



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 14-015

### **Application of the BOARD OF EDUCATION OF THE HENDRICK HUDSON 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:**

Thomas, Drohan, Waxman, Petigrow & Mayle, LLP, attorneys for petitioner, Daniel Petigrow, Esq., of counsel

### **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 found that it failed to offer respondents' (the parents') son an appropriate educational program for the 2012-13 school year and ordered it to reimburse them for the costs of the student's tuition and costs associated with his attendance at a nonpublic residential school (NPS). The appeal must be sustained in part.

#### **II. Overview—Administrative Procedures**

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

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the

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

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

### **III. Facts and Procedural History**

The student has been the subject of a prior administrative appeal related to the 2010-11 and 2011-12 school years, and as a result, the parties' familiarity with his earlier educational history and prior due process proceedings is assumed and will not be repeated here in detail (Application of a Student with a Disability, Appeal No. 12-138). Briefly, at the time of the impartial hearing in this case, the student was enrolled in the NPS (Tr. pp. 366, 601).<sup>1</sup>

On June 14, 2012, the CSE convened for an annual review of the student's program and to develop his IEP for the 2012-13 school year (Tr. pp. 137, 859; Dist. Exs. 19; 28 at p. 1). The June 2012 CSE determined that the student remained eligible for special education and related services

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<sup>1</sup> The NPS has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (Tr. pp. 51, 189, 865-66; Dist. Ex. 20 at p. 1; see 8 NYCRR 200.1[d]; 200.7).

as a student with an other health-impairment (Dist. Ex. 19 at p. 1).<sup>2</sup> Additionally, the June 2012 CSE developed annual goals to address the student's needs relative to study skills, social/emotional/behavioral needs, and career/vocational/transitional needs (Tr. p. 159; Dist. Ex. 19 at pp. 6-7). The June 2012 CSE also proposed program modifications for the student, which included access to class notes, additional time for assignments, the provision of nursing services as needed, and refocusing and prompting, in addition to testing accommodations (Tr. pp. 181-84; Dist. Ex. 19 at pp. 8-9). Having determined that a small special class constituted an appropriate educational setting for the student, and in light of the parents' desire to continue the student's placement at the NPS, the June 2012 CSE considered placement of the student in a therapeutic 8:1+1 special class placement (Tr. pp. 186, 188-90; Dist. Exs. 19 at p. 7; 20 at p. 1). The June 2012 CSE also recommended the provision of two 30-minute sessions of counseling per week, with one to be provided individually and one in a small group (Dist. Exs. 19 at p. 7; 20 at p. 1). The district's director of pupil personnel services (the PPS director) described two potential out-of-district placements for the student located in separate districts (Tr. pp. 191-92; see Tr. pp. 193-94). The June 2012 CSE planned to send referral packets to an out-of-district Board of Cooperative Educational Services (BOCES) program and another out-of-district program that offered "certain therapeutic elements" (Tr. pp. 191-92, 199-200; see Tr. pp. 882-83; Dist. Ex. 20 at p. 1; see Dist. Ex. 25 at p. 4). Consequently, on June 29, 2012, the PPS director sent referral packets to both of the potential out-of-district programs (Dist. Ex. 23).

In a letter to the PPS director dated July 19, 2012, the central intake chairperson from the out-of-district BOCES program advised that based upon a review of the student's IEP, supporting documentation, and an intake interview with its school psychologist, the BOCES central intake committee had determined that a "suitable and appropriate Special Education program [did] exist for [the student]" (Dist. Ex. 25 at pp. 4-5). The central intake chairperson further indicated that the student was recommended for placement in a BOCES Therapeutic Support Program-Fragile (BOCES) located at an out-of-district high school (id.). On July 20, 2012, accompanied by his mother, the student participated in an intake interview with the school psychologist from BOCES (Tr. pp. 720, 742-43, 1071-72; Dist. Ex. 26 at p. 1).

By e-mail to the student's mother dated July 26, 2012, the PPS director provided the parents with the results of its referral of the student and informed her that the non-BOCES out-of-district program declined to accept the student (Dist. Ex. 25 at pp. 1, 3). She further advised the student's mother that her office was in the process of scheduling a "CSE program review meeting" to discuss the referral results and placement of the student, and suggested that the CSE reconvene on August 15, 2012 (Tr. p. 217; Dist. Ex. 25 at p. 1).

In a letter to the PPS director dated July 27, 2012, the student's mother confirmed that the student participated in the intake interview with the school psychologist from BOCES, and based on the outcome of that meeting, the parents had determined that it did not constitute an appropriate educational setting for the student (Dist. Ex. 26 at p. 1). The student's mother further outlined her objections to the BOCES program, including that the program would have resulted in complete segregation of the student from his typically developing peers for the first semester of the school year (id. at p. 3). She further noted that integration between the BOCES special class and the high

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<sup>2</sup> The student's eligibility for special education and related services as a student with an other health-impairment is not in dispute on appeal (Tr. pp. 508, 779; see 34 CFR 300.8[c][9]; 8 NYCRR 200.1 [zz][10]).

school did "not occur on a regular basis or in a seamless manner" (*id.*). In addition, the student's mother noted that because class profiles were not available, the parents could not ascertain whether the proposed class was comprised of students with similar academic, social/emotional, and management needs as the student (*id.*). Furthermore, the student's mother questioned whether the recommendation for placement in BOCES accounted for the significant progress that the student made the prior school year or whether the student would be able to participate in academically rigorous courses (*id.*). Additionally, the student's mother emphasized her concerns regarding the student's health, and that the proposed program did not have a plan in place to address the student's school avoidance in the event that the student's migraine headaches reoccurred (*id.*). Finally, the parents requested the Behavior Assessment System for Children, Second Edition (BASC-2) test protocols used in a May 2012 district psychological evaluation and the class profiles of the students attending the BOCES program (*id.* at p. 6; see Dist. Ex. 13).

On August 15, 2012, the CSE reconvened to review the student's program and placement as a result of the referral to BOCES (Tr. pp. 221-22, 1083-84; Dist. Exs. 18; 28 at p. 1). The August 2012 CSE recommended placement of the student in an 8:1+1 BOCES special class, in conjunction with related services comprised of one weekly 30-minute session of individual counseling and one weekly 30-minute session of group counseling (Dist. Ex. 18 at pp. 2, 9). However, the IEP also indicated that the student would be placed in general education classes in math, science, and English (*id.* at p. 12). The parents objected to the August 2012 CSE's program recommendation, deeming it "too restrictive" for the student and because they believed that placement in the BOCES program would stigmatize him (*id.* at p. 2). Moreover, the parents indicated that transferring the student from his NPS placement could "trigger a relapse of his management of his migraines and his school refusal behavior" (*id.*).

By letter to the district's interim superintendent of schools (superintendent), dated August 21, 2012, the parents advised the district that they rejected the August 2012 IEP and had determined to unilaterally place the student in the NPS for the 2012-13 school year (Dist. Ex. 27 at pp. 2-3). After outlining their reasons for rejecting the August 2012 IEP, the parents further informed the district that due to its failure to provide the student with an appropriate educational program, they intended to seek an award of tuition reimbursement, including related costs and expenses, for the costs of the student's unilateral private placement (*id.*).

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

By due process complaint notice dated April 10, 2013, the parents commenced an impartial hearing, requesting as relief an award of tuition reimbursement and related expenses for the student's attendance at the NPS for the 2012-13 school year (IHO Ex. 1 at pp. 4-37). The parents listed over 140 allegations with respect to their claim that the district denied the student a free appropriate public education (FAPE) for the 2012-13 school year (IHO Ex. 1 at pp. 6-30). In pertinent part, the parents alleged that the June 2012 CSE lacked an individual other than themselves who had first-hand knowledge of the student or his educational needs (*id.* at p. 7). They maintained that the June 2012 CSE selectively ignored information from individuals who knew the student (*id.*). The parents further contended that the June 2012 CSE "made little attempt to identify possible placements suitable for [the student]," and following a brief discussion, only forwarded referral packets to two separate out-of-district programs (*id.* at p. 9). The parents also asserted that the June 2012 CSE did not engage in any meaningful discussion regarding whether the district high school could provide an appropriate program for the student (*id.*). Furthermore,

the parents maintained that the "functional non-involvement" of the other members of the June 2012 CSE permitted the PPS director "to railroad her agenda through," depriving the student of a FAPE (*id.*). Next, the parents alleged that the district's failure to respond to their July 2012 request for documentation prior to the August 2012 CSE meeting impeded their participation at the meeting (*id.* at pp. 12-13).

