



The University of the State of New York

The State Education Department

State Review Officer

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No. 11-107

**Application of the [REDACTED]
[REDACTED] for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability**

Appearances:

Michael Best, Special Assistant Corporation Counsel, attorneys for petitioner, Diane da Cunha, Esq., of counsel

Partnership for Children's Rights, attorneys for respondent, Erin McCormack-Herbert, Esq., of counsel

DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondent's (the parent's) daughter and ordered it to reimburse the parent for her daughter's tuition costs at the Cooke Center Academy (Cooke) for the 2010-11 school year. The parent cross-appeals from the impartial hearing officer's decision to the extent that he did not reach certain determinations on issues raised in the due process complaint notice. The appeal must be sustained in part. The cross-appeal must be sustained in part.

At the time of the impartial hearing, the student was attending eleventh grade in a 10:1+1 class at Cooke and receiving related services (Tr. pp. 250, 293, 325-26, 562; Parent Exs. A at pp. 1-2; K; M at p. 1). Cooke is described in the hearing record as a high school for special education students with moderate to severe cognitive impairments, speech and language deficits, and social impairments or immaturity (Tr. pp. 281, 287). Cooke 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). The student's eligibility for special education and related services as a student with a speech or language impairment is not in dispute in this appeal (Parent Ex. C at p. 1; see 34 C.F.R. § 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

Background

The student received a diagnosis of hydrocephalus at birth which required that a shunt be placed in her head to relieve the accumulation of excessive cerebrospinal fluid in her brain, and she has undergone nine related surgeries (Parent Exs. A at p. 2; E at p. 3). The student's performance on a 2008 administration of the Wechsler Abbreviated Scale of Intelligence (WASI) reflected a full scale IQ of 73, in the borderline range of functioning (Parent Ex. F at p. 1). The student presents with mild to moderate cognitive impairments in various domains and exhibits significant deficits in all areas of academic functioning, although her classroom functioning is reported to be stronger than her performance on standardized tests (Tr. p. 289; Parent Ex. C at p. 3). The student has difficulty with tracking (keeping her place when solving problems or copying from the board), short term memory, and retention of material (Parent Ex. C at p. 3). She demonstrates a limited vocabulary; difficulty with higher level thinking and writing skills; and difficulty in proper use of grammar, mechanics, and paragraph development (*id.*). Her interpersonal skills are reportedly good although she demonstrates some social immaturity (Tr. p. 289). The student's deficits in speech-language processing and short and long term memory seriously affect the student's academic performance (*id.*).

The hearing record reflects that the student attended public school from fourth through sixth grade and that during that time she received special education teacher support services (SETSS) (Parent Ex. E at p. 2).¹ During her seventh grade year (2007-08), the student attended a private school and its after school program, and did not receive the services on her then-current individualized education program (IEP) (*id.*).² The student attended Cooke for ninth and tenth grade (2008-09 and 2009-10), and received speech-language therapy and counseling services (Parent Exs. D; E at pp. 1-2; F at p. 1; N at p. 17).

On December 15, 2009, the student was observed by a district special education teacher in her tenth grade English language arts (ELA) class at Cooke as part of the annual Committee on Special Education (CSE) review process (Parent Ex. D). The observation report reflected that the student was able to follow along in her book as the teacher read and that she was able to respond in a very soft voice, with generally appropriate answers when the teacher directed questions to her (*id.*). The student was noted to have read fluently and with some expression when it was her turn to read (*id.*). Her teacher reported that the student participated in class lessons and did the assigned readings (*id.*). During the observation, the student reportedly engaged in off-topic dialogue with a classmate and responded to her teacher's redirection with a "snippy attitude" (*id.*). The teacher indicated that the student's behavior during the observation was typical for her, and confirmed that at times the student "display[ed] some attitude" and engaged in distracting behaviors with one of her male peers (*id.*).

¹ The hearing record reflects that the student repeated fourth grade in the public school (Parent Ex. E at p. 2).

² Although the hearing record reflects that the student was in seventh grade during the 2007-08 school year, it also reflects that she was in ninth grade in September 2008 (*see* Parent Exs. E at pp. 1-2; F at p. 1).

