



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-519

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

Appearances:

Law Offices of Regina Skyer and Associates LLP, attorneys for petitioners, by William Meyer, Esq.

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

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their daughter's tuition at the Bay Ridge Preparatory School (Bay Ridge) for the 2023-24 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The student has attended Bay Ridge since the 2021-22 school year (ninth grade) (Parent Ex. F at p. 6).

On January 6, 2023, a CSE convened and found the student eligible for special education services as a student with a speech or language impairment (see generally Dist. Ex. 1). The January 2023 CSE recommended the student attend a 15:1 special class in English language arts (ELA), math, social studies, and science, and receive one 45-minute session per week of individual speech-language therapy and two 45-minute sessions per week of group speech-language therapy (Dist. Ex. 1 at p. 16). The January 2023 CSE recommended placement in a non-specialized district school (id. at p. 22).

Via prior written notice and school location letter, both dated August 4, 2023, the district summarized the recommendations made by the January 2023 CSE and notified the parents of the public school site the district assigned the student to attend for the 2023-24 school year (Dist. Ex. 2).

By letter, dated August 24, 2023, the parents, through their attorney, notified the district of their disagreement with the January 2023 IEP and their intent to unilaterally place the student at Bay Ridge for the 2023-24 school year (see Parent Ex. B). Thereafter, on September 1, 2023, the parent electronically signed an enrollment contract with Bay Ridge for the student's enrollment for the 2023-24 school year (eleventh grade) (see Parent Ex. C).

A. Due Process Complaint Notice

In a due process complaint notice dated March 7, 2024, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year (see generally Parent Ex. A). The parents alleged that "[t]he actions and inactions of the [CSE] ha[d] impeded [the student's] right to a [FAPE]" and "impeded the [p]arents' opportunity to participate in the decision-making process, and caused the student a deprivation of educational benefit" (id. at p. 2).

In particular, the parents argued that the January 2023 CSE was not duly constituted; the CSE failed to conduct or rely on sufficient evaluative information to determine the student's present levels of performance; the 15:1 special class was not the least restrictive environment (LRE) for the student; the management needs were inadequate to support the student's needs; the post-secondary goals and transition activities were vague and conclusory; and the annual goals were vague and failed to address the student's deficits (Parent Ex. A at p. 2). Lastly, the parents claimed that the assigned school could not implement the student's IEP (id. at p. 3).

In connection with the unilateral placement, the parents argued that Bay Ridge met the student's academic and social/emotional needs and equitable considerations favored an award of funding for the Bay Ridge tuition (Parent Ex. A at p. 3). As relief, the parents sought funding of the Bay Ridge program and transportation to and from the unilateral placement for the 2023-24 school year (id.).¹

B. Impartial Hearing Officer Decision

After a prehearing conference on April 9, 2024, and two status conferences on April 30, 2024 and May 14, 2024, an impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on May 30, 2024 and concluded on June 27, 2024, the second hearing date devoted to the merits (Tr. pp. 1-218). In a decision dated September 29, 2024, the IHO found that the district offered the student a FAPE in the LRE for the 2023-24 school year (IHO Decision at pp. 10, 12).

¹ In a due process response, the district generally denied the allegations contained in the due process complaint notice (see Response to Due Process Compl. Not.).

Initially, the IHO addressed the procedural violations alleged by the parents in their due process complaint notice (IHO Decision at pp. 7-8). The IHO discussed the parents' allegations that the CSE relied on insufficient evaluative information; however, found that the CSE had sufficient evaluative information to make its recommendations (id. at pp. 7, 9). Then, the IHO found that the parents' allegation that the CSE was not properly constituted was without any merit (id. at p. 7). The IHO further stated that the CSE provided the parents meaningful opportunity to participate in the CSE meeting (id. at p. 8).

