The University of the State of New York

The State Education Department
State Review Officer
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No. 19-065

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

Appearances:
Law Offices of Regina Skyer and Associates, LLP, attorneys for petitioners, by Gregory Cangiano, Esq. and Linda A. Goldman, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Brian Davenport, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition costs at Bonim Lamokom (Bonim) for the 2018-19 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The student has received a diagnosis of Down syndrome and has been found eligible for special education services as a student with an intellectual disability (Dist Ex. 1 at p. 1: Parent Ex.

L at p. 2). He has attended Bonim since 2014 (Parent Ex. L at p. 2).[1, 2] On or about January 8, 2018, the district conducted a bilingual psychoeducational evaluation of the student as part of a triennial reevaluation process (Dist. Ex. 3 at pp. 1-2). According to the evaluator, the student presented with "typical Down's syndrome features" and was cooperative and eager to please, reacted positively to encouragement, and when praised got excited and would smile widely and jump in his seat (id. at p. 1). The evaluator noted, however, that while the student attempted to verbally respond to questions, he had difficulty engaging in reciprocal conversation (id. at p. 2).

The resultant January 2018 psychoeducational evaluation report highlighted the student's scores from a January 2015 cognitive assessment, which fell within the extremely low range, and indicated that based on the current evaluation, the earlier scores were an accurate assessment of the student's intellectual functioning (Dist. Ex. 3 at pp. 2, 5). According to academic testing done in January 2018, the student's academic functioning levels were found to be below a kindergarten level (id. at pp. 2-3, 5). While the evaluator noted that the student was verbal and ambulatory, she also noted that the student's verbalizations were limited to single and two-word responses, his articulation was unclear, and his speech was "generally" only understood within the context of the conversation (id. at pp. 1, 5).

On February 15, 2018 the district conducted a "Level 1 Vocational Interview" with the parent (Dist. Ex. 4 at pp. 1-3).

On February 15, 2018, the CSE convened to conduct the student's annual review and to develop his IEP for the 2018-19 school year (Dist. Ex. 1 at pp. 1-19). Finding the student eligible for special education and related services as a student with an intellectual disability the CSE recommended a 12:1+1 special class provided in Yiddish in a specialized school along with related services of two 40-minute sessions per week of individual speech-language therapy provided in Yiddish, two 40-minute sessions per week of speech-language therapy in a group of two provided in Yiddish, one 40-minute session per week of individual occupational therapy (OT) provided in English, and two 40-minute sessions per week of individual physical therapy (PT) provided in English (id. at pp. 13-14, 17).[3] The February 2018 CSE also recommended that the student receive 12-month services consisting of the same special education program and services recommended above (id. at p. 14).

In a school location letter, dated June 12, 2018, the district notified the parents of the student's assigned school for the 2018-19 school year (Dist. Ex. 2 at p. 6). In a June 18, 2018 letter, the parents informed the district that they were rejecting the February 2018 IEP based on several "substantive and procedural defects" (Parent Ex. B at pp. 1-8). The parents also advised

[1] The parent testified that before attending Bonim, the student attended a Yiddish bilingual class of eight to ten students, most of whom were diagnosed with Down syndrome, in a public school and further testified that "it wasn't too scholastic" (Tr. pp. 52-53).

[2] The Commissioner of Education has not approved Bonim as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[3] 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]).

the district that they intended to place the student at Bonim as of the first day of the 2018-19 school year and would seek funding from the district, should the district fail to cure the defects (id. at pp. 1, 8).

On June 21, 2018 the parent toured the student's assigned school (Tr. p. 12; Dist. Ex. 7). On or around June 22, 2018, the parent informed the district that based on the parent's visit, the assigned school could not meet the student's complex needs, could not implement the IEP, and would not provide the student with any opportunities to interact with mainstream peers (Dist. Ex. 7). The parent requested that the district contact her immediately to discuss her concerns, as well as alternate programs for the student for the 2018-19 school year (id.).

On August 20, 2018 the parent executed an enrollment contract with Bonim for the student's attendance during the 2018-19 school year (Parent Ex. C at pp. 1-3).

A. Due Process Complaint Notice

By due process complaint notice dated September 14, 2018, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2018-19 school year (Parent Ex. A). The parents asserted that they filed the due process complaint notice because of the district's "failure to properly respond to their June 19, 2018 Notice" (id. at p. 1).[4] The due process complaint notice reasserts the same allegations as contained in the parents' June 2018 letter (compare Parent Ex. A, with Parent Ex. B).

The parents alleged that the February 2018 CSE impermissibly predetermined the student's program recommendation for the 2018-19 school year, which the parents also alleged deprived them of the right to meaningfully participate in the development of the student's IEP (Parent Ex. A at p. 8). With regard to the process of developing the IEP, the parents alleged that the district did not evaluate the student in all areas of suspected disability, specifically referencing the student's needs related to speech-language, fine and gross motor, and sensory functioning (id. at p. 2). The parents also alleged that the district failed to evaluate the student's need for assistive technology resulting in an IEP that lacked essential information concerning the student's assistive technology needs (id. at p. 4). Additionally, the parents alleged that the district failed to conduct a vocational assessment of the student (id.). Next, the parents argued that the district failed to take measures to determine whether the student was "limited English proficient" and failed to obtain appropriate evaluative information prior to recommending bilingual services (id. at p. 5).