The student's performance during the first and second trimester in tenth grade at Cooke was reflected in a progress report dated February 2010 (Parent Ex. N). It reflected that the student primarily received ratings of "2" (indicating that the student demonstrated partial understanding expected at her instructional level) in all academic subjects and that she primarily received ratings of "A" (always) or "U" (usually) regarding her ability to demonstrate appropriate "student skills" such as working collaboratively with peers, participating in class discussions, completing homework timely, following directions, and organizing class materials (*id.* at pp. 1-8). The student's performance in nonacademic classes including social skills, language skills, travel training, and health was reflected with consistently higher ratings of "3" (student demonstrates an understanding at her instructional level with support) and "4" (student demonstrates an independent understanding expected at her instructional level) (*id.* at pp. 9-11, 13). Teacher comments included in the progress report reflected the following: in ELA, the student demonstrated only the minimum required of her in class and at times engaged in distracting side conversations, although she usually turned homework in on time, worked well with peers in cooperative learning opportunities, and helped classmates in organizing their work; in writing, she showed great progress in her use of grammar, punctuation, and capitalization; in earth science 2, she had demonstrated improvement in the quality of her homework but required a great deal of practice using coordinates and degrees to locate places on a globe and needed constant prompting to refrain from talking during class and to focus on the material presented; in travel training, the student had demonstrated good class participation and ability to complete tasks; and in art, although she initially had difficulty focusing, the student enjoyed and was proud of her completed projects (*id.* at pp. 1-2, 7-8, 12, 15).

On March 26, 2010, the CSE convened for an annual review of the student and to develop an IEP for the 2010-11 school year (Tr. pp. 425-26, 446; Parent Ex. C at p. 1). The meeting was attended by a district special education teacher who also served as the district representative, a district school psychologist, a district social worker, the parent, and an additional parent member (Parent Ex. C at p. 2). The student's math and ELA teachers from Cooke, and the assistant head of school also attended via telephone (*id.*). The March 2010 CSE discussed the student's needs and developed a statement of present levels of performance in the areas of academic and social/emotional performance, and in health and physical development (Dist. Ex. 1 at pp. 1-2; Parent Ex. C at pp. 3-6). The CSE developed and reviewed 13 annual goals to address the student's needs in reading comprehension, vocabulary, mathematics, written expression, transition skills, receptive and expressive language skills, and social skills (Dist. Ex. 1 at p. 1; Parent Ex. C at pp. 7-10). The CSE also reviewed the student's academic management needs and recommended the provisions of small group instruction, directions repeated and rephrased as needed, use of graphic organizers/chart/graphs, auditory and visual cues, checklists, and scaffolding, and redirection to tasks (Dist. Ex. 1 at p. 2; Parent Ex. C at p. 4). The student's social/emotional management needs as reflected in the IEP included small group instruction and positive reinforcement for on-task behavior (Parent Ex. C at p. 5). The IEP reflected that the student had a shunt in her head and noted her need to be careful when engaging in physical activities, but did not indicate that the student required health/physical management needs (*id.* at p. 6). The CSE also reviewed and continued the student's testing accommodations including extended time-double time with five-minute breaks as needed, questions read aloud that do not measure reading comprehension, calculator permitted except on tests measuring computational skills, and directions read and reread aloud (Dist. Exs. 1 at p. 2; 3 at p. 14; Parent Ex. C at p. 13).

The March 2010 CSE determined that the student was eligible for special education programs and services as a student with a speech or language impairment and recommended placement in a 15:1 special class in a community school for English, math, social studies, foreign language, and science (Parent Ex. C at pp. 1, 15). The CSE modified the student's previously recommended speech-language services from two 45-minute sessions in a group of three to two 45-minute sessions in a group of five per week, and added counseling services of one 45-minute individual and one 45-minute group (of 4) session per week (*id.* at p. 13). The resultant IEP also reflected an updated transition plan and that the student's diploma objective was changed from a Regents diploma to an IEP diploma (Dist. Exs. 1 at p. 2; 3 at p. 15; Parent Ex. C at pp. 14-15). The IEP reflected that a 12:1+1 special class in a specialized "program" was considered as a placement for the student but was deemed too restrictive for the student (Parent Ex. C at p. 12).

On August 3, 2010, the parent signed a contract enrolling the student at Cooke for the 2010-11 school year (Parent Ex. I). On August 24, 2010, the parent sent a letter to the district notifying it of her intent to re-enroll the student at Cooke for the 2010-11 school year and to seek direct payment from the district for the student's tuition at Cooke (Parent Ex. P). In her letter, the parent stated that the March 2010 IEP was not designed to meet the student's special education needs because the IEP failed to adequately address the student's transition needs and the recommended 15:1 special class placement would not provide the student with sufficient academic and social/emotional support to address her cognitive and speech-language delays (*id.* at p. 1). The parent also indicated that she had visited the particular school building to which the district assigned the student to attend for the 2010-11 school year and determined that it was inappropriate due to concerns about the school's ability to meet the student's transition needs and the student's safety in a large school setting (*id.* at pp. 1-2).