The parents also raised procedural and substantive defects surrounding the August 2012 CSE meeting and resultant IEP (IHO Ex. 1 at pp. 14-30). For example, the parents contended that the August 2012 CSE was also improperly composed, because it lacked an individual who had previously taught the student (*id.* at p. 14). The parents maintained that they were the sole individuals in attendance who knew the student (*id.* at p. 15). Moreover, they asserted that the district made no attempts throughout the CSE process to secure the attendance at the CSE meeting of a representative from the NPS (*id.*). The parents also challenged the sufficiency of the evaluative data before the August 2012 CSE, and specifically alleged that the August 2012 CSE did not receive, review, or consider any teacher reports, classroom observation, updated behavioral assessments, private provider letters, or parent input (*id.* at p. 19). They further submitted that the August 2012 IEP omitted evaluative data from the student's providers, in addition to the results of the February 2012 administration of the BASC-2 (*id.* at p. 24). In addition, the parents argued that the annual goals contained in the August 2012 IEP were not appropriate, and they further alleged that despite their efforts to review the goals at the August 2012 CSE meeting, the PPS director refused to further discuss the matter (*id.* at p. 19). With respect to the appropriateness of the annual goals, the parents asserted that none of them "approach[ed] the high school level" and that they were not aligned to the student's needs or were not specific to his special education needs (*id.* at pp. 21-24, 30).

The parents also raised allegations that the outcome of the August 2012 CSE meeting was predetermined (IHO Ex. 1 at pp. 14, 24). With respect to the appropriateness of the district's recommendation to place the student in a BOCES program, the parents alleged that the district relied on inaccurate and/or conflicting information in developing its program recommendation for the student (*id.* at p. 16). Specifically, the parents claimed that notwithstanding the BOCES school psychologist's representations during the July 2012 intake interview discouraging placement of the student in the mainstream environment during the first semester, at the August 2012 CSE meeting the BOCES school psychologist explained that the student could participate in any general education class at that district high school (*id.* at pp. 16, 20, 27). They also asserted that the August 2012 CSE did not discuss how the student could be placed in general education classes while simultaneously also receiving the benefits of the recommended 8:1+1 special class placement (*id.* at p. 28). Ultimately, the parents contended that an "inherent contradiction exist[ed]" between the August 2012 IEP's recommendation for placement of the student in an 8:1+1 special class and his "sudden" participation in the mainstream environment (*id.* at p. 26). In summary, the parents alleged that the district's program recommendation was "wholly inappropriate" to address the student's special education needs and would result in physical, emotional, and academic regression (*id.* at p. 30). They further maintained that the student required placement in a small, structured, supportive and predictable environment, with the availability of "therapeutic recreation" (*id.* at pp. 20-21).

Next, the parents argued that the NPS provided a program and services individually tailored to address the student's needs (IHO Ex. 1 at p. 30). Although the parents acknowledged that the NPS was not a "therapeutic school," they maintained that its environment and nature were

therapeutic (*id.*). They further alleged that the NPS provided the student with an educational setting that conformed to the recommendations of the student's medical and mental health providers and that the NPS also offered the student services and accommodations aligned with his individual needs (*id.* at pp. 30-31). Furthermore, the parents contended that the student had progressed in his primary areas of need (*id.* at pp. 31-32). Lastly, the parents alleged that they had participated in the CSE process in good faith, and therefore, equitable considerations favored their request for an award of relief in this instance (*id.* at pp. 32-33). If anything, the parents asserted that equitable considerations should weigh against the district, which they maintained did "not act[] in as forthright a manner," throughout the CSE process (*id.* at pp. 33-35).

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

On May 29, 2013, the parties proceeded to an impartial hearing, which concluded on June 12, 2013, after six days of testimony (Tr. pp. 1-1402). On December 17, 2013, the IHO rendered his decision, in which he found that the district did not provide the student with a FAPE for the 2012-13 school year, that the NPS constituted an appropriate unilateral placement for the student, and that equitable considerations favored the parents' claim for relief in this instance (IHO Decision at pp. 9-20). Accordingly, the IHO ordered the district to reimburse the parents for the costs of the student's tuition at the NPS for the 2012-13 school year (*id.* at p. 20). Specifically, with respect to the parents' allegations surrounding a denial of a FAPE for the 2012-13 school year, the IHO determined that the August 2012 IEP failed to reconcile how the student would be able to take advantage of mainstreaming opportunities while enrolled in an 8:1+1 special class placement, and he proceeded to characterize the IEP as "incomplete" (*id.* at pp. 9-12). He further found that the district failed to determine the extent to which the student could benefit from education in the general education environment (*id.* at p. 11). While the IHO noted both parties' support for mainstreaming the student, he described testimony from the BOCES school psychologist as "equivocal," and further indicated that she was "shifting in her commitment to such programming" (*id.*). Moreover, he concluded that the CSE never meaningfully discussed "the manner in which the 8:1+1 class size would be integrated into the mainstream environment" (*id.*). Under the circumstances, the IHO found that the August 2012 IEP was internally inconsistent, given its provisions that the student attend an 8:1+1 special class, while being placed in general education classes for mathematics, English and science (*id.* at p. 11).<sup>3, 4</sup>

With regard to the appropriateness of the NPS, the IHO concluded that the hearing record supported a finding that it provided the student with specially designed instruction to meet his

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<sup>3</sup> The IHO also concluded that although none of the student's special or regular education teachers were in attendance at the June 2012 and August 2012 CSE meetings, the absence of such individuals from the CSE did not rise to the level of a denial of a FAPE (IHO Decision at pp. 12-13). Similarly, he also concluded that the district's failure to respond to the parents' July 2012 request for documentation did not rise to the level of a denial of a FAPE (*id.* at p. 13). As neither party has appealed from these determinations, they have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[d]; 8 NYCRR 200.5[j][5][v]).

<sup>4</sup> Additionally, the IHO acknowledged as issues, but did not render findings on, the appropriateness of the 8:1+1 special class placement through BOCES, or the appropriateness of the proposed goals (IHO Decision at pp. 13-14). Although the district raises these matters on appeal, the parents did not explicitly assert them as additional bases on which to affirm the IHO's determination; therefore, they will not be further considered (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]).

educational needs (IHO Decision at p. 15). In particular, the IHO found that the student benefitted from the small class sizes offered at the NPS, which allowed faculty members to closely monitor his progress and give the student individualized attention to address his difficulty managing stress and his migraine headaches (id. at pp. 15-16). Additionally, the IHO noted that the student participated in two study hall sessions, and that personnel provided him with guided note taking as well as additional time to take exams in a quieter room than the classroom (id. at p. 16). The IHO also found that the residential component to the NPS was an essential feature to its appropriateness, because it enabled the student to integrate his school and home environments (id. at pp. 16-17). Moreover, the IHO found that the NPS's location afforded the student the ability to participate in recreational activities that alleviated his stress, which in turn diminished the frequency of his migraines (id. at p. 17). Furthermore, the IHO noted that the NPS provided the student with an accommodation plan offering "very specific and customized accommodations for the [s]tudent," including counseling sessions, the use of an iPad, participation in a supervised study hall, and access to the school's nurse (id.). With respect to the provision of counseling and nursing services, the IHO noted that the NPS provided the student with informal counseling sessions on a regular basis (id. at p. 18). In the event that the student experienced a migraine headache, the IHO found that the NPS provided the student with around the clock nursing services (id.). Under the circumstances, the IHO found that the student "ha[d] shown immense progress in coping with his migraines" (id.). In view of the foregoing, the IHO concluded that the hearing record established that the NPS constituted an "ideal placement" for the student (id. at p. 19). Lastly, with respect to a weighing of the equities in this matter, the IHO found no basis upon which to deny or diminish an award of relief (id. at p. 20).

