The University of the State of New York

The State Education Department
State Review Officer
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No. 14-107

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

Appearances:
Law Offices of Regina Skyer & Associates, LLP, attorneys for petitioners, Gregory Cangiano, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Brian J. Reimels, 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 parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her son's tuition costs at a nonpublic school (the NPS) for the 2013-14 school year. While portions of the IHO's decision are hereby modified, the appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The record reflects that at the time that the IEP at issue was developed, the student was a 17 year-old who had received a diagnosis of Down's syndrome at birth, and who had received early intervention and preschool special education services until he entered public school, which he attended until the age of thirteen (Tr. pp. 203-04; Dist. Ex. 2 at p. 1). At the time of the impartial hearing the student was in his fourth year at the NPS (Tr. p. 204).

On April 16, 2013, a CSE convened to develop an IEP for the 2013-14 school year (Dist. Ex. 2 at p. 12).[1] The April 2013 CSE continued to find the student eligible to receive special education and related services as a student with an intellectual disability and recommended placement in a 12:1+1 special class in a specialized school (id. at pp. 9, 12).[2] The April 2013 CSE also recommended related services of one 30-minute session per week of speech-language therapy in a group, two 30-minute sessions per week of individual speech-language therapy, two 30-minute sessions per week of individual occupational therapy (OT), and one 30-minute session per week of individual physical therapy (PT) (id. at p. 9). The April 2013 CSE also provided for an extended school year and specified that the student would be provided with special class instruction and speech-language therapy in Yiddish (id. at pp. 9, 12).

By final notice of recommendation (FNR) dated June 11, 2013, the district summarized the special education and related services recommended in the April 2013 IEP, and identified the particular public school site to which the district assigned the student for the 2013-14 school year (Dist. Ex. 8).

On June 17, 2013, the parent sent a letter to the district rejecting the April 2013 IEP because she believed the district did not properly evaluate the student, that the IEP did not include appropriate annual goals, short-term objectives, or transition services, and because the program offered was not in the student's least restrictive environment (LRE) (Parent Ex. A at p. 1-2). The parent also informed the district that if the district did not cure the alleged procedural and substantive defects, she would place the student at the NPS and seek funding from the district (id. at pp. 2-3).

Subsequently, the parent visited the assigned school, and by letter dated July 8, 2013, informed the district that she was rejecting the recommended school because it was not clear "whether the school could actually implement [the student's] IEP in the terms of the Yiddish instruction" and because "there is little to no mainstreaming opportunities available" (Parent Ex. C). Thereafter, on July 30, 2013, the parent signed an enrollment contract for the student's attendance at the NPS for the 2013-14 school year (Parent Ex. D).[3]

A. Due Process Complaint Notice

In a due process complaint notice dated September 27, 2013, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2013-14 school year (Parent Ex. B). Specifically, the parent asserted that the April 2013 CSE did not "rely

[1] The copy of the April 2013 IEP submitted into evidence is devoid of any marks in areas that have checkboxes to indicate responses to specific questions (Dist. Ex. 2). For example, the IEP calls for information such as "IEP amendment" and "Reconvene of IEP meeting" followed by checkboxes for yes or no (Dist. Ex. 2 at p. 12). However, none of those checkboxes are marked in the IEP (see Dist. Ex. 12).

[2] 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]).

[3] Although the contract includes the tuition costs for a two-month summer program, the parent is not seeking reimbursement from the district for the costs of the summer program (Tr. p. 121; Parent Ex. D at p. 1).

on necessary evaluations," did not reference any testing or evaluations in the IEP, did not identify the student's functional levels in decoding, writing, math calculation, or math problem solving, and included inconsistent information regarding the student's reading and math levels (id. at p. 2). Further, and in making its recommendation for a 12:1+1 special class in a specialized school, the parent contended that the CSE did not consider all options along the continuum of services, based its program recommendation on programs available rather than the student's needs, and ignored input from the parent and principal of the NPS indicating the student required a more individualized and inclusive program (id. at p. 3). The parent further alleged that the CSE's recommendation for a 12:1+1 special class was too large and not sufficiently supportive, and that the recommendation for a bilingual paraprofessional in a class with instruction in English was not appropriate because the student would not be able to communicate with peers or fully understand the lessons (id. at p. 2-3). The parent also alleged that the recommendation for placement in a specialized school was not in the student's LRE (id. at pp. 2-3), and that the April 2013 IEP lacked management needs related to activities of daily living (ADL) skills or to the student's variable attention, low frustration tolerance, language deficits, and need for individualized attention (id.at p. 3). Moreover, the parent asserted that the annual goals and short-term objectives did not address the student's areas of deficit and were generic, vague, and did not include a baseline from which to work (id. at pp. 3-4), and she contended that the April 2013 CSE did not follow proper procedures in developing a transition plan by failing to include the student or a service provider in the development process and by failing to conduct a vocational assessment (id.at pp. 4-5). As a result of the perceived failures in the development of the transition plan, the parent asserted that the transition plan was inadequate, that the transition services were vague and generic, and that the IEP did not include applicable and measurable goals for the transitional services (id.). Finally, the parent asserted that she visited the assigned public school site and found it to be inappropriate because it could not provide bilingual Yiddish instruction in the classroom or in speech-language therapy, offered infrequent mainstreaming opportunities, and could not offer an appropriate academic and social/emotional peer group (id. at p. 5).

B. Impartial Hearing Officer Decision

An impartial hearing was convened on February 7, 2014 and concluded on March 26, 2014 after three days of nonconsecutive hearings (Tr. pp. 1-271). In a decision dated June 13, 2014, an IHO found that the student was not entitled to tuition reimbursement and/or the payment of tuition to the nonpublic school for the 2013-14 school year (IHO Decision at p. 26). In this regard the IHO made a number of findings, including that the April 2013 CSE "meaningfully considered the appropriate programs on the continuum," that the recommendation for a 12:1+1 special class in a specialized school was appropriate to address the student's significant cognitive, academic, language, and other delays, and that a 12:1+1 special class in a specialized school was the student's LRE (id. at pp. 18-20). In addition, the IHO suggested that the goals included in the April 2013 IEP were appropriate (id. at p. 20), and found that the transition services and goals were discussed during the April 2013 CSE meeting, and that the April 2013 IEP correctly indicated that the student would benefit from instruction in all areas of daily living (id.at pp. 20-21). The IHO also found that although problematic, the district's failure to conduct a vocational assessment did not rise to the level of a denial of FAPE (id. at p. 21), and that the provision of a bilingual paraprofessional in the event a bilingual classroom was not available would have been sufficient to provide the student with an educational benefit (id. at pp. 21-22). Further, the IHO found that the parent's

claims regarding the assigned school were speculative (id. at p. 22). Accordingly, the IHO found the district offered the student a FAPE for the 2013-14 school year.[4]

In addition, the IHO found a number of reasons why the NPS would not have been an appropriate placement for the student, most significantly determining that the school identified only generic curriculum and did not identify specific strategies or services specifically designed to meet the student's unique needs (IHO Decision at pp. 23-24). In addition, the IHO found that the school did not employ teachers with training to work with special education students, and that the parent did not submit any evidence regarding the summer portion of the school year (id.at pp. 24-25).[5] The IHO, however, found that the parent cooperated with the district, and that there was no reason to rule against the parent based on equitable considerations (id. at p. 26).