Due Process Complaint Notice

The parent filed a due process complaint notice dated February 16, 2011 asserting that the district failed to offer the student a free appropriate public education (FAPE) for the 2010-11 school year (Parent Ex. A). The parent alleged that the March 2010 CSE's recommendation that the student be placed in a 15:1 special class in a community school was not appropriate because the student required a higher level of individual attention and academic support and the CSE made the 15:1 placement recommendation over the objection of the parent and the student's then-current private school staff members (*id.* at p. 2). She further asserted that the district failed to adequately evaluate and address the student's needs as they related to transitioning from school to post-school activities because it failed to conduct a current vocational assessment and failed to include an adequate description of the student's transition needs, appropriate goals, and transition services into the student's IEP (*id.* at pp. 2-3). According to the parent, the March 2010 IEP does not adequately describe the student's health and physical management needs and assigns no responsibility to district officials for ensuring the student is not placed at risk of head trauma (*id.* at p. 3). The parent further argued that the assigned school would not meet the student's special education needs because it would not provide her with a 15:1 special class placement for all academic subjects as mandated in her IEP, would not meet the student's transition needs including her need for travel training as documented in her IEP, and would not meet the student's health and safety needs (*id.* at pp. 2-3). The parent stated that upon timely written notice to the

district, she had reenrolled the student in Cooke for the 2010-11 school year to ensure that the student received an appropriate education (id. at p. 3). As a remedy, the parent requested that the district pay for the student's tuition to Cooke for the 2010-11 school year (id. at p. 4).

Impartial Hearing Officer Decision

The impartial hearing convened on April 28, 2011 and concluded on June 9, 2011, after four days of proceedings (Tr. pp. 1-590). By decision dated July 27, 2011, the impartial hearing officer found that the district failed to offer the student a FAPE for the 2010-11 school year (IHO Decision at pp. 9-12). First, the impartial hearing officer found a procedural error with respect to the composition of the CSE because the district special education teacher at the March 26, 2010 CSE meeting was not the student's teacher during either the 2009-10 or 2010-11 school years (id. at p. 9). He also stated that although there were two special education teachers from Cooke present at the March 26, 2010 CSE meeting, neither participated for the entire duration of the meeting or were involved in determining the student's special education program (id. at p. 10). However, the impartial hearing officer found that the lack of a proper special education teacher at the March 2010 CSE meeting did not rise to the level of a denial of a FAPE (id.).

The impartial hearing officer found that there was a denial of a FAPE because the recommended 15:1 placement was insufficient to meet the student's special education needs (IHO Decision at p. 11). He noted that both the parent and assistant head of Cooke appeared to have strenuously objected to the recommended 15:1 placement and expressed concerns that the student needed more individual attention and assistance than could be provided in that setting (id. at p. 10). The impartial hearing officer also noted that the district's acknowledgment that the 15:1 placement was the smallest setting that could be recommended without placing the student in a District 75 setting that was for students with disabilities far more severe than those of the student, but stated that does not render the recommendation for a 15:1 appropriate for the student (id. at p. 11). The impartial hearing officer gave weight to the testimony of the witnesses from Cooke because they interacted with the student daily and were intimately familiar with the student's deficits and abilities, as opposed to the district members of the CSE who were lacking familiarity with the student or the manner in which she learned (id. at pp. 10-11).

Regarding the assigned school, the impartial hearing officer also noted that he was impressed by the professionalism of the special education teachers who testified on behalf of the district, but found their testimony to be compromised by the fact that neither witness had ever met the student and they were personally unfamiliar with the degree of her needs and deficits (IHO Decision at p. 11). The impartial hearing officer rejected the opinions of the district special education teachers that the student was sufficiently like the other students in the 15:1 classes and could have received an appropriate education in such a setting (id. at p. 12). The impartial hearing officer also found the assigned school inappropriate because classes focused on preparing students for taking State RCT examinations, however the student had not yet taken and failed a Regents examination in math which was a prerequisite for taking the RCT exam (id.). He further noted that the assigned school did not offer Spanish in a 15:1 setting and that the student would have to either go into a general education setting or take an online course for that subject, neither of which complied with the mandate in the student's March 26, 2010 IEP (id.).

