The University of the State of New York

The State Education Department
State Review Officer
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No. 22-035

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

Appearances:
Liz Vladek, General Counsel, attorneys for petitioner, by Deanna Everett-Johnson, Esq.

Law Offices of Regina Skyer and Assoc., LLP, attorneys for respondents, by Gregory Cangiano, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Bonim Lamokom School (Bonim Lamokom) for the 2019-20 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The student has a history of global delays that include "extremely low" cognitive abilities, delayed academic skills, "poor" expressive language skills and difficulty with articulation, delayed social/emotional development, delayed fine and gross motor skills, sensory processing difficulties, and deficits in activities of daily living (ADL) skills (see Dist. Exs. 18-21). He has received a diagnosis of Down syndrome and has a history of a heart condition (Dist. Ex. 3 at pp. 2-4).

According to the parent, the student attended a Yiddish 12:1+1 special class in a district community school for elementary school through the 2014-15 school year (Parent Ex. P ¶ 6). The parents unilaterally placed the student at Bonim Lamokom beginning in the 2015-16 school year (id. ¶¶ 7, 9).[1] For the 2018-19 school year, a CSE had recommended that the student attend a 12:1+1 special class in a specialized school with Yiddish as the language of service and receive related services (Parent Ex. D at pp. 12-13, 16).[2]

A CSE convened on January 10, 2019, to formulate the student's IEP for the 2019-20 school year (see generally Dist. Ex. 3). The January 2019 CSE found the student continued to be eligible for special education as a student with an intellectual disability and recommended the student attend a full-time 12:1+1 special class in a district specialized school with Yiddish as the language of the service (id. at pp. 1, 17, 21; see Parent Ex. D at p. 1).[3] The CSE also recommended the related services of individual occupational therapy (OT) once per week for 30 minutes in English and group OT once per week for 30 minutes in English, individual physical therapy (PT) twice per week for 30 minutes in English, individual speech-language therapy twice per week for 30 minutes in Yiddish, and group speech-language therapy once per week for 30 minutes in Yiddish (Dist. Ex. 3at pp. 17-18). To further support the student, the January 2019 CSE identified the following strategies/resources needed to address his management needs: small class with structured environment, related services, multi-modality approach, slow pace, constant review and repetition, praise and reinforcement, and additional practice, as well as prompting, guidance, and encouragement throughout the day (id. at p. 4). Additionally, the January 2019 IEP indicated that the student would participate in alternate assessments and included annual goals with corresponding short-term objectives that addressed the student's skills in academics, receptive and expressive language, ADLs, gross and fine motor, communication, functional ability, and safety awareness (id. at pp. 5-16, 20). To support the student as he moved out of secondary education, the January 2019 IEP contained postsecondary goals, identified the student's transition needs, and set forth a set of transition activities (id. at pp. 5, 19-20).

The CSE determined that the student was eligible to receive services during July and August as part of a 12-month program wherein the student would receive the same special education program and services in Yiddish and English as recommended for the 10-month portion of the school year (Dist. Ex. 3 at. pp. 18, 22-23). However, the resultant IEP also indicated that, if there was no provider available in the recommended language, the student should be provided "interim service[s] in English pending availability of a bilingual provider" and "should be placed in an interim monolingual class" (id. at p. 23).

In a prior written notice and in a school location letter, both dated June 12, 2019, the district summarized the recommendations of the January 2019 CSE and identified the particular public

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

[2] The parents challenged the district's offer of a FAPE to the student for the 2018-19 school year in a due process complaint notice dated November 21, 2018 (Dist. Ex. 15).

[3] The student's eligibility for special education as a student with an intellectual disability is not in dispute (see 34 CFR 300.8[c][6]; 8 NYCRR 200.1[zz][7]).

school site to which it assigned the student to attend for the 2019-20 school year (Dist. Exs. 5; 17).[4]

In a letter dated June 17, 2019, the parents disagreed with the recommendations contained in the January 2019 IEP and notified the district of their intent to unilaterally place the student at Bonim Lamokom for the 2019-20 school year (see Parent Ex. C).

On June 26, 2019, the parents executed a contract for the student's attendance at Bonim Lamokom for the 2019-20 school year (Parent Ex. G).

