The University of the State of New York

The State Education Department
State Review Officer
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No. 24-061

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

Appearances:
Isaacs Bernstein, PC, attorneys for petitioners, by Lisa Isaacs, Esq.

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

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition costs at the Mother Franciska Elementary School (MFES) for the 2023-24 school year.[1] 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

[1] MFES is also occasionally referenced as the Seton Foundation for Learning. The Seton Foundation for Learning is an umbrella organization for three private schools, one of which is MFES (Tr. p. 62).

mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited here in detail. Briefly, the CSE convened on March 15, 2023, to formulate the student's IEP for the 2023-24 school year (see generally Parent Ex. E). In a letter dated May 31, 2023, the parents disagreed with the recommendations contained in the March 2023 IEP, and asked "whether the IEP c[ould] be revisited" prior to informing the district that they awaited an offer of an assigned public school

for the student to attend for the 2023-24 school year so that they could visit and discuss their concerns; nevertheless, the parents indicated that they intended to unilaterally place the student at MFES "[s]hould [they] not be satisfied with the [district's offer of placement]" (see Parent Ex. L at pp. 1, 2).

The district sent a school location letter to the parents, dated June 14, 2023 (see Parent Exs. N at p. 1; X at ¶ 26). The parents responded by letter dated June 20, 2023 indicating that there was an error as to the student's classification on the district's prior written notice and school location letter and further indicated that the parents would proceed with placing the student at MFES (Parent Ex. O).

The parents visited the assigned public school on June 26, 2023 and rejected it as inappropriate (Parent Ex. Z ¶ 27). On June 26, 2023, the parents sent a letter to the district describing their visit to the assigned public school and reiterated their intent to enroll the student at MFES at district expense (Parent Ex. P).

A. Due Process Complaint Notice

In a due process complaint notice, dated June 27, 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 Parent Ex. B). Amongst other allegations, the parents alleged that the March 2023 IEP failed to recommend an appropriate class size for the student and that the recommended program was not the least restrictive environment (LRE) for the student (id. at pp. 2-3). The parents also asserted that the district's assigned school was not able to medically accommodate the student's needs and could not provide the student with his mandated individual therapies (id. at p. 4). In their due process compliant notice, the parents asserted that MFES was an appropriate unilateral placement and that the equitable considerations supported a full award for the costs of the student's tuition (id. at p. 4-5).

B. Events Post-Dating the Due Process Complaint Notice

The parents filed an amended due process complaint notice, dated August 31, 2023 (Parent Ex. A). The amended due process complaint notice repeated the claims from the earlier due process complaint notice and included an additional allegation that the student's recent three-year evaluation, specifically his January 7, 2023 psychoeducational evaluation, was defective and the CSE's failure to address the deficient evaluation deprived the student of a FAPE for the 2023-24 school year (id. at pp. 2-3; see Parent Ex. F).

C. Impartial Hearing Officer Decision

A pre-hearing conference was held on August 2, 2023 (Tr. pp. 1-9).[2] Status conferences were held on August 14, 2023 and August 31, 2023 (Tr. pp. 10-34).[3, 4] A second pre-hearing conference was held on October 12, 2023 (Tr. pp. 35-40). A status conference was held on October 25, 2023 (Tr. pp. 41-50). The impartial hearing then convened on December 14, 2023 and concluded the same day (Tr. pp. 51-203). In a decision dated January 16, 2024, the IHO determined that the district offered the student a FAPE for the 2023-24 school year and that had she determined that the district failed to offer the student a FAPE for the 2023-24 school year she would have found MFES to be an appropriate unilateral placement and that equitable considerations weighed in favor of the parents' request for an award of tuition reimbursement (IHO Decision at pp. 28-29). The IHO dismissed the parents' claims with prejudice (id. at p. 29).

IV. Appeal for State-Level Review

The parents appeal. The parties' familiarity with the particular issues for review on appeal in the parents' request for review and the district's answer thereto is also presumed and, therefore, the specific allegations and arguments will not be recited here. The following issues presented on appeal must be resolved in order to render a decision in this case:

1. whether the parents properly raised a request for the CSE to reconvene and whether a failure to reconvene denied the parents meaningful participation in the CSE process;

2. whether the CSE was obligated to conduct any additional evaluations of the student after performing a psychoeducational evaluation that reflected a 26-point decrease in the student's full scale intelligence quotient (FSIQ);

3. whether the CSE's recommendation of a 12:1+1 special class in a specialized school was an appropriate placement for the student in the student's least restrictive environment;

4. whether the public school site to which the student was assigned lacked the capacity to implement the student's March 2023 IEP.

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

[2] The district did not appear at the August 2, 2023 pre-hearing conference (see Tr. p. 2).

[3] The IHO issued an order on pendency on August 14, 2023 (see Parent Ex. C).

[4] During the August 31, 2023 status conference, the IHO addressed the allegations contained in the parent's due process complaint notice and the parties' respective burdens of proof, thereby narrowing the issues for the hearing (Tr. pp. 21- 22).

