The University of the State of New York

The State Education Department
State Review Officer
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No. 23-062

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Liz Vladeck, General Counsel, attorneys for petitioner, by Frank J. Lamonica, Esq.

Isaacs Bernstein, PC, attorneys for respondents, by Lisa Isaacs, 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 determined that the educational program and services recommended by its Committee on Special Education (CSE) for respondents' (the parents') daughter for the 2022-23 school year were not appropriate. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The hearing record is sparse with regard to the student's educational history, and minimally reflects that the student in this case has continuously attended the Seton Foundation for Learning's (Seton) elementary school since she was five years old (see Parent Ex. N ¶¶ 16, 18, 20-21; see also Parent Ex. H at p. 1).[1]

[1] The Commissioner of Education has not approved Seton as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

On January 4, 2022, a district school psychologist completed a psychoeducational evaluation of the student as part of the student's mandated three-year reevaluation (January 2022 psychoeducational evaluation) (see Dist. Ex. 13 at p. 1). As reflected in the evaluation report, at the time of the evaluation the student was attending a third-grade special class at Seton's elementary school and received related services of occupational therapy (OT), physical therapy (PT), and speech-language therapy (id.). In addition, the evaluator indicated that the student had received a diagnosis of Down syndrome, was eligible for special education as a student with an intellectual disability, and used a speech generating device (SGD) to communicate (id. at pp. 1-2). In the report, the evaluator included information from the student's "last IEP" as part of the relevant background for the evaluation (id.). The evaluator administered the following to the student as part of the reevaluation: a student interview, a clinical interview (human figure drawing), the Wechsler Abbreviated Scale of Intelligence—Second Edition (WASI-II), and the Wechsler Individual Achievement Test—Fourth Edition (WIAT-IV) (id. at pp. 2-3). In addition, the evaluator conducted a teacher interview and had the student's teacher complete the Vineland-3 Domain-Level Teacher Form (id. at pp. 2, 4).

Based upon the student interview and her behavioral observations of the student, the evaluator noted in the January 2022 psychoeducational evaluation report that the student "brought her communication device with her," but further noted that "it was unnecessary for the evaluation as [the student] was able to speak" (Dist. Ex. 13 at p. 3). The evaluator also noted that, although the student's speech was, at times, "unintelligible," the student did not "mind repeating her answers and [the evaluator] was able to understand her responses" (id.). According to the evaluation report, the student "attempted to open the device several times but she was not sure about the password necessary to unlock it" (id.). The evaluator indicated, however, that the student was "cooperative and compliant in the course of this evaluation," she "attempted all tasks presented to her and ha[d] taken all items in stride," the student followed "all directions and was able to concentrate well with refocusing," and she was able to "communicate with the [evaluator] and respond to all [of the evaluator's] questions" (id. at pp. 3-4).

In summarizing the student's testing results, the evaluator reported that the student's cognitive skills fell within the "Mildly Delayed range overall," with her "perceptual reasoning ability [which fell within the "Borderline" range] . . . be[ing] significantly better developed than her verbal comprehension ability," which fell within the "Mildly Delayed" range (Dist. Ex. 13 at pp. 5-6). With respect to academics, the evaluator reported that the "majority of [the student's] abilities f[ell] into the Extremely Low range" and thus, she functioned "well below grade level at this time" (id. at p. 6). With regard to social/emotional functioning, the evaluator reported that the student presented as a "well behaved and well related youngster," whose "overall adaptive behavior f[ell] into the Low range" and who demonstrated a "[h]igher potential" within the "Socialization and Motor Skills domains" (falling within the "Moderately Low range") (id.).