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

The district appeals and requests findings that it offered the student a FAPE for the 2012-13 school year, that the NPS did not constitute an appropriate unilateral placement for the student and that equitable considerations do not favor the parents' request for relief in this instance. Regarding its assertion that it provided the student with a FAPE for the 2012-13 school year, the district argues that the August 2012 IEP's recommendation for placement of the student in an 8:1+1 special class was not inconsistent with the IEP's provision for mainstreaming. The district maintains that the hearing record establishes that the student would initially be placed in an 8:1+1 special class with the provision of counseling, and with the support of the parents and the CSE, the student could have access to general education classes during the 2012-13 school year. In addition, the district submits that the August 2012 IEP accurately reflected the evaluative information gathered over the course of two CSE meetings, and that the annual goals incorporated into the August 2012 IEP were appropriate. Furthermore, the district asserts that placement of the student in an 8:1+1 special class, in conjunction with the provision of individual and group counseling was appropriate for the student, because it offered him a small, supportive, learning environment consistent with the recommendations of his private providers.

Next, the district maintains that the NPS was not appropriate to meet the student's educational needs. In pertinent part, the district alleges that the NPS did not provide the student with specially designed instruction to meet his unique needs, nor was it capable of providing him the necessary services. The district claims that although the NPS effectuated an accommodation plan for the student, with the exception of preferential seating, none of the accommodations or supports was unique to the student. Moreover, the district contends that despite the availability of certain advantages at the NPS, such as small classes and access to recreational activities, these

advantages do not constitute special education. Further, the district alleges that the NPS is not a therapeutic placement and that the student does not receive any formal counseling sessions there through a trained therapist or certified provider. With respect to progress, the district claims that the student's academic gains were uneven due to the student's failure to complete homework assignment, his lack of engagement in assignments in which he was not interested, and his display of inappropriate behavior. Finally, with respect to equitable considerations, the district maintains that they warrant a denial of relief in this instance because the parents never intended to accept a district placement.

In an answer, the parents request that the IHO's decision be affirmed in full, and further seek findings that the district did not offer the student a FAPE for the 2012-13 school year, the NPS constituted an appropriate unilateral placement for the student, and that the equities favor their claim for relief. Specific to their allegation that the district failed to provide the student a FAPE for the 2012-13 school year, the parents argue that the IHO properly concluded that the August 2012 IEP was self-contradictory and failed to reconcile how the student could attend general education classes while enrolled in the 8:1+1 special class, and that the CSE never meaningfully discussed the benefits or the extent of the student's participation in the general education environment. In addition, the parents note that despite their requests for class profiles of the students in the BOCES, the district failed to comply. Furthermore, the parents assert that although they objected to the August 2012 IEP and the CSE's recommendation for placement in the BOCES program, the PPS director made no further efforts to identify an alternative placement for the student.

Next, the parents maintain that the NPS was appropriate to meet the student's special education needs. In relevant part, the parents assert that the student's placement at the NPS was consistent with the recommendations of the student's private providers. They further allege that the residential component of the NPS was an essential piece of an appropriate program for the student, due to the seamless integration between the student's home and school environment, which ultimately broke the student's cycle of migraines. In addition, the parents claim that the NPS provided the student with an accommodation plan tailored to meet the student's unique needs. In particular, the parents claim that the student's use of an iPad and participation in study hall have aided him with his homework and organization difficulties. Furthermore, the parents argue that the NPS provided the student with informal counseling on a regular basis. Additionally, the parents assert that the student had access to the school nurse to address his migraine headaches which, coupled with the NPS personnel's compassionate approach to education, addressed the student's health-related needs. The parents also allege that the student progressed in his areas of need as a result of his enrollment in the NPS during the 2012-13 school year. For example, the parents contend that the student's self-confidence improved, and that the student progressed academically, socially, and physically due to his placement in the NPS. They also maintain that the student's migraine headaches decreased in frequency due to his enrollment in the NPS. Lastly, with respect to a weighing of the equities, the parents maintain that there is no basis in the hearing record upon which to deny or diminish an award of 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. 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; 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. Florida 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]). 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., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at \*10 [S.D.N.Y. Feb. 9, 2007]). 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; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at \*7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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 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]; Perricelli, 2007 WL 465211, at \*15). 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 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; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at \*6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "academic, developmental, and functional needs" of the student]), 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]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

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; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at \*7 [S.D.N.Y. Aug. 27, 2010]).

## **VI. Discussion**

### **A. Adequacy of the August 2012 IEP—Mainstreaming Opportunities**

Initially, as detailed below, the hearing record supports the IHO's determination that the August 2012 CSE never meaningfully discussed nor did the August 2012 IEP reflect the manner

in which the student would be integrated into the mainstream setting while contemporaneously enrolled in a full-time 8:1+1 special class (IHO Decision at pp. 10-11).

In this instance, the hearing record suggests that during the August 2012 CSE meeting, the parents attempted to determine how the student would participate in mainstream courses while enrolled in an 8:1+1 special class in the BOCES program (see generally Tr. pp. 1085-86). According to the student's mother, at the August 2012 CSE meeting, the BOCES school psychologist stated that the student could be mainstreamed in "any class he wanted," and that the student would not be segregated from the remainder of the student body (Tr. p. 1085). The student's mother testified that she was surprised by the BOCES school psychologist's representations at the August 2012 CSE meeting because "it was 180 degrees from what she had said" previously during the July 2012 intake, and the student's mother questioned how the student could both be mainstreamed and be placed in an 8:1+1 special class (Tr. pp. 1085-86; see Tr. pp. 777-78, 1073). Similarly, although the BOCES school psychologist advised the August 2012 CSE that typically upon enrollment in BOCES, students required time to acclimate to the program prior to availing themselves of mainstreaming opportunities, mainstreaming was possible from the start with parental and CSE support (Tr. p. 234).

However, the PPS director noted that the BOCES school psychologist did not indicate whether she was ready or able to negotiate the student's schedule at that juncture, nor did the school psychologist have sufficient information regarding available courses, their enrollment numbers or teachers, and that information would be provided to the parents at a later date (Tr. p. 235). Despite questions from the parents during the August 2012 CSE meeting regarding how a student could be enrolled in an 8:1+1 special class and participate in mainstream classes comprised of 24 students, the student's mother testified that the BOCES school psychologist did not clarify how this scenario would work (Tr. p. 1086; Parent Ex. AA at p. 4; see Dist. Ex. 28 at p. 1). The PPS director added that there was no information presented at the CSE regarding how students enrolled in the program spent their day or how it was structured (Tr. pp. 523-24). Moreover, the student's mother and the PPS director further testified that no discussion took place during the August 2012 CSE meeting regarding in what classes the student would be mainstreamed (Tr. pp. 340, 1086).

Subsequently, at the August 2012 CSE meeting, the PPS director presented the CSE's recommendation for a 10-month school year 8:1+1 special class BOCES placement (Dist. Ex. 18 at pp. 9-10; see Tr. p. 238; Dist. Ex. 28 at pp.1-2). In addition to the supports available within the BOCES program, the August 2012 CSE recommended that the student receive one 30-minute session of both individual and small group counseling per week (Dist. Ex. 18 at p. 9). With respect to the student's removal from the general education environment, the August 2012 IEP indicated that the student required the support of a small class program with therapeutic supports and that he would be scheduled for general education classes in math, science, and English (*id.* at p. 12). The PPS director explained that she specified those classes on the August 2012 IEP for mainstreaming because:

there was agreement that he needed a small class program with therapeutic support. Having had [the BOCES school psychologist] at the meeting with us, saying that . . . mainstreaming from the start is a possibility but they would never consider it unless they knew the CSE and the parent were behind it and in support of it, this was my statement of support for that mainstreaming. It really

unfortunately ought to say something probably more like he will be considered for scheduling in these classes.