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]).[5]

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

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

VI. Discussion

A. Scope of Hearing

As an initial matter, the parents argue that their ability to participate in the development of the student's IEP for the 2023-24 school year was impeded by the CSE's failure to reconvene upon their written request to do so. Specifically, the parents assert that they sent a letter to the district, dated May 31, 2023, requesting that the CSE reconvene to "revisit" the student's IEP and discuss

[5] 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 parents' concerns with the CSE's recommendations for the 2023-24 school year. The parents contend that they were also deprived of meaningful participation in the IEP development process because the district did not discuss the results of the psychoeducational evaluation with them, particularly, the decline in the student's FSIQ reflected therein. The district contends that the parents' claim based on the CSE's alleged failure to reconvene was not raised in the parents' due process complaint notice and, therefore, should not be considered on appeal.

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]).

When a matter arises that did not appear in a due process complaint notice, the next inquiry focuses on whether the district, through the questioning of its witnesses, "open[ed] the door" to the issue under the holding of M.H. v. New York City Department of Education (685 F.3d at 250-51; see also Bd. of Educ. of Mamaroneck Union Free Sch. Dist. v. A.D., 739 Fed. App'x 79, 80 [2d Cir. Oct. 12, 2018]; B.M., 569 Fed. App'x at 59; J.G. v. Brewster Cent. Sch. Dist., 2018 WL 749010, at *10 [S.D.N.Y. Feb. 7, 2018], appeal dismissed [2d Cir. Aug. 16, 2018]; C.M. v. New York City Dep't of Educ., 2017 WL 607579, at *14 [S.D.N.Y. Feb. 14, 2017]; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 327-28 [S.D.N.Y. 2013]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, *9 [S.D.N.Y. Aug. 5, 2013]).

Here, the district is correct that the parents did not assert a claim based on the district's failure to reconvene, or any other parental participation claims, in the due process complaint notice (Parent Ex. A at p. 2). In fact, in her decision, the IHO made a specific finding that the parents had not raised a parental participation claim in the due process complaint notice and, because they had raised the claim in their closing brief for the first time it would not be addressed (IHO Decision at p. 6, n. 16). Although the parents acknowledged the IHO's finding on appeal and assert it was incorrect, the parents offer no explanation as to how parental participation was raised as an issue to be determined as part of this proceeding (see Req. for Rev. ¶ 26). Accordingly, as the parents failed to raise parental participation, or a reconvene of the CSE, as part of the due process complaint notice and have not offered any explanation as to how those issues may have been raised as part of the proceeding, the IHO did not err by declining to address any parental participation claim that was raised for the first time in the parents' closing brief (IHO Decision at p. 6., n. 16).

Moreover, a review of the hearing record reflects that the parents did not seek the district's agreement to expand the scope of the impartial hearing to include this issue or file an amended due process complaint notice to add this claim. Nor can it be said that the district "opened the door" to this claim by raising evidence as a defense to a claim that was not identified in the due process complaint notice (M.H., 685 F.3d at 250-51). As the parents' parental participation claims were not properly raised as part of the scope of this proceeding, neither claim will be considered herein, and the IHO properly declined to consider them.

B. Sufficiency and Consideration of Evaluative Information

The parents allege that the student's FSIQ, as reported in the January 2023 psychoeducational evaluation, should have triggered the CSE to conduct further evaluations to determine why the student's FSIQ decreased by 26 points from prior testing (Req. for Rev. ¶ 18).

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

In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the

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

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

Federal and State regulations explain that the CSE is charged with reviewing existing evaluation data and, "[o]n the basis of that review, and input from the child's parents, identify[ing] what additional data, if any, are needed" to determine if the student remains eligible for special education as a student with a disability, the present levels of performance of the student, and whether any changes to the student's programming and annual goals are warranted to allow the student to access the general education curriculum (34 CFR 300.305[a][2]; 8 NYCRR 200.4[b][5][i]-[ii]).

As set forth in further detail above, the parents assert that there was a "discrepancy" of 26 points between the student's FSIQ obtained during the January 2023 psychoeducational evaluation and his FSIQ from the 2019 psychoeducational evaluation (Req. For Rev. 18). Speaking to the results of the January 2023 psychoeducational evaluation, the evaluating psychologist testified that the student had "very strong language skills compared to his other abilities" as well as "notable cognitive deficits that were much weaker than expected of children his age," including his performance on nonverbal and visual spatial subtests (Tr. pp. 88-89). According to the evaluator's testimony, due to these delays, the student had difficulty with abstract reasoning, visual stimuli, retention and "anything that warrant[ed] eye/hand coordination and that visual motor component" (Tr. p. 92). The evaluating psychologist testified that the 2019 psychoeducational evaluation "was more than three years prior" to the January 2023 evaluation, and "intellectual functioning can change substantially over the course of a three-year period" (Tr. p. 93). The hearing record shows that the evaluating psychologist administered the WISC-V during the January 2023 psychoeducational evaluation, and the evaluator who conducted the May 2019 evaluation used the Wechsler Preschool and Primary Scale of Intelligence-Fourth Edition (WPPSI-IV) (see Parent Exs. F at p. 2; G at p. 1). The evaluating psychologist testified that the WISC-V was "aligned to the expectations of children within this age group," was "more abstract," and would have "highlight[ed] … more of a deficit that would have started to surface at the age of five," the student's age at the time of the May 2019 psychoeducational evaluation (Tr. p. 94; see Parent Ex. G at p. 1). She further testified that the WISC-V was designed for students ages six-and-a-half to age 21, whereas the WPPSI-IV was for "children age[d] three to about six-and-a-half" (Tr. p. 98). While the student's FSIQ was lower on the January 2023 WISC-V, according to the evaluating psychologist, the student's scores on the January 2023 cognitive assessment were consistent with those on the previous assessment (Tr. p. 94). For example, the evaluating psychologist testified