With respect to the February 2018 IEP, the parents challenged the adequacy of the student's present levels of performance set forth in the IEP (Parent Ex. A at p. 2). Next, the parents argued that the annual goals and short-term objectives in the IEP were generic, vague, and lacked a baseline upon which to measure progress (id. at p. 3). In addition, the parents argued that the IEP lacked "meaningful academic and social/emotional management needs" (id.). With respect to assistive technology, the parents argued that the IEP included insufficient information related to the specific software the student needed (id. at p. 4). The parents further asserted that the IEP failed to provide sufficient support to address the student's social/emotional functioning (id.).

[4] The parents' notice is dated June 18, 2018 (Parent Ex. B at p. 1).

Next, the parents argued that the recommended transitional services, coordinated set of transition activities, and measurable postsecondary goals were inadequate (id. at pp. 6-7).

With respect to the February 2018 CSE's recommendation of a 12:1+1 special class in a district specialized school, the parents argued that it was not appropriate for the student (Parent Ex. A at p. 2). First, the parents argued that the recommendation was not appropriate because the student required a highly individualized program that provides 1:1 support and frequent interaction with mainstream peers (id.). The parents further argued that the program recommendation was not the student's LRE because the student would not be able to interact and learn alongside typically developing peers (id. at pp. 3-4). Next, the parents argued that the CSE's recommendation of a bilingual paraprofessional in lieu of a bilingual classroom was not appropriate because the student's primary language was Yiddish (id. at p. 4). The parents further argued that the recommendation for related services, specifically OT and PT, in English was not appropriate because the student needed the related services delivered in Yiddish and the recommendation was based on district policy rather than the student's needs (id. at pp. 5-6). Finally, the parents argued that the IEP did not include a recommendation for special transportation (id. at p. 7).

The parents alleged that the recommended program could not be implemented because the program recommendation added up to 42 periods per week, which exceeded the number of periods in a school week (Parent Ex. A at p. 8). The parent further challenged "the program," as being "too large" for the student and asserted that the student would not be available for learning if he was forced to navigate a large "unstructured school" and further asserted that the program did not provide necessary opportunities for the student to interact with regular education peers (id.). The parents asserted that the program did not offer a suitable and functional peer group for instructional and social/emotional purposes (id. at pp. 2, 4, 8). Lastly, the parents argued that as of the date of the filing of the due process complaint notice, the district failed to recommend a placement for the student (id. at p. 8).

As relief, the parents requested direct funding for the student's tuition at Bonim for the 2018-19 school year (Parent Ex. A at p. 8).

B. Impartial Hearing Officer Decision

An impartial hearing convened and concluded on June 5, 2019 (Tr. pp. 1-61). In a decision dated June 8, 2019, the IHO found that the district offered the student a FAPE for the 2018-19 school year (IHO Decision at pp 3-5). Initially, the IHO found that the district presented a prima facie showing that it conducted a timely review and offered a placement consistent with the IEP it developed and that the district provided the clinical record upon which the IEP was based (id. at p. 3). The IHO then noted that several claims in the parents' due process complaint notice were not supported by the hearing record and were "simply naked assertions" that had no impact on his decision (id. at p. 3).[5] In addition, with respect to the parents' claim that the 12:1+1 special class

[5] A comparison of the IHO Decision with the parents' due process complaint notice reveals that the allegations that the IHO determined were "naked assertions" included the parents' allegations regarding grouping, the present levels of performance, annual goals, social/emotional support, a vocational assessment, assistive technology, bilingual services, an evaluation of the student's language needs for bilingual education, transportation, implementation, predetermination and parent participation, and allegations regarding the size of the program and

program recommendation was not appropriate, the IHO found it "quixotic" because the student's unilateral placement seemed "substantially identical" to the district's recommended program (id. at p. 2). Moreover, the IHO found that the 12:1+1 special class placement was appropriate and that there was nothing in the hearing record that would suggest that the assigned school could not "deliver" the program set forth in the IEP "any less well than [the] unilateral placement" (id. at p. 4).

With respect to the evaluative information before the February 2018 CSE, the IHO found that while no recent evaluations had been conducted, other than the January 2018 bi-lingual psychoeducational assessment, the CSE had the student's OT, PT, and speech/language progress reports (id.) Although the IHO found that this did not rise, or contribute, to a denial of a FAPE and there was no evidence that the student needed further testing, he ordered updated evaluations, including speech, OT, and PT evaluations (id. at pp. 4-5).

Concerning the parents' argument that the February 2018 IEP lacked social/emotional management needs, the IHO found the parents' allegation unavailing (id. at p. 4). He noted that the unilateral placement made "curricular and methodological choices" consistent with the student's social/emotional needs as detailed in the present levels of performance and management needs sections of his IEP, and that taken together these sections adequately delineated the student's needs in this area (id. at p. 4).