(Tr. p. 240).<sup>5</sup>

Notwithstanding the BOCES school psychologist's willingness to work with the parents to arrange scheduling the student in appropriate mainstream classes, the PPS director conceded at the impartial hearing that the August 2012 CSE did not specify in which classes the student would be mainstreamed (Tr. pp. 338-39). She further confirmed that there had not been a determination that math, science, and English were the classes in which the student would be mainstreamed, but she felt that there needed to be a statement to support the parents' concern and request for mainstreaming (Tr. pp. 240-41). Therefore, the hearing record supports the IHO's conclusion that the CSE did not discuss in which academic classes the student would be mainstreamed, nor did it address the representation set forth in the August 2012 IEP that the student would receive instruction in an 8:1+1 special class for six hours per day, and also receive instruction in general education mathematics, English, and science classes, which resulted in an IEP that "contradict[ed] itself" (IHO Decision at pp. 10-11; Dist. Ex. 18 at pp. 1, 12).

Accordingly, based on the failure of the August 2012 IEP to indicate how the student would simultaneously attend an 8:1+1 special class placement while enrolled in mainstream classes, the hearing record supports the IHO's conclusion that the IEP was internally inconsistent, resulting in a denial of a FAPE to the student (see, e.g., R.E., 694 F.3d at 186 [holding that "[a]t the time the parents must choose whether to accept the school district recommendation or to place the child elsewhere, they have only the IEP to rely on, and therefore the adequacy of the IEP itself creates considerable reliance interests for the parents"]).

## **B. Unilateral Placement**

Having concluded that the district failed to provide the student with a FAPE for the 2012-13 school year, I must next consider whether the NPS constituted an appropriate unilateral placement for the student. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school must offer an educational program which meets the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S., 231 F.3d at 104). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents'

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<sup>5</sup> In this instance, the district provided testimony explaining how the student could have been mainstreamed in the recommended BOCES (Tr. pp. 240, 1085). However, "[i]n determining the adequacy of an IEP, both parties are limited to discussing the placement and services specified in the written plan and therefore reasonably known to the parties at the time of the placement decision" (R.E., 694 F.3d at 187). Therefore, in reviewing the program offered to the student, the focus of the inquiry is on the information that was available at the time the IEP was formulated (see C.L.K. v Arlington Sch. Dist., 2013 WL 6818376, at \*13 [S.D.N.Y. Dec. 23, 2013]; D.A.B. v New York City Dept. of Educ., 2013 WL 5178267, at \*12 [S.D.N.Y. Sept. 16, 2013]).

placement" (Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003]). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, \*9 [S.D.N.Y. Mar. 18, 2010]).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65).

### **1. Student Needs**

The hearing record shows that the student's presentation prior to the beginning of the 2011-12 school year—his first year at the NPS—had significantly changed by September 2012, the beginning of the school year in contention in this appeal (compare Tr. pp. 818-22, 967-70, 990-91; Dist. Ex. 23 at pp. 34-40; and Parent Ex. S at pp. 8-9, with Tr. pp. 939-45, 1056-58; Dist. Exs. 17 at pp. 1-2; 18 at p. 2; and Parent Ex. S at pp. 1-2). Specifically, during the 2011-12 school year the frequency of the student's headaches decreased as compared to the 2010-11 school year, resulting in significantly improved school attendance, final grades within a "C+" to "B+" range, and exhibited improvements socially and with organization skills (Tr. pp. 818-19, 823-26; Dist. Ex. 18 at p. 2; Parent Exs. H at pp. 1-3; N).

In May 2012, the student's English I and honors biology teachers both completed a BASC-2 Teacher Rating Scales-Adolescent, and the student's mother completed a BASC-2 Parent Rating

Scales-Adolescent (Dist. Exs. 10 at pp. 1-2, 11 at pp. 1-2, 12 at pp. 1-3). The district school psychologist prepared a report dated May 11, 2012 based upon the completed BASC-2 forms (Tr. pp. 121, 124; Dist. Ex. 13 at pp. 1-3). In her report, the school psychologist indicated that the student's English I teacher had rated somatization and social skills as areas of difficulty for the student, specifically that the student "always" visited the nurse, experienced headaches, and did not encourage others to do their best or offer to help others (Dist. Ex. 13 at p. 3). According to the May 2012 report, the student's honors biology teacher rated hyperactivity and atypicality as problem areas for the student, indicating that the student sometimes had trouble staying seated, disrupted others, and exhibited poor self-control (id.). The honors biology teacher also indicated that the student sometimes acted strangely, had strange ideas, and said things that did not make sense (id.). The school psychologist's report indicated that the parents did not rate any areas as concerns (id.).

On May 11, 2012, the PPS director observed the student in his NPS English I class (Dist. Ex. 6 at pp. 1-2). The class was composed of 11 students and one teacher (id. at p. 1). At the outset of the class, the PPS director reported that the student sat upright and appeared to be attentive, contributing correct information six times (id.). During another part of the lesson, when the student was not selected to answer questions at the board, he was observed to slump down in his seat and rest his head on his desk (id.). However, when the teacher asked students to review the information on the board for correctness, the student sat up and twice correctly responded (id.). Turning to another activity, the student was observed to return to a slumped posture with his head on the table, until he asked the teacher if he needed to take notes (id. at pp. 1-2). When the teacher responded in the affirmative, the student sat upright and appeared to write in his notebook (id. at p. 2).

The hearing record contains June 5, 2012 NPS teacher reports and the student's report card from the fourth marking period of the 2011-12 school year (Dist. Ex. 8 at pp. 1-5; Parent Ex. H at pp. 1-3). The reports indicated that at times in geometry class, the student fell asleep due to difficulty sleeping at night, and that his appearance of being tired affected his ability to remain alert and engaged in class (Dist. Ex. 8 at p. 1; Parent Ex. H at p. 2). The student's geometry teacher reported that the student was strong in mathematics, found geometry to be relatively easy, achieved a final grade of "B+," and that he recommended that the student enroll in honors algebra for the next school year (id.). The English I teacher reported that the student had a good year in English, earned a final grade of "B+," was an active participant in class, related class topics to his prior knowledge, and exhibited critical thinking skills (Dist. Ex. 8 at p. 2; Parent Ex. H at p. 1). She further suggested that the student continue to focus on organization skills, noting that when the student struggled it was when he came to class unprepared, without materials, or without completed homework (id.). The world cultures teacher indicated that the student was usually focused in class, but that the student could be forgetful, arrive without needed materials, and demonstrate inconsistent effort and interest (Dist. Ex. 8 at p. 3; Parent Ex. H at p. 3; see Dist. Ex. 15 at p. 2). According to the world cultures teacher's comments, the student achieved a final grade of "B," was one of his brightest students when drawing connections and making inferences, and was "so comfortable in embracing his own eccentricities" (Dist. Ex. 8 at p. 3; Parent Ex. H at pp. 2-3). The honors biology teacher reported that the student earned a final grade of "B," showed progress in his organization and focus, loved to participate in class, and because he picked up the information very quickly, the student was at times bored in class, which led to inattention (Dist. Ex. 8 at p. 4; Parent Ex. H at p. 2). According to the honors biology teacher, the student exhibited behavior such as playing class clown to draw attention to himself, which the teacher opined was

"in line with a typical, somewhat immature, bright 9th grader" (Dist. Ex. 8 at p. 4). The honors biology teacher reported that the student suffered from migraine headaches, "which seem to be triggered by stress" leading to a lack of sleep that fed into a cycle of disorganization, missing class, and missing assignments (id.). In Spanish I, the student had a "satisfactory" final quarter of the school year, achieving a final grade of "C+," with his teacher noting an improvement from the previous quarter (Dist. Ex. 8 at p. 5; Parent Ex. H at p. 1). According to the Spanish I teacher, five of the student's homework assignments were either incomplete or missing, daily preparation for class remained an area in need of improvement, and his classroom behavior was "poor" (id.). The Spanish I teacher indicated that on numerous occasions, the student had shown he was fully capable of succeeding in the class, but his attention to detail and daily preparation were his downfall in terms of his overall grade (Dist. Ex. 8 at p. 5; Parent Ex. H at pp. 1-2).