On February 28, 2022, a CSE convened to conduct the student's annual review and to develop an IEP for the 2022-23 school year (fourth grade) (see Parent Ex. D at pp. 1, 34). Finding that the student remained eligible for special education as a student with an intellectual disability, the February 2022 CSE recommended the following: a 12-month school year program in a 12:1+1 special class placement in a district specialized school; related services consisting of three 30-minute sessions per week of individual OT, three 30-minute sessions per week of individual PT, one 30-minute session per week of PT in a group, and four 30-minute sessions per week of

individual speech-language therapy (id. at pp. 1, 29-30, 36).[2] The February 2022 CSE also recommended supplementary aids, services, program modifications, and accommodations consisting of the daily use of a dynamic display SGD with a communication application; the CSE also recommended that the student participate in adapted physical education (id.). As strategies to address the student's management needs, the February 2022 CSE noted the following in the IEP: "to acquire a new skill, [the student] require[d] being taught in a differentiated 1:1 instructional setting"; "[l]arger groups bec[a]me distracting" for the student and "cause[d] [her] to lose focus"; and although the student "demonstrate[d] skills in 1:1 instructional settings, she struggle[d] to generalize skills into a larger group setting" (id. at p. 7). The CSE further noted that the student "struggle[d] with maintaining skills during school breaks and weekends" (id.). With respect to the effect of the student's needs on her involvement in, and her progress in, the general education curriculum, the CSE indicated that the student's "deficits in processing new information, verbal expression, academic pre-readiness skills, visual motor and planning, as well as her need for refocusing, modeling and repetition, . . . impede[d] upon [the student's] ability to be involved in and progress in the general education curriculum" (id.). The February 2022 CSE also noted; however, the student "should have the opportunity to interact with h[er] typically developing peers when possible" (id.).[3] Next, the February 2022 CSE developed annual goals with corresponding short-term objectives (id. at pp. 8-29). Finally, the CSE recommended special transportation for the student (id. at p. 33).

By email dated April 4, 2022, the district school psychologist who completed the student's January 2022 psychoeducational evaluation and who attended the February 2022 CSE meeting sent the student's February 2022 IEP to the parents (see Dist. Ex. 17; see also Dist. Ex. 15 ¶ 3). Within the email, the district school psychologist indicated that the parents would receive a school location letter "at a later date" (Dist. Ex. 17).

In an email dated April 4, 2022 to the district school psychologist and to a district special education teacher—both of whom had attended the student's February 2022 CSE meeting—the parents explained that "[f]or the record, [the student] c[ould] write her name independently very well" and had not done so for the evaluator because the student was "not comfortable" with her (Dist. Ex. 7; see Dist. Ex. 15 ¶ 4). The parents also addressed documentation in the February 2022 IEP under "parent concerns," which indicated that "notwithstanding the teacher and [her] progress report," they did not agree with the CSE's decision to recommend a 12:1+1 special class placement at the meeting (Dist. Ex. 7). However, according to the parents' email, the student's teacher did not indicate that a "larger class was better for [the student]" and instead, the teacher had stated that the student "d[id] better in smaller groups, which [wa]s also mentioned at the beginning of the IEP" meeting (id.). The parents also noted that the 12:1+1 special class placement was the district school psychologist's recommendation, "as someone who d[id] not know [the student] at all" (id.). Next, the parents reported that at the February 2022 CSE meeting, they were told that the "8:1" special class was not appropriate for the student because "it [wa]s primarily behavioral"; however,

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

[3] In contrast, the February 2022 IEP—within the section of the IEP used to document recommendations for the student's participation with nondisabled peers—indicated that the student was a "full time special education student" and "ha[d] no interaction with her general education peers" (Parent Ex. D at p. 33).

the district school psychologist recommended the 12:1+1 special class "even though that size d[id]n't work for [the student]" (id.). In closing, the parents expressed their frustration with the district school psychologist and indicated that they "no longer wish[ed] to receive any further correspondence from [her]" (id.).[4]

On or about June 9, 2022, the parents executed an enrollment contract with Seton for the student's attendance during the 2022-23 school year from July 1, 2022 through June 30, 2023 (see Parent Ex. G at pp. 1, 4).

By email dated June 10, 2022, the district forwarded a "Prior Notice Package" (PNP) and a school location letter (dated June 9, 2022) to the parents (see Dist. Exs. 3 at p. 1; 5; see also Dist. Exs. 4 at p. 1 [representing the school location letter]; 6 [representing the parents' consent to use email to communicate with the district]; 8 at pp. 1-2 [representing SESIS events log]).