The impartial hearing officer found that the parent met her burden of establishing the appropriateness of Cooke for the student for the 2010-11 school year (IH O Decision at pp. 12-13). In making this finding, he noted the size of the school and the classroom student-to-teacher ratios, that the student was making progress in her programs although the level of her academic work remains low but consistent with her deficits, a vocational program offered by Cooke, and internships in which the student had successfully participated (id.). The impartial hearing officer also found that there was nothing in the record that would militate against the parent being entitled to the relief sought in her due process complaint notice (id. at pp. 13-14). The impartial hearing officer ordered the district to pay Cooke for the student's tuition for the 2010-11 school year (id. at p. 15).

Appeal for State-Level Review

This appeal by the district ensued. The district alleges that the impartial hearing officer erred in finding that it failed to offer the student a FAPE for the 2010-11 school year. The district alleges that the recommended 15:1 special class would have provided the student with sufficient individualized attention while allowing her to interact with nondisabled students in the least restrictive environment (LRE); that the class was designed to address below grade-level performance; and that the IEP contained numerous measures to address the student's distractibility, including small group instruction, repetition and rephrasing of directions, graphic organizers/charts/graphs, redirection to task, auditory and visual cues, checklists, and scaffolding. The district further alleges that the impartial hearing officer improperly found that none of the district's CSE members had personal knowledge of the student, as the district's special education teacher conducted a classroom observation of the student and there is no requirement that CSE members be personally acquainted with a student. Further, the district argues that because the student attends a private school, the district does not have the same level of personal knowledge of the student as the private school teachers and the CSE was not required to defer to the opinions of the parent or staff from Cooke.

The district alleged that there is no denial of a FAPE for a failure to implement a program where the student does not attend the program. The district alleged as an alternative argument that the assigned school was appropriate even though the student never attended because the recommended math class would have benefited the student by providing her with practice in reading and understanding word problems, which were her major math deficits, and that the recommended program's online Spanish course would have afforded the student the opportunity to work at her own pace under the supervision of a 1:1 teacher and that a deviation to the online course from the IEP prescribed 15:1 Spanish class would not have precluded the student from the opportunity to receive educational benefit.

The district alleged that equitable considerations do not favor the parent because she enrolled the student at Cooke prior to visiting the assigned school and voiced concerns about the student's safety in the assigned school but permits the student to ride mass transit alone on a daily basis while attending Cooke. The district seeks an annulment of the impartial hearing officer's July 27, 2011 decision ordering the district to pay the student's tuition at Cooke for the 2010-11 school year.

The parent submitted an answer in which she denies many of the substantive allegations in the petition and alleges that the impartial hearing officer correctly determined that the district failed to offer the student a FAPE for the 2010-11 school year. Specifically, the parent alleges that the impartial hearing officer correctly determined that the recommended 15:1 special class was insufficient to meet the student's special education needs; that the impartial hearing officer's oversight in finding that none of the district CSE members had met the student when one had done an observation of the student did not unduly influence the impartial hearing officer's decision as to whether the district offered a FAPE; that the impartial hearing officer is not obligated to accept the district's opinion regarding the appropriateness of the student's IEP and it was within the impartial hearing officer's discretion to credit the testimony of the parent's witnesses over the district's witnesses; and that it was the district's burden to demonstrate that the recommended 15:1 special class offered sufficient support to address the student's needs and it did not meet that burden. Additionally, the parent alleges that the district did not appeal the impartial hearing officer's decision to reject the opinions of district witnesses that the student was sufficiently like other students in the recommended 15:1 classes and could have received an appropriate education in that setting, and as such the determination by the impartial hearing officer is final and binding on the parties.

The parent cross-appeals the impartial hearing officer's decision to the extent that he did not (1) reach a determination regarding the district's inability to implement the student's IEP mandated services, (2) extend his ruling regarding the district's focus on RCT preparation to the recommended ELA class, (3) reach an overall finding that the assigned school was inappropriate for the student, (4) determine whether the district properly evaluated and addressed the student's transition needs, and (5) determine whether the district properly identified and addressed the student's health needs. The parent asserts that the district could not fully implement the student's IEP and that such implementation failure was material and resulted in the denial of a FAPE. The parent further alleges that the district did not complete an appropriate transition assessment of the student, and that the student's IEP did not set forth adequate transition goals or adequately describe the student's transition needs or services that she would receive for the 2010-11 school year. The parent also alleges that the student's IEP and recommended placement were not appropriate with respect to the student's health needs and, specifically, that the IEP did not indicate the student's health/physical management needs or assign responsibility to school officials for ensuring that the student was not placed at risk of head trauma. The parent further alleges that the student was recommended for placement in a large high school where she would have attended gym class with up to 50 other students and been exposed to hallways where 3,000 students change class simultaneously.