Next, the IHO found no merit to the parents' claim that the CSEs recommendation for a 12:1+1 special class placement in a specialized school was not in the student's LRE (id.). The IHO found that the recommended program in the specialized school was adjacent to a general education school with which it had cooperative arrangements to create opportunities for interaction with age-appropriate peers (id.). Additionally, the IHO found that although the district conducted a vocational assessment on the same day as the CSE meeting, it was available to the CSE and the evaluation did not need to be conducted prior to the CSE meeting (id.). Further, the IHO found that there was nothing in the hearing record to support the parents' assertion that the student needed OT and PT services to be delivered bilingually (id.). The IHO noted that nothing in the hearing record suggested that the parents were dissatisfied with the related services being delivered in English when the student previously attended a district program (id.). Furthermore, the IHO noted that the bilingual psychoeducational assessment concluded that the student understood both languages and it was unknown which language was dominant (id.). Next, the IHO found no merit to the parents' assertion that the student's transition plan was inappropriate (id. at p 5). However, assuming there was an inadequate transition plan in the student's IEP, the IHO found that this would be a procedural error that did not rise to a denial of a FAPE because the district conducted a transition assessment of the student (id.). Based on the above, the IHO determined that the district offered the student a FAPE and ordered the district to conduct new evaluations in the areas of speech, OT, and PT (id.).

whether a school placement was recommended (compare IHO Decision at p. 3, with Parent Ex. A at pp. 2-5, 7-8).

IV. Appeal for State-Level Review

The parents appeal, enumerating eight issues for review. Specifically the parents assert: (1) the IHO erred in determining that the February 2018 IEP was valid despite the absence of an assessment of the student's English language proficiency; (2) the IHO erred in rejecting the parents' allegation that the CSE failed to conduct an assistive technology evaluation and recommend appropriate supports; (3) the IHO erred in determining that the February 2018 IEP was valid despite the CSE's failure to conduct a triennial reevaluation; (4) the IHO erred in rejecting the parents' claims regarding the student's need for mainstreaming opportunities and that the recommended program was not in the LRE for the student; (5) the recommended program could not be implemented; (6) the IHO erred in finding that the recommended program was appropriate because it mirrored the program at Bonim, asserting that there was no evidence regarding similarity of the student's peer group and that Bonim offered all instruction and related services in Yiddish; (7) the parent's unilateral placement of the student at Bonim was appropriate; and (8) equitable considerations weigh in favor of granting the parents' request for direct funding of the student's tuition at Bonim.

The parents request that the SRO find that the district failed to offer the student a FAPE for the 12-month extended 2018-19 school year and award direct funding for the cost of the student's tuition at Bonim.

In its answer, the district responds to the parents' allegations with admissions, denials, or various combinations of the same and argues in favor of the IHO's determinations that the district offered the student a FAPE. The district requests that the SRO uphold the IHO's decision in its entirety.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress.

After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and

provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[6]

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. Scope of Review

Before reaching the merits, a determination must be made regarding which claims are properly before me on appeal. The parents asserted a number of issues in their due process complaint notice which are not raised in their request for review including: predetermination of the student's program recommendation; the need for a vocational assessment of the student; the sufficiency of the student's present levels of performance set forth in the February 2018 IEP; the sufficiency of the annual goals and short-term objectives; the lack of "meaningful academic and social/emotional management needs"; support for the student's social/emotional needs; transitional services, a coordinated set of transition activities, and measurable postsecondary goals; special transportation; and the recommendation of a school location for the student (compare Req. for Review, with Parent Ex. A). To the extent that the parents do not raise arguments on appeal regarding those claims which were alleged in the due process complaint notice, those claims are deemed abandoned and will not be further addressed (8 NYCRR 279.8[c][2], [4]).

B. February 2018 CSE Process and February 2018 IEP

On appeal the parents assert claims related to the sufficiency of the evaluative information available to the February 2018 CSE, the assessment of the student's language needs and the

[6] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

appropriateness of addressing those needs without all of the student's instruction (including OT and PT) being provided in Yiddish, the assessment of the student's needs related to assistive technology and the lack of details regarding the CSE's recommendation for assistive technology, and the February 2018 IEPs failure to provide for mainstreaming opportunities.[7]

As discussed in more detail below, the parents' strongest argument for overturning the IHO's decision is based on the lack of information in the February 2018 IEP regarding mainstreaming opportunities for the student for the 2018-19 school year. Accordingly, this decision addresses that issue in greater detail and reviews the parents' other claims concerning CSE process and FAPE, for which the IHO issued findings that are being upheld on appeal, more briefly.

Overall, considering the evidence in the hearing record, and the parents' arguments on appeal, the evidence in the hearing record does not provide a sufficient basis for departing from the IHO's determination that the lack of formal testing in the areas of speech-language, OT, and PT—or with respect to assessing the student's language needs—did not contribute to a denial of FAPE. In order for a procedural violation, such as the failure to complete a reevaluation of the student within three years from the student's last evaluation, to constitute a denial of FAPE it must impede the student's right to a free appropriate public education, significantly impede the parent's opportunity to participate in the decision-making process, or cause 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]). On appeal, the parents do not contend that the present levels of performance identified in the February 2018 IEP were not accurate, nor do they assert that the related services progress reports—produced by the student's private school—were insufficient to identify the student's needs in those areas. Rather, the parents only contention that the lack of formal evaluations impeded the student's right to a FAPE "was . . . because the parents were never provided with proper notices and results of evaluations, which were necessary for them to make an informed decision and meaningfully participate in the IEP process" (Req. for Rev. at pp. 8-9). However, the district provided the parent with prior written notice describing the CSE's recommendation and the evaluative information considered (see Dist. Ex. 2). Accordingly, the IHO's finding on this point will not be disturbed.