In a letter dated June 10, 2022, the parents, through their attorney, informed the district that they had received the student's IEP and believed it failed to offer the student a free appropriate public education (FAPE) in the least restrictive environment (LRE) (see Parent Ex. E at p. 1). As support for this assertion, the parents criticized the district's development of an IEP in the absence of a mandated three-year reevaluation of the student, the annual goals in the IEP, the absence of a recommendation for a 1:1 instructional setting, and the lack of opportunities for inclusion, which was "very important in helping [the student] model her social behavior and language skills with typical peers" (id.). The parents also indicated that, at that time, they had not yet had an "opportunity to visit any offered school" (id.). The parents also indicated that they would "contact [the district] again to advise whether their concerns with the IEP c[ould] be addressed at the proposed school, and whether the school [wa]s an appropriate program" for the student (id.). In addition, the parents notified the district of their intention to unilaterally place the student at Seton and seek funding from the district if they were not "satisfied with their investigation of the offered program" (id. at pp. 1-2).

Shortly thereafter, in a letter dated June 16, 2022, the parents, through their attorney, wrote to the district to further critique the contents of the student's IEP (see Parent Ex. F at p. 1). For example, the parents noted that, although they now realized that the district "incorporated" the student's three-year reevaluation into the IEP in areas such as the present levels of performance, it was "not identified as an evaluation" (id.). In addition, the parents indicated that they "challenge[d] the competency of the evaluation," asserting that the evaluator "insufficiently inquired into [the student's] needs or involve[ed] them in the process" because the evaluator did not administer a parent interview or conduct a classroom observation (id.). Next, the parents noted that, at the February 2022 CSE meeting when discussing the district's evaluation, they had expressed that the student's "performance was an underestimate of [the student's] abilities," and that was when the evaluator (district school psychologist) "became hostile and defensive in response," which "further alienat[ed]" them from the IEP development process (id.). According to the parents, the student's

[4] At the impartial hearing, the district school psychologist testified that, following the receipt of the parents' April 4, 2022 email, "we ha[d] offered to talk to [them], for [them] to call us" and that the "whole team" had tried calling the parents "several times," but they never responded (Jan. 24, 2023 Tr. pp. 78-80). She also testified that the "team responded to the parent[s]," because they continued to communicate with the district special education teacher (Jan. 24, 2023 Tr. p. 81).

IEP reflected the evaluator's "hostility" in a statement that was an "utter mischaracterization of an exchange that took place at the [CSE] meeting" (id.). The parents also noted that the district disregarded their input, as well as input from the student's then-current teacher reporting about the progress the student made in a "very small, regulated environment" where she received "individual instruction," by recommending a 12:1+1 special class placement that was "too large" for the student (id.). The parents indicated that, at the CSE meeting, they found it "incredible" that the district would recommend a 12:1+1 special class placement after hearing about the student's distractibility and sensitivity to noise, limited attention to tasks, and her need for "frequent prompting" (id. at pp. 1-2). In addition, the parents indicated that the same 12:1+1 special class placement recommendation had previously been found to be inappropriate, and the CSE "refused to consider the other possible" placements, including an 8:1+1 and a 6:1+1 special class placements, by telling the parents that the 8:1+1 special class placement was for "behavioral students" and that the 6:1+1 special class placement was for students with "autism" (id. at p. 2). According to the letter, when the parents asked the CSE if the district "actually had a program that would be appropriate" for the student—who did not exhibit behavioral concerns and who "learn[ed] well"—"the meeting ended" (id.).

Next, the parents indicated that the student's IEP had been "written in such a way as to suggest that [they] would not accept a public school placement," which the parents characterized as "if in retaliation for [their] challenges" (Parent Ex. F at p. 2). The parents further indicated their willingness to "consider a public school setting in earnest and w[ould] visit a public program when and if one [wa]s offered" (id.). As a final point, the parents noted that they would be in contact with the district to "advise whether [their] concerns with the IEP c[ould] be addressed at the proposed school, and whether the proposed school [wa]s an appropriate program" for the student (id.). However, if the parents were not satisfied with their "investigation of the offered program, they w[ould] unilaterally place [the student] at Seton" and "invoke their due process rights for funding" (id.).