that on both the May 2019 and January 2023 assessments, the student "demonstrated a relative strength in the area of verbal comprehension" and "struggled greatly in the area of visual spatial processing" (Tr. pp. 94-95). In addition, the evaluating psychologist testified that on the WISC-V, "the two subtests that comprise[d] verbal fluid reasoning, which is your novel nonverbal reasoning skill … [we]re different from the WPPSI[-IV]" administered in May 2019, and the student's performance in the WISC-V figure weights domain, which "[wa]s heavily loaded in quantitative reasoning" really brought down his index score in that domain (Tr. p. 95). The evaluating psychologist further noted that there was a discrepancy between the two tests in the student's working memory performance (Tr. p. 95).

The evaluating psychologist further testified that it was possible for a student's FSIQ to change over the period of three years, and while she acknowledged that 26 points was "a notable change in IQ" she also testified that to determine the cause of such a drop one would "have to look at all the variables that would contribute to such a change in score," such as "[d]iagnoses, opportunities for education, opportunities for stimulation, weakness in … any of the testing areas, including language, fine motor, [and] gross motor" (Tr. pp. 100-01). Here, the March 2023 IEP reflects the CSE's discussion of the student's January 2023 psychoeducational evaluation, March 2023 educational progress summary, March 2023 speech-language progress report, March 2023 OT progress report, and March 2023 PT progress reports (compare Parent Ex. E, with Parent Exs. F; H; I; J; K). The evaluating psychologist additionally testified that the student's physical limitations would affect his performance on cognitive testing however she could not make accommodations for the student's physical needs on the nonverbal and visual spatial portions of the WISC-V because it was "a standardized instrument that must be administered in a standardized fashion" (Tr. pp. 105-07). When asked, the evaluating psychologist confirmed that the WISC-V scoring did not reflect that the student's physical delays affected his performance (Tr. p. 107). She emphasized that "the standardized instrument [she] used capture[d] all areas that comprise[d] [] cognitive functioning, highlighting those relative strengths for [the student] as well as the areas that [we]re deficits" (Tr. pp. 107-08).[7]

Here, while the parents were understandably concerned with the student's lower FSIQ reflected in his most recent psychoeducational evaluation, the evidence in the hearing record demonstrates that the difference in the student's FSIQ score from the prior test was explainable based on the evaluative measures used for the two different tests. Additionally, the parent has not identified what further tests would have been appropriate to conduct or an area of need that was not adequately explored through the evaluative information the March 2023 CSE had before it when it developed the student's educational programming for the 2023-24 school year. Moreover, aside from considering the formal testing and assessments available to it, the CSE also relied on detailed information from MFES which described the student's functioning in his current educational program, which is reflected in the student's present levels of performance included in the March 2023 IEP (see Parent Exs. E at pp. 2-9; F; H; I; J; K). Based on the foregoing, the evidence in the hearing record does not support the parents' allegation that the evaluative

[7] To the extent that the IHO determined that the student's May 2019 FSIQ was "an outlier" through comparison of the student's performance on a previous assessment which yielded a cognitive composite score of 65 on the Bayley Scales of Infant and Toddler Development—Third Edition (Bayley-III), there is no evidence in the hearing record that a cognitive composite score is equivalent to a FSIQ and, therefore, it should not be used as a basis for comparison (see IHO Dec. p. 23; Parent Ex. G at p. 1).

information available to the March 2023 CSE was insufficient for the CSE to develop the student's IEP for the 2023-34 school year. Further, review of the March 2023 IEP supports the IHO's finding that the CSE reviewed, considered, and incorporated information from the January 2023 psychoeducational evaluation, March 2023 educational progress summary, March 2023 speech-language progress report, March 2023 OT progress report, and March 2023 PT progress reports as well as the discussion held at the CSE meeting, and as the CSE had sufficient evaluative information available to identify the student's present levels of performance and make a determination as to whether any changes to the student's programming and annual goals were warranted, it was not required to perform any further evaluations of the student.