Turning to the parents' claims regarding whether the district appropriately addressed the student's needs related to speaking a foreign language, as a result of the student's language needs, the CSE recommended a 12:1+1 special class provided in Yiddish in a specialized school along with speech-language services in Yiddish, and OT and PT in English (Dist. Ex. 1 at pp. 13-14, 17). Overall, the hearing record supports the IHO's finding that the student did not need to receive OT

[7] The parents also allege that the IEP could not be implemented because the recommendation for a 12:1+1 special class for 35 periods per week and seven sessions per week of related services amounted to 42 periods per week; two more periods per week than are included in the school's 40 period per week schedule. The principal for the assigned public school testified that the school could have implemented the student's IEP, which called for placement in a special class for 35 periods per week and seven sessions per week of related services (Tr. p. 15; see Dist. Ex. 1 at pp. 13-14). However, the principal also testified that the school's weekly schedule consisted of 40 periods (Tr. p. 16). Under the circumstances presented in this matter, I do not find that the district would have been incapable of implementing the IEP or that the alleged departure from it would be considered either a failure to implement substantial or significant provisions of the IEP or a substantial or material deviation from the terms of the IEP.

and PT services in Yiddish. For example, the special education teacher explained that OT and PT are provided in English because they do not need to be in a different language and can be "shown or demonstrated" (Tr. pp. 38-39).

With respect to the parents' arguments related to the lack of an assistive technology evaluation and the student's need for assistive technology, the February 2018 IEP could have been better developed. The February 2018 IEP stated that the student needed a particular device or service to address his communication needs and that he needed an assistive technology device and/or service (Dist. Ex. 1 at p. 4). However, for assistive technology, the February 2018 IEP recommended the student be provided "software" as a daily, full-day "individual service" in his special class and related services (id. at p. 14).[8] Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. One of the special factors that a CSE must consider is whether the student "requires assistive technology devices and services, including whether the use of school-purchased assistive technology devices is required to be used in the student's home or in other settings in order for the student to receive a [FAPE]" (8 NYCRR 200.4[d][3][v]; see 20 U.S.C. § 1414[d][3][B][v]; 34 CFR 300.324[a][2][v]; see also Educ. Law § 4401[2][a]). While the February 2018 CSE's recommendation does not necessarily rise to the level of a denial of FAPE—the failure to recommend specific assistive technology devices and services rises to the level of a denial of a FAPE only if such devices and services are necessary for the student to access his educational program (see, e.g., Application of the Bd. of Educ., Appeal No. 13-214; Application of a Student with a Disability, Appeal No. 11-121)—the February 2018 CSE should have considered conducting an assistive technology evaluation for the student. Going forward, if it has not already done so, the district should endeavor to assess the student's needs related to assistive technology by conducting an assessment of those needs. When warranted by the student's needs, the district must assess the student's "functional capabilities" and whether they may be "increase[d], maintain[ed], or improve[d] through the use of assistive technology devices or services (34 CFR 300.5; 8 NYCRR 200.1[e]; see 34 CFR 300.6; 8 NYCRR 200.1[f]). "The evaluation should provide sufficient information to permit the [CSE] to determine whether the student requires assistive technology devices or services in order to receive FAPE" (Letter to Fisher, 23 IDELR 656 [OSEP 1995]).

C. Least Restrictive Environment

Next, turning to the crux of the matter, the parents assert that the recommended program was not in the student's LRE, contending that the February 2018 IEP did not provide for any mainstreaming opportunities for the student.

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

[8] The February 2018 IEP included under management needs "Instruction using his assistive technology device—Waterford Program" (Dist. Ex. 1 at p. 3). The principal at Bonim provided testimony that Bonim uses a "Waterford Tablet" to address the student's significant writing challenges (Parent Ex. L at p. 6). In a description of the curriculum at Bonim, Waterford Early Learning is described as "an individualized computer software program for reading, math, and science" (Parent Ex. G at p. 13).

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. Sobol, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 CFR 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 CFR 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 CFR 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; 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 education setting, with the use of supplemental aids and services, can be achieved satisfactorily for a student, and, if not, (2) whether the district 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]). A determination regarding the first prong, (whether a student with a disability can be educated satisfactorily in a general education class with supplemental aids and services), is made through an examination of a non-exhaustive list of factors, including, but not limited to "(1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class" (Newington, 546 F.3d at 120; see 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). The Court recognized the tension that occurs at times between the objective of having a district provide an education suited to a student's particular needs and the objective of educating that student with non-disabled peers as much as circumstances allow (Newington, 546 F.3d at 119, citing Daniel R.R., 874 F.2d at 1044). The Court explained that the inquiry is individualized and fact specific, taking into account the nature of the student's condition and the school's particular efforts to accommodate it (Newington, 546 F.3d at 120).