A. Due Process Complaint Notice

By due process complaint notice dated June 27, 2022, the parents alleged that the district failed to offer the student a FAPE for the 2022-23 school year (see Parent Ex. A at p. 1). More generally, the parents asserted that the district's proposed program failed to "accommodate [the student's] need for a very small setting" where she could "receive small group and individual instruction all day long" (id. at p. 2). In addition, the parents indicated more specifically that the district's triennial evaluation of the student failed to include a classroom observation and failed to include a "meaningful, multi-disciplinary review of her social, emotional and academic performance and functioning," which would have provided the CSE with the "information necessary to craft an effective IEP" (id.). Next, the parents indicated that the annual goals and short-term objectives pertaining solely to academics in the student's IEP were vague and immeasurable and lacked baselines (id. at pp. 2-3). The parents further indicated that the annual goals and short-term objectives failed to indicate that the student required "close attention and one-on-one instruction . . . [to] be a successful learner" and that an individual unfamiliar to the student could not "apply these goals and objectives" (id. at p. 3).

Next, the parents noted that the student's "placement recommendation and [annual] goals d[id] not include provisions for her to be educated" in a one-to-one or small group setting (Parent

Ex. A at p. 3). The parents further noted that the student could not "learn in a group of [12] students" and that the "frequent prompts and reinforcers, practice and repetition" the student required were not "made [a] part of the program," which meant that the student would not make progress in the proposed program (id.). In addition, the parents indicated that the student's IEP did not include any provisions for "contact with typically developing peers," which was beneficial to the student's development of "language and social skills" (id.).

As a final point, the parents alleged that the district failed to offer the student a "seat" for the 2022-23 school year (Parent Ex. A at p. 3).

Turning to the student's unilateral placement at Seton, the parents indicated that it was appropriate and constituted the student's educational placement in the LRE (see Parent Ex. A at pp. 3-4). The parents noted that Seton offered the student a "small, highly structured setting"; "individualized attention" in the classroom; Seton "coordinate[d] the delivery of [the student's] related services on site in private, one-on-one settings in a controlled, structured and quiet environment"; and Seton provided the student with an opportunity to interact with her nondisabled peers and to participate in "field trips" within the community (id. at p. 4). The parents also noted that equitable considerations weighed in favor of their request for public funding of the student's tuition costs at Seton for the 2022-23 school year (id.).

As relief, the parents initially sought to enforce the student's pendency rights and additionally sought an order directing the district to directly pay or reimburse the parents for the costs of the student's tuition at Seton for the 2022-23 school year (see Parent Ex. A at p. 4). The parents further sought "related services and supports and transportation" funded by the district through "Related Service Authorizations" (RSAs) or "transmittals" (id.).

B. Impartial Hearing Officer Decision

On August 30, 2022, the parties proceeded to an impartial hearing, and on this date, the IHO received evidence concerning the student's pendency services (see Tr. pp. 1-14). In an interim decision on pendency dated September 4, 2022, the IHO concluded that, based on the parties' agreement, a prior unappealed IHO decision (dated April 12, 2022) formed the basis for the student's pendency services during these administrative proceedings (see Parent Ex. K at pp. 2, 5; see generally Parent Ex. B). Consequently, the IHO ordered the district to fund the costs of the student's "tuition and related services and supports" as the student's pendency services, consistent with the "program and services" provided to the student at Seton during the 2021-22 school year (Parent Ex. K at pp. 4-5).[5]

When the impartial hearing resumed on September 28, 2022, the hearing record reflects that another IHO had taken over the case, and for reasons unexplained, the district did not appear (see Tr. pp. 15-19). On December 22, 2022, neither party appeared for the impartial hearing (see

[5] The IHO noted in the pendency decision that the district, in the prior unappealed IHO decision, had been ordered to "fund the cost of the 2021-2022 Seton Foundation For Learning placement and provide related services and supports and transportation funded through [RSAs] or transmittals" (Parent Ex. K at pp. 3-4; see Parent Ex. B at p. 6).

Tr. pp. 23-29). The impartial hearing resumed on January 24, 2023, and concluded on February 3, 2023, after six total days of proceedings (see Tr. pp. 30-114).