In a letter to the CSE dated June 13, 2012, the student's psychiatrist reported that he had seen the student in December 2011 and April 2012, and opined that the student continued to qualify for special education as a student with an other health-impairment (Dist. Ex. 17 at p. 1). The psychiatrist reported that the student continued to have a diagnosis of a migraine headache disorder, evidenced by "the just about monthly occurrence of migraine headaches," that although they occurred with much less frequency than the prior school year, the migraines continued to have an impact on his educational performance (id.). According to the psychiatrist, the student's migraine headache disorder was better controlled and appeared well managed in the NPS, which "appears individually appropriate for him with small supportive classes, 24 hour nursing services from 2 nurses, a structured study hall, medication management, therapeutic recreational services, flexible individualized counseling services, flexibility with assignments, an individual accommodation plan, an academic advisor, and careful monitoring by staff" (id.).

The psychiatrist's June 2012 letter described the student's past (May 2011) difficulties, remarking that from his perspective, the student had made excellent progress academically, socially, and physically in one year (Dist. Ex. 17 at p. 1). He attributed the student's progress in large part to his placement in a small supportive, residential school environment that suited his educational, medical, and "special emotional needs" (id. at pp. 1-2). The psychiatrist further noted that the student had been tapered off his anti-migraine medications, passed every class, and participated in class regularly (id. at p. 1). Although the student's grades were "uneven," the psychiatrist attributed this to the student's difficulty during the 2010-11 school year, when he was unable to complete most of the work and received medical exemptions in almost every class (id. at pp. 1-2). As the student's progress according to the psychiatrist was "quite notable" yet the student was "still fragile," the psychiatrist did not recommend any change of school placement for the 2012-13 school year, stating that disrupting the student's positive progress would be "both emotionally and educationally devastating" (id. at p. 2). The psychiatrist further expressed his fear that a change in placement could lead to "emotional regression and a return to the debilitating physical symptoms" the student exhibited during the 2010-11 school year (id.).

In the June 2012 letter, the psychiatrist indicated that the student's "persistent vulnerabilities" in the areas of somatization and social skills identified in the district school psychologist's June 2012 BASC-2 report coincided with his ongoing clinical impressions of the student (Dist. Ex. 17 at p. 2). In addition, the district school psychologist's report, and the reports from three out of four of the student's teachers, raised concerns suggestive of an attention deficit hyperactivity disorder (ADHD) symptomology in the student, which warranted further clinical evaluation that the psychiatrist would undertake in upcoming sessions (id.). The psychiatrist

further advocated that the "supportive, informal counseling" provided by one of the student's teachers during the 2011-12 school year, be supplemented by a "more systematic psychotherapy program" during the 2012-13 school year, to more "effectively address those areas of continuing vulnerability with which [the student] continues to struggle" (id.). Updated diagnostic impressions included a headache disorder with physical and psychological contributants; associated features of anxiety and dysthymia; possible ADHD; internalizing personality features; migraine headaches by history; and school and social adjustment problems (Dist. Ex. 17 at p. 2).

The August 2012 IEP reflected teacher reports that the student had difficulty with sleep, complained of headaches during class, and evidenced behavior consistent with clinically significant somatization and at-risk somatization, social skills, and atypical behavior as reported on the BASC-2 (Dist. Ex. 18 at p. 6). According to the August 2012 IEP, the student's psychiatrist had reported that the student continued to exhibit vulnerabilities in the areas of somatization and social skills, as well as features of anxiety and a mood disorder, and that the psychiatrist advocated for a "'more systematic psychotherapy program'" to address the student's vulnerabilities (id.). The August 2012 IEP reflected the student's private therapist's report that the student's social skills were immature, and that he lacked insight into the connection between his experiences with school stress and his migraines, also advocating for a therapeutic intervention to address those needs (id.). Additionally, the August 2012 IEP indicated that the student continued to have difficulty with organization and independent completion of expected work (id. at p. 2).

The August 2012 IEP social/emotional present levels of performance indicated that the student had "dramatically improved in his school attendance and participation" while attending the NPS (Dist. Ex. 18 at p. 6). Although the student's headaches continued to occur, the August 2012 IEP indicated that the number of debilitating migraines had significantly decreased (id.). Strengths identified in the August 2012 IEP included that the student made and maintained several important friendships and enjoyed socializing outside of school, and that he was respectful and attentive to adults (id.). The August 2012 IEP identified specific social/emotional needs, including that the student needed counseling to increase his ability to cope with frustration and stress and decrease his anxiety regarding school and social situations; access appropriate school personnel during stressful situations; and develop a positive self-concept and demonstrate confidence in his many talents and abilities (id. at pp. 2, 6). Management needs included in the August 2012 IEP were that the student needed a structured and supportive environment and to improve coping skills to manage academic and social stressors (id. at p. 7).

## **2. Description of the NPS**

The hearing record describes the NPS as a "coeducational, independent, boarding and day school serving students in grades nine through the post-graduate year" (Parent Ex. Z at p. 5). During the 2012-13 school year approximately 172 students attended the NPS, mostly as "boarders" (Tr. p. 590). The student's tenth grade English II teacher and school counselor (counselor) testified that the NPS described itself as "principally a college preparatory school" (Tr. pp. 588-91, 601; IHO Ex. 32 at p. 3). The NPS does not have a consulting psychologist or psychiatrist on staff, nor is it a therapeutic placement, although the counselor stated he had observed its "therapeutic manifestations" (Tr. pp. 463, 590; IHO Ex. 32 at p. 4). According to the counselor, the environment at the NPS was "psychologically safe" in that although not "stress-free," it emphasized the importance of not having students feel belittled, in competition with each other, or bullied, but rather "celebrating eccentricity" (Tr. pp. 655-58, 668-72; IHO Ex. 32 at p. 4).

The NPS also had a "very heavy athletic slant," and according to the counselor, the opportunities for outdoor activities also contributed to a psychologically safe setting (Tr. pp. 591, 670-71). The student attended the NPS for tenth grade during the 2012-13 school year and received instruction in western civilization, English II, Spanish II, honors algebra II, and honors chemistry (Parent Exs. I at pp. 1-3; J at pp. 1-3; L at pp. 1-3).

### **a. The NPS Accommodation Plan**

Turning first to the parties' dispute over whether the NPS provided the student with specially designed instruction to meet the student's unique educational needs, the director of college guidance (guidance director) at the NPS testified that he knew the student in that he had reviewed the materials the family provided to develop an accommodation plan, and because he saw the student four or five times a day (Tr. pp. 424-26). The guidance director and counselor described the student as a "bright young man," who appeared to be an average student exhibiting both strengths and weaknesses in the classroom, noting that the student's enthusiasm waned when he was not interested in the subject matter (Tr. pp. 426-27, 429, 605-09). The guidance director further described the student as a "normal tenth grade boy" who although—"like many tenth grade boys"—he was socially awkward, was also comfortable talking with peers and adults (Tr. p. 432). The guidance director was aware that the student had missed a few days of school due to a headache disorder, and that he experienced difficulty with anxiety (Tr. pp. 432-33).