If, after examining the factors under the first prong, it is determined that the district was justified in removing the student from the general education classroom and placing the student in a special class, the second prong requires consideration of whether the district has included the student in school programs with nondisabled students to the maximum extent appropriate (Newington, 546 F.3d at 120).

Neither party presents an argument related to the first prong of the Newington test—in other words neither party asserts that the student could be satisfactorily educated in a general education setting with the use of supplemental aids and services. Accordingly, whether the district's program is in the LRE turns on the second prong of the Newington test, whether the district has included the student in school programs with nondisabled students to the maximum extent appropriate (Newington, 546 F.3d at 120).

In the instant matter, the February 2018 IEP detailed the student's present levels of functioning, social-emotional needs, emerging social behavior, and interest in social interaction—which all indicated the student could participate in some activities with his regular education peers.

For example, the IEP noted that the student demonstrated friendship seeking behaviors with others the same age and that the parent stated that the student was more cognizant of "what's going on around him" and that he "wants to 'fit in'" (Dist. Ex. 1 at p. 2). Further, the February 2018 IEP's present levels of performance noted that the student presented as a pleasant and friendly male who responded positively to praise and reinforcement, got along well with peers and adults, enjoyed sharing ideas while talking, and played simple card or board games (id.).

While the IEP indicated that the CSE considered placing the student in a special class in a community school setting, the stated reason for rejecting the community school setting was that the student required a full-time special education placement and needed more intensive specialized instruction to address his cognitive, academic, speech/language, fine and gross motor concerns (Dist. Ex. 1 at pp. 16-18). Additionally, while the district school may have been able to accommodate the student by providing opportunities for interactions with regular education students through a cooperation agreement with a neighboring school, as was found by the IHO, there was no indication of these opportunities on the IEP (see IHO Decision at p. 4; Dist. Ex. 1). The only evidence that the student would have been provided with any mainstreaming opportunities came from the testimony of the principal of the assigned school elicited during the hearing (Tr. pp. 14-15). In reviewing the program offered to the student, the focus of the inquiry is on the information that was available at the time the IEP was formulated (see C.L.K. v Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013]; D.A.B. v New York City Dept. of Educ., 2013 WL 5178267, at *12 [S.D.N.Y. Sept. 16, 2013]). 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).

Based on the above, the February 2018 CSE had information that the student could have been included in some school programs with his nondisabled peers. Accordingly, even though the district was 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.

D. Unilateral Placement

The parents argue that Bonim is an appropriate unilateral placement for the student.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). 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; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). 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 [citing 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; Hardison v. Bd. of Educ., 773 F.3d 372, 386 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, *9 [S.D.N.Y. Mar. 18, 2010]).

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

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a

> unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

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

1. Student's Needs

While the accuracy of the student's needs as described in the present levels of performance is not being challenged on appeal, a brief review is necessary to evaluate the appropriateness of the parent's unilateral placement.[9]

The February 2018 IEP's present levels of performance noted the student's cognitive functioning was within the extremely low range and that his academic functioning levels were below a kindergarten level (Dist. Ex. 1 at p. 1). As noted in the IEP, according to school progress reports, the student was still unfamiliar with reading/identifying uppercase letters but could identify/read 17 lowercase letters, could print all uppercase letters and about two lowercase letters, and could almost print his name (id. at p. 2). In addition, the student could rote count to 30, recognize numbers to 20 and could add sums to six (id.).

With respect to speech-language development, the February 2018 IEP stated that the student presented with poor oral motor skills which impacted significantly on his speech intelligibility and that he presented with poor receptive language and profound expressive language delays (Dist. Ex. 1 at p. 1). Regarding receptive language, the IEP noted that the student had difficulty following two step directions, comprehending basic concepts, identifying associations, and attending to the task at hand; he needed redirection to complete simple tasks (id.). In the area of expressive language, the student presented with poor syntactical skills, used one to two words in a sentence to communicate, and could produce CV and VC words but had difficulty producing CVC words (id. at pp. 1-2). The February 2018 IEP indicated that the student's speech intelligibility was extremely poor, that it was difficult to understand him even with a shared reference, and he presented with poor eye contact in all settings (id. at p. 2). Specifically, it was

[9] In their due process complaint notice, the parents asserted that the present levels of performance contained in the February 2018 IEP did not adequately describe the student's needs, and as an example indicated that the description of the student's ability to "recognize 'a majority of uppercase alphabet letters but is inconsistent in identifying lowercase alphabet letters'" was too vague to ascertain the student's baseline abilities (Parent Ex. A at pp. 2-3). The parents have not pursued this claim on appeal and have not challenged the accuracy of the information contained in the present levels of performance. Accordingly, the description of the student in the present levels of performance, looked at carefully to avoid inconsistencies with how the student's needs presented at the private school, provides a starting point for a discussion of how the unilateral placement addressed the student's special education needs.

reported that the student distorted vowel sounds in his speech production and presented with sound distortions on the phonemes such as /s/, /sh/, and /dz/ which affected his intelligibility of speech (id.). In addition, the student presented with several phonological processes including final consonant deletion, cluster reduction, deaffrication, devoicing, fronting and backing, syllable reduction, substitutions, omissions, and distortions; he had difficulty with motor programming and producing sound sequences and multisyllabic words (id.). The February 2018 IEP noted that the student got frustrated when the task appeared difficult, which negatively impacted his ability to progress (id.).