In a decision dated March 10, 2023, the IHO concluded that the district failed to offer the student a FAPE for the 2022-23 school year, that Seton was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parents' requested relief (see IHO Decision at pp. 4-7). As a result, the IHO ordered the district to reimburse the parents for, or to directly pay, the costs of the student's tuition at Seton for the 2022-23 school year (id. at p. 7).

In finding that the district failed to offer the student a FAPE, the IHO determined that the recommended 12:1+1 special class placement was "too large and insufficient to support the student's significant cognitive and academic deficits," noting specifically that the student would not receive "sufficient 1:1 instruction in the proposed class, which the student require[d] to obtain an educational benefit" (IHO Decision at p. 5). The IHO indicated, therefore, that the 12:1+1 special class placement "could not meet the student's individual academic and social/emotional needs" (id.). The IHO, however, did not "credit the parent's assertion that the [district] failed to send her a school location letter," and pointed to evidence in the hearing record that the school location letter had been sent to the "parent's correct email address" (id.).

With respect to the student's unilateral placement, the IHO found that the evidence demonstrated that Seton "provided direct and specialized educational instruction that was specifically designed to meet the student's unique educational needs" (IHO Decision at p. 5). The IHO also found that, contrary to the district's contentions, use of district-provided RSAs at Seton "instead of full-time employees for the student's related services d[id] not make the placement inappropriate" (id. at pp. 5-6). Therefore, the IHO determined that Seton was an appropriate unilateral placement (id. at p. 6).

Turning to equitable considerations, the IHO found that the district was "aware of the student's placement" at Seton prior to the 2022-23 school year, which "satisfied" the "notice requirement" (IHO Decision at p. 6). In addition, the IHO indicated that any "hostilities" exhibited by the parents with regard to the district's recommended program were not "disruptive [of] the CSE process," and thus, equitable considerations did not warrant a denial of tuition reimbursement in this matter (id. at pp. 6-7). As a result, the IHO ordered the district to reimburse the parents or directly pay Seton for the costs of the student's tuition for the 2022-23 school year (id. at p. 7).

IV. Appeal for State-Level Review

The district appeals, arguing that the IHO erred by finding that the district failed to offer the student a FAPE for the 2022-23 school year. Specifically, the district argues that the 12:1+1 special class placement was the student's LRE and offered the student a suitable peer group. In addition, the district contends that the parents failed to offer any independent evaluative information to contradict the recommendation for a 12:1+1 special class, and moreover, that the facts of this case satisfied the Second Circuit's two-pronged test to determine the student's LRE. Next, the district asserts that the assigned public school site was capable of implementing the student's IEP as written, noting further that the parents had not raised an implementation claim and improperly alleged that the district failed to offer an assigned public school site. With respect to the student's IEP, the district asserts that the present levels of educational performance accurately

described the student's needs, and relatedly, that the IEP included specific and measurable annual goals and short-term objectives. As a final argument, the district contends that the hearing record contains no evidence that the district's alleged failure to conduct a classroom observation deprived the student of a FAPE. As relief, the district seeks to reverse the IHO's finding that the district failed to offer the student a FAPE and to reverse the IHO's award of reimbursement or direct funding of the student's tuition costs at Seton for the 2022-23 school year.

In an answer, the parents respond to the allegations raised in the district's request for review. The parents assert that certain elements of the IHO's decision were not appealed from, in particular, the parents assert that the district did not appeal from the IHO's factual findings that the student required a small, special class in order to receive an educational benefit, the student required 1:1 instruction to learn new skills, and the student benefitted from exposure to and contact with her typically developing peers. In addition, the parents assert that the district's appeal of the IHO's finding that the district did not offer the student a FAPE was broad and conclusory and that, absent a more "precise assignment of error, the decision should not be reviewed."