C. March 2023 IEP—12:1+1 Special Class

With respect to the CSE's recommendation that the student attend a 12:1+1 special class in a specialized school, the parents allege that the IHO erred by "assum[ing] the student required full-time special education" and argue that the student "was a good candidate for inclusion." The parents assert that "the record is devoid of any consideration of whether student could be educated alongside neurotypical students in enrichment classes, let alone in ELA."

In this matter, although the sufficiency of the student's present levels of performance and individual needs as described in the March 2023 IEP are not in dispute on appeal, a discussion thereof provides context for the next issue to be resolved, namely, whether the recommended 12:1+1 special class placement was appropriate to meet the student's needs in the student's LRE.

On January 7, 2023, the district conducted a psychoeducational evaluation of the student as part its triennial reevaluation (Parent Ex. F at p. 1). The January 2023 psychoeducational evaluation report indicated that, as measured by the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V), the student's FSIQ was 59, which was described as extremely low (Parent Ex. F at p. 3). The evaluator noted that "[the student's] performance was marked with a lot of scatter" (id. at p. 4). The student's verbal comprehension index score (SS 89) was at the "upper limits of the [l]ow [a]verage" range, with his working memory index score (SS 76) falling in the "very low" range, and his visual spatial index (SS 45), and fluid reasoning index (SS 58) falling in the "extremely low" range (id. at pp. 3, 4). The January 2023 psychoeducational included administration of the Vineland Adaptive Behavior Scales, Third Edition (Vineland-3), which based on parent responses yielded an Adaptive Behavior Composite standard score of 71, which was described as "moderately low" (id. at p. 7).

With regard to the student's academic skills, the January 2023 psychoeducational evaluation report reflected that on the Wechsler Individual Achievement Test-Fourth Edition (WIAT-IV), the student received the following standard scores: word reading subtest 81 (10th percentile); reading comprehension subtest 73 (4th percentile); spelling 68 (2nd percentile; alphabet writing fluency 65 (1st percentile); math problem solving 53 (.1 percentile); and numerical operations 69 (2nd percentile) (Parent Ex. F at p. 5). The January 2023 psychoeducational evaluation report related that although the student's word recognition skills were in the "low average" range, his overall reading and math skills were below expectations and, with respect to writing skills, the student wrote his name and identified most beginning consonant sounds in words (id. at pp. 6-7).

The student's March 2023 MFES annual progress summary indicated that the student could read short stories and answer questions about the title, author, and characters, and sequence the events of the story (Parent Ex. K at p. 1). The student could write his first and last name, and letters when prompted with a visual, but needed to work on size and spacing and staying on the line when writing (id.). In math, the progress summary indicated that the student could tell time to the hour and half hour and was working on addition within ten using visuals and manipulatives, and subtraction within ten using picture cues (id.). He was also learning to add pennies and dimes, read a thermometer, and skip count by five and ten (id.). The progress summary noted that the student required direct teaching and systematic reinforcement using highly motivating reinforcers to maintain attention, especially during non-preferred activities (id. at p. 2). The student also needed a one-on-one setting for introduction of difficult or challenging tasks or a small group of no more than three students for tasks that are more familiar (id. at pp. 1-2).

Concerning the student's communication skills, the March 2023 MFES progress summary reported that the student expressed his wants and needs using lengthy sentences, asked and answered questions, carried on a conversation for multiple exchanges, and understood teacher directions even when given from a distance (Parent Ex. K at p. 2). The student was social with adults and peers and engaged in conversation and play with his peers (id.). The March 2023 MFES speech-language therapy report indicated that the student was working on naming synonyms and antonyms of a given word, identifying content words, identifying categories, spelling CVC words ending in vowels, identifying the sequence of events from a reading, identifying the main idea, and "responding to 'why', 'how' and 'what if' questions when presented a reading selection" (Parent Ex. I at p. 1). His strengths included maintaining conversations and expressing his likes and dislikes (id.). The speech-language therapy report noted that, when frustrated or unsure of an answer, the student hyperventilated and he benefitted from multimodal prompting, breaks after activities, and positive reinforcement (id.).

Turning to the student's motor skills, the March 2023 MFES OT progress report indicated that the student had delays in upper body/hand strength, fine motor skills, bilateral coordination, visual perception/visual motor skills, self-care/activities of daily living skills, graphomotor skills, and sensory processing/work behaviors (Parent Ex. H at p. 1). The student had "overall low muscle tone and decreased upper extremity/core strength and endurance that impact[ed] his functional skills in all areas" (id.). The March MFES 2023 PT report stated that the student had "altered motor strength, endurance, balance, coordination, and motor planning … and presented with low muscle tone throughout" (Parent Ex. J at p. 1). The student could use Lofstrand crutches to ambulate but needed "stand by" assistance and verbal cues for safety awareness (id. at p. 2). He could ambulate independently with a posterior walker but occasionally needed cues for obstacles, gait, and pacing (id. at p. 2).[8]