Regarding social development, and as detailed above, the student sought friendship with others his own age, played simple board/card games, and maintained a comfortable distance between himself and others during social situations (Dist. Ex. 1 at p. 2). However, the student was unable to talk with others about a shared interest or talk to others without interrupting or being rude (id.). The February 2018 IEP further noted that the student's interpersonal relations, play and leisure, and coping skills were all in the low range (id.).

Concerning the student's physical development, the February 2018 IEP stated that he displayed poor handwriting skills and was working on his pencil grasp and forming various numbers and letters properly, had difficulty with various pre-writing and ADL tasks, and was working on shoe lace tying skills (Dist. Ex. 1 at p. 3). Additionally, the student had gross motor delays including kyphotic posture; poor quality of gait and stair negotiation; and poor coordination and balance, strength and endurance, and flexibility and range of motion in his lower extremities which limited his performance in the classroom and physical education setting (id.). Further, the February 2018 IEP noted that the student demonstrated decreased attention, frustration tolerance, and safety awareness of himself and others (id.).

The February 2018 IEP also detailed the nature and degree to which environmental and human or material resources were needed to address the student's management needs (Dist. Ex. 1 at p. 3). Specifically, the IEP noted that the student required a 12:1+1 special class, speech-language therapy, OT, PT, redirection and refocusing, instruction using his assistive technology device-Waterford program, repetition and review of a skill taught, and positive reinforcement to enhance academics and attentional skills (id.).

2. Specially Designed Instruction

As noted above, to qualify for reimbursement under the IDEA, a parent must demonstrate that the unilateral placement provided educational instruction specially designed to meet the student's unique needs, supported by services necessary to permit the student to benefit from instruction (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65). State regulation defines specially designed instruction, in part, as "adapting, as appropriate to the needs of an eligible student under this Part, the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability" (8 NYCRR 200.1[vv]).

An undated program description of Bonim stated that the school was created to provide students with Down syndrome and other special needs with a unique culturally enriching educational program, that the school was located within a regular education school where students were mainstreamed at every available opportunity, and that the programs were designed to meet

the educational, psychological, and emotional needs of children and young adults of varying types and degrees of disabilities (Parent Ex. F; see Parent Ex. G).

In his written testimony, the Bonim principal stated that for the 2018-19 school year the student was placed in a 12:1+1 classroom which enabled him to receive significant 1:1 support throughout the day (Parent Ex. L at p. 4). A Bonim therapy schedule for the student indicated that during the 2018-19 school year he received four 30-minute sessions per week of speech-language therapy, one 30-minute session per week of OT, and two 30-minute sessions per week of PT (Parent Ex. E). The Bonim principal testified that the school's speech-language therapist had state certification in Yiddish and although he had not seen "the actual certification" for the occupational therapist and physical therapist, he "definitely" knew they were fluent in Yiddish (Tr. pp. 48-49).

The Bonim principal also stated that to ascertain the student's abilities in terms of his academics, he assessed the student using select portions of the Brigance Comprehensive Inventory of Basic Skills and that, based on the results, the staff determined the student's baseline abilities and developed academic goals for the 2018-19 school year (Parent Ex. L at pp. 4-5). The Bonim principal stated that the student's curriculum for the 2018-19 school year included reading, decoding, reading comprehension, phonics, spelling, handwriting, math, time, calendar, money, science, social studies, computers, history, physical education, current events, social skills, hygiene, safety, and prevocational training (id. at p. 4).

The Bonim principal stated that school staff used the Palmtree Reader curriculum, which he stated was appropriate for the student as it was concrete and used one comprehensive story that covered a number of subjects and skill areas (Parent Ex. L at p. 5). He also noted that the curriculum was modified to address the student's individual skill levels and that his teachers differentiated the instruction to his specific skill levels through the use of individual workbooks (id.). In addition, the Bonim principal indicated that the student received a great deal of redirection, repetition and review of skills taught, positive reinforcement, and scaffolding of new instructional material which had been essential for the student (id.). The Bonim principal stated that the student was working on demonstrating improved vocabulary skills and that, given a great deal of chunking and breaking down language, the student had progressed to be able to follow three-step directions (id.). The Bonim principal stated that the reading goals for the student for the 2018-19 school year included expanding his sight vocabulary, understanding the name and sound of each letter, blending 2-3 letter sounds together to form words, understanding how to spell "vc" words, answering "yes" and "no" questions about particular passages, answering "wh" questions about a given picture, predicting possible outcomes for stories read to him, recalling simple details about a story heard, and drawing an illustration to help him tell a story (id.).

Regarding math instruction, the Bonim principal stated that assessment results determined that Touch Math and Touch Money curricula would be used with the student as they were both concrete math programs and the school provided the student with a great deal of repetition and multisensory instruction (Parent Ex. L at p. 6). The Bonim principal noted that as the student's skills were "scattered" the teachers developed individual worksheets for the student based upon his specific skill level (id.). The Bonim principal stated that the math goals for the student for the 2018-19 school year included identifying numbers to 40, rote counting to 40, counting by 5s to 50, adding sums to 10 using multi-sensory materials and manipulatives, solving simple addition problems which are read aloud, telling time by 5 minutes to 45 minutes, telling time by one minute

to 30 minutes, and counting pennies to 10 cents, nickels to 35 cents, and pennies and nickels to 12 cents (id.).