On or about September 4, 2012, the guidance director developed an accommodation plan based upon materials provided to him by the parents (Tr. pp. 434-35; Parent Ex. C). In late September 2012, the guidance director met with the parents and reviewed the August 2012 IEP and the accommodation plan (Tr. pp. 434-35, 833-34). On October 5, 2012, the guidance director revised the accommodation plan, which was then distributed to the student's NPS teachers (Tr. p. 435; Parent Ex. D). The guidance director testified that he did not believe that there had been any changes to the student's accommodation plan since October 2012 (Tr. p. 435). The counselor testified that he did not know how the student's accommodation plan was initially drafted, nor did he recall whether he had a role in drafting the accommodation plan (Tr. pp. 616-17). He stated that the guidance director provided him with "all pertinent information," and throughout the year provided reminders and followed up (Tr. p. 617).

The October 2012 NPS accommodation plan indicated that the student had received a diagnosis of a mixed headache disorder, and outlined seven accommodations to be provided to the student: (1) extended time for in-class assignments; (2) preferential seating; (3) graphic organizers or guided notes to support information presented verbally; (4) iPad for use in class; (5) supervised study hall; (6) individualized/regular counseling sessions with the school counselor; and (7) access to the school nurse (Parent Ex. D).<sup>6</sup>

#### **(1). Extended Time, Preferential Seating, Guided Notes, iPad**

The guidance director testified that the student was allowed access to and permitted to use an iPad in class (Tr. p. 440). The iPad was added to the student's October 2012 accommodation

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<sup>6</sup> The October 2012 accommodation plan also indicated that the student did not take medication for his "condition" and advised that questions about the plan or requests to review supporting documents should be made to the guidance director (Parent Ex. D).

plan because of the success the student had using it in chemistry class (Tr. pp. 451-52; 835-36). The guidance director testified that "generally" all students had the opportunity to use iPads at the NPS, and although teachers had varying policies, the iPad was generally used as an instructional or learning aid (Tr. pp. 452-53). He further testified that he reminded the student's teachers that guided notes were required, and asked the teachers if they needed help implementing that accommodation (Tr. p. 440).

The counselor, who also taught the student's English II class, testified that he was aware that per the accommodation plan, the student was allowed extended time, test administration in a smaller setting, and guided notes, which he stated were provisions that were "integrated into daily life here anyway" (Tr. pp. 617-18). Extra time was provided in the counselor's English II class to any student who asked for it (Tr. p. 648). The counselor stated that he did not know if there was an accommodation that the student be provided with an iPad (*id.*). According to the counselor, a number of students in the English II class—and the NPS in general—were "sliding" into using tools such as laptops and iPads in the classroom (Tr. pp. 619-20).<sup>7</sup> When asked if the accommodation plan was helping the student, the counselor replied that he "believe[d]" so, but could not provide "quantifiable evidence" (Tr. p. 620).

The student's western civilization teacher stated that he was aware the student had an accommodation plan, and that he had received information about the plan from the guidance director (Tr. pp. 365-66, 379-80). The teacher testified that the student was allowed extra time and a separate room/quiet space if the student wanted it to complete tests but that by his choice, the student did not take tests in a separate location (Tr. pp. 377, 379, 413-14). In western civilization class, the student was encouraged to use an iPad, which all students were allowed to use (Tr. p. 378). The amount of organizational help with which the teacher provided the student lessened since the student began using the iPad for organization (Tr. pp. 378, 380-81). The student also used the iPad for note taking and homework (Tr. pp. 382-83). All students in the western civilization class were provided with guided notes, which the teacher stated he did not think the student needed (Tr. p. 378). The western civilization teacher testified that the student also received preferential seating next to the teacher in class, and that all students sat at an oval table where the teacher could see everyone, and that the teacher was no more than seven feet away from any student at a given time (Tr. pp. 381, 385).

## **(2). Supervised Study Hall**

The hearing record shows that the student participated in supervised study hall in two formats: one free period per day of supervised study hall held in the library with a teacher, who helped ensure the student was organized and "on top of his work" and—along with the other students in his dorm—a two-hour evening study hall (Tr. pp. 388-89, 441; IHO Ex. 32 at p. 5).<sup>8</sup> The guidance director indicated that the October 2012 accommodation plan referred to the daytime

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<sup>7</sup> The student's mother testified that iPads were not used in all classes at the NPS at the beginning of the 2012-13 school year (Tr. p. 836).

<sup>8</sup> The guidance director indicated that the student had asked to participate in an additional afternoon study hall, which showed "a kind of maturity and self-advocacy" (Tr. pp. 441-42).

supervised study hall, which was added to the October 2012 accommodation plan at the parents' request, and was an "additional service" available to all students (Tr. pp. 456-57).

### (3). Counseling

The counselor testified that outside of the English II class, he spoke to the student approximately three to five times per day in situations such as lunch and assemblies, and was aware that the student's accommodation plan included "regular counseling" (Tr. pp. 609-10, 617-18; see Tr. pp. 442-43). According to the counselor, he did not see the student for sessions in his office on a regularly scheduled basis (Tr. pp. 621-24, 649). Rather, the counselor testified that he provided the student with counseling services—which he described as "regular purposeful attentive conversations by me to see how [the student] is doing and to either coach or prod or ask"—in informal settings such as in the student's dorm room, at an assembly or in the dining room, and on the way to go rock climbing (Tr. pp. 624, 649). He further indicated that he held the "purposeful" conversations with the student "a little bit" more frequently than with other students because of the student's history of migraines, and that part of the conversation involved assessing how the student was doing (Tr. pp. 672-73; see Tr. p. 649). The counselor opined that the student "probably thinks I am just being friendly," and that there was "not a great need to be sticking my finger at [the student] all the time and say[ing] how are you doing" (Tr. pp. 624-25).

The counselor testified that he did not know what triggered the student appearing withdrawn at times, nor did he know if that presentation was connected to the student's headaches (Tr. pp. 647-48). He indicated that he had not been able to identify the precursors to the student's headaches, despite looking at calendars to attempt to ascertain a cause/effect or pattern (Tr. pp. 652-53). The counselor stated that he did not know why the student continued to experience migraines during the 2012-13 school year, albeit at a significantly decreased frequency (Tr. pp. 653-54).

Although the counselor did not recommend that the student receive "outside counseling," when the parents asked him to provide a recommendation, he provided the name of a private clinical social worker (Tr. pp. 625-26). The guidance director testified that he was aware that the parents had arranged—with the help of the counselor—for the private clinical social worker to see the student at the NPS, but that he had not met the private clinical social worker (Tr. pp. 443, 463-64). Beginning in March 2013, the private clinical social worker used the counselor's office to conduct approximately five sessions with the student (Tr. pp. 626-27, 1042-43, 1365-66). The counselor testified that the private clinical social worker told him her sessions with the student involved "more coaching than therapy," and that she worked on coping skills and strategies for reducing stress (Tr. pp. 634-35). The counselor stated that he was not aware of a treatment plan the private clinical social worker followed, and did not know the "particulars" of what she worked on with the student (Tr. p. 635). The parent testified that the private clinical social worker worked on increasing the student's socialization, self-advocacy, relaxation, and self-awareness skills (Tr. pp. 1043-45).<sup>9</sup>

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<sup>9</sup> The hearing record is devoid of testimony from the private social worker or evidence related to her sessions with the student.

#### **(4). Nursing Services**

According to the guidance director, the NPS had two full time nurses on staff who held office hours at specific times during the day, one of whom was always on-call (Tr. pp. 438-39). He further testified that all NPS students had access to the nurses (Tr. p. 457; see Tr. p. 618). Nursing records indicated that the student experienced headaches on multiple occasions throughout the 2012-13 school year and received nursing assistance in the form of administration of medication and provision of food and liquids, and that the parents and counselor were updated about the student's condition (Parent Ex. T at pp. 1-10).<sup>10</sup>

#### **b. Additional NPS Amenities**

##### **(1). Small Class Size**

Although not identified as a specific accommodation on the student's plan, the hearing record consistently cites the "small class" sizes available at the NPS as a contributing factor to the student's success (see, e.g., Tr. pp. 383-86, 445-46, 823, 828-29; Dist. Ex. 17 at p. 1; Parent Ex. S at p. 2). The guidance director testified that classes at the NPS typically ranged from 10-12 students, that no classes had more than 15 students, and that there were approximately six classes composed of fewer than six students (Tr. p. 445). When asked if class size had any effect on the student, the guidance director testified that he "imagine[d]" it had, and provided testimony about what he perceived to be the benefits of smaller classes, including the ability to debate classmates in a safe forum where students were respected and to receive individual attention from the teacher; further stating that it was easier for teachers to tailor their lessons to meet the student's needs (Tr. pp. 445-46). The western civilization teacher stated that he "couldn't see" the discussion-based style of learning that occurred in his class of 11 students taking place in a larger public school classroom, and that it was discussion-based learning which had helped bring the student "out of his shell" (Tr. pp. 383-84).