Turning to the substance of the appeal, the parents contend that procedural violations regarding the conduct of the evaluation, such as the lack of a classroom observation and failing to involve the parent in the review process, as well as substantive violations, such as failing to consider the student's current placement, failing to observe the student in her current setting, failing to assess the student's educational needs, and failing to consider the parents' and the student's teacher's concerns, were sufficiently serious deficiencies to result in a denial of FAPE to the student. Additionally, the parents contend that the student's IEP did not reflect her needs and, as a result, failed to provide necessary supports. The parents also raised objections to the district's justification for the 12:1+1 special class recommendation, asserting that the student's teacher and providers recommended a high level of support. The parents indicated the student could only answer questions in reading in a 1:1 setting. In addition, the parents contend that the evidence presented to show the student would have had access to typically developing peers was speculative and only indicated the type of school the student could have been placed in. Further, the parents contend that the testimony presented as to the assigned public school site did not show that the school would have been able to implement the IEP.[6] According to the parents, the testimony indicated that the assigned public school site did not offer any interactions with typically developing peers, that the provision of related services would not have conformed with the IEP mandate that all instruction take account of the student's distractibility and noise sensitivity, and that all individual therapies be delivered to the student in distraction-free settings.

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

[6] To be clear, the IHO found that, contrary to the parents' assertion in the due process complaint notice, the district sent them a school location letter, and thus, offered the student a "seat" for the 2022-23 school year at the assigned public school site (compare IHO Decision at pp. 3, 5, with Parent Ex. A at p. 3). Being aggrieved by this determination, to the extent that the parents sought to challenge the IHO's finding, they were required to do so in either an appeal or a cross-appeal (8 NYCRR 279.8[c][4]).

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 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]

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—Educational Placement in the LRE

In support of the argument that the IHO erred by finding that the district failed to offer the student a FAPE, the district initially asserts that the 12:1+1 special class placement was the student's LRE with a suitable peer group. According to the district, the district school psychologist's testimony explained the reasoning behind the CSE's decision to recommend a 12:1+1 special class, and moreover, her testimony aligned with the State regulatory definition of a 12:1+1 special class because the student's management needs interfered with the educational process. The district further asserts that the school psychologist explained in her testimony that the 12:1+1 special class was the student's LRE, because the student needed a significant amount of academic support while benefitting from the peer interaction in a class size of 12 students. Next, the district asserts that the school psychologist's testimony reflected that the CSE considered the LRE, and based on the student's past success and the January 2022 psychoeducational evaluation testing results, the student could learn in a 12:1+1 setting. As a final point, the district argues that the facts in this matter satisfy the Second Circuit's two-prong test to determine the student's LRE. The district asserts that the first prong of the analysis was met by virtue of the fact that the parties agreed that the student required a special education class as opposed to general education classes. With respect to the second prong, the district alleges that the school psychologist testified that, at the time of the February 2022 CSE meeting, the district specialized school recommendation was

[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).

co-located and provided an opportunity to participate with nondisabled peers at lunch and during recess.

The parent contends that the district's justification for the recommended 12:1+1 special class placement was not based on the student's specific needs, but rather, resulted from ignoring any potential placements available to the student other than those within a district specialized school. The parents assert that the district school psychologist testified that both the 8:1+1 and the 6:1+1 special class placements were too restrictive for the student and were designed for students with dissimilar needs. The parent also contends that the district's citation to State regulation regarding the management needs of students in special classes does not substantiate the CSE's recommendation of a 12:1+1 special class placement. With respect to the LRE, the parent argues that, in the appeal, the district misrepresented the school psychologist's testimony concerning the student's access to nondisabled peers at the assigned public school site, noting that instead, the witness testified that she did not make a specific recommendation for the student's assigned public school site to be in a co-located school or to have access to nondisabled peers.

After independently reviewing the hearing record and upon consideration of the parties' respective arguments on appeal, the evidence does not support the district's arguments to reverse the IHO's finding that the district failed to offer the student a FAPE in the LRE for the 2022-23 school year (see IHO Decision at pp. 2-5). Specifically, and even assuming for the sake of argument that the recommendation of a 12:1+1 special class placement was appropriate to meet the student's needs by providing the student with sufficient individual supports to address her cognitive and academic deficits, as well as providing her with sufficient 1:1 instruction, the hearing record is devoid of evidence that the February 2022 CSE considered the student's LRE when making its recommendation or in developing the student's IEP (see generally Tr. pp. 1-99; Parent Exs. A-O; Dist. Exs. 1-4). Rather, the evidence in the hearing record reveals that the February 2022 CSE, in making its placement recommendation for the 2022-23 school year, only considered self-contained programming options and options the district already had available rather than making its recommendations based upon the student's needs, a consideration of the full continuum of alternative placements, and then offering the student the least restrictive placement from that continuum that was appropriate for his needs in contravention of T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 165-67 (2d Cir. 2014). Consequently, the IHO's conclusion must be affirmed on other grounds.

