D.N.Y. 1992]).

recommended 12:1+3:1 special class program, consistent with her finding that the district failed to offer the student a FAPE for the 2023-24 school year.

C. Relief – 1:1 Academic Program

Turning now to the district's second argument that the IHO's ordered relief to provide the student with a 1:1 academic instruction program within the district was not appropriate because it would not provide the student with a FAPE in the LRE, the hearing record supports the district's argument.

The IHO attempted to address what type of program the student should attend (IHO Decision at pp. 15-16). In particular, the IHO correctly determined that the evidence in the hearing record showed that the district high school did not have special education classes, other than resource room, and placing the student in a general education class or a resource room program would not have been appropriate for the student (IHO Decision at p. 15; see Oct. 5, 2023 Tr. pp. 361, Oct. 17, 2023 Tr. pp. 501-04; Dist. Exs. 1 at p. 10; 11 at pp. 5, 8).¹⁷ Finding that there were no similar peers within the school district, and that the district was unable to locate an appropriate program for the student outside of the school district, the IHO determined that a program consisting of 1:1 instruction was all that remains even though it was "not ideal" (id. at p. 15). As a program consisting solely of general education classes or resource room is not appropriate for the student, the inquiry is now what an appropriate program for the student would be that provides the special education needed by the student, provides 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 is 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), while keeping in mind that the district was not required to create a "new" program "just to serve the needs of one disabled child" (T.M., 752 F.3d at 165-66).

Regarding the IHO's order that the student receive 1:1 academic instruction, the June 2023 IEP indicated that the student was very focused on his academics when he received instruction in a 1:1 setting (Dist. Ex. 1 at p. 5). The student's special education teacher testified that she would recommend the student receive 1:1 academic instruction for ELA, math, science, and social studies, but also testified that a 12:1+1 class would be appropriate for the student as well (Oct. 17, 2023 Tr. pp. 493-94, 505).

In addition to the student's needs identified above, the evidence in the hearing record shows that although the student may have required redirection to his tasks, he benefited from small group instruction and interacting with nondisabled students (see Oct. 4, 2023 Tr. p. 59; Dist. Exs. 1 at pp. 5, 7-8; 4 at p. 5; 10 at pp. 5-7).¹⁸ The June 2023 IEP indicated that the student needed repetition

¹⁷ "[T]he IDEA does not require regular education instructors 'to modify the regular education program beyond recognition'" (Killoran v. Westhampton Beach Sch. Dist., 2021 WL 4776720, at *11 [E.D.N.Y. Oct. 11, 2021], aff'd, 2023 WL 4503151 [2d Cir. July 13, 2023], quoting P. v. Newington Bd. of Educ., 512 F. Supp. 2d 89, 107, [D. Conn. 2007]; see Daniel R.R., 874 F.2d at 1048-49 ["[M]ainstreaming would be pointless if we forced instructors to modify the regular education curriculum to the extent that the handicapped child is not required to learn any of the skills normally taught in regular education. The child would be receiving special education instruction in the regular education classroom; the only advantage to such an arrangement would be that the child is sitting next to a nonhandicapped student."]).

¹⁸ At the time of the impartial hearing, the district had not identified any other student in the district recommended

and small group instruction to learn and retain academic concepts (Dist. Ex. 1 at p. 8). Additionally, the student's June 2023 IEP included annual goals that might not be accomplished in a 1:1 instructional setting: increase social communication skills and participate in and follow classroom routines and activities throughout the school day, which included raising his hand, listening appropriately while peers are speaking during classroom activities without interruption, and participating cooperatively with groups of students in classroom activities (id. at p. 13).

Moreover, the student required a program that included elements of a life skills program, which does not appear to be included in the IHO's ordered relief (IHO Decision at p. 17; see Oct. 4, 2023 Tr. pp. 27-28). The CSE chairperson testified that the student required a program that would enable him to "grow" his life skills such as those used in the workplace and social skills to prepare him for his transition into society after high school (Oct. 4, 2023 Tr. p. 28). Additionally, the CSE chairperson testified that at that time, the district did not have a work-based learning program (see Oct. 4, 2023 Tr. p. 105).