Next, the IHO addressed the parents' substantive allegations pertaining to the IEP and found that the district "presented sufficient documentation and testimony to provide a rationale for the programming and placement calculations challenged in the complaint" (IHO Decision at pp. 8-9). In terms of the recommended program, the IHO found that testimony from the school psychologist demonstrated that the present levels of performance were based upon recent evaluations and information from Bay Ridge (id. at p. 9). Also, the IHO found that the annual goals were "sufficiently specific to implement including skill, measurement method and periodicity" (id.). The IHO further found that the IEP incorporated information from "[p]arent-selected CSE team members" with respect to data and management needs (id.).

With respect to the parents' allegation that the district failed to provide a timely and appropriate school location for the student, the IHO held that the district provided the parents a school location letter and that the parents' concerns that the school could not implement the IEP were speculative (IHO Decision at pp. 9-10).

In connection with an analysis of the student's LRE, the IHO found that "[t]here appear[ed] to be no dispute between the [d]istrict and [p]arent[s] that education in a general classroom could not be achieved satisfactorily in the general education environment since parties agreed that [the] [s]tudent would benefit from a 15:1 learning environment" (IHO Decision at p. 11). The IHO stated that the main disagreement between the district and parents was "the number and type of students [the] [s]tudent c[ould] learn with for math and [E]nglish" (id.).² The IHO found that the parents' arguments were not about the district's program but the parents' "preference for private school special education classmates over public school special education classmates" (id.).

Next, the IHO addressed whether the student would be mainstreamed in the district's recommended program (IHO Decision at p. 11). The IHO noted that the CSE developed a program to allow the student opportunities for growth based upon the student's postsecondary goals (id.). The IHO found that the evidence in the hearing record demonstrated that the district "programmed to leverage [s]tudent's widely remarked upon social skills in a 15:1 setting to encourage learning, 'different perspective taking' by participating with 'her mainstream peers for lunch, for gym, for any other nonacademic setting'" (id.). However, the IHO stated that the CSE determined that the student's "academic needs were too great for access to nondisabled peers for 'core instructional courses'" and that the "CSE chose a smaller, self-contained class size for instruction with school-wide opportunities for non-disabled peer engagement to advance [the] [s]tudent towards post-secondary school goals" (id. at p. 12). Accordingly, the IHO concluded that the CSE recommended

² The IHO further stated that any allegations about the similarity of students in the 15:1 were speculative (IHO Decision at p. 11).

the 15:1 special class for instruction with opportunities for involvement with nondisabled peers to help the student achieve her post-secondary goals (*id.*).

Overall, the IHO concluded that the district offered a "cogent and responsive" explanation for its recommendations and offered the student a FAPE in the LRE for the 2023-24 school year (IHO Decision at p. 12). Accordingly, the IHO denied the parents' requested relief (*id.*).

IV. Appeal for State-Level Review

The parents appeal, alleging that the IHO erred in finding that the district offered the student a FAPE in the LRE for the 2023-24 school year and in denying the parents' requested relief.

The parents allege that the IHO erred in finding that the student's placement in a special class was the LRE for the student. The parents allege that, in light of the program the student was attending at Bay Ridge at the time of the CSE meeting, which offered the student both inclusion and self-contained classes, the CSE's recommendation was not the LRE. The parents also argue that the 15:1 special classes would not be appropriate in the subject areas in which the student "required the most support." Additionally, the parents contend that the district, in its IEP, failed to consider supplementary aids and services that would allow for the student's participation with nondisabled students.

As relief, the parents seek a finding that the district failed to offer the student a FAPE in the LRE for the 2023-24 school year. The parents also request a remand for a determination on the appropriateness of Bay Ridge and equitable considerations.

In an answer, the district generally denies the material allegations contained in the request for review. The district seeks to uphold the IHO's decision that it offered the student a FAPE in the LRE for the 2023-24 school year. More specifically, the district argues that the IEP was procedurally and substantively appropriate. Alternatively, if the IHO decision is reversed, the district also requests a remand for a determination on the appropriateness of Bay Ridge and whether equitable consideration favor the parents' request for relief.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist.,

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support 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]).³

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 Review

Before addressing the merits, a determination must be made regarding which claims are properly before me on appeal.