Before examining the merits of the parties' arguments related to the LRE, it may be instructive—given some of the arguments made—to remind the parties that I have presided over many cases in which a party or an IHO equates the term "additional support" with "more restrictive" as if the two phrases are synonymous and, for some disabled students, the type of additional supports available in non-integrated settings are very clearly necessary to provide the student with educational benefits or to avoid unduly impinging upon the educational experience of other students in the general education setting. However, it does not follow that "additional support" always means "more restrictive." The same misplaced understanding of "additional support" with "more restrictive" also appeared to occur in this case as evidenced by the February 2022 CSE's rejection of the 8:1+1 and a 6:1+1 special class placements in a district specialized school. Here, the district school psychologist testified that the 12:1+1 special class in a district specialized school was the student's LRE because she "needed a significant amount of academic support while benefiting from social[/]emotional development of her peer interactions in a class

size of 12 students, which a district [specialized] school would provider her" (Dist. Ex. 15 ¶ 6; see Tr. pp. 71-72). She further testified that the CSE rejected an 8:1+1 special class placement because the student "did not need a smaller class size" and rejected a 6:1+1 special class placement because the students populating such classes tended to be nonverbal and focused on daily living skills (Dist. Ex. 15 ¶ 6).[8] At the impartial hearing, when asked whether the CSE considered a "smaller class than" a 12:1+1, the school psychologist testified that the CSE considered the LRE for the student, and because she had "made success" and "made gains," she could learn in a 12:1+1 setting (Tr. pp. 69-70).

This evidence generally reflects the misplaced understanding of a student's need for additional adult support within a classroom compared to the student's placement in the LRE—which relates to the disabled student's opportunities to interact with nondisabled peers—and not a student's opportunity to interact with other disabled peers in a special class with more students in it. On appeal, both parties' arguments generally advance the same misconceptions with respect to the student's LRE. As a result, these arguments are wholly without merit (see R.B. v. New York City Dep't of Educ., 603 F. App'x 36, 40 [2d Cir. 2015] [explaining that the requirement that students be educated in the least restrictive environment applies to the type of classroom setting, not the level of additional support a student receives within a placement with the goal of integrating children with disabilities into the same classrooms as children without disabilities]; T.C. v. New York City Dep't of Educ., 2016 WL 1261137, at *7 [S.D.N.Y. Mar. 30, 2016] [noting that 'restrictiveness' pertains to the extent to which disabled students are educated with non-disabled students, not to the size of the student-staff ratio in special classes]).

However, with regard to the district's arguments attempting to bootstrap the facts of this case in order to satisfy the Second Circuit's two-prong analysis to determine the student's LRE, a review of the evidence in the hearing record reflects that not only did the district mischaracterize the evidence, but also that the February 2022 CSE never considered the extent to which the student would interact with her nondisabled peers and thus never engaged in the type of two-step inquiry found in the IDEA and Newington when making placement recommendations in the student's IEP.

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.,

[8] Notably, the February 2022 IEP does not reflect that the CSE considered, but rejected, any other placement option—such as an 8:1+1 or a 6:1+1 special class placement—but for a 12:1+1 special class placement in a community school (see Parent Ex. D at p. 36). The June 2022 prior written notice related to the February 2022 CSE meeting reflected the same information as the IEP (compare Dist. Ex. 3 at p. 3, with Parent Ex. D at p. 36).

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).[9]

[9] 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).