Therefore, it is not clear from the IHO's decision or the evidence in the hearing record whether the 1:1 academic instruction program the IHO ordered would provide the student with life skills instruction or properly address some of his annual goals (IHO Decision at p. 17).

In this instance, the evidence in the hearing record described above supports finding that an appropriate program for the student would be a special class placement for students whose special education needs consist of the need for specialized academic and life skills instruction, alongside peers with similar individual needs, and consideration of areas where the student could participate in activities with nondisabled peers. Therefore, the evidence does not support the IHO's order requiring the district to provide the student with 1:1 academic instruction for the 2023-24 school year, because a 1:1 setting for academic instruction is not an appropriate educational program for the student.¹⁹

Nonetheless, as correctly stated by the IHO, the district does not offer special education classes at the high school level other than resource room services, which would be taught at grade level and would not be appropriate for the student; however, the IHO was incorrect by stating that the only remaining option was for the student to receive all academic instruction in a 1:1 setting (IHO Decision at p. 15). Additionally, the awarded relief in the form of an IEP amendment, under certain circumstances, has the effect of circumventing the statutory process, pursuant to which the CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing the student's needs (see Adams v. Dist. of Columbia, 285 F. Supp. 3d 381, 393, 396-97 [D.D.C. 2018] [noting with approval the hearing officer's finding "that the directives of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective placement in a private school"]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008] [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]]). Accordingly, another option available to the IHO was to order

for "an alternately assessed program" (see Oct. 4, 2023 Tr. p. 208; Oct. 20, 2023 Tr. p. 551).

¹⁹ Additionally, the district correctly argues that the State regulations do not include 1:1 academic instruction as part of the continuum of services that a CSE could consider (see 8 NYCRR 200.6).

the CSE to reconvene to determine what an appropriate program for the student would be, given her determination that the 12:1+3:1 placement was not appropriate. As such, I find it appropriate in this matter to modify the IHO's order to require the CSE to reconvene and determine what program and placement would be appropriate for the student given the determinations above that neither the 12:1+3:1 special class nor the possibility of isolating the student in a 1:1 setting with only 1:1 academic instruction were appropriate programs to meet the student's unique needs. Moreover, given the determination that the district denied the student a FAPE for the 2023-24 school year, it is more appropriate for the undersigned to designate the relief in this matter as compensatory education for the period of time until the CSE is able to locate an appropriate program and placement for the student.

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education relief may be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 & n.12 [2d Cir. 2014]; P. v. Newington Bd. of Educ., 546 F.3d 111, 123 [2d Cir. 2008] [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Doe v. E. Lyme, 790 F.3d 440, 456 [2d Cir. 2015]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

Generally, compensatory services are not designed for the purpose of maximizing a student's potential or to guarantee that the student achieves a particular grade-level in the student's areas of need (see Application of a Student with a Disability, Appeal No. 16-033; cf. Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Rather, an award of compensatory education should place the student in the position that he would have been in had the district acted properly (see Parents of Student W., 31 F.3d at 1497 [holding that "[a]ppropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA" and finding "[t]here is no obligation to provide a day-for-day compensation for time missed"]).