A. Due Process Complaint Notice

In an amended due process complaint notice, dated June 1, 2021, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20 school year and requested funding of their unilateral placement of the student at Bonim Lamokom for that school year (see Parent Ex. B).[5] The parents alleged that the January 2019 CSE did not include them in the development of the student's annual goals and failed to evaluate the student's language proficiency or his speech-language, cognitive, or academic skills and that the January 2019 IEP did not adequately describe the student's present levels of performance, included an inadequate description of the student's management needs, and included deficient annual goals that were not measurable (id. at pp. 2-5). The parents argued that the ratio of the recommended 12:1+1 special class was not reasonably calculated to engage the student to receive educational benefit and did not offer the support and individualized 1:1 instruction that the student required and that the IEP did not include supports to facilitate the student's social/emotional development (id. at pp. 2-3). In addition, the parents asserted that the recommendation for related services with English as the language of service was based on the availability of the services in the district and would not meet the student's needs (id. at p. 5). The parents alleged that the recommendations contained within the IEP did not provide the student with opportunities for exposure to nondisabled peers and, therefore, did not represent the student's LRE (id.). The parents also contended that the IEP did not include appropriate transition support services, failed to consider assistive technology, and did not include a recommendation for special transportation (id.). Moreover, the parents alleged that recommendation for "a bilingual paraprofessional in lieu of a bilingual classroom should one not be available [w]as improper" (id. at pp. 4-5).

With respect to the assigned public school site's capacity to implement the January 2019 IEP, the parents alleged that the number of mandated hours of special education set forth in the IEP exceeded the amount of periods in a week (see Parent Ex. B at p. 2). In addition, the parents argued that the provision of a bilingual paraprofessional would not have been an adequate substitute for a bilingual classroom for the student (id. at p. 6). The parents also alleged that the

[4] The hearing record contains duplicative exhibits (compare Parent Exs. E, K, N, with Dist. Exs. 5, 19-22). For purposes of this decision, only district exhibits are cited in instances where both a parent and district exhibit are identical in content. The IHO is reminded that it is her responsibility to exclude evidence that he determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

[5] The parents' original due process complaint notice was dated April 28, 2021 (Parent Ex. A).

proposed classroom could not have provided the student with a suitable and functional peer group (id.).

The parents alleged that Bonim Lamokom was an appropriate unilateral placement for the 2019-20 school year and that there were no equitable considerations that would bar funding (Parent Ex. B at p. 6). For relief, the parents requested district funding of the costs of the student's attendance at Bonim Lamokom for the 2019-20 school year (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened on August 11, 2021 and concluded on February 16, 2022 after seven days of proceedings (Tr. pp. 1-101). In a decision dated February 21, 2022, the IHO determined that the district failed to offer the student a FAPE for the 2019-20 school year, that Bonim Lamokom was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parents' request for an award of tuition reimbursement (IHO Decision at pp. 4-8).[6]

In particular, the IHO found that the district failed to assign the student to attend a classroom with a Yiddish-speaking special education teacher for summer 2019 and was not persuaded by the district's position that a Yiddish-speaking classroom paraprofessional would have been adequate (IHO Decision at pp. 5-6). In addition, the IHO found that the IEP did not include special education transportation or provide for "mainstreaming opportunities," which the student required (id. at p. 6). The IHO indicated that he "considered the parent[s'] other claims with respect to the alleged denial of FAPE and f[ou]nd them to be without merit" (id.).

Regarding the unilateral placement, the IHO found that Bonim Lamokom "provided direct and specialized educational instruction that was specifically designed to meet the student's unique educational needs" (IHO Decision at p. 6). In addition, the IHO determined that the parents cooperated with the CSE process and gave the district timely notice of their intent to unilaterally place the student (id. at p. 7).

As relief, the IHO ordered the district to reimburse the parents and/or directly pay for the cost of the student's tuition at Bonim Lamokom for the 2019-20 school year, less 15 percent for the portion of the school day at Bonim Lamokom that was devoted to religious instruction (IHO Decision at pp. 7-8).

IV. Appeal for State-Level Review

The district appeals, arguing that the IHO erred in finding that the district failed to offer the student a FAPE during the 2019-20 school year on the grounds that the district failed to provide sufficient mainstreaming opportunities for the student in the least restrictive environment (LRE), failed to provide sufficient special transportation, and failed to demonstrate that all IEP services

[6] The hearing record also contains two interim decisions rendered by the IHO, dated June 15, 2021 and November 21, 2021 respectively, denying the district's motions to dismiss the parents' respective complaints as outside the applicable statute of limitations.

with respect to the student's extended school year program would be implemented, including a bilingual Yiddish speaking special education teacher.

In an answer, the parents respond to the district's material allegations with admissions and denials and argue that the IHO's decision should be upheld 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]).[7]

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).

[7] 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).