IV. Appeal for State-Level Review

The parent appeals the IHO's decision and asserts that the IHO erred in finding that the district "sustained its burden of proving that it provided a FAPE" to the student. In particular the parent alleges that the district did not meet its burden of proof because the district's witness did not have a specific recollection of what transpired during the April 2013 CSE meeting and testified only as to what is typically done during CSE meetings, that this witness admitted that all of the academic goals, related service goals, and transition goals in the IEP were created based on reports and information from the NPS, and that a 12:1+1 class size was recommended based on the district's continuum of services rather than the student's needs and was chosen because it was the staffing ratio used at the private school. In addition, the parent contends that the IHO erred with respect to her findings regarding the district's "failure" to provide a bilingual Yiddish program, asserting that the April 2013 IEP did not include a recommendation for a bilingual paraprofessional in a classroom with instruction in English as an interim placement, that the district "made no showing" that it meaningfully assessed the student's proficiency in English prior to recommending provision of services in English with a bilingual paraprofessional, and that the student required bilingual instruction to make progress. The parent also asserts that district failed to conduct a vocational assessment, and that the transition plan included in the April 2013 IEP was vague, generic, and did not "provide sufficient information to be capable of any meaningful implementation." The parent further argues that the IHO erred in dismissing her claims related to the assigned public school site, contending that the district was obligated to prove that the assigned public school site was capable of implementing the April 2013 IEP, and that her claims are not speculative because the student was enrolled at the NPS after the start of the 12-month 2013-14 school year. The parent also asserts that the assigned public school site was inappropriate because it could not provide an appropriate peer group or mainstreaming opportunities.

[4] Specifically, the IHO found that the "CSE's recommendation of a 12:1+1 special class in Yiddish or with an interim placement bilingual para, related services and the program accommodations and strategies were designed to provide the Student with sufficient individualized support such that his IEP was reasonably calculated to enable the student to receive educational benefit for the 2013-14 school year" (IHO Decision at p. 22).

[5] Notwithstanding the finding that the NPS was not an appropriate placement, the IHO did find that the student benefitted from mainstreaming at the NPS even though the regular education students were four to five years younger than the student (id. at p. 25).

In addition to the above, the parent appeals the IHO's finding that the NPS was not an appropriate placement for the student, contending that the NPS is a "small, structured, full-time special education school" and that it provides an individualized program, including a life skill curriculum to address ADL skills, an appropriate peer grouping, and mainstreaming opportunities. The parent also alleges that the school uses individualized worksheets to tailor lessons to the student's needs, and that the student has responded positively to the program at the NPS and has made "concrete" progress.

The district answers, generally denying the allegations contained in the petition and asserting that the IHO was correct in finding that the district offered the student a FAPE for the 2013-14 school year and that the NPS was not an appropriate placement. In addition, the district argues that the parent did not appeal several of the IHO's findings and that these determinations are final and binding, including the appropriateness of a 12:1+1 classroom, the annual goals and short-term objectives, the level of related services, and the accommodations and strategies included in the April 2013 IEP. The district also asserts that in the event the parent is awarded relief, the relief should be reduced by 30-percent to account for the portion of the school day for which the student received religious instruction at the NPS.

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 a 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 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. Scope of Review

As an initial matter, the parent raised a number of issues in her due process complaint notice that are not raised on appeal. These include claims that appear to relate to the general sufficiency of the evaluative data considered by the April 2013 CSE (the parent claimed, for example, that the district did not rely on "necessary evaluations to properly gauge [the student's] current skill levels"),[6] claims relating to the April 2013 IEP's description of the student's present levels of performance, and claims relating to the student's management needs. Accordingly, these issues will not be reviewed (8 NYCRR 200.5[k], 279.4[a]).[7] In addition, the district asserts, and I agree, that the parent has not appealed several of the IHO's findings including the appropriateness of a 12:1+1 classroom, the sufficiency of related services in the April 2013 IEP, and the sufficiency

[6] To the extent that the parent specifically contends on appeal that the April 2013 CSE did not adequately assess the student's English proficiency prior to recommending a bilingual paraprofessional, this allegation is addressed below.

[7] While the parent makes the broad allegation in her petition that the IHO erred in finding that the district sustained its burden of proving that it provided the student with a FAPE for the 2013-14 school year, she does not allege any specifics with respect to this claim. In that regard I note that it is not an SRO's role to research and construct the parties' arguments or guess what may have been intended (see, e.g., Gross v. Town of Cicero, 619 F.3d 697, 704 [7th Cir. 2010] [finding that an appellate review does not include researching and constructing the parties' arguments]; Fera v. Baldwin Borough, 350 Fed. App'x 749, 752-53, 2009 WL 3634098 [3rd Cir. Nov. 4, 2009] [finding that a party on appeal should at least identify the factual issues in dispute]; Taylor v. American Chemistry Council, 576 F.3d 16, 32 n.16 [1st Cir. 2009]; Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 841 [10th Cir. 2005] [noting that a generalized assertion of error on appeal is not sufficient]; Lance v. Adams, 2011 WL 1813061, at *2 [E.D. Cal. May 6, 2011] [finding that the tribunal need not guess at the parties' intended claims]; Bill Salter Advertising, Inc. v. City of Brewton, 2007 WL 2409819, at *4 n.3 [S.D. Ala. Aug. 23, 2007]).

of the accommodations and strategies included in the April 2013 IEP.[8] Accordingly, these issues are final and binding on the parties (8 NYCRR 200.5[k], 279.4[a]; see also 34 CFR 300.514[b]).

B. Parent Participation/Predetermination

The parent, in her due process complaint notice, made a number of allegations that suggest that the program offered to the student for the 2013-14 school year was predetermined and/or developed without her input. Similar allegations are made in the petition where, for example, the parent alleges that the program provided to the student was based, not on his individual needs, but "on what was available with the [district's] continuum of services" (Pet. at ¶ 15). As noted above, the IHO disagreed with the parent on this issue and found that the CSE "meaningfully considered the appropriate programs on the continuum" for the student (IHO Decision at pp. 18-19). As a preliminary matter, therefore, I will address this issue.

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation"]; Sch. for Language & Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]; Paolella v. District of Columbia, 210 Fed. App'x 1, 3 [D.C. Cir. Dec. 6, 2006]).

In accord with the IHO's decision, the hearing record indicates that the parent and the principal from the NPS had an opportunity to participate in the April 2013 CSE meeting. Participants at the April 2013 meeting included a district representative, who was also a bilingual social worker, a district school psychologist, a special education teacher, a parent member, and via telephone, the parent and the principal of the NPS (Dist. Ex. 2 at p. 15).

Contrary to the parent's allegation that the April 2013 CSE did not base the program recommendation on the student's needs, the district representative testified that the CSE recommended placement in a 12:1+1 special class in a specialized school because the CSE believed the student would benefit from being in a small classroom setting due to his "extremely low" test scores (Tr. pp. 47-48). The April 2013 IEP indicates that the CSE considered a placement

[8] As noted above, the district also contends that the parent failed to appeal the IHO's findings with respect to the sufficiency of the annual goals and short-term objectives in the April 2013 IEP. While I generally agree, I note that the parent accuses the district's witness at the hearing of admitting that all of the goals in the IEP (including the related service goals and transition goals) "were created based on the reports and information provided by [the NPS] teachers and staff" (Pet. at ¶ 13). Accordingly, I will treat this as a challenge to the sufficiency of the goals in the IEP and consider the issue below.

in a special class in a community school but rejected it because it could not address the student's global delays (Dist. Ex. 2 at p. 13). The IEP also indicates the CSE considered home instruction but rejected it as being too restrictive (id.).

The parent testified that she attended the April 2013 CSE meeting via telephone (Tr. p. 217). She did not remember what programs the CSE considered, but she did remember that the CSE recommended placement in a 12:1+1 special class and that she did not question the placement during the meeting (Tr. pp. 217-18). Further, the district representative testified that the CSE discussed things like the goals and the recommendation for a bilingual paraprofessional; however, she did not remember if the parent or the NPS's principal voiced any concerns at the meeting about these things (Tr. pp. 51-53, 55-56).[9] The principal from the NPS testified that he participated in the April 2013 CSE meeting by telephone and confirmed that a discussion took place regarding the student's language of instruction and an interim bilingual paraprofessional (Tr. pp. 116-18).

In this instance, although neither the district representative nor the parent had a perfect recollection of the discussions that took place during the April 2013 CSE meeting, their testimony indicates that discussions did take place concerning the recommended program and a bilingual paraprofessional and there is no indication that the parent was prevented from participating in the development of the IEP (Tr. pp. 52-53, 55-56, 116-18, 217-18). The IDEA, rather than requiring parental consent to an IEP, "'only requires that the parents have an opportunity to participate in the drafting process'" (D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *11 [E.D.N.Y. Sept. 2, 2011], quoting A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208, 216 [D. Conn. 2006]; see E.F., 2013 WL 4495676, at *17 [noting that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; see also T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [noting that the IDEA gives parents the right to participate in the development of their child's IEP, not a veto power over those aspects of the IEP with which they do not agree]). Accordingly, the hearing record does not support the parent's allegations that the April 2013 CSE predetermined the student's program recommendation or deprived the parent an opportunity to participate in the development of the IEP.

C. Annual Goals

In her due process complaint notice, the parent raised issues regarding the sufficiency of the annual goals contained in the April 2013 IEP (Parent Ex. B at pp. 3-4). In this regard the parent contended, without elaboration, that the annual goals and short-term objectives were generic, vague, and did not accurately reflect the student's educational and social/emotional needs, did not provide a baseline, and did not address the student's areas of deficit (id.). Though the IHO did not

[9] The district representative also testified that the annual goals were created based on a report from the NPS prior to the April 2013 CSE meeting and were discussed during the meeting with the parent and the principal from the NPS (Tr. pp. 50-51). As the IDEA does not require that goals be drafted at the CSE meeting, the drafting of goals prior to the April 2013 CSE meeting did not constitute a denial of FAPE (see, e.g., G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *22 [S.D.N.Y. March 29, 2013], aff'd, 554 Fed. App'x 56 [2d Cir. Feb. 11 2014]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at * 8 [S.D.N.Y. Sept. 29, 2012]).

make an explicit finding on this issue, her decision strongly suggests that she found that the annual goals contained in the April 2013 IEP were sufficient.

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]).

Contrary to the parent's assertions, the hearing record reflects that the annual goals and short-term objectives were written to reflect the student's needs. The student's April 2013 IEP contained approximately 17 measurable annual goals and 40 short-term objectives to address the student's needs in the areas of academics, social/emotional, self-help, motor, and speech-language (Dist. Ex. 2 at pp. 3-8). Each goal included evaluative criteria (e.g., 75% accuracy, 80% accuracy, 4 out of 5 times, etc.), evaluation procedures (e.g., teacher/provider observations), and a schedule to be used to measure progress (e.g., one time per quarter/month). According to testimony by the district representative, the academic goals were developed based on reports from the NPS, and the speech, OT, and PT goals were developed by the student's related services providers from the NPS (Tr. pp. 50-51).

According to a "Readiness-Personal Data Response" checklist, the student was either not assessed or was unable to be assessed in his ability to identify a dollar or equivalent values of coins, which corresponds with an annual goal and short-term objectives in the April 2013 IEP for the student to identify half dollars, dollars, and equivalent values (compare Dist. Ex. 2 at p. 4, with Dist. Ex. 4 at p. 9).[10] As indicated in the student's January 2012 psychoeducational evaluation, the student demonstrated significant weakness in reading comprehension skills (Dist. Ex. 6 at p. 5), and to address this area the April 2013 IEP contained objectives for the student to retell a story and answer questions related to a story (Dist. Ex. 2 at p. 4). The "Readiness-Personal Data Response" checklist also indicated that the student did not display calendar skills such as identifying the day of the week when given the date, and identifying time duration when given dates (Dist. Ex. 4 at p. 9). To address this area the April 2013 IEP included goals related to using a calendar (Dist. Ex. 2 at p. 5). In addition, goals related to the student's dressing skills, self-help skills, writing skills, phonological awareness, oral motor skills, and his ability to expand utterances, properly use nouns, pronouns, and verbs were all taken verbatim from related services reports provided by staff at the NPS (Tr. p. 51; compare Dist. Ex 2 at pp. 5-7, with Dist. Ex. 7 at pp. 2, 4). The NPS principal described the student's needs in the area of physical therapy as related to his gait, posture, navigating stairs and ball skills (Tr. p. 93), consistent with goals contained in

[10] The "Readiness-Personal Data Response" is a checklist used by the staff at the NPS to record the student's knowledge of basic concepts (see Dist. Ex. 4). The checklist contains many blank boxes, but it is not explained whether the student failed to display the skill or if he was not tested for the skill (Dist. Ex. 4 at p. 9).

the April 2013 IEP related to improving his gross motor skills, gait, ball skills, balance and posture (Dist. Ex. 2 at p. 8).

I do, however, note that according to the "Readiness-Personal Data Response" checklist, the student was able to tell time by the hour, and the April 2013 IEP included a goal for the student to demonstrate proficiency in telling time to the hour within one year (compare Dist. Ex. 2 at p. 3, with Dist. Ex. 4 at p. 8). However, the parent has not asserted, either on appeal or in her due process complaint notice, that the student had already met any of the annual goals (Parent Ex. B), and the district representative's testimony indicates that the April 2013 CSE reviewed the annual goals at the CSE meeting and the parent and the NPS principal had an opportunity to raise objections at that time (Tr. pp. 40-41, 51-52). Further, and even assuming that the student may have met one of the annual goals at the time of the April 2013 CSE meeting, the annual goals and short-term objectives, when read together, were sufficiently measurable and detailed, and adequately addressed the student's identified educational needs 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 inaccurate as to constitute the denial of a FAPE (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]).

D. Bilingual Instruction

The parent argues on appeal that the student required a bilingual classroom in order to make educational, social, and emotional progress, and she raises concerns about the possibility of "a contingency for placement in a monolingual classroom" with a temporary bilingual paraprofessional should a bilingual classroom not be provided. As noted above, the parent further argues that (a) the April 2013 IEP does not actually provide for the contingent use of a bilingual paraprofessional, and that (b) the district "made no showing" that it "meaningfully assessed" the student's proficiency in English prior to making such a program recommendation. The district generally denies the parent's allegations and asserts that the placement of the student in a "monolingual classroom" with a bilingual paraprofessional on an interim basis would have been appropriate. As noted above, the IHO generally agreed with the district.

As an initial matter, the district contends that the parent failed to raise the issue of whether or not the April 2013 IEP actually provides for the use of a bilingual paraprofessional in her due process complaint notice. The party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student With a Disability, Appeal No. 13-151). However, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; J.C.S. v Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *8-*9 [S.D.N.Y. Aug. 5, 2013]; see K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. July 24, 2013]). Upon review, I find that the parent's

due process complaint notice cannot reasonably be read to include the issue of whether the April 2013 IEP provides for the use of a bilingual paraprofessional. In fact, the parent's due process complaint notice affirmatively alleges that while the April 2013 IEP requires bilingual instruction, it "further recommends . . . an 'Alternate Placement Paraprofessional,'" which the parent goes on to allege "is no substitute for bilingual instruction in the classroom" (Parent Ex. B at p. 2). Accordingly, I find that this issue is not properly raised on appeal.

Further, and even if this issue were properly raised, I would find that the contention lacks merit. Although not as clearly as would be desirable, the April 2013 IEP indicates that the CSE recommended the service of a bilingual paraprofessional as an interim placement in the event a bilingual classroom with instruction in Yiddish was not available (Dist. Ex. 2 at pp. 2, 13). Specifically, the IEP indicates that the student would benefit from a setting with "an alternate placement bilingual para-professional" (id. at p. 2), and further provides that in the event that a provider was not available who spoke Yiddish that "[t]he student should be placed in an interim monolingual class" (id. at p. 13). The district representative testified that the April 2013 CSE recommended placement in a bilingual class, but that in the event a bilingual class was not available the student would receive a bilingual paraprofessional as an interim placement, and both the district representative and the principal from the NPS testified that the recommendation for a bilingual paraprofessional was discussed during the April 2013 CSE meeting (Tr. pp. 45-47, 55, 117-18). Additionally, based on the parent's July 1, 2013 letter to the district, the parent understood that the district was recommending that the student be provided a bilingual Yiddish paraprofessional as an interim placement (Parent Ex. C). Based on all of the above, I find that the April 2013 IEP included a recommendation for a bilingual paraprofessional as an interim placement in the event that a classroom with instruction in Yiddish was not available.

The above being said, the district's recommendation for a bilingual paraprofessional in a monolingual classroom, as an interim placement, must be appropriate to address the student's language needs. A CSE must consider special factors including a student's communications needs and, in the case of a student with limited English proficiency, how the student's language needs relate to the student's IEP (34 CFR 300.24[a][2][ii], [iv]; 8 NYCRR 200.4[d][3][ii], [iv]). 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. [Mar. 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. For example, the April 2013 IEP provides that the student should receive instruction and certain services in Yiddish, and alternatively notes that the student "would benefit from a small specialized setting (12:1:1) with an alternate placement bilingual para-professional" (Dist. Ex. 2 at p. 2). In addition, as discussed above, discussions took place during the April 2013 CSE meeting regarding the student's language needs and the recommendation for a bilingual paraprofessional (Tr. pp. 55, 116-18). The district representative testified that the April 2013 CSE recommended a bilingual Yiddish classroom because that would have been "the most appropriate placement" for the student due to "his current setting and his functioning level" (Tr. p. 56). However, the district representative also testified that based on the bilingual psychoeducational report, an interim bilingual paraprofessional in a monolingual classroom would have been sufficient to meet the student's needs (Tr. pp. 57-58).

Moreover, I am unable to find, as the parent suggests, that the use of a Yiddish-speaking paraprofessional would have denied the student a FAPE in this matter. The hearing record indicates that the April 2013 CSE had several sources of evaluative information available in developing the student's IEP, including a report from a January 2013 classroom observation, a January 2012 bilingual psychoeducational evaluation report, and various reports produced in January 2013 by the NPS (Tr. pp. 40-41, 116-17; Dist. Exs. 3-7).[11] The January 2012 psychoeducational evaluation report indicates that the assessment was conducted in both English and Yiddish (Dist. Ex. 6 at p. 2),[12] that the student spoke and understood English, and that during the evaluation the student responded primarily in English (though the report indicates that Yiddish translations enhanced his performance) (id. at p. 2). Further, the district representative testified that, based on the psychoeducational report, the April 2013 CSE determined that a bilingual paraprofessional would have been sufficient to address the student's language needs (Tr. pp. 57-58). Accordingly, there is evidence in the record before me (which the CSE was able to, and did, rely upon) which indicates that the student understood both English and Yiddish, and supports a finding that the CSE's recommendation for an interim placement in a classroom with instruction in English and the support of a bilingual paraprofessional was appropriate to meet the student's needs (Tr. pp. 57-58; Dist. Ex. 6 at p. 2). Thus, to the extent that the parent contends that the district made "no showing" that it meaningfully assessed the student's English proficiency (Pet. at ¶ 29), I find that this claim lacks merit.[13]

[11] Reports from the NPS included in the hearing record are the "Readiness-Personal Data Response," a career interests checklist, and reports from the student's speech-language and OT providers (Dist. Exs. 4-5; 7).

[12] While the January 2012 psychoeducational evaluation identified the "Language of Assessment" as Yiddish on the first page (Dist. Ex. 6 at p. 1), it goes on to note, as described above, that the evaluation was conducted in both Yiddish and English (id. at p. 2).

[13] In this regard I note that the parent cites to Application of a Child with a Disability (Appeal No. 05-131), and suggests that the district was required to conduct an evaluation to specifically determine the student's language proficiency prior to recommending the use of a bilingual paraprofessional. However, Application of a Child with a Disability (Appeal No. 05-131) is distinguishable from the present case and need not be read that broadly. Specifically, in Application of a Child with a Disability (Appeal No. 05-131), an SRO found that the IEP at issue suggested that the student's primary need was to receive instruction in Spanish, that the student was unable to benefit from instruction in English, and that while there was some suggestion that the student's skills in English

I do, however, note that the principal of the NPS testified that a bilingual paraprofessional would not be sufficient for the student (Tr. pp. 94-95, 117-18). However, the IHO discredited the testimony of the principal of the NPS regarding the language of instruction at the NPS, noting that his testimony "was all over the place" (IHO Decision at pp. 24-25). Upon review, although the NPS's principal's testimony is not necessarily contradictory, it does not provide a clear description of what language the student may have been instructed in at the NPS (Tr. pp. 94-95, 101, 124-27).[14] For example, while the principal testified that the majority of instruction at the NPS was provided in Yiddish, he indicated that the class was bilingual, that written materials were in English, that while oral delivery was in Yiddish, some students in the class did not speak Yiddish, and that instruction was provided in Yiddish followed by instruction in English (id.). The parent also testified that instruction at the NPS was provided in Yiddish and translated into English (Tr. pp. 228-29).

In addition, I note that the parent expresses a concern that the student would "miss half the instruction by the teacher" with the service of a bilingual paraprofessional rather than a bilingual Yiddish classroom (Parent Ex. C), and that the principal at the NPS also expressed this concern (Tr. pp. 117-18).[15] In this regard, while I can understand that the parent wanted the student to be in a bilingual classroom, as even the district representative described it as the "most appropriate placement" for the student, I note that the district is not required to "maximize the potential" of students with disabilities, but instead must offer only "a basic floor of opportunity" (Rowley, 458 U.S. at 200 [overturning the Second Circuit's decision that the district was required to provide a deaf student with a sign-language interpreter where student was only able to access 59% of instruction without an interpreter]). Accordingly, and considering the bilingual psychoeducational evaluation and the evidence that the student may have received at least some of his instruction at

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were sufficient for him to benefit from services in English, the record was not clear regarding the student's proficiency in English (id.). Accordingly, the SRO reasoned that the district could not recommend a bilingual paraprofessional without reevaluating the student to assess whether the student would benefit from such a placement. By contrast, and as noted above, in this case the student's last bilingual psychoeducational evaluation report provided that the student understood both English and Yiddish and supports a finding that the CSE's recommendation for an interim placement in a classroom with instruction in English and the support of a bilingual paraprofessional was appropriate to meet the student's needs (Tr. pp. 57-58; Dist. Ex. 6 at p. 2).

[14] The IHO also relied on testimony from an educational consultant, who testified that during his observation of the student at the NPS in February 2014 the language of instruction was mostly in English (IHO Decision at pp. 24-25). It is not clear whether the testimony from the principal at the NPS was referencing the language of instruction during the 2012-13 or 2013-14 school years or both; however, the observation took place during the 2013-14 school year and accordingly only relates to the 2013-14 school year (Tr. p. 82; Parent Ex. U). Accordingly, while the educational consultant's testimony is not necessarily in direct conflict with the testimony of the principal of the NPS, it does corroborate the IHO's determination that the principal's testimony regarding the language of instruction was not credible.

[15] The parent testified that the student would become too distracted by translation of instruction from English to Yiddish (Tr. p. 229). However, as the hearing record indicates the student was bilingual and spoke English and Yiddish (Tr. pp. 58, 101, 124, 164, 228; Dist. Ex. 6 at p. 2), the translation may have helped address the student's attention. Specifically, and although the bilingual psychoeducational evaluation report indicated the student was "easily distracted," it also indicates that he benefited from "constant repetition" (Dist. Ex. 6 at p. 1). As a bilingual paraprofessional would repeat the instruction by translating it from English into Yiddish for the student, this would provide repetition and could help address the student's attention deficits.

the NPS in English, the hearing record supports a finding that the student would have received educational benefits from a monolingual class with a bilingual paraprofessional (Dist. Ex. 6 at p. 2; Tr. pp. 94-95, 101, 124-27, 164, 228-29).

E. Transition Services

Under the IDEA, to the extent appropriate for each individual student, an IEP must focus on providing instruction and experiences that enable the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34]; see Educ. Law § 4401[9]; 34 CFR § 300.43; 8 NYCRR 200.1[fff]). Accordingly, pursuant to federal law and State regulations, an IEP for a student who is at least 16 years of age (15 under State regulations), or younger if determined appropriate by the IEP Team, must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills (20 U.S.C. § 1414[d][1][A][i][VIII]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]).

IEPs must also include the transition services needed to assist the student in reaching those goals (20 U.S.C. § 1414[d][1][A][i][VIII]; 34 CFR 300.320[b]). In this regard, State regulations require that an IEP include a statement of a student's needs as they relate to transition from school to post-school activities (8 NYCRR 200.4[d][2][ix][a]),[16] as well as the transition service needs of the student that focuses on the student's course of study, such as participation in advanced placement courses or a vocational education program (8 NYCRR 200.4[d][2][ix][c]). The regulations also require that the student's IEP include needed activities to facilitate the student's movement from school to post-school activities, including instruction, related services, community experiences, the development of employment and other post-school adult living objectives and, when appropriate, acquisition of daily living skills and a functional vocational evaluation (8 NYCRR 200.4[d][2][ix][d]), as well as a statement of responsibilities of the school district (or participating agencies) for the provision of services and activities that "promote movement" from school to post-school.

Here, where the district offered a transition plan as part of the student's April 2013 IEP, the issue is whether the transition plan was adequate, and, if not, whether the inadequacy rose to the level of denying the student a FAPE. Upon review, as the student was working on pre-vocational skills at the time of the CSE meeting (Tr. pp. 184-85), I see no reason to depart from the IHO's finding that the April 2013 IEP addressed the student's pre-vocational needs by indicating the student would benefit from instruction in all areas of daily living (IHO Decision at pp. 20-21; Dist. Ex. 2 at p. 3). Further, the student's April 2013 IEP included measurable post-secondary goals and a coordinated set of transition activities to facilitate the student's movement to post school activities (Dist. Ex. 2 at pp. 3, 10-11). In addition, the student was expected to become aware of community resources, identify career interests, and to continue to develop self-help skills (id. at pp. 10-11).

Additionally, the district's failure to conduct a vocational assessment, although a procedural violation, does not necessarily render an IEP inadequate where the CSE relied on

[16] These are supposed to be listed in the present levels of performance section of a student's IEP (see 8 NYCRR 200.4[d][2][ix][a]).

sufficient information (R.B. v. New York City Dep't of Educ., 2014 WL 1618383, at *7 [S.D.N.Y. Mar. 26, 2014]). The district representative testified that the student's transition goals were developed in collaboration with a district special education teacher and staff from the NPS during the April 2013 CSE meeting (Tr. p. 52). However, the district representative was not sure whether the district conducted or relied upon a functional vocational assessment in developing the student's April 2013 IEP (Tr. pp. 63-64). Nevertheless, the hearing record included a document prepared by the NPS titled "career interests," which indicated the student's preferences regarding the types of work situations the student favored (Dist. Ex. 5). For example, the document indicates that the student preferred to work alone, to work while sitting, to try new tasks, to perform tasks rather that showing others how to do them, to work outdoors, and to work in a quiet setting (id.). In addition, the student reportedly indicated that it was more important to him to make money than to help others, preferred to share ideas by writing rather than speaking, preferred a job that required physical energy rather than thinking, that allowed him to stay clean rather than getting dirty, and to work with objects rather than people (id.). Accordingly under these circumstances, the district had sufficient information to determine the student's vocational skills, aptitudes, and interests, and the failure to conduct a vocational assessment did not impede the student's right to a FAPE, significantly impede the parent's opportunity to participate in the decision making process, or cause a deprivation of educational benefits (see, e.g., R.B., 2014 WL 1618383, at *7; Scott v. New York City Dep't of Educ., 2014 WL 1225529, at *12 [S.D.N.Y. March 25, 2014]).

F. Least Restrictive Environment

The parent asserts that the recommended program was not in the student's LRE, contending that the April 2013 IEP did not provide for any mainstreaming opportunities even though the student derived educational gains from integrating with typically developing peers (Pet. at ¶¶ 34-36). In contrast, the district asserts that the "record does not demonstrate that [the student] required exposure to nondisabled peers in order to receive an educational benefit," and that the student's "significant cognitive, academic, and ADL deficits warrants placement in a structured program such as a specialized school" (Answer ¶ 48).

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 v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; 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 the student or on the quality of services that he or she needs (34 CFR 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]).

As noted above, the district argues that the student did not require access to regular education peers in order to receive a FAPE, but this misses the purpose of the LRE requirement. Rather, the IDEA expresses "a strong preference" for educating students with disabilities alongside their nondisabled peers "to the maximum extent appropriate" (Walczak, 142 F.3d at 132). Although the Second Circuit recognizes that this creates a "tension between the IDEA's goal of providing an education suited to a student's particular needs and its goal of educating that student with his non-disabled peers as much as circumstances allow" (Newington, 546 F.3d at 119), provision of a FAPE alone does not automatically meet the LRE requirements (see L.B. ex rel. K.B. v Nebo School Dist., 379 F3d 966, 975 n.13 [10th Cir 2004] [A district must both provide a FAPE and ensure that FAPE is provided in the LRE to the maximum extent appropriate]). Accordingly, the district's argument is without merit, and a fact-specific inquiry into the program offered to the student must be conducted to determine whether the district's recommended program was in the LRE for the student (see Newington, 546 F3d at 120).

To assist in this fact-specific inquiry, 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. v. State Bd. of Educ., 874 F.2d 1036, 1048-50 [5th Cir. 1989]). As both parties agree that the student should be placed in a special class and thus removed from a general education classroom setting, the first prong of this test is not at issue. Accordingly, whether the district's program is in the LRE 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).

With respect to the program offered to the student, the April 2013 IEP contains some contradictory statements as to how the student would be mainstreamed in the recommended program (Dist. Ex. 2 at pp. 2, 11). According to the April 2012 IEP, for example, the student was precluded from participating in regular classes due to the student's significant cognitive, language, and academic delays (id. at p. 11). The IEP further indicates that the student would be placed in a special class for 35 periods per week and would be provided with adapted physical education (id. at pp. 7, 9, 11). However, the IEP also provides, with respect to the effect of the student's needs on involvement and progress in the general education curriculum, that the student would have "[f]ull participation in all school activities" without further explanation (id. at p. 2). Based on the above, an examination of the April 2013 IEP does not provide sufficient information as to the extent the student would participate in school activities with nondisabled peers.

Further, and while the April 2013 IEP is unclear with respect to mainstreaming opportunities, the IEP indicates that the student could have benefitted from interaction with

nondisabled peers, as the IEP described the student as "very social" and as liking "to be involved in activities with his peers" (Dist. Ex. 2 at p. 1). In addition, according to the bilingual psychoeducational evaluation, the student maintained a comfortable distance in social situations, was able to follow rules in playing simple card or board games, and understood that gentle teasing may be a form of humor or affection (Dist. Ex. 6 at p. 6). However, the student was not able to play games involving skill or decision making or engage in conversations about shared interests or small talk (id.).

Based on the above, I find that the April 2013 CSE was aware that the student exhibited an ability to participate in activities with nondisabled peers (Dist. Exs. 2 at p. 1; 6 at p. 6), and that it should have taken the student's abilities into account and indicated the extent to which the student would be mainstreamed on the IEP (Dist. Ex. 2 at pp. 2, 11). Accordingly, even though the district may have been justified in removing the student from a general education setting, given the CSE's failure to clearly indicate how and when the student would be included in school programs with nondisabled students, I am unable to find that the student was mainstreamed to the maximum extent appropriate, or that the district offered the student a FAPE in the LRE. The IHO's decision, therefore, must be modified on this basis.