##### **(2). Boarding/Physical Activities Component**

Notwithstanding the parents' contentions that the student required a residential placement in order to reap educational benefits from his program, the district asserts that the student does not require such a restrictive level of programming because there is no evidence that the student has regressed in a special education day program. Although the restrictiveness of the parental placement may be considered as a factor in determining whether the parents are entitled to an award of tuition reimbursement (C.L. v. Scarsdale Union Free Sch. Dist., 2014 WL 928906, at \*7 [2d Cir. Mar. 11, 2014]; Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]; M.S., 231 F.3d at 105; Schreiber v. East Ramapo Cent. Sch. Dist., 2010 WL 1253698, at \*19 [S.D.N.Y. Mar. 21, 2010]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 138 [S.D.N.Y. 2006]; Pinn v. Harrison Cent. Sch. Dist., 473 F. Supp. 2d 477, 482-83 [S.D.N.Y. 2007]), parents are not

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<sup>10</sup> According to nursing records, in May 2013, the student experienced a headache lasting approximately five days (Parent Ex. T at pp. 1-5). Nursing notes indicated that the nurse, counselor, and one of the student's teachers discussed the situation, and determined that the "student may have to go home to heal if needed for the week if he cannot leave his room to attend class, sports and spring program" (id. at p. 2). The records further indicated that the parents "underst[oo]d that if [the] student continues to have [a] migraine for a longer period of time and it is d[e]bilitating, he will go home" (id.).

as strictly held to the standard of placement in the LRE as are school districts (C.L., 2014 WL 928906, at \*8; see Carter, 510 U.S. at 14-15). The Circuit Courts of Appeal have adopted varying tests to determine whether unilateral residential placements are reimbursable under the IDEA (see, e.g., Richardson Indep. Sch. Dist. v. Michael Z., 580 F.3d 286, 297-300, 298 n. 8 [5th Cir. 2009] [holding that a residential placement must be essential for the student to receive meaningful educational benefits and primarily oriented toward enabling the student to receive an education]; Mary T. v. Sch. Dist., 575 F.3d 235, 242-44 [3d Cir. 2009] [holding that a residential placement must be necessary for educational purposes as opposed to being a response to medical or social/emotional problems segregable from the learning process]; Dale M. v. Bd. of Educ., 237 F.3d 813, 817 [7th Cir. 2001] [holding that the services provided by the residential placement must be primarily oriented toward enabling the student to obtain an education, rather than noneducational activities]; see also Munir v. Pottsville Area Sch. Dist., 723 F.3d 423, 432 [3d Cir. 2013]). However, it is not necessary to select a particular test to employ in this case, as the Second Circuit has reaffirmed that when evaluating a unilateral parent placement in a residential setting, the operative determination is the appropriateness of the placement to meet the student's educational needs, not whether it was necessary to meet them (D. D-S. v. Southhold Union Free Sch. Dist., 506 Fed. App'x 80, 82 [2d Cir. Dec. 26, 2012]; see Mrs. B., 103 F.3d at 1120-22; see also Jefferson County Sch. Dist. R-1 v. Elizabeth E., 702 F.3d 1227, 1238-39 [10th Cir. 2012] [holding that the essential question is whether the residential placement provides specially designed instruction and related services to meet the student's unique needs], cert. denied 133 S. Ct. 2857 [June 24, 2013]; Indep. Sch. Dist. No. 284 v. A.C., 258 F.3d 769, 775-77 [8th Cir. 2001] [holding that the relevant inquiry is not whether the problems are themselves educational, but whether the social/emotional problems prevent the student from receiving educational benefits and must be addressed in order for the student to learn]).<sup>11</sup>

In this instance, the guidance director opined that the NPS's "residential learning community" was good for the student because of the "wealth of learning that happens outside of class," such as his ability to interact with teachers until 10:30 p.m. and engage in extracurricular activities (Tr. pp. 443-44). The western civilization teacher testified that an overall benefit from being at the NPS was that the student lived with staff (Tr. p. 389). Because the teacher was a dorm parent, he was available if the student had questions (Tr. pp. 389, 397). Both the guidance director and the western civilization teacher testified that the student benefitted from additional "nonacademic" activities such as soccer, whitewater rafting, and kayaking (Tr. pp. 390-91, 443-44). Based upon his subjective observations, the counselor "guess[ed]" that outdoor activities had helped create a psychologically safe setting for the student (Tr. p. 671).

The private psychologist stated that the student's attitude toward school and his parents had positively changed because of the change in environment moving from the public school to the

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<sup>11</sup> To the extent that some circuits have relied on regulatory language providing that a residential program must be provided only if "necessary to provide special education and related services" (34 CFR 300.104; see Ashland Sch. Dist. v. Parents of Student R.J., 588 F.3d 1004, 1009 [9th Cir. 2009]; Richardson, 580 F.3d at 299; Mary T., 575 F.3d at 244), I consider these cases inapposite, as the regulation refers to the district's obligation to offer a FAPE (20 U.S.C. § 1412[a][1], [10][B]), not the remedies of which parents may avail themselves once the district has failed to meet its obligations (20 U.S.C. § 1412[a][10][C]; see Residential Placement, 71 Fed. Reg. 46,581 [Aug. 16, 2006] [stating that 34 CFR 300.104 "applies to placements that are made by public agencies in public and private institutions for educational purposes and clarifies that parents are not required to bear the costs of a public or private residential placement if such placement is determined necessary to provide FAPE"])).

NPS (Tr. pp. 944, 949). Specifically, that the student found the NPS to be small, supportive, and allowing a great deal of physical activity and freedom from both his parents and his "imagination" of the expectations and dynamics at home (Tr. pp. 944-45). The private psychologist opined that factors specific to the NPS prompted those changes, including being surrounded by "normal" peers, the structure and teacher support provided, outdoor activities as a means to thrive in a nonacademic area, and "having his own space" and not feeling as if he was being watched or doing something wrong (Tr. pp. 946, 966). He testified that the boarding aspect of the NPS had helped the student feel more independent and competent, moving him from "whatever subtle or not so subtle family dynamics that may have been influencing the headaches" (Tr. p. 951). The private psychologist opined that the student would not have received the same benefit from a day program, because it would not address family "issues," and the student would still have to go home each night (Tr. pp. 951-52).

The parent testified that the residential component of the NPS helped the student become more socially integrated because of the simplicity of the environment and the presence of students around him all the time (Tr. pp. 823, 850). She stated that the student's ability to stay home when experiencing a migraine was reinforcing, and to break the cycle of migraines it was "educationally necessary" for the student to be outside of the home in a "seamless" environment without a distinction between home and school (Tr. pp. 841-42).<sup>12</sup> Additionally, the parent testified that the structured routine of the NPS helped the student "tremendously," as did the proximity to outdoor activities, weekend social activities, and accessibility to staff (Tr. pp. 849-50, 852-54).