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. January 2019 IEP

1. Least Restrictive Environment

The district contends that the IHO erred in finding that the district's recommended program was not the student's LRE and asserts that the student was properly placed in a special class in a specialized school based upon his needs and that the CSE considered the student's access to typically developing peers and included some mainstreaming activities in the IEP. The parents assert that the CSE failed to properly consider the student's LRE and failed to provide any meaningful access to typically developing peers in the student's IEP. The parents contend that the student had previously been placed in a special class in a community school and the move to a special school should have been explicitly justified within the IEP and the failure to do so deprived the parents of an opportunity to meaningfully participate in the development of the student's IEP. The parents assert that the CSE should have been aware that the student benefitted from a less restrictive setting in the unilateral placement where the student had structured interaction with non-disabled peers, such that opportunities for inclusion should have been included in the January 2019 IEP.

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 300.107, 300.114[a][2][i], 300.116[a][2], 300.117; 8 NYCRR 200.1[cc], 200.6[a][1]; see T.M., 752 F.3d at 161-67; Newington, 546 F.3d at 111; Gagliardo, 489 F.3d at 105; Walczak, 142 F.3d at 132; Patskin v. Bd. of Educ. of Webster Cent. Sch. Dist., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling, or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ. of Borough of Clementon Sch. Dist., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. N. Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobol, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 CFR 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 CFR 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 CFR 300.115; 8 NYCRR

200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; the continuum also makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 CFR 300.115[b]).

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

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

(Newington, 546 F.3d at 120; see N. Colonie, 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50). The Court recognized the tension that occurs at times between the objective of having a district provide an education suited to a student's particular needs and the objective of educating that student with non-disabled peers as much as circumstances allow (Newington, 546 F.3d at 119, citing Daniel R.R., 874 F.2d at 1044). The Court explained that the inquiry is individualized and fact specific, taking into account the nature of the student's condition and the school's particular efforts to accommodate it (Newington, 546 F.3d at 120).

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).

The parents do not argue that the student could have been appropriately educated in a general education classroom with the use of supplemental aids and services; accordingly, the issue turns on the second aspect of the Newington test, that is, whether the CSE provided mainstreaming opportunities for the student with nondisabled peers to the maximum extent appropriate.

The January 2019 IEP notes that the CSE considered placing the student in either a 12:1+1 or a 15:1 "Special Class in a community school" but rejected these options as insufficient to address

[the student's] significant global delays" (Dist. Ex. 3 at p. 23). The IEP also states, in a section considering the effect of the student's needs on his involvement with and progress within the general education curriculum, that the student's "significant global delays preclude[d] participation in a general education program for academic related areas" and that he would "participate in appropriate school nonacademic and extracurricular activities with supervision and support" (id. at p. 4). In a section considering the student's participation with students without disabilities, the IEP does not explain the extent to which the student would not participate in activities with nondisabled peers; rather, it only notes that the student's "significant global delays preclude[d] participation in regular assessment" (id. at p. 21). Additionally, this section of the IEP notes that, rather than participating in a regular physical education program, the student would be provided with "adaptive physical education" (id.).

According to the district school psychologist, who attended the January 2019 CSE meeting and served as the district representative, the CSE made its program recommendations with LRE considerations in mind "to ensure that [the student] made meaningful academic progress during the school year while being exposed to his peers for social-emotional development" (Dist. Ex. 23 at ¶¶ 2, 9). She indicated that the CSE decided not to recommend that the student attend a community school because the committee believed that the student would experience "substantial regression" over the summer (id. ¶ 10).

The principal of the assigned public school noted in her affidavit testimony that at the school students were exposed to nondisabled peers during the 2019-20 school year through extracurricular activities such as "family fun days," movie nights, dances, recycling activities, running club events, and unified sports teams with the community school located next door to the specialized school, and that some disabled students traveled on the same bus as the nondisabled students (Dist. Ex. 24 at ¶ 11).[8] She indicated that family fun days would take place on the weekend or after school (Tr. p. 56).

The parents argue that, prior to the January 2019 CSE meeting, a "[c]ommunity [s]chool setting ha[d] consistently been determined to be the LRE for [the student]" (Answer ¶ 13). According to the parent, the student had attended a Yiddish 12:1+1 special class in a district community school for elementary school through the 2014-15 school year (Parent Ex. P ¶ 6).