G. Unilateral Placement

Having determined that the district has not shown that it offered the student a FAPE in his LRE for the 2013-14 school year, I need not address the parent's remaining contentions related to the provision of a FAPE, including the sufficiency of the assigned public school site.[17] Instead, I

[17] I am, however, compelled to note that Second Circuit Court of Appeals has been clear that where an IEP is rejected by a parent before a district has had an opportunity to implement it, the focus must be "on the written plan offered to the Parents," and that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see, e.g., K.L. v. New York City Dep't of Educ., 530 Fed.Appx. 81, 87 [2d Cir. 2013]; F.L., 553 Fed. Appx. at 9). Accordingly, I am inclined to agree with the IHO's finding that "the validity of the proposed placement is to be judged on the face of the IEP" (IHO Decision at p. 21, citing A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 286 [S.D.N.Y. 2014]) and to disagree with the parent's assertion in the Petition (Pet. ¶¶ 17-21) that the district must "proffer evidence" that the assigned public school site could have implemented the IEP. To that extent, I note that while some district courts have found that parents have a right to assess the adequacy of a particular school site to meet their children's needs (or that issues pertaining to a school site relate to the provision of a FAPE), the weight of the relevant authority, consistent with the precedent discussed above, supports the approach taken by the IHO (see B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at *20-*22 [E.D.N.Y. Mar. 31, 2014]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957 [S.D.N.Y. Mar. 31, 2014]; M.O. v. New York City Dept. of Educ., 2014 WL 1257924, at *2 [S.D.N.Y. Mar. 27, 2014]; E.H. v. New York City Dep't of Educ., 2014 WL 1224417, at *7 [S.D.N.Y. Mar. 21, 2014]; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *26 [E.D.N.Y. Aug. 19, 2013]; M.R. v New York City Bd. of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013]; A.M., 964 F. Supp. 2d at 286; N.K., 961 F. Supp. 2d 577, 588-90 [S.D.N.Y. 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *10 [S.D.N.Y. Feb. 20, 2013]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012], adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at *12-*14 [S.D.N.Y. June 16, 2014] [school district discharges its burden by establishing that it developed an IEP that is procedurally and substantively adequate; "[a]bsent non-speculative evidence to the contrary, it is presumed that the placement school will fulfill its obligations under the IEP"]; but see V.S. v. New York City Dep't of Educ., 2014 WL 2600313, at *4 [E.D.N.Y. June 10, 2014]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16 [S.D.N.Y. May 27, 2014]; Scott v. New York City Dep't of Educ., 2014

must address the appropriateness of the parent's unilateral placement of the student at the NPS for the 2013-14 school year which, as noted above, the IHO found was not an appropriate placement.

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. at 14).[18] 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. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "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' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ., 459 F.3d 356, 364 [2d Cir. 2006]; 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] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). 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.

WL 1225529, at *19 [S.D.N.Y. Mar. 25, 2014]; J.F. v. New York City Dep't of Educ., 2013 WL 1803983 [S.D.N.Y. Apr. 24, 2013]; D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13 [S.D.N.Y. 2013]; B.R. v. New York City Dep't of Educ., 910 F. Supp. 2d 670, 676-78 [S.D.N.Y. 2012]; E.A.M., 2012 WL 4571794, at *11).

[18] In addition, parents are not held as strictly to the standard of placement in the LRE as school districts (C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836-37 [2d Cir. 2014]; Frank G., 459 F.3d at 364; Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]; M.S v. Bd. of Educ., 231 F.3d 96, 105 [2d Cir. 2000] [stating that parents "may not be subject to the same mainstreaming requirements as a school board"]. As there is insufficient evidence in the hearing record to controvert the IHO's determination that the student benefitted from the mainstreaming opportunities available at the NPS, under the facts and circumstances of this case, the restrictiveness of the NPS would not preclude a finding that it was appropriate to meet the student's needs.

> 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. Academic Instruction

According to the testimony of the principal of the NPS, the NPS has 40 students enrolled, the majority of whom have received diagnoses of Down syndrome (Tr. p. 74).[19] The principal testified that the school's goal is to have every student "become independent in the community" (id.). Towards that goal the school provides an academic curriculum, pre-vocational, and vocational training (Tr. pp. 74-75). The principal explained that the academic curriculum at the NPS is developed for individual students by focusing on information that students would understand and use for "day to day living" (Tr. p. 81).

However, rather than explaining what special education instruction or supports the school used to address the student's unique needs, the NPS principal testified generally regarding the curricula used at the NPS and how the NPS chose a curriculum for the student (Tr. pp. 97-99, 104-12). For example, the principal asserted that the school had to "use many curriculums [sic] in many different ways" in order to teach the student (Tr. p. 104). The principal of the NPS also testified the school had previously provided the student with a curriculum which taught letter recognition and decoding, but because the student had progressed to a first grade level, based on testing, a new curriculum was selected, which provided instruction in reading comprehension and grammar (Tr. p. 98). The principal further stated that the math curriculum was chosen because it provided instruction in a concrete manner, and that the student required repetition to learn (Tr. p. 104). The principal also testified that it was important that the curriculum used with the student was concrete, practical, and visual in order for the student to grasp the information (Tr. p. 103).

[19] According to the educational consultant from the NPS, the NPS had 26 school-aged students and an additional 14 "students" over the age of 21 (Tr. p. 154-55).

Further, while documentation submitted by the NPS included information on the curriculum used at the NPS (Parent Ex. L), the document contains only a generic description of the subject areas addressed at the NPS and what appear to be various commercially prepared instructional programs that the school has available (Parent Ex. L). Additionally, as pointed out by the IHO, while a mid-year report provided by the NPS identified the student's curriculum and areas of instruction, it did not describe program modifications, strategies, or instructional methods specifically designed to address the student's unique needs (Parent Ex. M). The only strategies identified in the mid-year report are that the student's math and reading instruction were provided in small groups of two to three students and that math instruction included the use of worksheets and hands-on instruction (id. at p. 3). Overall, while the testimony of the NPS principal and the documentation submitted by the NPS provides significant details as to what the student was being taught, it provides very little information as to how instruction was being provided (Tr. pp. 97-99, 104-12; Parent Exs. L; M). Accordingly, I cannot find that the parent has met her burden of establishing that the NPS provided the student with education instruction specifically designed to address the student's academic needs (see Ward v. Bd. of Educ., 568 Fed. App'x 18, 22 [2d Cir. May 30, 2014]; Doe v. E. Lyme Bd. of Educ., 2012 WL 4344301, at *8 [D. Conn. Sept. 21, 2012] [small class size alone does not constitute special education]).

Moreover, and further compounding the lack of detailed information as to how the school addressed the student's needs is the lack of information in the hearing record regarding the qualifications of the student's teachers at the NPS. In this regard I note that the principal testified that none of the teachers at the NPS were college graduates, though two were pursuing bachelor's degrees (Tr. pp. 127-28).[20] In fact, according to the mid-year report submitted by the NPS, one of the student's teachers/teaching assistants "[c]ompleted four semesters towards his bachelor's degree" and the other teaching assistant was "in his senior year of his bachelor's degree" (Parent Ex. M at p. 5). Further, while the NPS principal testified that his duties included "professional development throughout the year," he did not describe any professional development programs at the school (Tr. pp. 73-74). Likewise, while an educational consultant employed by the NPS testified that two organizations provided training at the NPS, he was unsure regarding specifics about the training (Tr. pp. 160-61, 183-85). Rather, the educational consultant testified that he was aware that there was a connection between the NPS and the Hebrew Association for Special Children (HASC) and he understood that HASC operated private schools and provided training; however, he did not identify the type of training provided by HASC (Tr. p. 185). The hearing record, therefore, is devoid of any evidence regarding the training of the student's instructors (in general educational pedagogy or in addressing the needs of disabled students), which is particularly troubling considering that the NPS principal described the role of the teachers at the NPS as individualizing the curriculum for the students (Tr. p. 96).[21]

[20] In addition an educational consultant hired by the NPS indicated that he believed one of the teachers was in the process of obtaining credits in special education (Tr. p. 160).