In this case, it is without question that during the 2012-13 school year, the student exhibited progress in the sense that except when experiencing a migraine, he attended classes consistently, achieved grades in the "A-" to "C+" range, and demonstrated increased maturity and ability to socially interact with peers while attending the NPS (Tr. pp. 427-28, 430, 601-03, 616, 630-31; Dist. Exs. 18 at pp. 2, 6; 31 at p. 6; Parent Exs. L at pp. 1-3; N; S at pp. 1-2).<sup>13</sup> However, despite the accommodations and amenities described above provided to the student at the NPS, the hearing record does not contain evidence that the NPS provided the student with specially designed instruction to meet his ongoing need to develop insight and understanding into what triggered his stress and anxiety, and positive coping skills to address stress and decrease anxiety; difficulties that the hearing record showed not only contributed to the student's tendency to develop migraine

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<sup>12</sup> Although the parents assert that the student required a "seamless" environment in order to access his education, the IDEA does not require that the district provide an ideal learning environment. Rather, the IDEA requires that the district provide a "basic floor of opportunity" which confers "some educational benefit" upon the student (Rowley, 458 U.S. at 200-01), "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker, 873 F.2d at 567; see R.C. v. Byram Hills Sch. Dist., 2012 WL 5862736, at \*15 [S.D.N.Y. Nov. 16, 2012]).

<sup>13</sup> Despite the evidence in the hearing record that the student made some progress at the NPS, the Second Circuit has found that progress made in a unilateral placement, although "relevant to the court's review" of whether a private placement was appropriate, is not sufficient in itself to determine that the unilateral placement offered an appropriate education (Gagliardo, 489 F.3d at 115; see Frank G., 459 F.3d at 364 [holding that although a student's "[g]rades, test scores, and regular advancement [at a private placement] may constitute evidence that a child is receiving educational benefit . . . courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs"]; Lexington County Sch. Dist. One v. Frazier, 2011 WL 4435690, at \*11 [D.S.C. Sept. 22, 2011] [holding that "evidence of actual progress is also a relevant factor to a determination of whether a parental placement was reasonably calculated to confer some educational benefit"]).

headaches, but also to exhibit organizational deficits and avoidance behaviors (Tr. pp. 997-1003, 1006-09, 1017-21, 1025-27, 1333-34; Dist. Exs. 17 at p. 2; 18 at pp. 2, 6-7; 36 at pp. 1-2; 37 at pp. 1-2). In September 2012, the parents informed the NPS of a goal they identified for the student; that he "shall understand and identify the factors leading to stress and express such factors and feelings, rather than internalizing and somatizing stress," noting that the goal would be achieved during continued meetings with the counselor (Dist. Ex. 36 at p. 2). While the student appears to have benefitted from the informal nature of his interactions with the NPS counselor, the hearing record is devoid of information such as counseling notes, progress reports toward goals, etc., showing how, if at all, these sessions addressed the student's need to develop insight and coping skills (Tr. pp. 622-25; see Tr. pp. 1006-09; Dist. Ex. 18 at pp. 2, 6).<sup>14</sup> The hearing record reflects that in June 2012, the private psychiatrist recommended that the "supportive, informal counseling" provided by the NPS be supplemented by a "more systematic psychotherapy program" during the 2012-13 school year which, by December 2012, the parents agreed was needed and obtained from non-NPS personnel (Tr. pp. 838; Dist. Ex. 38 at pp. 1-2). There is no evidence regarding if or how private counseling addressed the student's needs.

Similarly, the NPS report cards and interim progress updates show that although the student achieved satisfactory grades during the 2012-13 school year, he continued to exhibit organizational and motivational/behavioral difficulties at times in his class (Dist. Ex. 37 at pp. 1-2; Parent Exs. I at pp. 1-2; J at pp. 1-2; K at pp. 2-3, L at pp. 1-2; M at pp. 4, 7, 21, 26, 28, 32). In September 2012, the parents informed the guidance director and counselor of their belief that "getting [the student] to focus on stronger organization skills and keeping him ahead of due dates will both allow him to do better in class, while avoiding a return of his repeated migraines" (Dist. Ex. 36 at p. 1). The parents provided the NPS with goals—that they had identified—which related to the student completing assignments in a timely manner, proofreading/perfecting/augmenting analysis rather than turning in a first draft, turning in homework on time, and maintaining contemporaneous notebooks for each class to be reviewed with his teachers to ensure the sufficiency of his notes (id. at pp. 1-2). Although obtained near the conclusion of the 2012-13 school year, a recommendation from the student's May 2013 district-funded neuropsychological evaluation report further supports the position that the student required "direct instruction with planning and organization of complex assignments, time and task management, and with social skills, particularly in the context of team projects" (Parent Ex. X at p. 7; see Tr. pp. 1291-92). Outside of the accommodations provided to the student—which as described above were available to most if not all students at the NPS—the hearing record does not include information about how the NPS addressed the student's needs identified by the parents in their suggested goals, or how it otherwise provided specially designed instruction to address the student's organizational difficulties (Dist. Ex. 36 at pp. 1-2; Parent Ex. D).

It is understandable why the parents selected a placement such as the NPS, which offered the type of environment that resulted in a decrease in the number of the student's migraine headaches, and social and academic progress. However, placing the student in the NPS setting—which the hearing record did not show provided the student with specially designed instruction to address organizational needs, the need to develop insight, and his underlying vulnerability toward

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<sup>14</sup> In contrast, the hearing record included the private psychologist's session notes, which reflected the discussions the student and the private psychologist had about the student's headaches, triggers, stress, family pressure and dynamics, and benefits of self-awareness (Dist. Ex. 31 at pp. 5-6). The private psychologist testified that he did not have any conversations with the counselor during the 2012-13 school year (Tr. p. 983).

and lack of coping skills related to anxiety, stress, and somatization—is not sufficient in this case to meet the parents' burden to establish that the NPS's program provided the student with educational instruction specially designed to meet his unique needs (see Gagliardo, 489 F.3d at 113-15; Frank G., 459 F.3d at 365; see also Rowley, 458 U.S. at 188-89; Application of the Dep't of Educ., Appeal No. 09-031; Application of the Dep't of Educ., Appeal No. 08-042; Application of a Student Suspected of Having a Disability, Appeal No. 08-023; Application of a Student with a Disability, Appeal No. 08-021).<sup>15</sup> Rather, it appears that the student's placement at the NPS provided him with "the kind of educational and environmental advantages and amenities that might be preferred by parents of any child, disabled or not" (Gagliardo, 489 F.3d at 115).<sup>16</sup> Consequently, I find that the parents did not establish that the NPS was an appropriate placement for the student for the 2012-13 school year, and that the IHO's determination must be overturned.

## VII. Conclusion

In summary, having found that district failed to offer the student a FAPE for the 2012-13 school year and that the parents failed to establish that the NPS was an appropriate placement for the student, the necessary inquiry is at an end and I need not reach the issue of whether equitable considerations supported the parents' claim for reimbursement (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at \*13 [E.D.N.Y. Sept. 2, 2011]). I have considered the parties' remaining contentions and find that it is not necessary to address them in light of my determinations herein.

### **THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that the IHO's decision dated December 17, 2013 is modified, by reversing that portion which found that the parents established that the NPS was appropriate and awarded them reimbursement for tuition and the costs of the student's 2012-13 attendance at the NPS.

**Dated: Albany, New York  
March 18, 2014**

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**JUSTYN P. BATES  
STATE REVIEW OFFICER**

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<sup>15</sup> Per State regulation, specially-designed instruction means "adapting, to the needs of an eligible student . . . the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability; and to ensure access of the student to general curriculum, so that he or she can meet the educational standards that apply to all students" (8 NYCRR 200.1[vv]).

<sup>16</sup> While access to the recreational activities offered at the NPS may have alleviated the student's stress levels and in turn, reduced the frequency of his migraine headaches, such activities do not themselves rise to the level of special education. In this case it is clear that the NPS provided the student a small class size and that appears have helped. However, the parties point to no authority, and I have found none, that holds that small class size alone constitutes special education within the meaning of the IDEA (see Frank G. v. Board of Educ. of Hyde Park, 459 F.3d 356, 365 [2d Cir. 2006] [declining to determine whether small class size alone constituted special education]), and I am not inclined to extend such a rule under the totality of the factual circumstances presented in this case.