Regarding equitable considerations, the parent alleges that they favor her and that the impartial hearing officer properly awarded tuition reimbursement. Specifically, the parent alleges that she signed the Cooke enrollment contract on the same day in August 2010 that she visited the assigned school, but that it was nonetheless reasonable for her to sign the Cooke enrollment contract either before or after visiting the assigned school. She also alleges that the district's argument that she expressed health-related safety concerns about the assigned school allegedly before she saw students in session at the assigned school and despite the fact that the student rides mass transit to school is unfounded. The parent alleges that she cooperated with the district, advised the district about her concerns regarding the student's education, and did not

prevent the district from offering the student a FAPE. The parent requests that a State Review Officer dismiss the district's appeal and uphold the impartial hearing officer's decision in its entirety.

The district submitted a reply and answer to the parent's cross appeal. The district alleges that the parent's claim that the impartial hearing officer's rejection of the district witnesses' opinions is final and binding upon the parties is without merit because the impartial hearing officer's statement that he rejected the teacher's opinions that the student was sufficiently like other students in those classes and could have received an appropriate education in such a setting is not a finding, conclusion or order required to be identified for appeal under State regulations and was not the basis for the impartial hearing officer's determination that the district failed to offer the student a FAPE. Additionally, the district alleges that the district specifically objected to the impartial hearing officer's determination that the district recommended 15:1 class would not provide the student with a FAPE and the impartial hearing officer's rejection of the district witnesses on the grounds that they were not personally acquainted with the student is not required nor practicable where the student attends private school.

The district also alleges that the parent did not separately set out the allegations of her cross-appeal but rather intertwined them with the allegations of her answer, and generally denies many of the allegations contained in the parent's answer. The district specifically denies that the impartial hearing officer failed to make findings on parent's claims that (1) the inability of the assigned school to provide a 15:1 foreign language class was a material failure to implement the student's IEP and amounted to a denial of a FAPE; (2) the preparation for the RCT of the proposed ELA class and the requirement for Regents testing before taking the RCT tests at the assigned school were inappropriate for the student; (3) the assigned school was overall inappropriate for the student; (4) the district did not properly address the student's transition needs; and (5) the district did not properly address the student's health needs. The district maintains its request for an annulment of the impartial hearing officer's July 27, 2011 decision and a determination that it offered the student a FAPE for the 2010-11 school year or, alternatively, that equitable considerations do not favor the parent.

Applicable Standards

Two purposes of the Individuals with Disabilities Education Act (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 v. T.A., 129 S. Ct. 2484, 2491 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all

procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is 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 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer'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 v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 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; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a

Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). 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; 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 C.F.R. § 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 M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

Discussion

Unappealed Determinations - Finality

As an initial matter, I will address the parent's allegation that the district did not appeal the impartial hearing officer's decision to reject the opinions offered by district witnesses, and as such that determination has become by the impartial hearing officer is final and binding on the parties. The district asserts that the parent's allegation is without merit.

A petition for review must comply with section 279.4(a) of the Regulations of the Commissioner of Education, which provides, in pertinent part, that: "[t]he petition for review shall clearly indicate the reasons for challenging the impartial hearing officer's decision, identifying the findings, conclusions and orders to which exceptions are taken, and shall indicate what relief should be granted by the State Review Officer to the petitioner" (8 NYCRR § 279.4[a]). I find that the impartial hearing officer's rejection of the opinions of district witnesses and the grounds therefore was sufficiently raised by the district.³ Accordingly, those

³ The impartial hearing officer stated that he was "far more persuaded by the opinions of those who daily interact with [the] student and are intimately familiar with her deficits and abilities, as opposed to those members of the [CSE], none of whom have ever met [the] student or had any personal familiarity with her or the manner in which [the] student learned, except for the information gathered from those who taught [the] student or the reports provided by them," and that while noting the professionalism of the district special education teachers, found "their testimony compromised by the fact that neither witness had ever met [the] student and so were personally unfamiliar with the degree of her needs and deficits" (IHO Dec. at p. 11). While the IDEA requires that students with disabilities have available to them a special education and related services designed to meet their unique needs, there is no requirement that every member of the CSE have a high degree of personal familiarity with the student (see 20 U.S.C. §§ 1400-1482; see also 34 C.F.R. 300.116[a][1]; 8 NYCRR 200.3[a][1]). I also note that the parent in this matter opted to enroll the student in a private school,

determinations by the impartial hearing officer will be considered herein (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]).