[21] A mid-year report provided by the NPS indicated that all of the teachers and assistants received in house training and training by HASC (Parent Ex. M at p. 5). It further indicated that trainings included CPR, first aid, choking, and sensitivity training (id.). None of the described trainings related to academic instruction, let alone the provision of specialized instruction. Further, in a section titled "Professional Development" the mid-year report included a list of professional development courses and a list of workshops attended during a conference;

While a unilateral placement need not employ special education teachers certified by the State (Carter, 510 U.S. at 14), it does have to provide the student with an appropriate education for the parent to be entitled to reimbursement (Frank G., 459 F.3d at 364-65). To that extent I note that part of the provision of special education instruction includes teachers qualified to provide such instruction. Accordingly, given the lack of specificity regarding the student's instruction combined with lack of information regarding the training and qualifications of the individuals providing instruction at the NPS, I am unable to find that the hearing record demonstrates that the NPS was appropriate to meet the student's needs.

2. Progress at the NPS

Finally, the parent argues that the hearing record contains evidence to support a finding that the student made progress at the NPS and that the student's progress is indicative of the appropriateness of the NPS. While evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate, it is a factor that may be considered (Gagliardo, 489 F.3d at 115). However, in this instance the hearing record does not support the parent's contention that the student made "concrete" progress at the NPS; rather, the hearing record supports the IHO's conclusion that the student made little progress at the NPS since January 2012 (IHO Decision at p. 24).

The principal of the NPS asserted that the student was a slow learner, but with individual attention, he had made progress (Tr. p. 88).[22] However a comparison of the January 2012 psychoeducational evaluation with the reports produced by the NPS during the 2013-14 school year indicates that the student made minimal progress between January 2012 and January 2014 (compare Dist. Ex. 6, with Parent Exs. M; N; O; P).

For example, in January 2012 the student was administered the Woodcock-Johnson III Tests of Achievement (WJ-III ACH) to assess his academic abilities (see Dist. Ex. 6). According to the January 2012 report, the student's overall academic functioning at the time was at a high

however, it does not indicate which teachers at the school took those courses or attended the workshop (id. at p. 6). In this regard the educational consultant hired by the NPS indicated that he read about a large in-house training at the NPS in November 2013, which was the same month as the conference referenced in the mid-year report; however, the educational consultant testified that he was not involved with the school at that time (Tr. p. 161; Parent Ex. M at p. 6). Accordingly, there is insufficient information in the hearing record to determine whether or not the student's teachers received the courses or attended the workshops referenced in the mid-year report.

[22] Specifically, the principal testified that the student had made "a lot" of progress in his ADL and ball skills and had made progress in academics (Tr. pp. 92-94, 104-06). The principal explained that in September 2013, the student's overall math and computational skills were on the kindergarten level, but that at the time of the hearing, the student's math skills were at the beginning of the first grade level (Tr. p. 104). In addition, the principal stated that the student was previously only able to add up to 12, but that currently he was able to add up to 14 (Tr. p. 105). The principal stated that the student learned to subtract up to the number six (id.). Further, the student had previously been able to tell time only to the hour, but he was now able to tell time on the half hour (id.). In addition, the principal testified that the student was now able to name all coins and their values up to a quarter (id.). According to the principal, the student had reportedly progressed from the low first grade to the mid-first grade level in the area of vocabulary, from the kindergarten to the low first grade level in the area of word recognition, from kindergarten to upper first grade level in decoding, and from kindergarten to low first grade level in reading comprehension (Tr. pp. 105-06).

kindergarten to low first grade level (Dist. Ex. 6 at pp. 3-4). Similarly, at the time of the January 2014 progress report provided by the NPS, the student was functioning at a kindergarten to low first grade level as well (Parent Ex. M at pp. 3-4). In addition, the January 2012 report stated that the student was able to add single digit numbers without carryovers, tell time by the hour, and identify coins; but had difficulty with subtraction and could not state the value of coins (Dist. Ex. 6 at pp. 4-5). Similarly, the January 2014 report stated that the student was able to add numbers up to sums of 14, identify coins and their values; and had mastered the ability to tell time to the half hour (Parent Ex. M at p. 4). The January 2012 report also stated that the student demonstrated weak reading comprehension skills, and was unable to print simple sentences (Dist. Ex. 6 at pp. 4-5). Likewise, the February 2014 speech and OT progress reports provided by the NPS indicated that the student continued to struggle with comprehension, and that the student continued to work toward the goal of writing a short sentence (Parent Ex. N, O). The January 2012 report further stated that the student was able to walk up and down stairs with alternating feet, but was unable to tie a knot while the February 2014 OT and PT progress reports indicated that the student was still working on, or had recently made progress on those skills (compare Dist. Ex. 6 at p. 5, with Parent Exs. O, P). Finally, the January 2012 report described the student as unable to begin conversations or play games requiring decision making and the January 2014 report indicated that the student continued to need to work on starting conversations and playing games (compare Dist. Ex. 6 at p. 5, with Parent Ex. M at p. 2).

While the student's general lack of progress alone would not justify denying the parent's request for tuition reimbursement if the NPS otherwise addressed his unique needs, here it reinforces my conclusion that the NPS did not constitute an appropriate unilateral placement for the student and that the parent's request for reimbursement of the costs of the student's tuition must be denied.

VII. Conclusion

Considering the totality of the circumstances, particularly the parent's failure to establish how instruction at the NPS was designed to address the student's needs, combined with the lack of information regarding the qualifications of the individuals who would be providing special education instruction to the student, the hearing record does not support a finding that the parent's unilateral placement of the student at the NPS for the 2013-14 school year was reasonably calculated to provide the student with educational benefits (see Frank G., 459 F.3d at 364). Having determined that the parent failed to sustain her burden to establish the appropriateness of the student's unilateral placement at the NPS for the 2013-14 school year, the necessary inquiry is at an end and I need not reach the issue of whether equitable considerations support an award of tuition reimbursement (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
September 25, 2014

HOWARD BEYER
STATE REVIEW OFFICER