[8] The parents allege that the IHO erred in holding that it was not the district's obligation to list the student's mobility-related assistive technology on the March 2023 IEP or to provide the student's equipment (Req. for Rev. ¶ 27). However, the March 2023 IEP noted in multiple sections that the student used a wheelchair and walking aids to navigate the school environment (Parent Ex. E at pp. 3, 7, 9, 36, 38). The hearing record also reflects that the parents provided the student with his wheelchair and other equipment used for mobility (Tr. pp. 192-93). Finally, the March 2023 IEP included recommendations for individual nursing services for transportation and in the school building and the IEP indicated the assigned nurse and teacher assisted the student during transitions in

Regarding the March 2023 CSE's recommendation for placement of the student in a 12:1+1 special class, State regulation provides that "the maximum class size for special classes containing students whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students, shall not exceed 12 students, with one or more supplementary school personnel assigned to each class during periods of instruction" (8 NYCRR 200.6[h][4][i]; "Continuum of Special Education Services for School-Age Students with Disabilities," at pp. 15-16, Office of Special Educ. [Nov. 2013], available at http://www.p12.nysed.gov/specialed/publications/policy/continuum-schoolage-revNov13.pdf). By way of comparison, State regulation also indicates that the maximum class size for special classes containing students whose management needs are determined to be intensive or highly intensive and requiring a significant or high degree of individualized attention and intervention shall not exceed eight or six students, respectively, with one or more supplementary school personnel assigned to each class during periods of instruction" (8 NYCRR200.6 [h][4][ii][a]-[b]).

To meet the student's special education needs, the March 2023 CSE recommended that the student attend a 12:1+1 special class in a district specialized school with adapted physical education five periods per week (Parent Ex. E at p. 31). The March 2023 CSE also recommended four 30-minute sessions of individual occupational therapy per week, five 45-minute sessions of individual OT per week, five 45-minute sessions of individual PT per week, three 30-minute sessions of individual speech-language therapy per week, full-time one-on-one school nurse services, and a one-on-one transportation nurse during transport to and from school (id. at pp. 31-32). With respect to the student's management needs, the March 2023 IEP indicated that the student continued to require direct teaching and systematic reinforcement for all information presented and "intense motivation for earned reinforcers in order to maintain appropriate attention during non-preferred activities" (id. at p. 9). In addition, the IEP indicated that novel materials were helpful to increase the student's attention and task compliance (id.). The IEP noted that the student needed difficult or challenging tasks to be presented in a 1:1 setting and familiar tasks in a group of no more than three (id.). The IEP included testing accommodations and annual goals that targeted the student's motor development, sensory processing, language development, academic skills, and activities of daily living (ADL) skills (id. at pp. 11-32, 34).

The school psychologist testified that based on the evaluative information reviewed, including the psychoeducational evaluation report, teacher report, and "several progress reports," the 12:1+1 special class in a district specialized school recommended by the March 2023 CSE was the most appropriate program for the student (Tr. p. 123). She testified that given the discrepancy between the student's average verbal comprehension and low perceptional reasoning abilities, and his below grade level academics, the lower student teacher ratio and one paraprofessional would have "bridged the gap" for the student and helped him "learn appropriately with his peers (Tr. p 124). The school psychologist testified that that the student had "higher potential with verbal comprehension" and the March 2023 CSE felt that the 12:1+1 special class was a "higher academic program," with higher ability students than the 8:1+1 or 6:1+1 special classes and the student could have benefitted from it (Tr. p. 128). According to the school psychologist's testimony, the March

the school building (Parent Ex. E at pp. 9, 31-32). Accordingly, the hearing record does not indicate that the student was deprived of any necessary assistive technology devices or services needed for mobility.

2023 CSE considered an 8:1+1 special class program for the student but rejected the program as "too restrictive for [the student]" because the 8:1+1 special class was generally geared for students with an autism diagnosis or lower intellectual level than the student's (Tr. pp. 128-29). This is reflected in the student's March 2023 IEP (Parent Ex. E pp. 38-39).

The parent testified that at MFES, the student was in "a very small group for learning," and she believed that a smaller classroom was necessary for the student; however, it is unclear what specific aspects of the recommended 12:1+1 special class ratio the parent disagreed with other than the class size (Parent Ex. Z ¶ 23). Further, it is difficult to determine the overall level of support the student received at MFES as the hearing record is silent regarding the exact ratio of the classroom at MFES. Although the MFES director testified that there were seven students total in the student's class and "instruction [was] delivered in one-to-one or small group settings," which she identified as "usually" fewer than seven students, she does not identify what additional staff were present in the classroom during the school day or their role, if any, in supporting the student (Tr. p. 172; Parent Ex. Y ¶ 35). Nonetheless, the school psychologist testified that although the 12:1+1 ratio in the recommended program was higher than the ratio in the program the student attended at MFES, there was the "possibility for differentiated instruction" and a "small group and one-to-one setting" (Tr. p. 137). Moreover, based on the information available to the March 2023 CSE and the student's present levels pf performance, the student did not require either individual or small group instruction throughout the school day (see Parent Ex. E at pp. 2-9). As noted above, the March 2023 IEP indicated that the student needed direct teaching and systematic reinforcement, intense motivations and earned reinforcement, novel materials to increase attention and compliance with tasks, and further indicated as part of the student's management needs that he would receive "information [] presented in a differentiated 1:1 setting for difficult or challenging tasks or in a small group of no more than 3 students for tasks that may be somewhat familiar to him" (Parent Ex. E at p. 9).