[8] The parents contend that this testimony should be disregarded as impermissibly retrospective, however, I disagree because, although the Second Circuit has held that a district cannot rely on after-the fact testimony in order to "rehabilitate a deficient IEP," testimony that "explains or justifies the services listed in the IEP" is permissible and may be considered (R.E., 694 F.3d at 186-88; see also E.M. v. New York City Dep't of Educ., 758 F.3d 442, 462 [2d Cir. 2014] [explaining that "[b]y way of example, we explained that 'testimony may be received that explains or justifies the services listed in the IEP,' but the district 'may not introduce testimony that a different teaching method, not mentioned in the IEP, would have been used'"] [internal citations omitted]; P.C. v. Rye City Sch. Dist., 232 F. Supp. 3d 394, 416 [S.D.N.Y. 2017] [noting that the "few additional details" about the CSE's recommendations described in testimony did not materially alter the written plan or prevent the parents from making an informed decision]). Here, participation of the student in extracurricular activities is listed in the January 2019 IEP (Dist. Ex. 3 at p. 4), and the testimony of the principal explains the types of extracurricular activities offered at the school. An IEP must describe the special education services that will be provided to a with sufficient detail to guide when those services will be available, but it does not have to provide details of events that a student may experience with nondisabled peers.

However, the parents indicated that the student did not make progress in that setting and, therefore, they unilaterally placed him at Bonim Lamokom beginning in the 2015-16 school year (id. ¶ 7).

According to the evidence in the hearing record, Bonim Lamokom shared a school facility with a private general education school and provided students with disabilities opportunities to interact with nondisabled peers upon arrival in the school, during recess, at lunch, during physical education periods four times per week, during transitions, at school events, and through scheduled "buddy time," which was a special program that paired a student with a disability with a nondisabled peer for "pure learning" (see Parent Exs. O at ¶¶ 6, 10, 12-15; P at ¶¶ 7-8). The CSE reviewed a teacher report and three related service provider updates from staff at Bonim Lamokom, and the principal of Bonim Lamokom as well as the student's classroom teacher participated in the January 2019 CSE meeting (Dist. Ex. 23; see Dist. Exs. 3; 19-21). Additionally, the CSE reviewed a 2017 psychoeducational evaluation of the student conducted while the student attended Bonim Lamokom and the district school psychologist conducted a classroom observation of the student at Bonim Lamokom (Dist. Exs. 8; 18). None of the documents before the CSE described the degree which the student had been or could be appropriately mainstreamed with nondisabled peers.

Based on the foregoing, while Bonim Lamokom generally may have been structured to provide its students with opportunities to interact with nondisabled peers at during the school years leading up to the January 2019 CSE meeting, the evidence is unclear as to the degree the student was able to take advantage of such opportunities or the extent that he benefited from the same.

On the other hand, the district school psychologist's reference to the student's need for a 12-month school year program as a justification for the specialized school recommendation appears to imply that 12-month services would not be available in a community school (Parent Ex. 23 at ¶ 10). This constitutes a placement decision impermissibly based on the availability of services in the district, rather than the student's unique needs as reflected in the IEP (34 CFR 300.116[b][2]; 8 NYCRR 200.6[a][2]; see T.M., 752 F.3d at 163 [finding that the IDEA's LRE requirement is not limited, in the extended school year (ESY) context, by what programs the school district already offers, but rather must be based on the student's needs]; Adams v. State, 195 F.3d 1141, 1151 [9th Cir. 1999]; Reusch v. Fountain, 872 F. Supp. 1421, 1425-26 [D. Md. 1994]; Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006] ["Although the Act does not require that each school building in [a district] be able to provide all the special education and related services for all types and severities of disabilities[,] [i]n all cases, placement decisions must be individually determined on the basis of each child's abilities and needs and each child's IEP, and not solely on factors such as . . . availability of special education and related services, configuration of the service delivery system, availability of space, or administrative convenience"]; see also Letter to Clarke, 48 IDELR 77 [OSEP 2007] [stating that service delivery determinations must be made by the CSE "based on a child's individual and unique needs, and cannot be made as a matter of general policy by administrators, teachers or others apart from the IEP Team process"]).

Ultimately, the IEP's reference to the student's ability to participate in extracurricular activities, as further explained by the testimony of the principal of the assigned school, may well have resulted in sufficient mainstreaming opportunities for the student in light of his needs. Ultimately, however, it is unnecessary to decide because, as set forth below, the evidence in the hearing record supports the IHO's conclusion that the district failed to offer the student a FAPE on other grounds.

2. Transportation

The district contends that the IHO erred in finding that the student was denied a FAPE because student's IEP did not provide for special education transportation, arguing that the IEP did provide special education transportation and that the hearing record contains further information about what would be provided. The parents assert that the IHO correctly determined that the lack of special education transportation contributed to the denial of FAPE because, although the IEP notes that the student required special transportation, there were no specific accommodations identified.