To address the student's needs in writing, the Bonim principal stated that the student's program focused on forming various numbers and letters properly and that he benefitted from techniques such as skywriting and writing using modalities and manipulatives (Parent Ex. L at p. 6). The Bonim principal stated that the student had progressed in increasing control and strength in his hands (id.). The Bonim principal stated that to address the student's significant writing challenges, the student used a Waterford Tablet which enabled the student to input letters and words through typing or touching the screen rather than using a pen or pencil (id.).

Regarding speech-language, the Bonim principal stated that a principal goal for the student was that he communicate appropriately according to the demands of the social situation and that the school staff used supports to help the student control dysfluencies through the use of continuous phonation as well as through the use of light articulatory contacts (Parent Ex. L at p. 4).

To address the student's significant challenges regarding safety awareness, the student received explicit instruction in recognizing danger, using emergency procedures within the school and community, recognizing when he is lost, and seeking help from appropriate persons (Parent Ex. L at p. 6).

With respect to ADL skills the student's program focused on maximizing the student's independent living abilities, personal care skills, communication, and employment readiness (Parent Ex. L at p. 7).

According to the Bonim principal, the student was taught social skills through direct instruction and reinforced through modeling and role playing (Parent Ex. L at p. 7).

Additionally, the student was provided vocational training which included classroom-based activities such as lessons addressing the exploration of careers, work environments, work values, and job skills training and community-based work activities with local employees (Parent Ex. L at p. 6).

Based upon the foregoing, a review of the hearing record reveals that Bonim identified the student's academic, social/emotional and physical needs and developed a special education program that provided educational instruction specially designed to meet the unique needs of the student, supported by such services as were necessary to permit the student to benefit from instruction (see Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 364-65).

3. Progress

Moreover, there is some evidence in the hearing record that the student made progress at Bonim during the 2018-19 school year. A finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed App'x 80, 82 [2d Cir. Dec. 26, 2012]; Frank G., 459 F.3d at 364). However, a finding of progress

is nevertheless a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]). Here, the available evidence in the hearing record shows that the student was making at least some progress at Bonim during the 2018-19 school year.

Progress reports from the 2018-19 school year indicate that with respect to PT the student had made "improved progress" with object manipulation such as catching and throwing different size balls from various distances; had made some progress with increasing his lower extremity range of motion specifically in his hamstrings, lower back muscles and joints which affect his proper performance of physical activities and proper sitting and standing positions in the classroom setting; and less consistent progress with extremity strength (Parent Ex. I at pp. 1-2).[10] In the area of OT, the 2018-19 progress report stated that the student was progressing in some of his school and ADL tasks; that he presented with the ability to perform and complete some ADL skills with minimal verbal cues; and was working on shoe lace tying skills, keeping his face and hands clean, tucking in his shirt and buttoning his pants and shirt (id. at p. 8). This evidence demonstrates that the student was making progress with respect to some areas of motor development at Bonim during the 2018-19 school year.

4. LRE

Although the restrictiveness of a parental placement may be considered as a factor in determining whether parents are entitled to an award of tuition reimbursement (M.S., 231 F.3d at 105; Walczak, 142 F.3d at 122; see Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]), parents are not as strictly held to the standard of placement in the LRE as are school districts (C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 830, 836-37 [2d Cir. 2014]; [noting "while the restrictiveness of a private placement is a factor, by no means is it dispositive" and furthermore, "[i]nflexibly requiring that the parents secure a private school that is nonrestrictive, or at least as nonrestrictive as the FAPE-denying public school, would undermine the right of unilateral withdrawal the Supreme Court recognized in Burlington"]; see Carter, 510 U.S. at 14-15; M.S., 231 F.3d at 105 [stating that parents "may not be subject to the same mainstreaming requirements as a school board"]) and "the totality of the circumstances" must be considered in determining the appropriateness of the unilateral placement (Frank G., 459 F.3d at 364). However, where the "only deficiency in the IEP was the LRE issue, the unilateral placement can only be regarded as proper, or appropriate, if the unilateral placement addressed that LRE deficiency" (A.S. v. Bd. of Educ. Shenendehowa Cent. Sch. Dist., 2019 WL 719833, at *9 [N.D.N.Y. Feb. 20, 2019]).

The Bonim principal noted that one of the main advantages of the school's program was the opportunity for the student to integrate with the mainstream population (Parent Ex. L at p. 7). According to the Bonim principal, the student had opportunities to interact with mainstream peers throughout the school day during lunch, physical education, recess, all major school events,

[10] As indicated earlier, the hearing record includes undated progress reports which, based on the listed age of the student, appear to have been created in winter 2018 or spring 2019 (Parent Ex. L at pp. 1-12).

transitions, and the incorporated "'Buddy Time'" (Parent Ex. L at p. 7-8).[11] The Bonim principal noted that since the student could only learn social skills in a social environment he "truly" benefitted by observing and imitating his regular education peers (id. at p. 8).