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, and contrary to the district's arguments on appeal, the facts of this case do not satisfy either the first or second prong of the Second Circuit's two-pronged analysis. First, there is no evidence that the parties explicitly agreed that the student required a special education classroom, rather than a general education classroom. Instead, I am left to conclude based upon my own examination of the evaluative information, that a CSE might have reasonably concluded that some removal of the student from the general education environment might be necessary in order for her to receive enough special education support to meet the standard for a FAPE under Endrew F. and Rowley. But that does little to help the district's LRE argument because it is the second prong that I find particularly problematic in this case. In other words, assuming that the removal of the student from a general education classroom was appropriate for portions of the day due to her low academic functioning—such as for academic instruction—the next question that the CSE otherwise failed to grapple with was the extent to which the student should otherwise be placed with nondisabled students to the maximum extent appropriate as required by the statute (see 20 U.S.C. § 1412[a][5][A]). Here, it appears that once the CSE considered the student's deficits in the core areas of her academics, the LRE determination was made in a one-size-fits-all manner that the student should be completely removed from nondisabled peers at all times. Overall, the hearing record contains no evidence to establish that the district engaged in any meaningful LRE considerations that were individualized to this student after making its recommendation to remove the student from her nondisabled peers for the 2022-23 school year. For example, the hearing record does not include any contemporaneous information, such as notes or CSE meeting minutes, and the June 2022 prior written notice for the February 2022 CSE meeting merely recites the same information about special class placement options that the CSE considered and rejected but does not otherwise reflect what, if any, discussions took place about the recommended placement or the student's placement in the LRE (compare Parent Ex. D at p. , with Dist. Ex. 3 at p. 1; see generally Tr. pp. 1-99; Parent Exs. A-O; Dist. Exs. 1-17). At a minimum, the evidence in the hearing record indicates that—consistent with the district school psychologist's frank testimony—the February 2022 CSE did not "make any recommendations for [the student] to be educated with typical peers" (Tr. p. 72).

A review of the student's February 2022 IEP lends no support to the district's LRE argument. Instead, the IEP is internally inconsistent with respect to any recommendations for the student's opportunity to interact with nondisabled peers. For example, in describing the impact of the student's needs on her involvement in, and progress in, the general education curriculum, the CSE noted that the student "should have the opportunity to interact with his [sic] typically developing peers when possible" (Parent Ex. D at p. 7). However, in that portion of the IEP where the CSE should describe the extent to which the student would interact with her nondisabled peers, the February 2022 CSE noted that the student was a "full time special education student" and had "no interaction with her general education peers" (id. at pp. 32-33). Moreover, the district's argument on appeal that the district school psychologist's testimony during the impartial hearing had indicated that, at the time of the February 2022 CSE meeting, the district specialized school recommendation was co-located and provided the student with an opportunity to participate with

nondisabled peers at lunch and during recess is not supported by the documentary evidence.[10] As the parents contend, the district mischaracterizes the school psychologist's testimony, who specifically testified that she had no involvement in selecting an assigned public school site—or school location—for the student, as a placement officer made the determinations concerning the assigned public school site (Tr. p. 65). The school psychologist also testified that, contrary to the district's assertion, she believed the CSE had "brought up with the parent that if—if [the student wa]s given a co-located school, the children ha[d] the ability to participate with their nondisabled peers in the lunchroom, at recess" (Tr. p. 72). When asked if she mandated the student's participation with nondisabled peers in the IEP, the school psychologist testified that she did not because it was an "administrative decision" to be made by the specialized public schools (Tr. p. 73).

VII. Conclusion

In summary, given the foregoing evidence, the district cannot prevail on appeal even if, as previously mentioned, the evidence in the hearing record had supported a determination that the recommendation of a 12:1+1 special class placement was appropriate to meet the student's needs. Contrary to the district's arguments, the evidence in the hearing record reflects that the February 2022 CSE failed to consider the student's placement in the LRE for the 2022-23 school year, and therefore, the IHO's finding that the district failed to offer the student a FAPE will not be disturbed.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
June 2, 2023

JUSTYN P. BATES
STATE REVIEW OFFICER

[10] Notably the IEP itself failed to indicate that the student should be placed with non-disabled peers for lunch and recess and the school psychologist's testimony provided at the time of the impartial hearing, even if accurate, is impermissibly retrospective (R.E., 694 F. 3d at 184-88 [explaining that 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]).