The IDEA specifically includes transportation, as well as any modifications or accommodations necessary in order to assist a student to benefit from his or her special education, in its definition of related services (20 U.S.C. § 1401[26]; see 34 CFR 300.34[a], [c][16]). In addition, State law defines special education as "specially designed instruction . . . and transportation, provided at no cost to the parents to meet the unique needs of a child with a disability," and requires school districts to provide disabled students with "suitable transportation to and from special classes or programs" (Educ. Law §§ 4401[1]; 4402[4][a]; see Educ. Law § 4401[2]; 8 NYCRR 200.1[ww]).

Specialized forms of transportation must be provided to a student with a disability if necessary for the student to benefit from special education, a determination which must be made on a case-by-case basis by the CSE (Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883, 891, 894 [1984]; Dist. of Columbia v. Ramirez, 377 F. Supp. 2d 63 [D.D.C. 2005]; see Transportation, 71 Fed. Reg. 46576 [Aug. 14, 2006]; "Questions and Answers on Serving Children with Disabilities Eligible for Transportation," 53 IDELR 268 [OSERS 2009]; Letter to Hamilton, 25 IDELR 520 [OSEP 1996]; Letter to Anonymous, 23 IDELR 832 [OSEP 1995]; Letter to Smith, 23 IDELR 344 [OSEP 1995]). If the student cannot access his or her special education without provision of a related service such as transportation, the district is obligated to provide the service, "even if that child has no ambulatory impairment that directly causes a 'unique need' for some form of specialized transport" (Donald B. v. Bd. of Sch. Commrs., 117 F.3d 1371, 1374-75 [11th Cir. 1997] [emphasis in original]). The requested transportation must also be "reasonable when all of the facts are considered" (Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1160 [5th Cir. 1986]).

According to a guidance document, the CSE should consider a student's mobility, behavior, communication, physical, and health needs when determining whether or not a student requires transportation as a related service, and that the IEP "must include specific transportation recommendations to address each of the student's needs, as appropriate" ("Special Transportation for Students with Disabilities," VESID Mem. [Mar. 2005], available at http://www.p12.nysed.gov/specialed/publications/policy/specialtrans.pdf). Other relevant considerations may include the student's age, ability to follow directions, ability to function without special transportation, the distance to be traveled, the nature of the area, and the availability of private or public assistance (see Donald B., 117 F.3d at 1375; Malehorn v. Hill City Sch. Dist., 987 F. Supp. 772, 775 [D.S.D. 1997]).

According to minutes from the January 2019 CSE meeting, the CSE discussed that the student's behavior on the school bus was poor (Dist. Ex. 7 at p. 2). The January 2019 IEP indicated

that the student needed special transportation accommodations or services but did not list what the CSE recommended in this regard (Dist. Ex. 3 at pp. 21, 23). The district school psychologist indicated in her affidavit testimony that the specialized school program recommended by the January 2019 CSE programmatically included door-to-door transportation and a bus matron on every school bus trip "who act[ed] as a supervisor of the bus to ensure the students [we]re properly behaved" (Dist. Ex. 23 at ¶ 18). She further noted that the information before the CSE did not indicate and that the parents did not request that the student needed limited travel time (id.).

The affidavit testimony of the district school psychologist describing special transportation accommodations and supports goes further than merely explaining or justifying supports listed in the IEP and is an impermissible attempt to rehabilitate a defect in the IEP (R.E., 694 F.3d at 186-88). Merely checking a catch-all box to indicate that a student is eligible for some kind of special transportation is inadequate to show that the CSE engaged in the requisite planning to address a student's individual needs.

B. Bilingual Instruction

The district alleges that the IHO erred in his determinations relating to the assigned public school site's capacity to implement the 12:1+1 special class mandated on the student's IEP in a classroom with a Yiddish-speaking special education teacher during the summer portion of the student's 12-month program. The district asserts that the student did not require a Yiddish speaking special education teacher during the summer to access the curriculum. The district asserts that the student's IEP stated that the student could be placed in a monolingual English speaking class on an interim basis and that "having an English speaking . . . teacher with a class paraprofessional translating instruction into Yiddish for two months qualifie[d] as the type of interim instruction contemplated by the student's IEP" (Req. for Rev. ¶ 12).[9] The district further asserts that the hearing record shows the student could speak and understand English and that some of the instruction at the unilateral placement was in English.

The parents contend that the IHO correctly determined that the lack of proper bilingual instruction during the summer portion of the student's 12-month program was inappropriate, and further contend that the district erred in failing to properly assess the student's language needs as required by State regulation and guidance. The parents assert that a 1:1 paraprofessional acting as a translator for the student would not be sufficient as special education instruction but would additionally isolate the student and serve as a barrier to improving his language delays and social skills.

[9] The district also contends that the facts in Application of a Student with a Disability, Appeal No. 14-107, are similar to the present matter and should lead to a finding that a Yiddish-speaking paraprofessional was appropriate for a bilingual student in a classroom with an English-speaking classroom teacher (Req. for Rev. ¶ 13). However, the SRO in that matter found that the question of the use of a bilingual paraprofessional had not been properly preserved for appeal, rendering any subsequent substantive findings therein as dicta (see Application of a Student with a Disability, Appeal No. 14-107). Moreover, Application of a Student with a Disability, Appeal No. 14-107, is factually distinguishable from the present matter since, as discussed further below, the January 2019 IEP did not include a recommendation for a bilingual paraprofessional on an interim basis (see Dist. Ex. 3 at p. 23).

1. IEP Interim Plan

Federal and State regulations provide that a CSE must consider special factors including, in the case of a student with limited English proficiency, how the student's language needs relate to the student's IEP (34 CFR 300.324[a][2][ii]; 8 NYCRR 200.4[d][3][ii]).[10] Pursuant to State guidance, when developing an IEP for a limited English proficient student with a disability, the CSE must consider "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 Special 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).

With respect to the student's language needs, the January 2019 IEP noted that the student had limited English proficiency and required special education to address his language needs as they related to his IEP (Dist. Ex. 3 at p. 4). An August 21, 2017 district psychoeducational evaluation report noted that although the student spoke both English and Yiddish, his testing performance improved in Yiddish and Yiddish was the student's dominant language (Dist. Ex. 18 at p. 1). The IEP also notes that the student's parents' language is Yiddish (Dist. Ex. 3 at p. 22).

The IEP called for a 12:1+1 special class in a specialized school with the language of the service being Yiddish, along with the related services of OT and PT in English and speech-language therapy in Yiddish (Dist. Ex. 3 at pp. 17-18). The IEP also calls for the same services to be offered during the summer portion of the student's 12-month program (id. at pp. 18, 22-23). The IEP states that "[i]f there is no provider available in this language," i.e., Yiddish, the student would be "provide[d] interim service in English pending availability of a bilingual provider" and contemplates placing the student in an "interim monolingual class" (id. at p. 23).

There may be circumstances when it is appropriate to develop an interim plan for a student (see E.H. v. Shenendehowa Cent. Sch. Dist., 2008 WL 3930028, at *9-*10 [N.D.N.Y. Aug. 21, 2008] [finding an interim IEP appropriate where the parties contemplated that the student would remain in his home schooling placement to allow the parents to evaluate possible classrooms in anticipation of a final IEP and where the final IEP was complete by October]; see also C.B. v. Garden Grove Unif. Sch. Dist., 575 Fed App'x 796, 799 [9th Cir. May 28, 2014] [finding it appropriate for a district to propose a 30-day interim placement in a small group setting to gather information about the student's ability to learn in a group setting for a student who had received one-to-one instruction for three years]; T.B. v Warwick Sch. Comm., 361 F3d 80, 84 [1st Cir. 2004] [endorsing a district's use of an interim IEP for one month to be reviewed thereafter to

[10] I note that the percentage of students with disabilities in the State who are also English-language learners has risen from 9.7 percent to 10.35 percent during the period between 2012 and 2020 (see "OSEP Fast Facts: Students with Disabilities who are English Learners (ELs) Served under IDEA Part B" [OSEP April 2022], available at https://sites.ed.gov/idea/osep-fast-facts-students-with-disabilities-english-learners#).

determine how the student responded to it]; K.K. v. Hawaii, 2015 WL 4611947, at *19 [D. Haw. July 30, 2015] [finding that a district did not violate the IDEA by offering homebound services as an interim measure until evaluations were complete]; Letter to Boney, 18 IDELR 537 [OSEP 1991] [noting that interim IEPs should only be used in special circumstances where necessary]; Briere v. Fair Haven Grade Sch. Dist., 948 F. Supp. 1242, 1255 [D. Vt. 1996] [indicating that the IDEA "does not authorize 'transitional' IEPs"]).[11] However, if a CSE develops an interim plan, the interim plan must offer the student a FAPE. In addition, to ensure that the interim or temporary placement does not become the child's final placement, CSEs should endeavor to develop an interim IEP with specific conditions and timelines, ensure that the parents are allowed to participate in the formation of the interim placement plan before it is carried out (and that prior written notice is issued), set a specific timeline, and conduct a CSE meeting at the end thereof for the purpose of finalizing the IEP (see E.H., 2008 WL 3930028, at *9). A district may not utilize an interim plan in order to postpone the provision of a FAPE to a student (see Letter to Boney, 18 IDELR 537 [noting that an IEP cannot be used to circumvent the requirement for an IEP to be implemented as soon as possible after a CSE meeting]). Just as with any IEP recommendations, an interim plan must be related to the student's needs, not administrative convenience of the district (see Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]).

Here, the district's attempt to build into the student's IEP a contingency plan is problematic as the interim plan was developed, not to address the student's needs, but to address the district's anticipation that it could not fulfill the terms of the IEP. Moreover, in this instance, the district does not purport to argue that the interim plan included in the January 2019 IEP—a monolingual classroom—was appropriate for the student on an interim basis or otherwise.[12] Instead, the district argues that, on an interim basis, the student would have received the support of a Yiddish-speaking paraprofessional (see Req. for Rev. ¶ 12). The district school psychologist testified that the CSE believed that an interim monolingual class with a Yiddish-speaking paraprofessional translating instruction was appropriate for the student because the student understood English (see Tr. pp. 90-91; Dist. Ex. 23 at ¶ 21). However, the IEP did not include a recommendation for a paraprofessional, and testimony indicating that the student would have received paraprofessional services on an interim basis constitutes impermissible retrospective testimony that attempts to rehabilitate or revise the IEP (R.E., 694 F.3d at 187-88 ["At the time the parents must decide whether to make a unilateral placement . . . [t]he appropriate inquiry is into the nature of the program actually offered"]). Additionally, there is no indication for how long the CSE contemplated that an "interim" placement would be in place (Dist. Ex. 3 at pp. 22-23).

Having found that the district essentially conceded that the "interim" arrangement of a monolingual classroom would not have been appropriate for the student, the January 2019 IEP,

[11] One temporary or interim arrangement specifically contemplated by the IDEA's implementing regulations is a comparable services plan, developed when a student moves into a district from another public agency (34 CFR 300.323[f]; 8 NYCRR 200.4[e][8][ii]).

[12] The district does argue that the student had some English proficiency in support of its argument that a Yiddish-speaking paraprofessional, instead of a Yiddish-speaking special education teacher, would have addressed the student's needs (see Req. for Rev. ¶ 12); however, the argument is beside the point since the IEP reflected an "interim" arrangement of a monolingual special class, with no reference to a Yiddish-speaking paraprofessional (Dist. Ex. 3 at p. 23).

which contemplates this temporary program, was not appropriate and did not offer the student a FAPE. The remaining arguments posed by the parties relate to the assigned public school site's capacity to implement a 12:1+1 special class with the language of service being Yiddish.

2. Assigned Public School Site

Generally, the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained 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.H. v. New York City Dep't of Educ., 611 Fed. App'x 728, 731 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 40 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]). However, a district's assignment of a student to a particular public school site must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244 [2d Cir. 2015]; R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 419-20; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014] [holding that while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). The Second Circuit has held that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (M.O., 793 F.3d at 245; see Y.F. v. New York City Dep't of Educ., 659 Fed. App'x 3, 5-6 [2d Cir. Aug. 24, 2016]; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. Mar. 16, 2016]; B.P. v. New York City Dep't of Educ., 634 Fed. App'x 845, 847-49 [2d Cir. Dec. 30, 2015]). Such challenges must be "tethered" to actual mandates in the student's IEP (see Y.F., 659 Fed. App'x at 5). Additionally, the Second Circuit indicated that such challenges are only appropriate, if they are evaluated prospectively (as of the time the parent made the placement decision) and if they were based on more than "mere speculation" that the school would not adequately adhere to the IEP despite its ability to do so (M.O., 793 F.3d at 244). In order for such challenges to be based on more than speculation, a parent must allege that the school is "factually incapable" of implementing the IEP (see M.E. v. New York City Dep't of Educ., 2018 WL 582601, at *12 [S.D.N.Y. Jan. 26, 2018]; Z.C. v. New York City Dep't of Educ., 2016 WL 7410783, at *9 [S.D.N.Y. Nov. 28, 2016]; L.B. v. New York City Dept. of Educ., 2016 WL 5404654, at *25 [S.D.N.Y. Sept. 27, 2016]; G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at *15 [S.D.N.Y. Sept. 19, 2016]; M.T. v. New York City Dep't of Educ., 2016 WL 1267794, at *14 [S.D.N.Y. Mar. 29, 2016]). Such challenges must be based on something more than the parent's speculative "personal belief" that the assigned public school site was not appropriate (K.F. v. New York City Dep't of Educ., 2016 WL 3981370, at *13 [S.D.N.Y. Mar. 31, 2016]; Q.W.H. v. New York City Dep't of Educ., 2016 WL 916422, at *9 [S.D.N.Y. Mar. 7, 2016]; N.K. v. New York City Dep't of Educ., 2016 WL 590234, at *7 [S.D.N.Y. Feb. 11, 2016]).

The district sent the parents a prior written notice dated June 12, 2019 and a letter identifying the particular public school assigned for the student dated June 12, 2019 (see Dist. Exs.

5, 17; Parent Ex B at p. 6). By letter dated June 17, 2019, the parents gave the district notice of their intention to unilaterally place the student at Bonim Lamokom for the 2019-20 school year based upon their disagreement with the contents of the January 2019 IEP (Parent Ex. C). In her affidavit testimony the student's mother related that she visited the assigned school and was informed that the school did not have a bilingual Yiddish speaking special education teacher for the months of July and August 2019 and was also told that the school did not have a bilingual Yiddish speaking speech-language therapist for the months of July and August 2019 (Parent Ex. P at ¶ 37).

The principal of the assigned school confirmed that the school did not have a bilingual Yiddish-speaking special education teacher to teach the 12:1+1 special class for the months of July and August 2019, but disagreed with the parents' assertion concerning a Yiddish speaking speech-language therapist during summer (Tr. pp. 51; Dist. Ex. 24 at ¶¶ 5, 7). More specifically she stated that the assigned school had a bilingual Yiddish speech-language provider who provided speech-language therapy to the students during the "entire 2019-20 school year" (id. at ¶7).

However, the principal indicated that there was a classroom paraprofessional in the student's proposed classroom that spoke Yiddish and "provided bilingual Yiddish instruction to all of the Yiddish speaking students in the class" and "translated the instruction into Yiddish . . . after the instruct[ion] was orally recited by the teacher" (Dist. Ex. 24 at ¶ 5). In her affidavit testimony, the district school psychologist also referenced that the classroom paraprofessional would be Yiddish speaking (see Dist. Ex. 23 at ¶ 21). On the other hand, during cross-examination, both the district school psychologist and the principal of the assigned school indicated that the bilingual paraprofessional may have been assigned to the student on a 1:1 basis and were much more equivocal as to the anticipated staffing of the proposed classroom (see Tr. pp. 48, 52-55). For example, the principal testified that, "depending on the students that are attending, the paraprofessional may have been the class para that also provided the Yiddish translation . . . for the students that are mandated for bilingual instruction or the para may have also been, dependent on the student, a one-to-one para that could provide the instruction if it's a student that was bilingual Yiddish as well" (Tr. p. 54).

I express no opinion in this decision as to whether the provision of an English-speaking teacher assisted by a classroom paraprofessional who provides translation services, would, by itself, render the 12:1+1 special class with Yiddish as the language of service incapable of being implemented because the case can be resolved on more narrow grounds. The testimonial evidence referencing a 1:1 Yiddish-speaking paraprofessional assigned to the student was impermissibly retrospective because that service was not listed on the student's IEP and, moreover, the testimony of the district witnesses with respect to a Yiddish-speaking classroom paraprofessional was at times contradictory. Therefore that evidence is not helpful to the district's position. On the other hand, claims about an assigned public school site's ability to staff a program or service mandated on an IEP tend to be speculative where the student has not attended the recommended program, as the district could have hired or shifted staff if the student had attended. Ultimately, however, the most significant flaw was that the district relied on the after-the-fact testimony regarding a bilingual paraprofessional to argue that the assigned school would do something different than the terms written into the January 2019 IEP which unambiguously stated that monolingual services would be provided instead as interim plan if the bilingual services called for in the IEP were unavailable. The parents were not required to accept a written IEP that called for bilingual services,

while at the same time indicating that such services would not be provided if the district lacked the requisite staffing. It is this IEP defect, together with the district's failure to describe the special transportation services in the IEP as discussed above, that results in the conclusion that the district denied the student a FAPE.

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determinations that the district failed to offer the student a FAPE for the 2019-20 school year, the necessary inquiry is at an end. The district has not appealed the IHO's findings that the unilateral placement at Bonim Lamokom was appropriate and that equitable considerations weighed in favor of an award of tuition reimbursement. As such, those findings have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
May 4, 2022

JUSTYN P. BATES
STATE REVIEW OFFICER