Based on the above, the district met its burden of proving that a 12:1+1 special class, in conjunction with the recommended related services, was an appropriate placement for the student.[9]

[9] To the extent that the parent also argues that the student's placement in a 12:1+1 special class was related to the district's failure to correctly apply the criteria relevant to whether the student would be alternately assessed, the parents appear to misapprehend the issue. The parents assert that the district based the recommendation that the student participate in standard assessment rather than the New York State Alternate Assessment (alternate assessment) "[s]olely" on the student's stronger verbal and social skills (Req. for Rev. ¶ 32). The school psychologist testified that "as per the psychoeducational evaluation, [the student] exhibits higher potential…[t]herefore, it has been decided not to switch to alternate assessment" (Tr. p. 127). The school psychologist later clarified that it is "New York State law that requires the intellectual ability to be below 69 overall, and the adaptive behavior to be in the low range… [and] considering that [the student's] verbal comprehension is higher in the average range, [she] could not" recommend the student for alternate assessment (Tr. pp. 139-40). The school psychologist's testimony was accurate. The CSE must determine annually whether a student with a severe cognitive disability is eligible to take the New York State Alternate Assessment based on specific criteria, the first of which is that the student has a severe cognitive disability and significant deficits in communication/language and significant deficits in adaptive behavior (https://www.nysed.gov/sites/default/files/special-education/2019-nysaa-policy-brief.pdf). The school psychologist testified that the student's performance on standardized assessments did not meet the above criteria. Specifically, the January 2023 psychoeducational evaluation report reflected that the student's WISC-V Verbal Comprehension Index standard score of 89 fell at the "upper limits of the [l]ow [a]verage range" (Parent Ex. E at

D. Least Restrictive Environment

The parents allege that the IHO erred by finding that the district's placement recommendation for the student was in the student's LRE. Specifically, the parents do not assert that the student should not have been placed in a special class for the 2023-24 school year, but instead contend that the March 2023 IEP was devoid of any mainstreaming opportunities for the student (Req. for Rev. ¶ 35).

The IDEA requires that a student's recommended program must be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.107, 300.114[a][2][i], 300.116[a][2], 300.117; 8 NYCRR 200.1[cc], 200.6[a][1]; see T.M., 752 F.3d at 161-67; Newington, 546 F.3d at 111; Gagliardo, 489 F.3d at 105; Walczak, 142 F.3d at 132; Patskin v. Bd. of Educ. of Webster Cent. Sch. Dist., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling, or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ. of Borough of Clementon Sch. Dist., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. N. Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobol, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 CFR 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 CFR 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 CFR 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special

p. 2). According to the March 2023 speech-language progress report, the student was working on communication skills that included naming synonyms and antonyms identifying nouns, adjectives, verbs, and adverbs, identifying categories for three items, spelling CVC ending in vowels, identifying the sequence of events from a reading passage, identifying the main idea, and responding to "why", "how" and "what-if" questions when presented a reading selection (Parent Ex. I at p. 1). The March 2023 speech-language progress report additionally recommended goals that included having the student work on grade-level reading material (id.). Further, the March 2023 annual progress summary reported that the student could read short stories and answer questions about the title, author, and characters (Parent Ex. K at p. 1). Although the parent testified that she would not have agreed to the student participating in standard assessments because she believed he needed "closer instruction and supervision and [would] not be able to sit for testing," the hearing record shows that the March 2023 recommended testing accommodations that included: time-and-a-half extended time; separate location in a setting other than the student's classroom with no more than eight students for standardized assessments; test passages, question items and multiple choice responses read aloud except for tests measuring reading comprehension; and directions read aloud (Dist. Exs. E at p. 34; Z ¶ 22). Accordingly, the evidence in the hearing record supports the IHO's finding that the student did not meet the criteria to qualify for an alternate assessment and that the CSE's decision not to recommend the student be alternately assessed was not a denial of a FAPE.

classes, special schools, home instruction, and instruction in hospitals and institutions; the continuum also makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 CFR 300.115[b]).

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

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

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

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).

Having determined that a 12:1+1 special class was an appropriate placement for the student, the LRE issue in this matter turns on the second aspect of the Newington test, that is, whether the CSE provided mainstreaming opportunities for the student with nondisabled peers to the maximum extent appropriate.

The parents' witness, the director of MFES testified that at MFES "[s]mall groups of students from our host school come to [the student's] classroom daily to socialize with our students and provide language and social models. The teacher, the assistants, and the paraprofessionals remain with the students and facilitate socialization" (Parent Ex. Y ¶ 61). The MFES director

stated that the student had opportunities to "mingle socially outside of his assigned classroom with the other students at MFES… during social groups, on the playground, at parties and dances or during an art project" (id. ¶ 65). The parents argue that the March 2023 IEP is devoid of any such mainstreaming opportunity recommendations (Req. for Rev. ¶ 35). However, a full review of the March 2023 IEP shows that is not the case (see Parent Ex. E).

The management needs section of the March 2023 IEP noted that the student "benefit[ted] from having the opportunity to interact with his typically developing peers when possible and when appropriate" and noted that the student "may participate in nonacademic activities with typically developing peers with proper supervision as deemed appropriate" (Parent Ex. E at pp. 9, 35). The district school psychologist testified that recommendations for when the student would have access to typically developing peers would be made at the building administration level and would not be included in the student's IEP (Tr. pp. 143-44). The parents' main argument that the March 2023 IEP did not recommend a placement in the student's LRE is that MFES provided for a set schedule of peer interactions with typically developing peers while the district's March 2023 IEP provided for peer interactions with typically developing peers "with proper supervision as deemed appropriate by school staff" (see Parent Ex. E at p. 35).

In making her determination, the IHO noted that the assigned public school was co-located, giving the student opportunities to interact with typically developing peers in common areas (IHO Decision at p. 27). As discussed above, the hearing record supports the IHO's determination that the student had mainstreaming opportunities available at the public school. Accordingly, although it would have been better practice for the March 2023 CSE to have specifically identified when and where the student would have been provided with opportunities to interact with his nondisabled peers during the school day, considering the selection of a more discretionary description of those opportunities appears from the IEP to have been based on the health and safety needs of the student, the failure to be more specific in this instance does not rise to the level of a denial of FAPE and I decline to overturn the IHO's decision that the March 2023 IEP sufficiently provided for the student's access to nondisabled peers to the maximum extent appropriate given his "full-time" 12:1+1 special class placement in a specialized school.

E. Assigned Public School Site

The parents argue that the IHO erred by determining that the parents' claims regarding the public school site to which the student was assigned were speculative and not sufficiently tethered to the March 2023 IEP. The parents assert that the assigned public school site was inappropriate for the student because it could not accommodate the student's medical needs related to toileting and catheterization, did not have other students in attendance with mobility impairments, and would not have been able to provide the student with a fully accessible playground and auditorium.

To meet its legal obligations, a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323 [a]; 8 NYCRR 200.4 [e][1][ii]; Cerra, 427 F.3d at 194; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *13 [S.D.N.Y. Aug. 23, 3012], aff'd, 530 Fed. App'x 81, 2013 WL 3814669 [2d Cir. July 24, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp.2d 605, 614 [E.D.N.Y. 2012]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [stating that "[a]n education department's delay does not violate the IDEA so long as the department 'still ha[s]

time to find an appropriate placement . . . for the beginning of the school year in September'"], quoting Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *8 n.26 [S.D.N.Y. Nov. 20, 2007]). Thereafter, and once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401 [9][D]; 34 CFR 300.17 [d]; see 20 U.S.C. § 1414 [d]; 34 CFR 300.320). When determining how to implement a student's IEP, the assignment of a particular school is an administrative decision, provided it is made in conformance with the CSE's educational placement recommendation (see M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244-45 [2d Cir. 2015]; K.L.A. v. Windham Southeast Supervisory Union, 371 Fed. App'x 151, 154 [2d Cir. Mar. 30, 2010]; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009]; White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 [5th Cir. 2003]; see also Veazey v. Ascension Parish Sch. Bd., 121 Fed. App'x 552, 553 [5th Cir. Jan. 5, 2005]; A.W. v. Fairfax Co. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]; Tarlowe, 2008 WL 2736027, at *6; Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]). There is no requirement in the IDEA that an IEP name a specific school location (see, e.g., T.Y., 584 F.3d at 420).

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

With respect to the assigned school's capacity to implement the March 2023 IEP, the Second Circuit has explained that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see E.H. v. New York City Dep't of Educ., 611 Fed. App'x 728, 731 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 40 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting T.Y., 584 F.3d at 419; R.B. v. New York City

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

With respect to the student's medical needs and the assigned public school site, the parent testified that even though the student had a one-to-one nurse, there was "only one nurse's station that serve[d] elementary and intermediate typical students as well as [t]he special education students," and the student needed "frequent attention in a sterile and private environment" (Parent Ex. Z ¶ 28). The assistant principal of the assigned public school testified that she remembered that during the parents' tour of the assigned school, the parent asked questions related to the student's specific toileting needs, including the student's need to be laid down in order to use the bathroom (Tr. p. 74). According to the assistant principal's testimony, she communicated that "at the moment," there were no students in the assigned public school who had those toileting needs, so she "was [not] sure what to do to accommodate" those needs, but she knew that the co-located general education school did have students with those needs, and would "just need to talk to the admin[istration] of [the co-located school] to see where those students use the toilet and just work out those little details"(Tr. pp. 74-75). When asked, the assistant principal confirmed that the student's toileting issues could have been accommodated at the assigned school; she just did not yet have the information as to how it would be done (Tr. p. 75).

The parents also assert that the assigned public school did not have other students with mobility impairments (Req. For Rev. ¶ 40). However, neither the IDEA nor federal regulations require students who attend a special class setting to be grouped in any particular manner. The United States Department of Education has opined that a student must be assigned to a class based

upon his or her "educational needs as described in his or her IEP" and not on "a categorical placement," such as one based on the student's disability category (Letter to Fascell, 18 IDELR 218 [OSEP 1991]). While unaddressed by federal law and regulations, State regulations set forth some requirements that school districts must follow for grouping students with disabilities. In particular, State regulations provide that in many instances the age range of students in a special education class in a public school who are less than 16 years old shall not exceed 36 months (8 NYCRR 200.6[h][5]). State regulations also require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii]; 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [approving an IEP that placed a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]). State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to levels of academic or educational achievement and learning characteristics, levels of social development, levels of physical development, and the management needs of the students in the classroom (see 8 NYCRR 200.6[h][2]; see also 8 NYCRR 200.1[ww][3][i][a]-[d]). SROs have often referred to grouping in the areas of academic or educational achievement, social development, physical development, and management needs collectively as "functional grouping" to distinguish that set of requirements from grouping in accordance with age ranges (see, e.g., Application of a Student with a Disability, Appeal No. 17-026).

While the district must implement a student's IEP consistent with the grouping requirements of State regulation, the Second Circuit has held that the IDEA does "not expressly require school districts to provide parents with class profiles" (Cerra, 427 F.3d at 194; see N.K., 961 F. Supp. 2d at 590 [noting that a district is not required to provide parents with "details about the specific group of children with which their child will be placed"]; E.A.M. v New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012]). Here, concerns about the likelihood that the student would be appropriately grouped with other students are speculative given that the student never attended the assigned public school site (M.C. v. New York City Dep't of Educ., 2015 WL 4464102, at *7 [S.D.N.Y. July 15, 2015]; R.B. v. New York City Dep't of Educ., 15 F. Supp. 3d 421, 436 [S.D.N.Y. 2014], aff'd, 603 Fed. App'x 36 [2d Cir. Mar. 19, 2015]; B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 371 [E.D.N.Y. 2014]; N.K., 961 F. Supp. 2d at 590; see J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *11 [S.D.N.Y. Feb. 20, 2013] [noting that the "IDEA affords the parents no right to participate in the selection of . . . their child's classmates"]). Indeed, claims regarding grouping are inherently speculative as the district cannot guarantee the composition of the class that the student would have attended (M.S. v. New York City Dep't of Educ., 2 F. Supp. 3d 311, 332 n. 10 [E.D.N.Y. 2013]; cf. R.E., 694 F.3d at 187, 192 [noting that at the time of the placement decision, a parent cannot have any guarantee that a specific teacher will be available to implement an IEP]).

The assistant principal of the assigned public school testified that the assigned school could have accommodated the student in a 12:1+1 special class, as recommended, that the school had available related services of OT, PT, speech-language therapy, and a school nurse was on site every day, and the assigned school could have met the mandates detailed in the student's March 2023 IEP (Tr. p. 73-74, 75-76). With regard to accessibility, the assistant principal testified that the school had two elevator banks (Tr. p. 77). According to the assistant principal, at the time of the parents' visit, the assigned public school did not have any students with mobility impairments

(Tr. p. 77). The students in the recommended 12:1+1 special class at the assigned public school had a range of classifications that included autism, and intellectual disabilities (Tr. p. 81). The mere fact that the school may not have had other students in attendance with mobility needs similar to those of the student, however, does not support a finding that the school would not be able to implement the student's IEP as written and, instead, constitutes the type of speculative claim that the IHO correctly found would not suffice.[10]

With respect to the parents' argument concerning the accessibility of the playground and auditorium at the assigned school, the assistant principal testified that the auditorium was fully accessible and she did not recall telling the parents that the student would be "segregated" in the auditorium because there were bleacher seats (Tr. p. 77). When asked if there was any adaptive equipment on the school playground, the principal testified that she did not know (Tr. p. 77). The IHO correctly held that the parents failed to allege that the student would not be able to access the playground or auditorium, rather that the student would "be limited to the seating or equipment he could access in those locations" (IHO Decision at p. 27).

In light of the above, there is no basis to disturb the IHO's determination that the assigned public school site had the capacity to implement the student's IEP for the student's 2023-24 school year.

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determinations that the district offered the student a FAPE for the 2023-24 school year, the necessary inquiry is at an end.

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

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
April 29, 2024

STEVEN KROLAK
STATE REVIEW OFFICER

[10] The MFES class profile reflected that all of the other students in the student's class at MFES had autism and there is no evidence that the student had peers with mobility impairments at MFES (see Parent Ex. T).