Here, the parents have not appealed the IHO's findings that the CSE relied on sufficient evaluative information in making its recommendations; that the CSE was duly constituted; that the district provided the parents meaningful opportunity to participate in the CSE meeting; that the annual goals were "sufficiently specific to implement"; and that the district provided the parents a school location letters and the parents' allegations about the assigned public school site's ability to implement the IEP were speculative. Accordingly, these findings have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

³ 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).

B. January 2023 IEP

The primary dispute on appeal pertains to whether the CSE's recommendation for the student to attend a 15:1 special class with speech-language therapy constituted the LRE for the student. Upon review, the evidence in the hearing record supports the IHO's conclusion that the district offered the student a FAPE in the LRE for the 2023-24 school year.

1. Student Needs

Although not in dispute, the student's needs shall be discussed for purposes of determining the LRE for the student.

The evaluative information considered by the January 2023 CSE included: a social history update dated November 23, 2021; a psychoeducational evaluation dated November 19, 2021; a vocational assessment dated November 23, 2021; an ELA school progress report from Bay Ridge dated January 3, 2023; a math progress report; a reading and writing progress report; a level I vocational interview dated January 6, 2023; a vocational assessment dated January 6, 2023; information relayed to the CSE by the speech-language pathologist and Bay Ridge ELA and math teachers; and review of student records (Dist. Exs. 1 at pp. 1-6, 25; 2 at pp. 1-2; see Dist. Exs. 3-7). In connection with the psychoeducational evaluation, the student was administered the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V), which yielded a verbal comprehension score of 86 (low average), a fluid reasoning score of 85 (low average), and an estimated full-scale IQ score of 86 (low average) (Dist. Exs. 1 at p. 1; 3 at p. 2).⁴

The January 2023 IEP stated that in terms of academic functioning, the student demonstrated difficulty with learning new concepts and applying concepts to new situations and initiating tasks independently (Dist. Ex. 1 at p. 3). The IEP also stated the student needed a "substantial amount of repetition and scaffolding to understand most topics" but noted she was "very organized" and a "pleasure" to have in class (id.).

The student's academic achievement was evaluated using the Wechsler Individual Academic Test- Fourth Edition (WIAT-4) which yielded subtest scores that ranged from the extremely low to high average range (Dist. Exs. 1 at p. 2; 3 at pp. 3-4). The student attained a standard score of 75 on the reading comprehension subtest and 78 on the written language essay subtest, which both fell in the very low range (Dist. Exs. 1 at p. 2; 3 at p. 3). On a measure of math problem solving the student attained a standard score of 64 which fell in the extremely low range, but for numerical operations attained a standard score of 88 which fell in the low average range (Dist. Exs. 1 at p. 2; 3 at p. 3). Regarding oral language skills the student attained a standard score on 116 on the receptive vocabulary subtest, which was in the high average range and 85 on the expressive vocabulary subtest, which was in the low average range (Dist. Exs. 1 at p. 2; 3 at p. 3). The student's social emotional development was evaluated using the Behavior Assessment System for Children-Third Edition (BASC-3) parent report form and based on parent responses the student

⁴ According to the psychoeducational evaluation report, portions of the WISC-V were administered remotely and not in accordance with standard procedure, and, therefore, the student's performance on the evaluation was "merely an estimate" (Dist. Ex. 3 at p. 2).

scored in the average range on all subtests which suggested there were no concerns regarding emotional, behavioral, and adaptive development (Dist. Ex. 3 at p. 4).

Much of the January 3, 2023 ELA and math progress reports from Bay Ridge were incorporated in the student's present levels of performance in the January 6, 2023 IEP (compare Dist. Exs. 1 at pp. 2-4., with Dist. Exs. 6-7). Specifically, the IEP indicated the student attended a modified English class with three other students that allowed for a "great deal of individualized modifications and accommodations" (Dist. Ex. 1 at p. 2). The IEP noted the student demonstrated difficulties in decoding and word recognition which led to difficulties in reading comprehension (Dist. Exs. 1 at pp. 2, 4; 6 at pp. 1-2).⁵ The student's reading comprehension abilities were reported to "significantly improve[]" once information was read aloud to her (Dist. Ex. 1 at p. 4). In addition, it was reported the student benefited from having text repeated, reviewed, and rephrased (id.). The IEP also noted the student benefitted from the use of a modified version of text, outlines, graphic organizers, note-taking, repetition, reading all texts and questions aloud, in-class review, and 1:1 support (id.).

The January 2023 IEP reflected the content of the Bay Ridge math progress report which indicated the student was in a modified Algebra class that covered New York State curriculum paced over two years (compare Dist. Exs. 1 at p. 3, with 7 at pp. 1-2). Specifically, the IEP stated that the student demonstrated difficulty with basic arithmetic and, according to her math progress report, a calculator allowed her to solve problems correctly and build her confidence (Dist. Ex. 1 at p. 3). According to the IEP, the modified math class provided the student with the following accommodations: extra time on quizzes and tests, scaffolding, repetition, and a significant amount of 1:1 support and content differentiation (id.). Moreover, the student reportedly benefitted from a smaller class size, slower pacing, and appeared more "comfortable asking questions in a small group" (id.). According to the math progress report, as summarized in the IEP, the student "required prompting and review for most examples before she c[ould] continue independently," and was more comfortable showing her work to the teacher before moving to the next step (Dist. Exs. 1 at p. 3; 7 at p. 1).

In accordance with the Bay Ridge teacher report, the January 2023 IEP indicated that writing was an area of significant struggle for the student mainly in the areas of organization, textual analysis, and how to breakdown lengthy assignments (compare Dist. Exs. 1 at p. 1, with Dist. Ex. 6 at p. 1). Additionally, the student had challenges with written language skills related to word retrieval, spelling, vocabulary, and grammar (Dist. Ex. 1 at p. 4). Writing was a "slow and laborious process" for the student, and she had difficulty including all of her ideas into her writing (id.). The IEP indicated the student had a significant amount of difficulty proof reading and correcting her own errors in spelling, grammar, syntax, and required explicit instruction to make corrections (id.). It further indicated the student was supported during writing by outlines, verbal cues, models, scaffolding, and a scribe for tests and assignments (id.).

According to the January 2023 IEP, the student had "receptive language challenges which were characterized by difficulties with auditory comprehension and language processing" (Dist. Ex. 1 at p. 4). In addition, the student had difficulty retaining novel vocabulary and understanding

⁵ The January 2023 IEP indicated that the student was performing at a sixth-grade instructional/functional level for reading and seventh grade instructional/functional level for math (Dist. Ex. 1 at p. 23).

complex syntax when learning new material (id.). The IEP noted the student struggled to "understand ambiguous and figurative language" and "benefited" when information was "broken down into smaller, more manageable chunks" (id. at pp. 4, 6). In addition, the student required repetition, review, multisensory presentations of a word or concept to understand its meaning in various contexts and extended time to process information (id.).

In terms of expressive language, the January 2023 IEP stated the student struggled with "word retrieval which manifest[ed] in circumlocutions, filler words and pauses during conversational speech" (id.). When learning a new academic concept, the student had difficulty with word retrieval and would switch or transpose sounds which impacted her ability to explain things in a clear and concise manner (id.). According to the January 2023 IEP, the student required models, prompts, sentence starters, phonemic cues, and verbal scaffolding to improve her expressive language skills (id.).

In terms of her social development, the IEP described the student as "sweet" and "respectful" to teachers and peers (Dist. Ex. 1 at p. 6). The student was able to self-advocate and was responsive to feedback (id.). She was also described as organized and the IEP noted she often helped other students (id.). Overall, there were no noted social concerns for the student (id.). There were also no reported concerns with the student's physical development (id.).

According to a level one vocational interview on January 6, 2023 and the January 6, 2023 IEP, the student was interested in a career in Biology, marine biology, and engineering fields (Dist. Exs. 1 at p. 5; 5 at p. 1). After high school, the student was expected to live in a college dorm and travel to school and work independently (Dist. Ex. 1 at p. 5).

Lastly, the IEP indicated the student was in the Bay Ridge Bridge Program which provided her "with a modified curriculum and differentiated instruction based on individual student needs" (id. at p. 3). The student was seen five times in a 10-day cycle, four times in a group of two, and one time individually to focus on developing her receptive and expressive language, reading, and writing skills (id.).

2. 15:1 Special Class and Least Restrictive Environment

The parents assert that, at the January 2023 CSE meeting, they informed the CSE that at Bay Ridge the student was in an English class of three students and a math class of four students as well as an "inclusion class" with her "mainstream peers" for history (15:1), physical education, and art. The parents assert that the student required "very small classes" for a "majority" of her academic courses with students of similar need. Lastly, the parents assert that the IEP failed to contain any information that consideration was given to mainstreaming the student with her nondisabled peers.

The district argues that the CSE recommended "a smaller, self-contained class size for academic instruction, and school-wide opportunities for [the student] to engage with non-disabled peers to advance the [s]tudent's post-secondary goals."⁶ Furthermore, the district argues that the

⁶ The January 2023 CSE developed postsecondary goals based upon the information obtained through the level one vocational assessment (Dist. Ex. 1 at p. 9; see Dist. Ex. 5). The student was anticipated to graduate and earn a local

IHO correctly found that it provided a offered a reasonable basis for its recommendations and therefore, offered the student a FAPE in the LRE.

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

To apply the principles described above, the Second Circuit adopted a two-pronged test for determining whether an IEP places a student in the LRE, considering (1) whether education in the general classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given student, and, if not, (2) whether the school has mainstreamed the student to the maximum extent appropriate (T.M., 752 F.3d at 161-67 [applying Newington two-prong test]; Newington, 546 F.3d at 119-20; see Killoran v. Westhampton Beach School Dist., 2023 WL 4503151, at *3 [2d Cir July 13, 2023]; 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,

diploma in June 2025 and wanted to attend college after graduating high school (id. at pp. 9, 19). She was able to care for all of her needs independently and planned to live in a college dorm (id. at p. 9). Considering the student's present levels of performance, strengths and interests, the student as well as providers and parent needed to "carefully evaluate school performance" and develop a plan for the goal of the student to attend college (id.). In addition, the student needed to improve her organizational skills in writing and decoding to pursue employment after high school graduation and improve her receptive, expressive, and written language skills (id. at p. 9, 20). The student would be advised that in preparing for independent living post high school, she needed to learn about obtaining working papers, registering to vote, possible driver's education, applying to college, and advocating for her academic needs at college (id. at p. 9).

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).⁷

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).

As will be fully explained below, applying the two-prong test in Newington and further taking into account the level of support the student required to receive educational benefit, the evidence in the hearing record demonstrates that the IHO correctly found that the January 2023 CSE offered the student a FAPE in the LRE.

Here, the January 2023 IEP described the resources and modifications needed to address the student's management needs including graphic organizers; sentence starters; assignments and information broken down into manageable pieces; passages/directions read aloud; models; multi-sensory teaching; frequent check-ins; repetition and review; immediate feedback; extra time to complete assignments; extended time on quizzes and tests; use of calculator; explicit instruction; scaffolding; practice quizzes/tests; practice, preview, and review; prompts/cues; frequent praise/encouragement; assistance with math word problems; and outlines (Dist. Ex. 1 at pp. 6-7).⁸

⁷ The Second Circuit left open the question of whether costs should be taken into account as one of the relevant factors in the first prong of the LRE analysis (Newington, 546 F.3d at 120 n.4).

⁸ Management needs are defined by State regulations as "the nature of and degree to which environmental modifications and human material resources are required to enable the student to benefit from instruction" and shall be determined in accordance with the factors identified in the areas of academic or educational achievement and learning characteristics, social and physical development (8 NYCRR 200.1[ww][3][i][d]).

In addition, the management needs section of the IEP noted that the student needed functional grouping "with peers with similar strengths and weaknesses" and recommended that, to assist the student with transition to the public school, she receive encouragement to request assistance from a teacher and provision of information about the school (*id.*). Of note, many of these management needs were taken directly from the ELA and math progress reports from Bay Ridge (*compare* Dist. Ex. 1 at pp. 6-7, *with* Dist. Exs. 6 at pp. 1-2; 7 at pp. 1-2). The CSE also determined that the student required the following testing accommodations on all classroom and standardized tests longer than 40 minutes: extended time (1.5); separate location/room-small group setting (no larger than eight students); on-task focusing prompts - verbal/non-verbal cues; five minute break after 40 minutes of testing; revised test format - directions, passages, questions read aloud except on tests measuring reading comprehension; preferential seating; use of scribe; human reader; use of calculator; and multiple day administration for all tests (Dist. Ex. 1 at pp. 18-19).

The January 2023 IEP included a statement concerning the effect of student needs on involvement and progress in the general education curriculum, stating that the student's cognitive scores were low average and academic functioning was "extremely low to low average in math, very low in writing, low average [in] expressive vocabulary, high average [in] receptive vocabulary, and very low in reading comprehension" (Dist. Ex. 1 at p. 7). In addition, the IEP noted that according to then-current teacher progress reports the student was on a sixth-grade level in ELA and seventh-grade level in math (*id.*). The IEP noted the student's "deficits [in] receptive and expressive language, written language and decoding" and stated the student required a "modified curriculum and small group instruction" (*id.*). According to the January 2023 IEP, Bay Ridge reported that the student was "so socially and emotionally advanced that she may not be grouped with similar functioning peers in a 15:1 setting" (*id.*).

For the 2023-24 school year (11th grade), the January 2023 CSE recommended that the student attend a 15:1 special class for ELA, math, social studies, and science and receive both individual and group speech-language therapy (Dist. Exs. 1 at p. 16; 2 at p. 2).⁹ The January 2023 IEP noted that "[m]ainstream opportunities should be made available whenever possible such as by lunch, recess and in assemblies" (*see* Tr. pp. 88-89; Dist. Ex. 1 at p. 21). The January 2023 IEP additionally noted that the student did not need adapted physical education and could participate in "regular physical education within her special education program," which indicated that the student's needs also did not preclude mainstreaming opportunities with respect to her gym class (*id.*).

The district school psychologist who attended the January 2023 CSE meeting testified that the student required a 15:1 special class for all of her core academic classes because she demonstrated weaknesses in decoding and reading comprehension which affected her in all academic settings (Tr. p. 88). Also, she testified that, based upon the student's reported functioning of sixth and seventh grade levels when she was in tenth grade, she would have a "very hard time" keeping up in a general education setting (Tr. p. 89). The school psychologist testified that the CSE considered that the student was in classes of four students at Bay Ridge, but felt that class size was "too restrictive" for a student with a low average IQ (Tr. pp. 95-96). She testified that a

⁹ State regulation describes a 15:1 special class placement as the "maximum class size for those students whose special education needs consist primarily of the need for specialized instruction which can best be accomplished in a self-contained setting" (8 NYCRR 200.6[h][4]).

15:1 special class was appropriate for a student with "low average cognitive functioning" who was functioning "a couple of years below grade level" and required special instruction (Tr. p. 96).

The CSE documented that the parents and Bay Ridge voiced concerns at the CSE meeting about the student not being grouped with similar functioning peers in a 15:1 setting in the district (Dist. Ex. 1 at pp. 7-8). The school psychologist testified that the parents and Bay Ridge staff did not agree with the CSE's recommendation because they were concerned that the student was a "very socially savvy girl, and they wanted to make sure that she would be placed with similarly functioning children" (Tr. p. 85; Dist. Ex. 1 at p. 24). In response to the parents' concerns, the school psychologist testified that the IEP management needs provided for the student to "be grouped with similarly functioning children" (Tr. p. 86; Dist. Ex. 1 at p. 7).

