The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 14-101

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

Appearances:
Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Brian J. Reimels, Esq., of counsel

Law Offices of Regina Skyer & Associates, attorneys for respondents, Gregory Cangiano, 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 the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) son and ordered it to fund the costs of the student's tuition at a nonpublic school (NPS) for the 2013-14 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

This matter involves a student who, at the time that the IEP at issue was developed, was 13 years old (Pet. at ¶ 6; Answer at ¶ 6). The parent reported that the student was initially evaluated around 12 months of age due to speech and motor delays (Tr. p. 154). He thereafter received early intervention services and attended a "special needs" preschool (Tr. p. 155). The student was evaluated again between the ages of three and five due to concerns with behavior, cognition, and language delays, and he reportedly was extremely delayed in all areas (Tr. pp. 155-56). The student attended a general education program in a nonpublic school for kindergarten and first

grade, followed by a special class placement in public school for two years, and in 2010 the parent placed him in the NPS (Tr. pp. 100, 156-159).

On April 11, 2013, a CSE convened to conduct the student's annual review to develop an IEP for the 2013-14 school year (Dist. Ex. 2). Finding that the student remained eligible for special education and related services as a student with an intellectual disability, the CSE recommended a 12-month program consisting of a 12:1+1 special class in a specialized school for all academic subjects with Yiddish as the language of service, and further recommended group counseling and individual speech-language therapy with Yiddish as the language of service, and individual occupational therapy (OT) and physical therapy (PT) provided in English (id. at p. 9).[1] The IEP indicated that the student would participate in an alternate assessment due to significant cognitive, language, and academic delays which precluded him from participation in State and local assessments (id. at p. 11).

On or about June 11, 2013, a Final Notice of Recommendation (FNR) was sent to the parent indicating the public school site to which the student had been assigned for the 2013-14 school year (Dist. Ex. 10). On June 21, 2013, the parent wrote a letter to the CSE indicating that she had visited the recommended school site and did not believe it was an appropriate placement for her son (Parent Ex. B). The parent expressed concerns that although the IEP provided for a bilingual Yiddish program, including instruction and speech-language therapy provided in Yiddish, none of the teachers at the school spoke Yiddish and the speech therapist at the school was not bilingual (id.). The parent also indicated that the school was too large for the student and would cause him to be "overwhelmed"; there were no mainstreaming opportunities available to students in the 12:1+1 program; the students in the proposed classroom were not appropriate peers for the student; and the school was too far away from the student's home (Parent Ex. B).

On August 20, 2014, the student's father executed an enrollment contract for the student's attendance at the NPS for the 2013-14 academic school year (Parent Ex. M). On August 23, 2013, counsel for the parent sent a letter to the CSE on behalf of the parent providing written notice of her intent to place the student at the NPS for the 2013-14 "academic year" and to seek funding for the placement if the district did not address errors in the student's IEP and "offer him an appropriate school placement" (Parent Ex. A at p. 1). The parent asserted that the annual goals and management needs contained in the April 2013 IEP were generic and vague; the program recommendation was not the least restrictive environment (LRE) for the student and the CSE failed to consider a less restrictive program; the CSE did not meaningfully consider a psychoeducational evaluation or classroom observation in making their recommendation, nor were such assessments reflected in the IEP; and instructional levels provided in the April 2013 IEP were inconsistent with evaluations conducted by the district (id. at p. 2).

A. Due Process Complaint Notice

By due process complaint notice dated November 8, 2013, the parent requested an impartial hearing and alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2013-14 school year (Dist. Ex. 1 at p. 1). Initially, the parent claimed that the April

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

2013 CSE failed to rely on necessary evaluations to ascertain the student's present levels of performance (id. at p. 2). The parent also contended that the April 2013 IEP lacked "meaningful academic, social-emotional and management needs" (id.). The parent next contended that the annual goals and short-term objectives contained in the IEP were generic, vague, and inappropriate to meet the student's needs (id. at p. 3). The parent asserted that the lack of any promotional criteria implied that the student would be required to meet grade-level standards, which was "unrealistic and nullifie[d]" the IEP (id. at p. 4). The parent also alleged that the recommended 12:1+1 special class in a specialized school was not in the LRE for the student, who was capable of learning from and integrating with his mainstream peers (id. at p. 3). The parent argued that the CSE did not explain the entirety of the student's IEP to them at the meeting, including that a 1:1 bilingual paraprofessional could be substituted if a bilingual classroom teacher was unavailable and that the 12:1+1 special class recommendation was not for the full day, thereby significantly denying the parents the opportunity to participate in the development of the student's IEP (id.). The parent further alleged that the CSE failed to provide the student's teacher at the NPS with access to the documents and materials that were before the CSE (id. at p. 4).

With regard to the assigned public school site, the parent alleged that the recommended placement was not appropriate, was not capable of implementing the bilingual instruction component of the student's IEP, and did not conform with the recommended program described to the parent during the April 2013 CSE meeting (Dist. Ex. 1 at p. 3). The parent also claimed that the classroom proposed by the FNR was the same classroom that was offered for the student's younger brother, which she contended was inappropriate and constituted a denial of FAPE (id. at p. 4). As relief, the parent indicated that she was seeking prospective funding of the cost of the student's tuition at the NPS (id. at p. 1), though she also alleged that the facts of this case would not "bar an award of tuition reimbursement" (id. at p. 4).

B. Impartial Hearing Officer Decision

On March 19, 2014, the parties proceeded to an impartial hearing, which concluded on May 14, 2014, after two days of proceedings (see Tr. pp. 1-194). In a decision dated June 6, 2014, an IHO found that the district failed to offer the student a FAPE for the 2013-14 school year (IHO Decision at pp. 7-9).

Specifically, the IHO noted that the student's classification, classroom student-to-staff ratio, and related services were not in dispute, and that the parent, rather, objected to the recommendation of a specialized school and claimed that the IEP failed to "specify a Yiddish-speaking teacher" (IHO Decision at p. 7). With respect to the latter of these issues, the IHO found that the parent's claim lacked merit, and also that the use of an "alternate language paraprofessional" would "likely not prevent the student from receiving educational benefit" (id. at pp. 8-9). Regarding the former, however, the IHO initially noted that the CSE was properly composed and that evaluative data presented a detailed picture of the student's academic functioning, management needs, and his language, motor, and physical delays, though she observed that "in terms of [the student's] social development and emotional needs" the "documentation" was less extensive (and thus the "language of the IEP" was "far less informative") (id.). However, the IHO found that a classroom observation of the student supported the parent's position that the student had the ability to interact with typically developing peers, though "clearly not for mainstreaming for academic subjects" (id. at p. 7). Accordingly, the IHO agreed with the

parent that the student could beneficially interact with typically developing peers and found that the student's IEP should have included opportunities for the student "to foster and improve his independence to prepare him for post-school life in the community" (id. at pp. 7-8). The IHO, therefore, determined that the district's recommended program resulted in a denial of FAPE to the student (id. at p. 9).

In addition, the IHO found that the parent's unilateral placement was appropriate for the student, and that equitable considerations favored the parents (IHO Decision at pp. 7, 8-9). Specifically, the IHO found that the evidence showed that the NPS provided specifically designed instruction to meet the student's needs and that the student was receiving educational benefit (id.). In addition, the IHO found that the parent had cooperated with the CSE and visited the assigned school site (id.). Accordingly, the IHO granted the parent's request for tuition reimbursement, with a 10 percent reduction for that portion of the school day at the NPS devoted to religious instruction (id.).

IV. Appeal for State-Level Review

The district appeals, requesting that the IHO's decision be overturned with respect to her findings regarding the appropriateness of the student's IEP and equitable considerations. Specifically, the district argues that the recommended 12:1+1 special class in a specialized school offered the student a FAPE in the LRE. The district does not challenge the appropriateness of the parent's unilateral placement.

In an answer, the parent responds to the district's allegations with admissions and denials, and argues to uphold the IHO's decision in its entirety. In addition, the parent raises claims that were not included in the impartial hearing request.[2]

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]).

[2] In particular, the parent alleges for the first time in her answer that the CSE failed to complete a vocational assessment of the student. This claim was not raised in the due process complaint notice and so is not properly raised on appeal (20 U.S.C. §1415[f][3][B]; 34 CFR 300.511[d]; 8 NYCRR 200.5[j][1][ii]). Even if this claim could reasonably be read into the due process complaint notice, it would not constitute a denial of a FAPE. At the time of the CSE meeting, the student was 13 years old. State regulations require the district to ensure that students age 12 receive an assessment that includes a review of school records and teacher assessments, and parent and student interviews to determine vocational skills, aptitudes, and interests (8 NYCRR 200.4[b][6][viii]). However, even if the district did not conduct such an assessment as required by State regulation, the parent has not alleged any resultant harm, and the CSE is not required to develop transition services to address these areas prior to the first IEP that will be in effect when the student is 15 years old (see 8 NYCRR 200.4[d][2][ix]). The district's failure to do so, although a procedural violation of State regulation, would not rise to the level of a denial of FAPE in this instance.

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]).

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 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]).

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. April 2013 CSE Process

1. Alleged Procedural Deficiencies in the Development of the IEP

As an initial matter, the parent alleged in her due process complaint notice that the April 2013 IEP was not developed in accordance with applicable regulations in a number of respects. Specifically, the parent alleged that the recommended program was not explained to her or summarized during the CSE meeting, that the principal of the NPS was not given access to the materials considered by the CSE, and that the April 2013 IEP did not contain any promotional criteria. Though not addressed by the IHO, I will consider each of these claims.

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]).

When the CSE convened on April 11, 2013, the following members were in attendance: a school psychologist who also served as the district representative, a district special education teacher, the parent, an additional parent member, and the principal of the NPS who participated via telephone (Tr. pp. 10-11; Dist. Ex. 2 at p. 14).[3] The parent testified that she participated in the CSE meeting, that the CSE reviewed the NPS reports during the meeting, and that "everything" was discussed (Tr. pp. 165-66). The principal of the NPS indicated that he had known the student since he entered the program in 2010 and that he was responsible for evaluating the student three times per year and creating goals and an individualized curriculum based on the evaluations (Tr. pp. 91-92, 100). The principal testified that he discussed the student's needs and provided progress reports to the April 2013 CSE (Tr. pp. 128-30).

With respect to the parent's claim that the CSE failed to adequately summarize and explain its recommendation, although the parent testified that the CSE did not explain "the overall structure" of the recommended program, she also indicated that she was "not sure what we were talking about" (Tr. p. 167). Inasmuch as neither the IDEA nor State or federal regulations specifically require that the CSE explain a student's program to his or her parents, there is no basis appearing in the record on which to find that the CSE's failure to do so significantly impeded the parent's opportunity to participate in the development of the April 2013 IEP.

Nor am I able to find that the parent's claim that the principal of the NPS, who participated in the meeting by teleconference, was not provided with all of the documentation considered by the CSE during the meeting resulted in a denial of FAPE. The district special education teacher testified that all of the members of the CSE participated and had an opportunity to ask questions and raise concerns (Tr. pp. 11-12). The district special education teacher testified that during the April 2013 CSE meeting, the March 2011 psychoeducational evaluation and December 2012 classroom observation were discussed and the NPS reports were used to establish the student's current levels of performance and to develop new goals (Tr. pp. 16-17). The district special education teacher also stated that the parent provided information and that the principal of the NPS participated for the duration of the meeting (Tr. p. 17). The NPS principal testified that he provided all of the information that the NPS had, including related services reports, progress reports and the academic evaluation (Tr. 128-29). Similarly, the parent testified that the principal of the NPS conveyed the student's need for instruction in Yiddish to the CSE (Tr. p. 167). While the hearing record does not show whether or not the district provided any of its documentation to the NPS in advance of the meeting, it is apparent that the majority of the information discussed by the CSE was provided by the NPS.

In addition, there is no evidence that the parent requested that the district provide copies of the documentation to be reviewed by the CSE to the NPS. Moreover, the record reflects that the principal of the NPS had knowledge of the student's deficits and understood all of the information under discussion (Tr. pp. 100-04, 109-20, 128-31, 146-47). None of the CSE members, including

[3] Although according to the district special education teacher the representative from the NPS represented himself as the student's teacher, the hearing record reflects that he was the principal of the NPS (Tr. p. 11; Dist. Ex. 2 at p. 14).

the parent, objected at the time of the meeting or requested copies of any evaluative information or indicated that they needed additional time to review information (Tr. pp. 21-22, 27, 29-31, 36-37). Based on the above information, regardless of whether the CSE provided copies of all of the documentation before it to the principal of the NPS, the hearing record does not suggest that a failure to do so compromised the parent's ability to meaningfully participate in the development of the student's IEP or otherwise denied the student a FAPE (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

Finally, the parent alleges that the April 2013 IEP did not contain any promotional criteria. Initially, I note that there is no requirement that an IEP contain promotional criteria, and the parent has not alleged any harm resulting from their absence. However, even were such criteria required, the district special education teacher testified that the promotional criteria section of the IEP was blank because the student's advancement would be determined by alternate assessment, which was described in a different section of the IEP (Tr. pp. 48-50; Dist. Ex. 2 at pp. 11-12). Therefore, I find that this allegation does not rise to the level of a denial of FAPE.

Under these circumstances, I decline to find a denial of a FAPE based on the parent's challenges to the manner in which the April 2013 IEP was developed; finding instead that the parent was able to participate in the development of the student's IEP to the extent contemplated by the IDEA.

2. Sufficiency of Evaluative Information

In her due process complaint notice, the parent asserted that the CSE failed to rely on evaluative information to establish the student's present levels of performance (Dist. Ex. 1 at p. 2). In support of this assertion, the parent argued that the April 2013 IEP reflected that no current formal evaluations were available for the CSE meeting and that the CSE indicated that the current teacher reports were sufficient to develop the IEP (Dist. Ex. 1 at p. 2). Though the IHO did not make an explicit finding with respect to the sufficiency of the evaluative information considered by the April 2013 CSE, she found that the CSE relied on a March 2011 psychoeducational evaluation, a December 2012 classroom observation, and reports from the NPS and related services providers (IHO Decision at p. 7; see Dist. Exs. 3-4; 6-9). Neither party appeals from the IHO's finding, although the district specifically notes in addition that the CSE considered information provided by the student's parents and teacher (Tr. pp. 16-17). However, because it is relevant to my analysis of other of the parent's claims, I briefly review the evaluative information available to the April 2013 CSE.

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]).

The March 2011 psychoeducational evaluation was completed as part of the student's triennial review (Dist. Ex. 4 at pp. 1-2). The district's special education teacher testified that the statement, "no current formal assessment" written on the April 2013 IEP meant that no formal

assessments had been conducted during the six to eight month period prior to the student's annual review (Tr. pp. 38-39; Dist. Ex. 2 at p. 1). The hearing record reflects that the March 2011 psychoeducational evaluation was conducted within the required three-year timeframe and that the CSE considered the evaluation as well as ongoing diagnostic evaluations conducted in the classroom and therapy room to assess the student's then-current needs (id.). In addition, and contrary to the parent's assertion in the due process complaint notice that the CSE "failed to rely on necessary evaluations," the record reflects that the CSE considered a September 2012 readiness skills checklist, a December 2012 classroom observation, and reports provided by the student's therapists, in addition to verbal information provided by the NPS principal and parent regarding the student's current level of functioning as well (compare Dist. Ex. 2 at pp. 1-2, with Tr. pp. 16-17, 91, and Dist. Exs. 3-4; 6-9). Accordingly, I decline to find a denial of FAPE in this matter based upon an alleged insufficiency of the evaluative data considered by the CSE.

B. April 2013 IEP

1. Present Levels of Performance

Having found that the CSE had before it sufficient evaluative information, I now consider whether the April 2013 IEP accurately describes the student's present levels of performance. Initially, I note that this issue arises because the district, in its petition, alleged that, while not clear, the "IHO appears to have determined that the IEP's description of [the student's] social/emotional needs was inadequate" (Pet. at ¶ 29). In response to this assertion, the parent contends in her answer that the IHO determined that "the IEP did not adequately take into account [the student's] social and emotional needs in formulating a program recommendation," and appears to suggest that a claim relating the adequacy of the description of the student's social/emotional needs in the April 2013 IEP was raised in her due process complaint notice (Answer at ¶¶ 29-30). However, and as an initial matter, it is not clear to me that the IHO made a finding regarding the sufficiency of how the IEP described the student's social/emotional needs. Rather, the IHO appears to have simply noted that while "documents" in the record present a detailed picture of the student's academic functioning, his management needs, and his speech, OT, and PT delays, that the documentation "is less extensive" with respect to his social and emotional needs, and that as a result the "language" of the IEP with respect to such functioning is "far less informative." In any event, I find that the parent's due process complaint notice cannot be reasonably read as raising an issue regarding the adequacy of how the student's social/emotional needs were described in the April 2013 IEP. Rather, the due process complaint notice simply alleges that the IEP was "devoid of any meaningful academic, social-emotional and management needs" (Dist. Ex. 1 at p. 2), and the paragraph expressing this concern continues with the regulatory definition of management needs and describes why the "'Management Needs' [sic] section" of the IEP is inappropriate for the student, specifically referencing an "absence of specific and meaningful academic, social-emotional and health management needs" (id.). Thus, had the IHO made a finding on this issue, such finding would have been improper (20 U.S.C. §1415[f][3][B]; 34 CFR 300.511[d]; 8 NYCRR 200.5[j][1][ii]).

Further, I find that any claims regarding the sufficiency of how the student's needs are described in the April 2013 IEP (i.e., the adequacy of the IEP's description of the student's present levels of performance) do not support a finding of a denial of FAPE. The IDEA requires that the IEP include a statement of a student's academic achievement and functional performance and how

the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1];8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

Here, the April 2013 IEP detailed the student's strengths and weaknesses in academic achievement, functional performance and learning characteristics, as well as in social and physical development. The district representative testified that the student's strengths and weaknesses were discussed at the 2013 CSE meeting and were reflected in the present levels of performance on the 2013 IEP (Tr. pp. 18-20). The present levels of performance also indicated that the student's level of intellectual functioning, activities of daily living, knowledge and development in subject and skill areas, and expected rate of progress in acquiring skills and information were below age and grade levels (Dist. Ex. 2 at p. 1). Spelling and reading skills were noted to be on a lower third grade level, while math skills were on a lower first grade level (id. at p. 1). These levels of functioning were consistent with teacher reports and the 2011 psychoeducational report (compare Dist. Ex. 2 at p. 1, with Dist. Ex. 4 at pp. 2-5, and Dist. Ex. 6 at pp. 6-8). In addition, the student was described as a visual and hands-on learner who learned best when he was able to use manipulatives and when visual stimuli were presented during small group lessons (Dist. Ex. 2 at p. 1). According to the IEP and consistent with the NPS OT report, the student was easily frustrated by challenging tasks and required encouragement to complete tasks (compare Dist. Ex. 2 at p. 1, with Dist. Ex. 7). Further, and with respect to the student's social development, the April 2013 IEP reflected that the student "is a pleasant talkative boy with a good sense of humor" (Dist. Ex. 2 at p. 1). In addition, it also notes that the student gets along with peers for the most part (id.).

In sum, the record reflects, as discussed above, that the CSE considered a March 2011 psychoeducational evaluation, a September 2012 readiness skills checklist, a December 2012 classroom observation, and reports provided by the student's therapists, in addition to verbal information provided by the NPS principal and parent regarding the student's current level of functioning. In addition, the record reflects that information contained within and/or that was provided by these sources was reflected in the April 2013 present levels of performance (compare Dist. Ex. 2 at pp. 1-2, with Tr. pp. 16-17, 91, and Dist. Exs. 3-4; 6-9). Accordingly, I decline to find a denial of a FAPE on the basis that the April 2013 IEP did not adequately reflect the student's present levels of performance.

2. Management Needs

As noted above, the parent in her due process complaint notice raised allegations regarding the sufficiency of the management needs described in the April 2013 IEP.[4] However, the parent did not make any specific allegations in this regard, nor did she do so in her answer. Rather, the parent simply alleged in her due process complaint notice that the IEP was "devoid" of any

[4] This issue was not addressed by the IHO in her decision.

"specific and meaningful academic, social-emotional and health management needs," and asserts in conclusory fashion in her answer that "strategies" listed in the IEP were vague and generic (Dist. Ex. 1 at p. 2).[5]

The record, however, reflects that the April 2013 CSE identified academic, social/emotional, and physical development management needs that were aligned with the student's present levels of performance and consistent with the evaluations and reports available to the CSE (see Dist. Ex. 2 at p. 2). Socially, for example, the April 2013 IEP reflected that the student was a pleasant boy with a good sense of humor who was eager to learn and participate in class lessons (id.). Teacher reports reflected on the IEP noted that the student had made "tremendous improvement" with respect to social development, generally got along with his peers, and was cooperative (id.). The descriptions of the student's social development on the IEP were consistent with the December 2012 classroom observation and the 2011 psychoeducational report (compare Dist. Ex. 2 at p. 1, with Dist. Ex. 3 at p. 2, and Dist. Ex. 4 at pp. 2-5). Individual counseling was recommended to address the student's social/emotional needs (Tr. pp. 24-26; Dist. Ex. 2 at p. 9). In addition, and despite the issues discussed below, the April 2013 IEP contemplated some type of participation with general education students (Dist. Ex. 2 at p. 2). Notably, the IEP reflected that the parent did not have any concerns regarding the student's social development in school (id. at p. 1), and the hearing record generally lacks information which would suggest the need for specific social/emotional management needs (id.).

In addition, the April 2013 IEP included recommendations for a small class setting with related services in a specialized school to address the student's academic, social, and emotional difficulties (Dist. Ex. 2 at p. 2). Recommended strategies included frequent verbal praise and encouragement, task analysis, use of manipulatives, frequent repetition and review of lessons (id.). According to the March 2011 psychoeducational evaluation report, the student required and benefitted from repetition and redirection, although he also "sat quietly and waited for instructions" (Dist. Ex. 4 at p. 3). The March 2011 psychoeducational evaluation report also indicated that the student easily established and maintained eye contact and rapport with the evaluator, engaged in informal conversation and "cheerfully attempted all tasks presented" (id.). Based on the December 2012 classroom observation the student followed classroom rules and routines, actively participated without the need for prompts, and demonstrated independence when assigned tasks (Dist. Ex. 3 at pp. 1-2).

Finally, in the area of physical development, consistent with the NPS OT report the April 2013 IEP indicated that the student presented with upper extremity weakness, decreased fine motor skills, a decreased attention span, and deficits in visual, perceptual, motor, and activities of daily living skills (compare Dist. Ex. 2 at p. 2, with Dist. Ex. 7). In this regard I note that the April 2013 IEP recommended both OT and PT for the student, and included goals designed to improve the student's coordination, strength and motor planning (Dist. Ex. 2 at pp. 8-9). Moreover, here again

[5] I presume that by referencing the student's "health" management needs that the parent is referring to needs relating to the student's physical development (see, e.g., 8 NYCRR 200.1[ww][3][i][c], [d]). In this regard I note that the April 2013 IEP reflects that the parent indicated that the student was in good health (Dist. Ex. 2 at p. 1), and there is no indication in the record that this statement is inaccurate.

it is notable that the IEP indicated that the parent did not have any concerns about the student's physical development (id.).

In light of the above, I find that the April 2013 IEP as a whole accurately described the student's management needs and included appropriate strategies to address them.

3. Annual Goals and Short-term Objectives

Another issue not addressed by the IHO, but which was raised by the parent in her due process complaint notice, relates to the sufficiency of the annual goals in the April 2013 IEP. In this regard the parent contended, without elaboration, that the annual goals and short-term objectives were generic, vague, and inappropriate to meet the student's educational needs (Dist. Ex. 1 at p. 3). The parent also suggested that the goals were not measurable, and that they did not adequately address the student's needs in math.

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

A review of the April 2013 IEP shows that the CSE developed 18 annual goals and, consistent with the CSE's determination that the student would participate in an alternate assessment, approximately 54 related short-term objectives to target the student's needs in the areas of math, reading, writing, self-help, coping, physical fitness, speech/language, fine motor, and gross motor development (Dist. Ex. 2 at pp. 3-8, 11; see 8 NYCRR 200.4[d][2][iv]). Each goal included evaluative criteria (e.g., 4 out of 5 times with 80% accuracy), evaluation procedures (e.g., teacher observations, class activities, verbal explanation), and a schedule to be used to measure progress (e.g., one time per month) (Dist. Ex. 2 at pp. 3-8). As noted above, the present levels of performance indicated that the student's level of intellectual functioning, activities of daily living, knowledge and development in subject and skill areas, and expected rate of progress in acquiring skills and information were below age and grade levels (id. at p. 1).

In addition, the district special education teacher testified that the April 2013 CSE developed the student's academic goals from the documentary information about the student's academic skills the NPS provided, and from descriptions of the student's skills in the classroom and input from the principal of the NPS and the parent (Tr. pp. 20-21). The special education teacher further testified that all of the student's goals were reviewed with the principal of the NPS and the parent (Tr. p. 21). With respect to the student's needs in math, the April 2013 IEP indicated that the student functioned at a first grade instructional level in math and included five annual goals that addressed functional math skills, including: demonstrating an understanding of time of day and calendar concepts, telling time, identifying the value of coins, and adding and subtracting without regrouping (id. at pp. 3-4, 12). In addition, the student's instructional level in reading was

noted to be at the third grade level and three annual goals on the IEP addressed reading/language arts skills, including: improving vocabulary skills as demonstrated by using context cues in written and spoken language to define new vocabulary words, demonstrating reading comprehension skills by retelling a story in a correct sequence, and demonstrating composition skills by dictating a story using three sequential details in complete sentences (id. at pp. 4-6). To address activities of daily living skills, annual goals were included on the IEP to address developing emergency skills for independence and self-care skills (id. at pp. 5, 7).

Finally, the April 2013 IEP included goals that addressed the student's related service needs. Gross motor needs, for example, were addressed by two goals that focused on improvement of coordination, strength, and motor planning, along with participating in an adapted physical education program to promote physical fitness (id. at pp. 6, 8). The student's speech-language needs were addressed in three goals which included demonstrating improved auditory processing skills and improved expressive language skills, and improving phonic awareness skills by identifying like sounds and sounds contained in spoken words (id. at pp. 6-7). Fine motor skills were addressed in two goals that focused on improving written communication skills by using proper letter formation and improving keyboarding skills (id. at p. 8).

Overall, the annual goals and short-term objectives, when read together, were sufficiently measurable and detailed, and adequately addressed the student's identified educational needs sufficient to guide a teacher in instructing the student and measuring his progress. I therefore find that the annual goals contained in the April 2013 IEP were not so generic, vague, or inappropriate as to constitute the denial of a FAPE to the student (N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at *9 [S.D.N.Y. June 16, 2014]; B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at *12 [E.D.N.Y. Mar. 31, 2014]; J.L. v. City Sch. Dist. of New York,2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013]).[6]

4. Bilingual Instruction

In addition to the above, the parent also raised concerns regarding the use of a "bilingual paraprofessional." In particular, the April 2013 IEP recommended a bilingual program for the student for purposes of instruction, counseling, and speech-language therapy (Dist. Ex. 2 at p. 9). In her due process complaint notice, however, the parent contended that the IEP contained an indication that should a bilingual program not be available, a "monolingual program" would be provided with a bilingual paraprofessional (Dist. Ex. 1 at p. 3). The parent suggests that such arrangement (i.e., a monolingual program with a bilingual paraprofessional) is insufficient for the student (Dist. Ex. 1 at p. 2; Answer at ¶ 18).[7] As noted above, the IHO disagreed and found that "an alternate language paraprofessional . . . is not likely to prevent the student from receiving educational benefit" (IHO Decision at pp. 8-9).

[6] I also note that, in her answer, the parent does not assert any particular deficiency with the goals, instead referencing the allegations made in her due process complaint notice.

[7] The parent also suggested that this arrangement was not discussed at the April 2013 CSE (Dist. Ex. 1 at p.2). However, this assertion is belied by testimony of the principal of the NPS who participated in the CSE meeting by telephone, and who indicated that the possibility of using a bilingual paraprofessional was discussed (Tr. p. 130).

Pursuant to State guidance, when developing an IEP for a limited English proficient student with a disability, the CSE must consider the student's language needs as they relate to the student's IEP, "as well as the special education supports and services a student needs to address his or her disability and to support the student's participation and progress in the general education curriculum" ("Bilingual and English as a Second Language (ESL) Services for Limited English Proficient (LEP)/English Language Learners (ELLs) who are Students with Disabilities," at pp. 1-2, Office of Spec. Educ. Memo. [March 2011], available at http://www.p12.nysed.gov/specialed/publications/bilingualservices-311.pdf). Such considerations include, but are not limited to: the student's need for "special education programs and services to support the student's participation and progress in English language arts instruction, content area instruction in English and ESL instruction;" and "whether the student needs bilingual special education and/or related services" (id. at p. 2). In this case, the CSE was required to "consider specially designed instructional programs provided by appropriately qualified staff" to address the student's needs with regard to understanding, speaking, reading, writing, and communicating in English (id.).

Here it is clear that the CSE did consider the student's needs with regard to understanding, speaking, reading, writing, and communicating in English. Again, and as the parties seem to agree, the April 2013 IEP recommended that the student receive instruction and certain related services in Yiddish or via the provision of such instruction or services in English along with a Yiddish-speaking paraprofessional.

Moreover, I am unable to find, as the parent suggests, that the use of a Yiddish-speaking paraprofessional (as opposed to Yiddish-speaking providers and/or teachers) would have denied the student a FAPE in this matter. In this regard I note that while the principal of the NPS testified that the student's primary language of communication was Yiddish and that the student needed a "Yiddish speaking program" (Tr. pp. 106, 130), there is ample evidence of the student's ability to speak and understand English in the record. For example, according to the March 2011 psychoeducational evaluation report considered by the April 2013 CSE, the student was a bilingual Yiddish child from a bilingual home (Dist. Ex. 4 at p. 2). Moreover, while the evaluator indicated that the student was "clearly more attentive and responsive when addressed in Yiddish," she also indicated that the student was able to converse in English (id. at p. 2). In addition, the district special education teacher who conducted the approximately one and one half hour December 2012 classroom observation testified that the language used for academic instruction during the observation was English (Tr. p. 16, 38), and that the student was noted to be a very active member of the class and volunteered often (Tr. p. 14). In fact, during a decoding lesson, the student spelled the words "produce" and "group" correctly, and he called out the correct spelling of other words before the teacher could elicit a response from another student (Dist. Ex. 3 at p. 1). He also worked in a group consisting of five boys to complete exercises which consisted of using words from a word box to fill in sentences, matching words with the same spelling, and unscrambling words from a word search (id.). The student was noted to work very quickly and self-correct when needed (id.). After completing the decoding exercises the student was able to read aloud (id.). The student also participated in a math lesson and eagerly completed his math worksheets (id.). The student was noted to be an active learner who did not require any prompts or cues to complete tasks (id. at p. 2). Accordingly, I cannot find that the use of a Yiddish-speaking paraprofessional would result in a denial of FAPE in this instance.

5. LRE

Finally, the IHO found that "[a]n appropriate IEP for [the] student must mandate opportunities, with proper support, for daily nonacademic interaction with his nondisabled peers" and found that the district denied the student a FAPE because the April 2013 IEP recommended an "overly restrictive placement" for him (i.e., a program in a specialized school) (IHO Decision at pp. 8-9). In response, the district contends that the IHO erred in finding that the recommended special class in a specialized school was not the student's LRE.

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

To apply the principles described above, the Second Circuit adopted a two-pronged test for determining whether an IEP places a student in the LRE, considering (1) whether education in the general classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given student, and, if not, (2) whether the school has mainstreamed the student to the maximum extent appropriate (Newington, 546 F.3d at 119-20; see North Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50). Here, the first prong of this test is not at issue since the parties agree that the district was justified in removing the student from the general education classroom and placing the student in a special class. Accordingly, and as the district notes, the issue in this case turns on the second prong of the test, or whether the district has included the student in school programs with nondisabled students to the maximum extent appropriate (Newington, 546 F.3d at 120).

Notably, the district in this matter does not argue that the student is not capable of being educated with nondisabled peers at all. Rather, the district claims that it offered the student a FAPE in the LRE, and that with respect to whether the student was appropriately educated with nondisabled peers "the IEP speaks for itself" (Answer at ¶ 34). However, the April 2013 IEP is not entirely clear with respect to the extent to which the student would be educated with nondisabled peers. In this regard, while the IEP on the one hand suggests that the student would not participate in regular classes for "academic subjects" (Dist. Ex. 2 at p. 11), it also suggests that the student would only be mainstreamed in "all appropriate school activities" (id. at p. 2). Further confusing matters is that the IEP, through a goal, suggests that the student would participate in adapted physical education (id. at p. 6), and provides that the student would remain in a 12:1+1 special class in a specialized school for 35 periods per week (id. at p. 9). The IEP, however, does not include any information regarding the non-academic portion of the student's day, nor does it indicate the length of the school day or of a period. This is especially problematic since testimony provided by the district special education teacher indicated that the student may have participated in non-academic classes and "specials" during the school day, but that the extent to which this might occur (and what would be done with the student during these times) could not be determined until a specific public school site placement was made (Tr. pp. 54-56). Thus, while the district suggests that the IEP's reference to 35 periods per week is equivalent to "all academic subjects," I am unable to find that this is the case. Accordingly, I am unable to determine from the April 2013 IEP alone the extent to which the student would have been included in school programs alongside nondisabled peers throughout the entire day.

Further, while there is testimony in the hearing record suggesting that the student may have been able to interact with general education students from other schools located in the same building as the public school site to which that the student would have been assigned (Tr. pp. 82-84), "[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 April 2013 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]). Retrospective evidence presented at a hearing that materially alters an IEP may not be relied upon and/or used to rehabilitate an inadequate IEP (see R.E., 694 F.3d at 188). Accordingly, given the absence of any clear indication in the IEP of how and when the student would be included in school programs with nondisabled students, I am constrained to find that the district failed to offer the student a FAPE in the LRE.

In light of the above I need not determine whether, as the IHO found, that placing the student in a special school (versus a community school) was by itself inappropriate and should not have been considered by the April 2013 CSE. However, I note that the district special education teacher testified that in this case the basis of the recommendation for a special class in a specialized school was the student's need for 12-month services which are not offered at community schools (Tr. pp. 29, 56-58).[8] To that extent I note that the Second Circuit Court of Appeals recently held

[8] On redirect, the district's attorney elicited additional testimony from the district special education teacher that there were other reasons for recommending a specialized school, including that specialized schools coordinate with outside agencies and have different programs within the school to address life skills in order to develop

that the IDEA's LRE requirement is not limited, in the extended school year (ESY) context, by what programs the school district already offers (see T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 163 [2d Cir. 2014]). Rather, the Court held that "[i]n order to comply with the LRE requirement, for the ESY component of a twelve-month educational program as for the school-year component, a school district must consider an appropriate continuum of alternative placements, and then must offer the student the least restrictive placement from that continuum that is appropriate for the student's disabilities" (id.). Thus, to the extent that a community school could have addressed the student's needs based on the nature of his disabilities during the school year, such a placement should have been considered by the district. The student's need for 12-month services, in other words, cannot be the only rationale for recommending a specialized school.[9]

C. Equitable Considerations

Having found that the student was denied a FAPE in the LRE, I need not consider the parent's remaining contentions related to the provision of a FAPE raised in her due process complaint notice. However, and since the district does not challenge the IHO's determination that the NPS was an appropriate placement for the student, a final question remains regarding whether the parents' claim is supported by equitable considerations.

Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; M.C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). With respect to equitable considerations, the IDEA provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]).

The IDEA also allows that reimbursement may be reduced or denied if parents do not provide notice either at the most recent CSE meeting prior to removing the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE]

---

independence (Tr. pp. 58-59). Thus, irrespective of this testimony it is not entirely clear from the totality of the record that the student's need for 12-month services was the sole basis for the April 2013 CSE's recommendation of a specialized school in in this matter.

[9] I remind the district that it may make multiple recommendations and that its obligation is to consider an appropriate continuum of alternative placements and offer the least restrictive placement that is appropriate for the student's needs. The district is not required to offer every conceivable summer program that might be a particular student's LRE (T.M., 752 F.3d at 165-66).

can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]).

Here, the district argues that equitable considerations do not support the parent's request for relief, contending that the parent never intended to send the student to a district public school and did not fully cooperate in the process of developing the student's IEP. However, while the parent did testify (as the district notes) that she did not like the public schools due to past bussing issues (Tr. pp. 173-74), and while she also indicated that the student "takes changes very hard" (Tr. p. 160), I do not find that this alone establishes that the parent was close-minded when she entered the CSE process as the district suggests. Moreover, the Second Circuit has been clear that parental preference for a nonpublic school placement does not preclude a claim for public funding of a student's tuition so long as "the parents cooperated with the District in its efforts to meet its obligations under the IDEA" (C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 840 [2d Cir. 2014]). In that respect, the district asserts that because the parent did not object to the IEP at the time of the April 2013 CSE meeting, it evidenced her "unwillingness to cooperate with the CSE's obligations." However, the district points to nothing in the hearing record indicating the parent impeded its ability to develop an appropriate IEP for the student (see A.R. v. New York City Dep't of Educ., 2013 WL 5312537, at *9-*10 [S.D.N.Y. Sept. 23, 2013]). Moreover, the hearing record indicates (and the district does not dispute) that the parent provided the district with timely notice both of her concerns with the particular assigned public school site and IEP, and of her intention to privately place the student and seek public funding therefor (Parent Exs. A; B). Thus, while the parent may not have expressed her concerns regarding the IEP at the time of the CSE meeting, I decline to find that this alone establishes an unwillingness to cooperate with the CSE's attempts to meet its obligations.

Finally, the district argues in a footnote that any award in this matter should be reduced by the amount of tuition already paid because the parent requested only prospective payment of the student's nonpublic school tuition in her due process complaint notice (and not tuition reimbursement). However, the hearing record is insufficiently developed to determine with precision the amount paid by the parent toward the costs of the student's tuition (Tr. pp. 162-63; see Parent Ex. M). Moreover, while it is not entirely clear that the only relief sought by the parent in her due process complaint notice was prospective funding,[10] the district indicates that the award ordered by the IHO in this matter was for prospective funding, and the parent, who requests simply that I uphold the IHO's decision, does not explicitly request anything different. Accordingly, I see no reason to disturb the amount of tuition awarded by the IHO on this basis.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
September 5, 2014

HOWARD BEYER
STATE REVIEW OFFICER

[10] As noted above, while the parent's due process complaint notice does indicate in parts that the parent is seeking prospective funding of the student's placement (Dist. Ex. 1 at p. 1), she also alleged, with respect to equitable considerations, that there were none "that would bar an award of tuition reimbursement" (emphasis added) (id. at p. 4).