Since the district's denial of FAPE will extend until the CSE reconvenes and recommends an appropriate program and placement for the remainder of the 2023-24 school year, and in an abundance of caution to ensure the student receives some level of specialized academic instruction until the CSE reconvenes, I will order the district to provide programming in the form of compensatory education that mirrors the IHO's ordered relief in the form of 1:1 instruction with a special education teacher for all academic areas (ELA, math, science, and social studies), instruction in specials (art, library, chorus, physical education, technology or any other special) that includes some access to nondisabled peers, and related services and supplemental supports as indicated on the June 2023 IEP, which include one 30-minute session per six day cycle of speech-language therapy in small group, two 30-minute sessions per week of individual OT, six 30-minute sessions per month of individual PT, and a full-time 1:1 aide, up and until the CSE reconvenes to recommend an appropriate program for the student and such program is implemented. Though the 1:1 academic placement is far from ideal, as indicated above, this case highlights the problems a smaller district may face when attempting to provide each eligible student with special education services that meet their unique needs without creating a special education program only for that student or placing them in an out-of-district program. The IHO attempted to describe for the parties the type of programming that she believed would be appropriate for the student such as a 12:1 or 15:1 special class setting with the support of an aide. Going forward, the district should expand its search to identify and document the existence of special class programs that will implement an IEP that includes special class placement options that are designed to build on his academic successes thus far, provide life skills/vocational training opportunities, and access to nondisabled peers to the maximum extent appropriate. The evidence in the hearing record indicates that the Franklin-Essex-Hamilton BOCES, of which the district in this case is a component district, no longer provides special education programming (Dec. 18, 2024 Tr. p. 21). Therefore, the district's search should appropriately identify all public and nonpublic schools operating such programs located within a 120 mile radius from the student's home for consideration of appropriate special class options (and indicate whether such programs have or are likely to have available space), and the documentation of this search should be prepared by the district even if both parties ultimately reach consensus during a CSE meeting that a particular program is too distant to be feasible.²⁰ If necessary, the district should contact the Office of Special Education for assistance in conducting a search of available programs.²¹

²⁰ If a district were to assign a disabled student to a distant program merely out of administrative convenience, such actions can be viewed as discriminatory, but no strict distance limits for transporting disabled students were established in IDEA due to varying circumstances faced by districts and parents. The United States Department of Education has explained that "[t]he Act encourages multi-district cooperation in order to develop sufficient size and scope for programs, especially in the more rural and sparsely populated areas of our nation. It may be unfortunate that such programming strategies sometime necessitate the busing of [disabled] children, but Federal requirements do not rule out the appropriateness of such practices" (Letter to Waxler, 211 IDELR 60 [BEH 1978]).

²¹ The distance to be traveled must take into account the student's special education needs and the probable maximum distance that the student can tolerate while remaining likely to receive educational benefits in accordance with the Andrew F. standard. A residential placement has, in rare circumstances, been found to be appropriate due to a combination of factors such as a lack of available programming options for rural students, but distances that fall within a student's tolerance limits will often preclude such placements as impermissibly restrictive (see, e.g. Sto-Rox Sch. Dist., 22 IDELR 1078 [SEA PA 1995]).

VII. Conclusion

Based on the foregoing, the IHO was correct in determining that the district failed to offer the student a FAPE for the 2023-24 school year but erred in ordering a 1:1 special class setting as the student's placement going forward for an unspecified duration of time. Accordingly, the IHO's decision is modified to the extent indicated above to provide the student with compensatory education until the CSE completes the search described above, reconvenes, and recommends an appropriate program and placement consistent with this decision.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated November 6, 2023 is modified by reversing the portion which ordered the district to provide the student with 1:1 academic instruction for the 2023-24 school year; and

IT IS FURTHER ORDERED that the district shall provide as compensatory education until the CSE recommends and implements an appropriate program for the student for the 2023-24 school year, 1:1 academic instruction in ELA, math, social studies, and science; a full-time 1:1 aide; one 30-minute session per six day cycle of speech-language therapy in a small group; two 30-minute sessions per week of individual OT; six 30-minute sessions per month of individual PT; and any special class placement consistent with this decision; and

IT IS FURTHER ORDERED that the CSE shall conduct a search for appropriate program options as described within the body of this decision and then shall, unless the parties otherwise agree on an alternative timeframe, reconvene to develop an IEP for the student within 60 days of this decision.

Dated: Albany, New York
January 12, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER