



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 24-583

### **Application of the BOARD OF EDUCATION OF THE LEWISTON-PORTER CENTRAL SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability**

#### **Appearances:**

Hodgson Russ LLP, attorneys for petitioner, by Ryan L. Everhart, Esq.

McNelis Law PLLC, attorneys for respondents, by Patrick M. McNelis, Esq.

### **DECISION**

#### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from a decision of an impartial hearing officer (IHO) which determined that the educational placement recommended by its Committee on Special Education (CSE) for respondents' (the parents') daughter for the 2023-24 school year was not appropriate. The appeal must be sustained.

#### **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**

During the 2023-24 school year, the student was a sixth grader at a public school within the district (Joint Exs. 4 at p. 1; 10 at p. 1). The student had previously attended a private, parochial school, located within the district, from kindergarten through fifth grade (Tr. p. 50; Joint Exs. 4 at p. 1; 7 at pp. 1-2; 8 at p. 1). While attending the parochial school, the student was found eligible for special education as student with multiple disabilities and received special education (Joint Ex. 3 at p. 1). Specifically, the student received consultant teacher services at the parochial school since second grade, along with related services of speech-language therapy and occupational therapy (OT) since kindergarten; physical therapy (PT) from kindergarten to fourth grade; and a 1:1 aide five days per week for four hours (Joint Exs. 3 at pp. 1-2; 8 at p. 1).

On June 13, 2023, a CSE convened for a meeting in which the student's parents participated (Joint Exs. 7 at pp. 1-2; 8 at pp. 1-2). The June 2023 CSE reviewed updated evaluative information, considered input from the student's parents, determined that the student was eligible for special education as a student with an other health impairment (OHI), and developed an IEP to be implemented on July 10, 2023 (Joint Exs. 7 at pp. 1-4; 8 at pp. 1-2).<sup>1</sup> The June 2023 CSE recommended the student attend a 15:1 special class for both math and study skills, with each class meeting five times per week for 40-minutes, and receive five 40-minute sessions per week of consultant teacher services in English language arts (ELA), science, and social studies classes (Joint Ex. 7 at pp. 1-2, 13-16). The CSE further recommended that the student receive the related services of speech-language therapy, OT, and counseling, as well as the support of a 1:1 aide, modified curriculum/assignments, and testing accommodations (Joint Exs. 7 at pp. 1-2, 13-16; 8 at p. 1).<sup>2</sup>

In November 2023, the district conducted a functional behavioral assessment (FBA) at the parents' request (see Joint Ex. 10 at pp. 1-3, 7-8). The resulting report, dated December 1, 2023, indicated that the parents requested the FBA "to better understand [the student's] behavior and overall functioning in the school setting" (Joint Ex. 4 at p. 1). The 2023 FBA focused on the student's work refusal, off-task behavior, elopement, and flopping on the floor (see Joint Exs. 4 at pp. 2-9; 13 at p. 2). In her report, the school psychologist who conducted the FBA indicated that the student engaged in behaviors and/or elopement in the context of whole class academic instruction and routines when presented with non-preferred tasks/activities that were too difficult or challenging primarily to avoid or escape them (Joint Ex. 4 at p. 9). The school psychologist opined that, while a behavioral intervention plan (BIP) "may not be warranted at this time," the CSE may wish to review the student's current programming to ensure appropriate support for her individual needs (id.).

On December 11, 2023, the CSE reconvened for a meeting in which the parents participated (Joint Ex. 10 at pp. 1-3).<sup>3</sup> During the December 2023 meeting, the CSE reviewed the FBA report and developed an IEP with a projected implementation date of January 2, 2024 (Joint Exs. 10 at pp. 1-3, 9; 11 at pp. 1-2). The December 2023 CSE meeting notes indicated that, based on the results of the FBA, teacher reports, the student's classroom functioning, and committee discussion, the CSE recommended that the student's related services remain the same but that the student's educational placement be changed from the hybrid consultant teacher/15:1 (CT/15:1) program to a 12:1+1 special class (id. at p. 2).<sup>4</sup> The December 2023 IEP incorporated the findings

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<sup>1</sup> The student was classified as a student with an other health impairment based on her diagnosis of Down Syndrome (Joint Exs. 7 at p. 1; 8 at p. 1). The student's eligibility for special education as a student with an other health impairment is not in dispute (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

<sup>2</sup> The June 2023 CSE recommended that the student receive speech-language therapy on a 12-month basis (Joint Ex. 7 at p. 14).

<sup>3</sup> Participants at the December 2023 CSE meeting included the chairperson, school psychologist, two special education teachers, a regular education teacher, the assistant principal, a speech-language pathologist, an occupational therapist, a school social worker, and the parents (Joint Ex. 10 at p. 1).

<sup>4</sup> The parties refer to the student's hybrid program of consultant teacher services paired with 15:1 special classes as "CT/15:1" (see Dist. Ex. 10 at p. 2).

of the FBA and reflected updates to the student's present levels of educational performance (compare Joint Exs. 4 at p. 9; 7 at pp. 4-10, with Joint Ex. 10 at pp. 3-7). The December 2023 CSE identified resources and strategies needed to address the student's management needs, as well as approximately nine annual goals in the areas of reading, writing, mathematics, speech/language development, social/emotional/behavioral functioning, and motor skills (Joint Ex. 10 at pp. 7-9). The December 2023 CSE recommended that the student continue to receive the related services of speech-language therapy, OT, and counseling (Joint Exs. 10 at pp. 1, 9-10; 11 at p. 1). However, rather than the hybrid program, consisting of consultant teacher services and 15:1 special class instruction, the December 2023 CSE recommended the student attend a 12:1+1 special class, "for all subjects except exploratories," and receive continued supplementary supports and services including the support of a 1:1 aide (Joint Ex. 11 at pp. 1-2; see also Joint Ex. 10 at pp. 1-2, 9-10). The December 2023 IEP reported that "[e]veryone in attendance agreed with this recommendation except [the student's] parents" (Joint Ex. 10 at p. 2).

On or about February 1, 2024, the student was suspended from school for five days following an incident of physical aggression toward her special education teacher (see Joint Exs. 12 at p. 1; 13 at p. 1; 14 at p. 1). Consequently, the district scheduled a manifestation determination review (MDR), which took place on February 7, 2024 (see Joint Exs. 13 at p. 1; 14 at p. 1). The CSE conducted the MDR, determined the student's behavior to be a manifestation of her disability, and developed an IEP to be implemented on February 8, 2024, again, recommending placement in a 12:1+1 special class for "[a]ll core classes" (Joint Exs. 13 at pp. 1, 9; 14 at p. 1). The February 2024 IEP indicated that the December 2023 FBA focused on the student's work refusal, off-task behavior, elopement, and flopping on the floor because, at that time, the student had only had one documented incident of physical aggression (Joint Ex. 13 at p. 2). The February 2024 CSE meeting notes indicated that the February 2024 incident was the student's third instance of physical aggression (id.).<sup>5</sup> According to the February 2024 CSE meeting notes, the CSE agreed that a new FBA should be completed to determine the function of the aggressive behavior and that, once completed, the CSE would reconvene to review the new FBA (id.). The CSE reportedly agreed to the parents' request for an independent FBA (id.).

### **A. Due Process Complaint Notice**

In a due process complaint notice dated January 1, 2024, the parents, through their attorney, alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (Joint Ex. 1 at p. 1). Specifically, the parents contested the district's recommendation to change the student's placement from a hybrid CT/15:1 program to a "self-contained" 12:1+1 special class (id. at p. 2). According to the parents, the proposed 12:1+1 placement was not the least restrictive environment (LRE) in which the student could be satisfactorily educated (id.). The parents requested maintenance of the student's placement in the

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<sup>5</sup> The hearing record includes documentation regarding incidents of behaviors during the 2023-24 school year, as well as suspension notices for documented incidents (Joint Exs. 15; 16; 17; Dist. Exs. 1; 2). The district offered as evidence an email from another student's parent, providing her child's account of the student's behavior in the 15:1 setting; however, the IHO excluded that email from admission into evidence (Tr. pp. 113-17). The IHO permitted questioning that allowed for general discussion that parents of other children in the 15:1 class made complaints regarding the student's behavior (Tr. p. 118). Notwithstanding that the IHO excluded the email from evidence, it was included with the hearing record filed on appeal. Evidence excluded from admission into evidence but nevertheless included in the hearing record on appeal was not considered in this decision.

hybrid program under pendency (*id.*). As relief, the parents requested development of a new IEP, providing the student with sufficient access to non-disabled peers; funding for an independent educational evaluation (IEE), including, but not limited to, an independent behavioral evaluation; and additional services to compensate for the district's failure to provide the student with a FAPE (*id.* at pp. 2-3).

## **B. Impartial Hearing Officer Decision**

Following three prehearing conferences, an impartial hearing convened on May 13, 2024 and concluded on June 3, 2024, after three days of proceedings (*see* Feb. 2, 2024 Tr. pp. 1-11; Mar. 4, 2024 Tr. pp. 1-7; Apr. 10, 2024 Tr. pp. 1-8; Tr. pp. 1-288).<sup>6</sup> During the impartial hearing, the following witnesses testified on the district's behalf: the district's director of special education and CSE chairperson; the student's special education teacher; and the school psychologist who conducted the November 2023 FBA (*see* Tr. pp. 47, 155-57, 213, 216; Joint Ex. 9 at p. 1). The student's mother testified on the parents' behalf (*see* Tr. pp. 259-81). Both parties offered documents for admission into evidence (*see* Tr. pp. 9-21). The parents stipulated to the admission of certain proposed district exhibits, which the IHO admitted as joint exhibits (*see* Tr. pp. 19-20; *see generally* Joint Exs. 1-17). The parents objected to the admission of other proposed district exhibits without foundational testimony (*see* Tr. pp. 19-20). All but two of those remaining proposed district exhibits were reintroduced following foundational testimony and admitted into evidence IHO (*see* Tr. pp. 83, 89, 172).<sup>7</sup> The district stipulated to the admission of Parent Exhibit A (Tr. p. 21). The parents later offered a second exhibit, Parent Exhibit B, which the IHO admitted into evidence (Tr. p. 142).<sup>8</sup>

In a decision dated October 21, 2024, the IHO found that the district failed to meet its burden of proving that the district's recommendation to change the student's placement from a hybrid CT/15:1 program to a 12:1+1 special class offered the student a FAPE for the 2023-24 school year (IHO Decision at pp. 3, 5-6). The IHO acknowledged that the parents were not seeking private school tuition reimbursement but nevertheless applied the legal standard applicable to such requests for relief, that is, the Burlington-Carter three-pronged test (IHO Decision at pp. 3-8). According to the IHO, the evidence in the hearing record shows that the student was making progress in the less restrictive placement (*id.* at pp. 7-8). The IHO emphasized that the student's report cards show good grades and favorable commentary concerning the student's conduct (*id.* at p. 7). Thus, according to the IHO, the parents showed that the student's current placement (i.e.,

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<sup>6</sup> The hearing record includes six transcripts dated February 2, 2024, March 4, 2024, April 10, 2024, May 13, 2024, May 31, 2024, and June 3, 2024. The transcripts of prehearing conferences dated February 2, 2024, March 4, 2024, and April 10, 2024 are separately paginated, each beginning with page one, and, therefore, any citation to these transcripts will be notated with the transcript date and page number. The transcripts dated May 13, 2024, May 31, 2024, and June 3, 2024 are paginated consecutively and the date of the proceedings will not precede the citation to these transcripts (*see generally* Tr. pp. 1-288).

<sup>7</sup> As noted above, Proposed District Exhibit 3, an email from another student's parent, was reintroduced and excluded by the IHO (*see* Tr. pp. 17, 112-18). Proposed District Exhibit 4, a memorandum purportedly prepared by the student's 1:1 aide, was not reintroduced (*see* Tr. pp. 17, 184).

<sup>8</sup> There is no indication from the hearing transcripts that proposed Parent Exhibit C was offered for admission into evidence.

the hybrid CT/15:1 program) was appropriate for the student, and "[t]he district failed to show anything to the contrary" (*id.* at p. 8). The IHO further found that the parents' "conduct . . . was cooperative and allowed the CSE to do its work" (*id.*). As relief, the IHO ordered the district to develop a new IEP, reflecting the student's placement in the hybrid CT/15:1 program with 1:1 aide support and various related services, and fund an independent FBA, the cost of which shall not exceed \$7,500.00 (*id.*).

#### **IV. Appeal for State-Level Review**

The district appeals. The parties' familiarity with the issues raised in the district's request for review and the parents' answer is presumed and, therefore, the allegations and arguments will not be recited here in detail. The disputed issue is whether the IHO erred in determining that the district's recommendation to change the student's placement from a hybrid CT/15:1 program to a 12:1+1 special class denied the student a FAPE for the 2023-24 school year.

#### **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 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]).<sup>9</sup>

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<sup>9</sup> The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

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

## **VI. Discussion**

On appeal, both parties agree that the IHO applied the incorrect legal standard to assess whether the parents were entitled to the relief sought. According to the parents, the IHO ultimately reached the correct conclusion, nonetheless. The parents contend that the recommended 12:1+1 special class was not the LRE in which the student can be satisfactorily educated. The parents argue that the documentary evidence, specifically, the student's report cards and progress reports, shows that the student was making identifiable progress and meeting the academic expectations of her general education classes. The parents further argue that the student's behavior, which, according to the parents, can be managed to reduce conflict and avoid escalation, does not warrant removal from the general education setting.

On the other hand, the district contends that the IHO ignored extensive evidence that the student was not meaningfully benefitting from her placement in the hybrid program and that a 12:1+1 special class was more appropriate for the student's needs. The district argues that, despite receiving extensive supportive services and accommodations, the student had difficulty functioning in her mainstream classes. Specifically, the district argues that the student sought to avoid doing classwork, could not independently perform any tasks, and was unable to complete significantly modified assignments or engage in her mainstream classes in any significant manner.

As an initial matter, the IHO found that "the district failed to meet its burden because the district failed to put on any case whatsoever on Prong 1" (IHO Decision at p. 6). The IHO's finding was significantly amiss because, to the contrary, the district presented documentary evidence, including three IEPs and prior written notices for the 2023-24 school year, in addition to live testimony from three witnesses (see generally Tr. pp. 1-317; Joint Exs. 1-17; Dist. Exs. 1-2, 5). Although the district did not provide information on the makeup of the 12:1+1 special class, the district is not required to provide a class profile (see Cerra, 427 F.3d at 194 [stating that the IDEA does "not expressly require school districts to provide parents with class profiles"]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 590 [S.D.N.Y. 2013] [stating that a district is not required to provide parents with "details about the specific group of children with which their child will be placed"]).

Moreover, the IHO erred in relying on the legal standard he applied to assess whether the parents were entitled to the relief sought. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]). "They can [then] obtain retroactive reimbursement from the school district after the IEP dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (*id.*). The Burlington-Carter three-pronged test is inapplicable here, as the parents did not unilaterally change the student's placement. As more fully discussed below, the IHO should have applied the two-pronged test adopted in Newington for determining whether an IEP places a student in the LRE (546 F.3d at 118-19).



## A. The Student's Needs

Next, a review of the student's needs and then-current functioning, as known to the CSE while developing the student's educational program for the 2023-24 school year, will provide the background necessary to assess the whether the district recommended an appropriate educational placement in the LRE.

### 1. June 2023 IEP

The June 2023 CSE reviewed updated evaluative information, as listed on the June 2023 IEP, that included an October 2022 OT evaluation, an October 2022 speech-language evaluation, an October 2022 psychological evaluation, and a February 2023 amended psychoeducational evaluation (Joint Exs. 7 at pp. 1-4; 8 at p. 1; see Tr. pp. 69-70, 72). The February 2023 amended psychoeducational evaluation, which is included in the hearing record, incorporated the following assessments: an October 2022 social history; an October 2022 classroom observation; the Woodcock-Johnson Tests of Achievement: Fourth Edition (WJ IV ACH), Form A, administered in October 2022; the Vineland Adaptive Behavior Scales, Third Edition (Vineland-III)-Parent, administered in October 2022; and the Vineland Adaptive Behavior Scales, Third Edition (Vineland-III)-Teacher and the Wechsler Intelligence Scale for Children: Fifth Edition (WISC-V), administered in February 2023 (see Joint Ex. 3 at p. 1).<sup>10</sup>

The October 2022 classroom observation took place in the student's Spanish class and described the student working 1:1 with a school specialist to explain the class material, the student talking to the consultant teacher, the consultant teacher reading notes from the board to the student, and the 1:1 aide taking notes for the student (Joint Ex. 3 at p. 2). The observation described the student as remaining on task, willing to participate with classmates, and excited to work with other students even if she did not know the answer (id.).

The June 2023 IEP indicated that administration of the Weschler Abbreviated Scale of Intelligence (WASI) in October 2022 yielded a full-scale IQ standard score of 56, which fell in the extremely low range (Joint Ex. 7 at pp. 3-4). The CSE chairperson testified that additional testing, reflected in the February 2023 amended psychoeducational evaluation, yielded a full-scale IQ of 40, indicating overall cognitive functioning in the extremely low range; achievement scales in the very low range; and adaptive scales in the moderately low range, showing weaknesses on all adaptive composites (Tr. pp. 56, 68).<sup>11</sup> Further, the chairperson testified that the student's scores across all domains were within the extremely low range indicating the student had "global delays in all areas and not many compensatory skills to help compensate for some of those delays" (Tr. p. 62).

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<sup>10</sup> There was no teacher input for the Vineland-III reflected in the February 2023 psychoeducational evaluation as the district did not receive the completed form from the student's teacher (Tr. p. 69; Joint Ex. 3 at p. 6).

<sup>11</sup> The June 2023 IEP did not report the composite full-scale IQ of 40, as yielded on the February 2023 amended psychoeducational evaluation; the additional comprehensive testing was conducted per the parents' request for purposes of determining the student's eligibility for services from the Office for People with Developmental Disabilities (OPWDD) (Tr. pp. 52-53, 65-66; compare Joint Ex. 3 at pp. 1, 2, with Joint Ex. 7 at pp. 3-4).

The June 2023 IEP carried much of its information over from the 2021-22 school year with some more current information regarding the student's speech-language therapy and OT. For example, the June 2023 IEP reported that, as of June 2023, the student "[r]ecently has had some difficulty with transitioning to and from speech and has shown a great decline in progress and participation" (Joint Ex. 7 at p. 4). Following this information and dated "2022," in the area of reading, the IEP reported the student read basic sight words with support; in writing, the student applied spelling, grammar, and punctuation rules with moderate support; and in math the student calculated addition and subtraction to 20 with support (*id.* at p. 5). The June 2023 IEP also reported that, as of June 2023, the student had recently "struggled to initially get settled into [OT] sessions," but, once she started, she worked well (*id.* at p. 8).

The June 2023 IEP included summary information that the CSE considered a 12:1+1 special class but rejected that option, as the student had been successfully mainstreamed since kindergarten with a modified curriculum/assignments and a 1:1 aide (Joint Ex. 7 at p. 2). The June 2023 IEP reported that the parents wanted the student to "continue to be mainstreamed so that she [wa]s challenged academically and for social interaction with developmentally typical peers" (*id.*). The CSE chairperson likewise testified that the parents expressed a preference for the CT/15:1 program, as they wanted the student integrated with typical peers for socialization purposes and felt this option would provide for academic rigor (Tr. pp. 75-76). The chairperson reported that, in an effort to obtain information from "both sides," she invited staff from the parochial school to the CSE meeting, including the student's regular education teacher, special education teacher, and private support teacher, in addition to district staff (Tr. pp. 70-71). However, the chairperson testified that the parochial school staff who worked with the student did not provide much input and, therefore, it was difficult "to get a very clear understanding of where [the student] was . . . academically" (Tr. pp. 72-73).<sup>12</sup> The chairperson testified that, aside from the parents, the other members of the CSE expressed a preference for the 12:1+1 placement, as they believed it would provide more academic support for the student so that she could make more progress (Tr. pp. 75-76). The chairperson testified that, ultimately, the June 2023 CSE agreed to try the hybrid program because records from the student's private school indicated she did well in her classes with support and modified work (*id.*).

The hearing record also includes testimony from the district school psychologist in attendance at the June 2023 CSE meeting, the same school psychologist who conducted the 2023 FBA (Tr. pp. 212-13, 216, 223-24). The school psychologist testified that her recommendation for the student to be placed in a 12:1+1 special class was based on the student's low IQ score, which would have made it difficult for the student to access the general education curriculum, as well as information reported by the student's parochial-school teacher at the CSE meeting (Tr. pp. 220-24). According to the school psychologist, the student's parochial-school teacher reported that the student did better in a small setting with hands on opportunities (Tr. p. 224). The school psychologist testified further that the student's academic achievement tests, with standard scores of less than 40, placed the student at a grade equivalent of kindergarten (Tr. pp. 221-22).

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<sup>12</sup> Neither the June 2023 meeting notes, nor the June 2023 prior written notice, reported specific information about the student provided by parochial school staff at the June 2023 CSE meeting (see generally Joint Exs. 7 at pp. 1-2; 8).

## 2. 2023 FBA and December 2023 IEP

The CSE chairperson testified that teachers contacted her "[v]ery early in the school year[,] even before the end of September," "with concerns that [the student] was unable to keep up with the modified curriculum and . . . was often engaging in work avoidant tasks, such as shutting down, putting her head down on the desk, maybe laying down on the ground[,] or leaving the room" (Tr. p. 80). According to the CSE chairperson, the district discussed having a program review at the end of October, this being prior to the student demonstrating aggressive behaviors, to discuss the student's "academic progress and to consider changing her program given how she was not engaging in the learning environment" (Tr. pp. 47, 92; Joint Ex. 9 at p. 1). The chairperson further testified that the district contacted the parents to inform them of the intended meeting, at which time the parents asked that the district complete an FBA prior to the meeting (Tr. p. 92). The student's mother likewise testified that she requested an FBA in October 2023, during the student's sixth grade school year (Tr. p. 275). According to the chairperson, the district agreed to the parents' request and completed an FBA prior to the December 11, 2023 CSE meeting (Tr. p. 92).

The hearing record includes testimony from the CSE chairperson that the December 2023 CSE considered the December 2023 FBA report, the psychoeducational testing done as part of the October 2022 re-evaluation, information from those who worked with the student, as well as input from the parents (Tr. pp. 99-100). The chairperson testified that the student's present levels of educational performance were updated in the December 2023 IEP (Tr. p. 100).

The December 2023 FBA report, as included in the hearing record and summarized in the December 2023 IEP, indicated that behaviors of concern included tantrum behavior such as crying, screaming, or dropping to the floor, as well as the behavior of "elopement," defined as leaving the designated instructional area without adult permission, such as leaving the classroom and running down the hall (Joint Ex. 4 at pp. 2-3). The FBA report indicated that, per an interview with the student's special education teacher, the target behaviors occurred most often during social studies, science, and 15:1 math, and that target behaviors typically did not occur during ELA, study skills, or when the student was in a small group (Joint Ex. 4 at p. 5; see Joint Ex. 10 at pp. 1-3).

According to the December 2023 FBA report, the school psychologist who completed the FBA observed the student on four separate occasions during social studies and science for 15-to-20-minute intervals (Joint Ex. 4 at pp. 5-8). During these observations, the school psychologist did not observe the targeted behaviors but tracked off task behaviors of the student and her peers and provided comparison of data between the student and peers (id. at pp. 5-9). The school psychologist observed the student engaged in the following activities: highlighting words and writing words on her individual whiteboard with assistance from her aide during a social studies lesson/slide show of "[p]lanned [c]ities on the Indus;" reviewing focus questions of a science investigation in small peer groups but interacting "mostly with her aide"; writing notes during a social studies lesson on a small whiteboard with assistance from her aide on the topic "Hinduism and Caste System"; and watching other students use fly swatters to "swat the correct vocabulary term" during a social studies vocabulary review (id. at pp. 5-8). During the first two social studies and science observations, the school psychologist observed the following behaviors: leaving the classroom for a few minutes to use the bathroom, reportedly telling her aide her stomach hurt; playing with a bubble pop sensory toy while her aide supported her in writing down vocabulary words; interacting with her aide during a science group activity with two peers and, with

prompting, telling a peer how to spell her name to write on a group assignment; running her finger on a sticker on her notebook during a silent reading activity; resting her head on her arms and sucking on and biting a plastic wrist watch while two peers worked to complete questions on a group handout (id. at pp. 5-6). During the second two observations in social studies class, the student did not engage in verbal off task behaviors but did engage in the "off-task passive behaviors" such as putting her head down on her desk during instruction (id. at pp. 6-8). The student's on-task interval recordings of 42 percent and 58 percent, during the respective observations, were significantly less than that of her peers who were on task during the same observations for 100 percent of intervals (id. at pp. 6-7, 8).

In addition, the December 2023 FBA report included antecedent-behavior-consequence (ABC) data, collected by the special education teacher over seven days, indicating that the student engaged in tantrum behaviors of "refusal/arguing, crying" during nine out of the 15 class periods in which data was collected (Joint Ex. 4 at p. 9). Analysis of the data revealed that antecedents to tantrum behavior primarily included being asked to work, working independently, and being presented with a task demand (id.). However, finishing a preferred task and transitioning were indicated as an antecedent three times and one time, respectively, during data analysis (id.). The student reportedly engaged in excessive/exaggerated coughing and passive behaviors, such as putting her head down or ignoring teacher requests, in three out of 15 class periods (id.). The student reportedly engaged in elopement as a behavior once during social studies class (id.).

The December 2023 IEP incorporated the FBA's summary finding that the student engaged in behaviors and/or elopement in the context of whole class academic instruction and routines when presented with non-preferred tasks/activities that were too difficult or challenging primarily to avoid or escape them (Joint Exs. 4 at p. 9; 10 at pp. 1, 3). The IEP included information from the FBA report that the student, as compared to her peers, engaged in significantly more off-task passive behaviors such as putting her head down or staring across the room (Joint Exs. 4 at p. 9; 10 at p. 1). The FBA report and IEP meeting summary reflected the school psychologist's opinion that a BIP may not be warranted at the time and, instead, the CSE may need to review the student's current programming to ensure it was appropriate to support her individual needs (Joint Exs. 4 at p. 9; 10 at p. 1). The FBA report, as included in the IEP, stated that the "large classroom size and whole class instruction may at times be overwhelming for [the student]" (compare Joint Ex. 4 at p. 9; with Joint Ex. 10 at p. 2). The December 2023 IEP stated further that "related service providers report[ed] little to no concerns regarding [the student's] behavior in their smaller group settings where the tasks [we]re at her instructional level" (Joint Ex. 10 at p. 2).

According to the December 2023 IEP, with regard to speech-language development, the student enjoyed speech class and actively participated in both group and individual sessions with the therapist and her peers (Joint Ex. 10 at p. 5). At times, the student needed reminders not to use silly words in middle school but could be redirected after two verbal reminders (Joint Ex. 10 at p. 5). The December 2023 IEP reported that the student worked on speaking in grammatically correct sentences to describe a sequence of events and continued to need assistance in using words such as "is," "was," and "the" when responding to questions about a paragraph read or when talking about personal information or experiences (id.). The December 2023 IEP reported that the student "d[id] not appear to become frustrated at all during [speech-language] therapy sessions" (id.). In the area of speech and language, the IEP described the student as talkative, with a lot of information and knowledge to share with peers (id.). The IEP stated that the other students in the student's

groups enjoyed being around her (id.). Areas of need addressed during speech and language sessions included slowing the student's rate of speech, including all sounds during structured therapy activities, and correcting production of the target sound /l/ in all positions of words (id.).

In regard to reading, the December 2023 IEP reported that the student read ten basic sight words with direct support (Joint Ex. 10 at p. 5). The IEP stated that the student could read kindergarten level texts and answer three questions provided when directions were read to her and with encouragement of re-reading (id.). According to the IEP, the student was currently working with intensive assistance to repeat words read aloud and comprehend more complex questions (id.). The IEP stated that the student had trouble independently reading at her instructional level and that, "[i]n the general education classroom, "all directions [we]re read aloud to her" (id.). The IEP reported that the student received modification and simplifications when working with vocabulary words and that pictures were provided to convey meaning (id.).

In regard to writing, the December 2023 IEP reported that the student "c[ould] write notes on her whiteboard with intense support" (Joint Ex. 10 at p. 5). When provided highlighted words, from content areas such as social studies, science and ELA, the student "c[ould] transfer the letters onto different manipulatives like a whiteboard, piece of paper, or Google document" (id.). With 1:1 support, the student worked on typing skills and improving her skills with re-writing words and forming basic sentences (id.). The student was provided encouragement to sound out letters individually when writing notes taken from the special education teacher (id.). Areas of struggle included using punctuation within sentences (id.). The IEP reported the student did not complete independent writing or fix errors made with her mechanics in the general education classroom (id.).

In the mathematics section, the December 2023 IEP indicated that the student attended a 15:1 math classroom, where she practiced addition and subtraction facts within 20 with less support than previously needed (Joint Ex. 10 at p. 5). The IEP reported the student had a modified math curriculum to fit her instructional goals and noted strategies the student used such as a number line and finger counting (id.). The student completed tasks such as graphing and counting money (id.).

In the area of study skills, the December 2023 IEP reported that the student attended a 15:1 study skills classroom and could usually follow the routine of coming in, sitting, and completing her first task of typing for 15 minutes per day (Joint Ex. 10 at p. 5). During study skills, the student worked on IEP goals and "practice[ed] her spelling of three letter sight words, reading ten sight words independently, and reading kindergarten level texts that include three different comprehension questions" (id.).