The CSE considered integrated co-teaching (ICT) services for the student but determined that the general education class setting would be too large as the student required modified instruction (Dist. Exs. 1 at p. 24; 2 at p. 2; 9 ¶ 10).¹⁰ According to the direct affidavit testimony of the school psychologist, ICT services were rejected because the student "required a smaller class size with a more individualized curriculum to achieve progress" (Dist. Ex. 9 ¶ 10). The CSE also considered a 12:1+1 special class in a district specialized school but rejected that option as "[a]nything less than [a] 15:1 would be too restrictive a setting" for the student (Dist. Ex. 1 at p. 24).¹¹ The school psychologist testified that a 12:1+1 was "too restrictive" because of the student's "high social-emotional strengths and present academic levels" (Tr. pp. 95-96; Dist. Ex. 9 ¶ 10).

¹⁰ Guidance from the New York State Education Department notes that ICT services may be "an alternative to placement in a special class" for some students and provides a non-exhaustive list of factors to weigh when considering whether the general education classroom is the [LRE] for the student to receive his or her special education services, including:

- the classes in which [ICT] is offered and the match to the student's needs;
- the extent of special education services the individual student needs to access, participate and progress in the general education curriculum;
- the similarity of needs of the other students with disabilities in the class;
- the potential effect of the class size on the student's learning needs;
- any potential benefits and harmful effects such services might have for the student or on the quality of services that he or she needs; and
- whether the extent of the environmental modifications or adaptations and the human or material resources needed for the student will consistently detract from the opportunities of other students in the group to benefit from instruction"

(see "Continuum of Special Education Services for School-Age Students with Disabilities," at pp. 14-15, Office of Special Educ. [Nov. 2013], available at <https://www.nysed.gov/sites/default/files/programs/special-education/continuum-of-special-education-services-for-school-age-students-with-disabilities.pdf>).

¹¹ The reference in the IEP and the school psychologist's testimony to the greater restrictiveness of other student-to-staff special class ratios generally conflates the student's need for additional adult support within a classroom with 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 (see *R.B. v. New York City Dep't of Educ.*, 603 Fed. App'x 36, 40 [2d Cir. Mar. 19, 2015] [explaining that the requirement that students be educated in the LRE 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

With respect to the parents' argument that a 15:1 special class was not sufficiently supportive for the student, State regulation describes a 15:1 special class placement as the "maximum class size for those students whose special education needs consist primarily of the need for specialized instruction which can best be accomplished in a self-contained setting" (8 NYCRR 200.6[h][4]). In arguing that the student required "placement in very small classes for the majority of her academic subjects in light of her overall profile of needs," the parents point to the testimony of the director of the Bridge Program at Bay Ridge. The director indicated that, given the student's "significant language processing deficits," she would have difficulty "keep[ing] up" in "larger classes," such as the recommended 15:1 special classes, and that she would benefit from "a much smaller class where she c[ould] be more focused and also pick up more on what's being discussed, talked about, and also participate more readily" (Tr. pp. 110-11).¹² However, the director did not attend the CSE meeting and, therefore, his after-the-fact opinion may not be relied upon to find the CSE's recommendations to be inappropriate (see C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [stating that in addition to districts not being permitted to rehabilitate a defective IEP through retrospective testimony, "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]; see also L.S. v. Union Free Sch. Dist. of the Tarrytowns, 2024 WL 1859970, at *17 [S.D.N.Y. Apr. 29, 2024]). Moreover, his testimony does not grapple with the views of the district that the student's social/emotional strengths and cognitive and academic levels would not warrant a setting more supportive than a 15:1 (Tr. pp. 95-96; Dist. Ex. 9 ¶ 10). Ultimately, the parents' preference for a "smaller class size" illustrates a common predicament: that often what is considered "small" in terms of class size is in the eye of the beholder (M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 335 [E.D.N.Y. 2012] [holding "[t]hat the size of the class in which [the student] was offered a placement was larger than his parents desired does not mean that the placement was not reasonably calculated to provide educational benefits"], aff'd, 725 F.3d 131 [2d Cir. 2013]), but a parents' decision to provide a smaller classroom ratio is not in and of itself conclusive evidence of the question of whether a public placement provides appropriate services to meet a student's needs (see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015]).

With regard to the student's integration with nondisabled students, the parties do not materially disagree that placement of the student in a general education class placement for most core academic classes would not be appropriate (see J.S. v. Clovis Unified Sch. Dist., 2017 WL 3149947, *1-*3, *12-*15 [E.D. Cal. 2017] [holding that the general education setting with resource specialist support, was not the LRE where, despite significant support from an instructional aide and a modified curriculum, the student could not understand class materials, participate in group activities, or engage with the general education curriculum, some of which could not be modified to the student's instructional level]; E.G. v. Northside Indep. Sch. Dist., 2014

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]).

¹² The director also testified about his concern that a 15:1 special class would not allow the student to be grouped with other students with similar needs (see Tr. pp. 113-14); however, as noted above, the IEP provided for such grouping (Dist. Ex. 1 at p. 7).

EL 12537177, *9-*10 [W.D. Tex. 2014] [stating that the IDEA does not require modification of the regular education curriculum "'beyond recognition'" or "'to the extent that the [disabled student] is not required to learn any of the skills normally taught in regular education'"], quoting Daniel R.R., 874 F.2d at 1048). Rather, it is undisputed that the student had very low reading comprehension skills, extremely low and low average math skills, and very low written language skills and required a modified curriculum and small group instruction in all areas of academics (Dist. Ex. 1 at pp. 2-3). Additionally, the student benefited from extended time to process information due to difficulties with auditory comprehension and language processing (*id.* at p. 4). The parents would no doubt prefer integrated programming for the student for certain academic classes such as social studies but only with class ratios and supports that mirror the programming offered at Bay Ridge (*see* Tr. pp. 106-07, 123-24). However, districts are not required to replicate the identical setting used in private schools (*see, e.g., M.C. v. Mamaroneck Union Free Sch. Dist.*, 2018 WL 4997516, at *28 [S.D.N.Y. Sept. 28, 2018]; Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at *6 [N.D.N.Y. June 19, 2009]; Watson, 325 F. Supp. 2d at 145).¹³

As removal of the student from the general education setting was required, this matter turns on the second prong of the Newington test, that is, whether the CSE provided mainstreaming opportunities for the student with nondisabled peers to the maximum extent appropriate. As noted above, the IEP provided that the student would be mainstreamed for lunch, recess, and assemblies, and could participate in regular physical education classes (Dist. Ex. 1 at p. 21). Given these opportunities, I find that the hearing record supports the district's recommendation to remove the student from the general education setting for core classes, and further that the IEP provided the student with access to nondisabled peers to the maximum extent appropriate in light of the student's needs and abilities (*see id.* at pp. 16, 21).

Accordingly, I will not disturb the IHO's finding that the district offered the student a FAPE for the 2023-24 school year in the LRE.

VII. Conclusion

Having determined that the evidence in the hearing record establishes that the IHO properly concluded that the district offered the student a FAPE in the LRE for the 2023-24 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether Bay Ridge was an appropriate unilateral placement for the student or whether equitable considerations favor the parents' request for relief (Burlington, 471 U.S. at 370).

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
March 21, 2025**

**CAROL H. HAUGE
STATE REVIEW OFFICER**

¹³ Moreover, to the extent the parent points to the student's programming at Bay Ridge for the 2023-24 school year, the student's schedule in this regard was not known to the CSE at the time of the January 2023 meeting and, therefore, could not be relied upon to find the CSE's recommendations to be inappropriate (*see C.L.K.*, 2013 WL 6818376, at *13; *see also L.S.*, 2024 WL 1859970, at *17).