The parent testified that one reason the parents placed the student at Bonim was because they wanted the student to "blend" with mainstream children, which they had in the same building at Bonim (Tr p. 53). The parent testified that during the 2018-19 school year the student had benefitted from being able to learn alongside and interact with mainstream peers, notably he spoke more and used expressions that were appropriate to the situation (Tr. pp. 53-54).

Overall, the evidence in the hearing record indicates that the student had opportunities to interact with nondisabled peers at Bonim and that the school was in the student's LRE.

E. Equitable Considerations

With regard to equitable considerations, the parents argue that equitable considerations do not bar reimbursement because they cooperated with the district during the CSE meeting, duly visited the assigned public school site, and gave the district adequate notice of their concerns.

The final criterion for a reimbursement award is that the parents' claim must be 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 also 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, fail to provide adequate notice of the student's removal from the public school system, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; see L.K. v. Dep't of Educ. of the City of New York, 2011 WL 127063, at *12 [E.D.N.Y. Jan. 13, 2011]; S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 362-64 [S.D.N.Y. 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 192 Fed. App'x 62 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]).

The hearing record reflects that the parents cooperated with the February 2018 CSE, did not impede or otherwise obstruct the CSE's ability to develop an appropriate special education

[11] The Bonim principal explained that Buddy Time was a special program done in collaboration with the general education school where the student is paired with a general education student for "pure" [sic] learning twice a week, which gave the student the opportunity to model appropriate behavior and forge new social relationships (Parent Ex. L at p. 8; see Parent Ex. G at p. 1).

program for the student, made the student available for evaluations, and did not fail to raise the appropriateness of an IEP in a timely manner or act unreasonably (C.L., 744 F.3d at 840). Therefore, equitable considerations would not bar an award of tuition reimbursement.

F. Relief

The IDEA indicates that a court or hearing officer may award tuition reimbursement only "if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment" (20 U.S.C. § 1412[a][10][C][ii]; see also 34 CFR 300.148[c]). Although the IDEA does not directly address whether tuition reimbursement is available as a remedy for the failure of a district to place a student in the LRE in cases where it has been determined that the district otherwise provided the student with a FAPE, several courts addressing the issue in the Second Circuit have indicated that tuition reimbursement may be available for a private placement that remedies the district's violation of the LRE requirement (see T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 167-68 [2d Cir. 2014] [finding that the district failed to consider an appropriate continuum of alternative 12-month placements and place the student in his least restrictive environment during the summer; remanding case and noting that "[i]f the district court finds that reimbursement is warranted, it should then fashion an appropriate reimbursement award . . ."]; M.M. v. New York City Dep't of Educ., 2017 WL 1194685, at *15-16 [S.D.N.Y. Mar. 30, 2017][recognizing T.M as "instructive and controlling" and finding that the Second Circuit was clear in T.M. that the remedy for a district's failure to provide a student with a program in the LRE "is for the district to reimburse that student for the cost of an appropriate alternative placement" that remedies the LRE violation]). Accordingly, in line with the developing case law affirming the availability of an award of tuition reimbursement where the parent finds an appropriate private placement in the LRE, and under the circumstances of this case, I find that the student is entitled to tuition reimbursement at Bonim. As discussed in detail above, the district's failure to include the student in school programs with nondisabled students to the maximum extent appropriate constitutes a violation of the district's LRE obligation under the IDEA. Additionally, as further discussed above, Bonim provided the student with specially designed instruction that met his unique needs in the LRE by incorporating multiple appropriate mainstreaming opportunities into the student's program.

Finally, while the parents are requesting direct funding of the student's tuition at Bonim, the parents have not presented any evidence, either at the impartial hearing or on appeal, with regard to their financial inability to make tuition payments. Accordingly, as the hearing record contains no evidence directly related to the parent's ability to make tuition payments, I am unable to order the district to directly fund the costs of the student's attendance at Bonim for the 2018-19 school year (see Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 428 [S.D.N.Y. 2011][indicating that parents "have a right to retroactive direct tuition payment relief" only if, in addition to satisfying the requirements for tuition reimbursement, they "lack the financial resources to 'front' the costs of private school tuition"]; Application of a Student with a Disability, Appeal No. 12-183 [denying direct funding where parent submitted incomplete information regarding her financial status]). However, the district is directed to reimburse the parents for the costs of the student's attendance at Bonim for the 2018-19 school year upon satisfactory proof of payment.

VII. Conclusion

In summary, the evidence in the hearing record establishes that, contrary to the IHO's decision, the district failed to offer the student a FAPE in the LRE for the 2018-19 school year, Bonim was an appropriate placement for the student for the 2018-19 school year and met the student's LRE, and that equitable considerations did not present a bar to an award of tuition reimbursement.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated June 9, 2019, is hereby modified to reflect the above determination that the district did not offer the student a FAPE in the LRE for the 2018-19 school year; and

IT IS FURTHER ORDERED, that, upon presentation of proof of payment, the district shall reimburse the parents for the cost of the student's tuition at Bonim for the 2018-19 school year.

Dated: **Albany, New York**
August 21, 2019

CAROL H. HAUGE
STATE REVIEW OFFICER