According to the December 2023 IEP, the student needed a modified curriculum in all classes (Joint Ex. 10 at p. 6). The IEP further reported that, during the December 2023 CSE meeting, the parents expressed "the need for more modifications to [the student's] schoolwork so [she] could understand the material better" (id.).

Turning to the student's social development, the IEP included information from counseling sessions that the student was sweet and kind to the social worker and other group members, participated in counseling conversations to the best of her abilities, and enjoyed participating in activities and group discussions (Joint Ex. 10 at p. 6). Regarding areas of need, the IEP reported

that the student tended to adapt her behavior to that of other group members and required social worker assistance to fully complete presented activities (*id.*).<sup>13</sup> The IEP reported that the parents wanted the student to develop her social skills and have the ability to interact with her peers in the general education setting (*id.*). The IEP also reported that, according to the parents, the student "enjoy[ed] school and love[d] her teachers (*id.* at p. 16).

In the physical development section, the December 2023 IEP reported that the student received OT to address her handwriting, typing, precision, and fine motor skills with a group of peers who were addressing similar skills (Joint Ex. 10 at p. 6). The IEP reported that the student missed one session for refusal and arrived late to another due to not wanting to transition but participated well within the group and put forth good effort during OT sessions (*id.*). The IEP reported that the student demonstrated success with her precision skills when motivated but, at times, required prompting to ensure coloring within the lines (*id.*). The IEP further indicated that the student needed cues for line placement, letters and spacing (*id.*). According to the IEP, the student demonstrated success with typing skills and continued to work on composing sentences, with assistance required (*id.*). The IEP noted the student's handwriting to be legible when copying (*id.*).

## **B. Least Restrictive Environment**

I now turn to the crux of the parties' dispute, that is, the LRE in which the student can be satisfactorily educated.

The IDEA requires that a student's recommended program 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

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<sup>13</sup> The December 2023 IEP reported that, whether positive or negative, the student expressed that she felt the same as other group members (Joint Ex. 10 at p. 6).

districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 CFR 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; the continuum also makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 CFR 300.115[b]).

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

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

(Newington, 546 F.3d at 120; see N. Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50). The Court recognized the tension that occurs at times between the objective of having a district provide an education suited to a student's particular needs and the objective of educating that student with 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).<sup>14</sup>

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).

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<sup>14</sup> 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).

For the reasons that follow, I find that the December 2023 CSE recommended an appropriate educational placement for the student in the LRE.

The hearing record included the student's April 2024 quarterly progress report, which reflects the student's progress toward meeting the goals stated in her IEP, as well as the student's 2023-24 report cards for quarters one to three (see generally Parent Exs. A; B; Joint Ex. 5).<sup>15</sup> While the IHO gave much weight to the grades and favorable commentary shown on the student's report cards, the IHO seemingly disregarded other information in the hearing record regarding the student's academic and cognitive levels, which were far below her peers in the sixth grade general education classes; the student's need for extensive modification of her assignments; and the presentation of entirely different assignments to the student in her general education classes, as the general education assignments did not align with the student's instructional level (see IHO Decision at p. 7).<sup>16</sup>

Citing the student's report cards, the IHO found that the student was making progress in the less restrictive placement (IHO Decision at p. 7). However, the 2023-24 report cards expressly stated that the student's grades reflected work that was modified to the student's ability level (by the special education teacher/consultant teacher) for the subjects of ELA, math, science, and social studies (Parent Exs. A; B). Indeed, the December 2023 prior written notice indicated that, according to the student's teachers, she rarely attended during instructional time, likely due to not understanding the content, and that grade-level assignments could not be modified to the student's instructional level (Joint Ex. 11 at p. 2). Moreover, the April 2024 progress report provided that, while the student progressed satisfactorily for the academic goal in mathematics, the student only gradually progressed toward the academic goal in reading and progressed inconsistently for the academic goal in writing (Joint Ex. 5 at pp. 3-5).

Notwithstanding the level of progress made toward academic goals, the IHO did not address or consider the student's academic goals in relation to the sixth-grade general education

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<sup>15</sup> According to the April 2024 progress report, the student progressed gradually in correctly decoding words from first grade level narratives or text in content area subjects (Joint Ex. 5 at p. 3). As related to the writing goal of spelling given words selected by her teacher, the student progressed inconsistently (id. at p. 4). The student progressed satisfactorily for the April 2024 quarter in representing and solving 10 addition problems up to 20 numbers using objects, drawings, and equations (id. at p. 5). In the area of speech/language, the student progressed satisfactorily in formulating grammatically correct utterances to describe a sequence of three events and to express her thoughts/ideas (id. at p. 6). The April 2024 progress report indicated gradual progress with the social/emotional/behavioral goal that the student, when expressing a negative emotion at school such as frustration, anger, anxiety, sadness, or impulsivity, will appropriately use a coping skill (id.). The April 2024 progress report indicated that the student attended weekly group counseling sessions, participated, and responded appropriately, provided prompts and choices, and addressed elopement when upset from class with some improvements made (id.). In the area of motor skills, the April 2024 progress report stated that the student progressed satisfactorily towards two goals related to fine motor skills involving folding, cutting, pencil control, and copying two lines of print (id. at p. 7).

<sup>16</sup> The student's 2023-24 report cards indicated grades ranging from the low 80s to the high 90s in courses including art, business technology, computer technology, ELA, exploring music, math, science, and social studies with grades of 100 in health and physical education (Parent Exs. A; B). The student's report cards further noted that "the student is 'a pleasure to have in class'" (IHO Decision at p. 7, quoting Parent Ex. B at p. 1).



curriculum.<sup>17</sup> The hearing record included information that the student functioned at the kindergarten/first grade level academically and was unable to access the sixth-grade curriculum even with modifications (Tr. pp. 100-105; 160-61, 164; Joint Exs. 10 at pp. 2, 5; 11 at p. 2; 13 at p. 5; see generally Dist. Ex. 5). For example, the April 2024 progress report stated that the student's reading goal focused on decoding words at the first-grade level, the writing goal focused on spelling words, and math focused on addition (see Joint Ex. 5 at pp. 3-5). Moreover, the present levels of performance section of the December 2023 IEP indicated that the student read ten basic sight words with direct support, could read kindergarten level texts, and answered three questions provided that directions were read to her (Joint Ex. 10 at p. 5). As related to writing, the December 2023 IEP reported the student "given highlighted words (words taken from [s]ocial, [s]cience or ELA notes) . . . c[ould] transfer the letters on different manipulatives like a whiteboard, piece of paper, or Google document" (id.). The December 2023 IEP further reported that, in math, the student practiced addition and subtraction facts within 20 with less support than previously needed (id.).

Although not addressed in the IHO's decision, the hearing record includes testimony from the CSE chairperson, who had information directly from the teachers regarding their concerns, the special education teacher who worked with the student from September 2023 through February 2024, and the school psychologist who completed the December 2023 FBA (see generally Tr. pp. 46-250).

The CSE chairperson testified that, based on the student's February 2023 cognitive and academic scores, district staff were concerned that the hybrid CT/15:1 program would not provide enough support for the student (Tr. p. 73).<sup>18</sup> The chairperson testified that the June 2023 CSE ultimately agreed to try the hybrid program, along with related services and significant modifications and accommodations including modified curriculum, modified grading, and a 1:1 aide (Tr. pp. 76-78; see Joint Exs. 7 at pp. 1, 13-14; 8 at p. 1). According to the chairperson, "[i]t is unusual to have modified curriculum and a one-to-one aide . . . in a consultant teacher program" (Tr. p. 78). The chairperson testified further that, "[t]ypically, when [the CSE] add[s] these to a student's IEP, it's an attempt to see if they can still be successful in the general education setting with these accommodations" and a "last step" prior to recommending or considering a special class option (id.).

According to the CSE chairperson, in deciding to recommend a more restrictive placement, the December 2023 CSE considered that the student could not read independently, needed intensive assistance, could write her name on her white board with intensive support, and, in math, practiced adding and subtracting within 20, with these skills reflecting a kindergarten instructional level (Tr. pp. 100-04). The chairperson described the student's instructional level as significantly below her peers and explained that some of the tasks addressed in the classroom "cannot even [be] modif[ied] for the [the student's] level because there's not a kindergarten standard that aligns with

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<sup>17</sup> Notably, the parents have not challenged the student's IEP goals, which do not comport with a sixth-grade instructional level (see generally Joint Ex. 1 at pp. 1-3).

<sup>18</sup> According to the CSE chairperson, a "pro" of the hybrid program would be that the student could potentially socialize with same aged peers in the general education classrooms while a "con" would be that the student may not have enough support to make academic progress (Tr. p. 74).

that topic" (Tr. pp. 103-04). Thus, according to the chairperson, the student's work in her general education classes "was completely different work than the other students in the classroom" (Tr. pp. 106-07). The chairperson testified that "[the district] did not see benefits" for the student in the consultant teacher classroom and expressed the belief that the student "was not making as much progress as . . . she could make if she were being given instructions throughout the day at her instructional level" (Tr. p. 107).

The student's special education teacher testified that she worked with the student during the 2023-24 school year, providing instruction in the 15:1 math class and studies skills class, and providing consultant teacher support for social studies, science, and ELA, from September 2023 through February 2024 (Tr. pp. 156-58).<sup>19</sup> Consistent with the CSE chairperson's testimony, the special education teacher testified that the student's instructional level was not close to the sixth-grade standards or the student's peers in the general education classes, as the student's reading skills were kindergarten/first grade level, and the student's math skills were first-grade level (Tr. pp. 160-61, 164). The special education teacher described her experience working with the student as dependent on the setting (Tr. p. 161). In the 15:1 math setting, she could provide the student with manipulatives and hands-on work, which the student "really enjoyed" (*id.*). As the consultant teacher in ELA, science, and social studies, she would often sit with the student and her 1:1 aide and "try to guide [the student] and prompt her through different questions that the teacher was asking to try to get on her instructional level" (*id.*). During lectures in the general education classroom, the special education teacher described, at times, working on highlighting words with the student and not necessarily having the student retain the information but rather "practice sitting in class and using her fine motor skills" (Tr. p. 162). The special education teacher testified that, during a general education class, the student often needed instruction on supplementary assignments, as the general education classroom assignments were not "aligned with her instructional level" (Tr. p. 162). The special education teacher further testified that, in addition to the student's need for modified assignments, the student needed 1:1 assistance, either by the special education teacher or the 1:1 aide, to complete assignments (Tr. p. 163).<sup>20</sup> Further, the special education teacher testified to supplementing materials that the student did not comprehend, providing different assignments, and teaching her the assignments (Tr. p. 179).<sup>21</sup> The special

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<sup>19</sup> According to the testimony of the CSE chairperson, the student continued in the hybrid CT/15:1 program for the 2023-24 school year because the parents requested a due process hearing (Tr. p. 119). The chairperson further testified that, following the February 2024 incident, she, and school administrators, in consultation with the parents, decided it would be best for everyone involved for the student to "have a fresh start and move to the [district's] other consultant teacher team" (*id.*).

<sup>20</sup> The special education teacher testified that she spent one and a half to two hours per day preparing modified and/or supplementary assignments for the student's general education classes (Tr. pp. 165-67, 179). She explained that, if the regular education teachers did new tasks or something she did not anticipate, she "would have to have things prepare[d] that [she] kn[e]w would keep [the student] occupied so that way [the student] wouldn't feel frustrated or overwhelmed" (Tr. p. 167).

<sup>21</sup> The special education teacher testified that, as a consultant teacher, she was not supposed to teach new materials (Tr. p. 179). Indeed, State regulation defines direct consultant teacher services as "specially designed individualized or group instruction provided by a certified special education teacher . . . to a student with a disability to aid such student to benefit from the student's regular education classes" (8 NYCRR 200.1[m][1]). State guidance further emphasizes that a consultant teacher cannot be the primary academic instructor for a student with a disability ("Continuum of Special Education Services for School-Age Students with Disabilities," at p. 10,

education teacher reported that, even provided these supports, the student did not function appropriately in the general education classroom setting, eloping from class, putting her head on the table, or sitting/plopping on the ground (Tr. pp. 180-81). According to the special education, the student appeared overwhelmed, tired, frustrated, and tense and showed physical aggression when overwhelmed (Tr. p. 182).<sup>22</sup>

On the other hand, the district's witnesses each testified that that the 12:1+1 special class was more appropriate for the student (see Tr. pp. 108, 193, 224, 244).<sup>23</sup> Specifically, the CSE chairperson testified that the 12:1+1 special class would provide specially designed instruction at the student's level, enabling the student to make more progress in reading, writing, and math (Tr. p. 108). According to the CSE chairperson, the 12:1+1 special class would allow the student more social interaction with peers, which "was very limited in her current setting" (id.). The special education teacher likewise testified that the 12:1+1 special class, wherein the student would receive more individualized academic instruction and curriculum, would fit the student's instructional needs (Tr. p. 193).<sup>24</sup> Indeed, the special education teacher testified that the 12:1+1 special class would follow materials that the student would comprehend rather than the sixth-grade curriculum (id.).

Contrary to the IHO's findings, review of the hearing record, as described above, reveals that, despite receiving extensive supportive services and accommodations, the student was not meaningfully benefitting from her placement in the hybrid CT/15:11 program and that the data before the CSE supported that revision of that programming had become necessary. The hearing record indicates, instead, that the recommended 12:1+1 special class would more appropriately address the student's needs.

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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>.

<sup>22</sup> Although the parents offered various rationales for the student's behavior (other than the academic demands of the hybrid CT/15:1 program), the evidence in the hearing record does not show those factors to be the sole underlying cause for the student's behavior (see Tr. pp. 260-70). Indeed, the hearing record includes evidence that the student's "related service providers report[ed] little to no concerns regarding [the student's] behavior in their smaller group settings where the tasks [we]re at her instructional level" (Joint Ex. 10 at p. 2).

<sup>23</sup> 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]).

<sup>24</sup> To further address the student's needs, the December 2023 CSE recommended the following resources / strategies to address the student's management needs: a structured environment; verbal and nonverbal cues to stay on task; a flexible academic environment; preferential seating while participating in whole-group instruction; frequent breaks to help with frustration; additional time to complete classroom assignments; a lower teacher to student ratio program with minimal distractions within a regular school environment; a visual schedule to provide the daily routine and encourage positive behaviors; additional support of special education services; intensive supervision to function in the educational setting; and a reward system for completing tasks (Joint Ex. 10 at p. 7). The December 2023 IEP included previously recommended management needs/strategies, as well as new management needs/strategies (compare Joint Ex. 10 at p. 7, with Joint Ex. 7, at p. 10).

Having determined that the student's removal from the general education setting was warranted (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 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), 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.

The December 2023 IEP recommended programming in a 12:1+1 special class for "[a]ll core classes," "[n]ot including lunch or exploratories" (Joint Ex. 10 at pp. 2, 9). Thus, according to the CSE chairperson, the recommended placement would provide the student the opportunity to interact with nondisabled peers (Tr. pp. 75, 109-110). Indeed, the CSE chairperson described the 12:1+1 special class as providing core academic subjects for four hours and 40 minutes out of the six hours and 30-minute school day, with the remaining time of three and a half periods per day spent integrated for specials, lunch, and a social-emotional component in which the entire school participated (Tr. p. 75).

Moreover, the hearing record includes evidence that the student did not actively participate in academic activities with general education students and had limited social interactions with peers in the general education setting (see Tr. p. 108). During the observations conducted as a part of the 2023 FBA, the student primarily interacted with her aide and, at times, appeared disengaged from the class (see Joint Ex. 4 at pp. 4-8).<sup>25</sup> The student's special education teacher testified that, while the student really enjoyed her teachers, she normally did not interact with peers in the general education setting (Tr. p. 191). According to the student's special education teacher, the student sat at a table with her 1:1 aide and two other students "[b]ut there was no interaction for group work or things like that" (Tr. p. 191). The special education teacher testified that the student "sometimes" engaged in small talk with the students who "travel[ed] in a class with her" but added that they only sat next to or near the student in ELA (Tr. p. 191). The special education teacher described the student's maturity level, as compared with the general education students in the sixth grade, as "[e]xtremely different" (Tr. p. 192). According to the special education teacher, the student, who liked to sing, dance, and play younger-aged games, was less mature than the other sixth grade students (id.).

It is understandable that the parents desired the continuation of the hybrid program for core classes for purposes of academic rigor and socialization with nondisabled peers. However, based on the evidence described above, 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 recommended 12:1+1 placement for approximately four hours and forty minutes

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<sup>25</sup> During one such observation, the school psychologist observed the student play with a bubble pop sensory toy on her desk (Joint Ex. 4 at p. 4 at p. 6).

per day, which also provided for daily lunch and exploratory classes in a mainstream setting, provided the student with opportunities to interact with nondisabled peers to the maximum extent appropriate (Joint Ex. 10 at pp. 2, 9). I therefore find that the district offered the student a FAPE in the LRE for the 2023-24 school year.

Finally, I note that the parties do not dispute that the student demonstrated aggressive behavior during the 2023-24 school year. Nevertheless, the parents did not request an order directing the district to develop an BIP in their due process complaint notice (Joint Ex. 1 at pp. 2-3). If the student continues to demonstrate aggressive behavior in the more restrictive setting, the district should consider developing a BIP.<sup>26</sup>

## **VII. Conclusion**

In summary, the IHO erred in concluding that the district failed to present a case and should have reviewed the parents' claim under the Newington framework rather than applying the Burlington-Carter test related to unilateral placements. For the reasons set forth above, I find that the IHO erred in determining that the district denied the student a FAPE in the LRE for the 2023-24 school year.

**THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the IHO's decision, dated October 21, 2024, is reversed.

**Dated:**            **Albany, New York**  
                         **February 28, 2025**

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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**

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<sup>26</sup> The CSE should continue to make recommendations that address the student's individual academic and social needs, considering the LRE, and considering the student needs the special class setting for a greater extent of each day.