Also, I note that neither party appealed the determination of the impartial hearing officer that the failure of the March 2010 CSE to have the student's special education teacher as a member of the committee was a procedural error but did not rise to the level of a denial of a FAPE; thus, that determination is final and binding on the parties and will not be reviewed on appeal (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]; see Pet. at n.4). Further, neither party appealed the impartial hearing officer's determination that Cooke was an appropriate placement for the student for the 2010-11 school year; thus, that determination is final and binding on the parties and will not be reviewed on appeal (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5][v]).

March 2010 IEP

Turning now to the March 26, 2010 IEP, the hearing record reflects that the March 26, 2010 CSE developed the present levels of academic performance and functional levels contained in the IEP based on the progress reports from Cooke and the input of the student's then-current Cooke math and ELA teachers during the CSE meeting (Tr. pp. 384-85, 432, 438; Dist. Ex. 1 at p. 1; Parent Ex. N at pp. 1-10).⁴ Testimony by the district representative at the CSE meeting indicated that the CSE developed academic management strategies, which strategies addressed the student's distractibility, short term memory, and retention of material, and developed goals to address the needs of the student that were identified in her present levels of academic performance (Tr. p. 433, 441-42; Dist. Ex. 1 at pp. 1-2; Parent Ex. C at p. 4). A review of the goals and objectives on the IEP reveals that they are linked to the student's deficits as described in the present levels of academic performance (see Parent Ex. C at p. 3; see also Parent Ex. C at pp. 7-8).

The student's present level of social/emotional performance was also developed based on the description of the student's behavior by her then-current teachers during the CSE meeting (Tr. p. 433; Dist. Ex. 1 at pp. 1-2). The IEP indicated that the student's behavior differed in her various classes, that she tended to be chatty and distracted especially in classes that included her preferred group of friends, but that her ability to pay attention improved after a few prompts (Parent Ex. C at p. 5; see Parent Ex. N at pp. 1, 8). The IEP also indicated that the student had typical peer relations and that her behavior did not seriously interfere with instruction and could be addressed by the special education teacher (Parent Ex. C at p. 5). The student's social/emotional needs were addressed via the social/emotional management strategies reflected in the IEP including small group instruction and positive reinforcement for on task behavior (id.). Testimony by the district representative indicated that the CSE also addressed the student's social/emotional deficits with the recommendation for individual and group counseling services, and a corresponding counseling goal that focused on increasing the student's ability to identify

thereby contributing to the lack of personal familiarity with the student by the CSE and the enhanced personal familiarity with the student by the staff at Cooke.

⁴ Testimony by the student's math teacher from Cooke reflected that the student's math instructional level was reported to be at a 2.5 grade level at the CSE meeting and that the 4.5 grade equivalent reflected on the IEP was indicative of the instructional level in the student's classroom at Cooke (Tr. p. 386; Parent Ex. C at p. 3).

and explore her feelings, developing strategies concerning her disability, and self-advocating (Tr. pp. 433-34; Dist. Ex. 1 at p. 2; Parent Ex. C at pp. 5, 9, 13).

The parent contends in her cross-appeal that the student's IEP was not appropriate with respect to the student's health needs because no health and physical management needs were included in the student's IEP and no school official was assigned responsibility for ensuring that the student was not placed at risk of head trauma. The student's IEP specifically states that the student "was born with hydrocephalus and has a vp shunt in her head" (Parent Ex. C at p. 6). It further states that the student has had nine surgeries and "needs to be careful when engaging in physical activities" (*id.*). The hearing record reflects that this information was provided by the parent (Tr. p. 434-35). Testimony by the district representative indicated that the CSE had asked the parent if the student required any further limitations due to her condition and that the parent indicated that the student was aware of it, and that there was no need to put anything else into the IEP regarding her condition (Tr. p. 446). The assistant head of school and the physical education teacher at Cooke testified that the student had previously demonstrated ability to participate in cheerleading and track (Tr. pp. 362, 553). Based on the foregoing, I find that the hearing record does not support that the student required additional health and physical management needs to be noted on her IEP, and find that the IEP as it relates to the student's health and physical development was appropriate for the student.

Recommended 15:1 Placement

I now turn to the parties' dispute regarding the appropriateness of the recommended placement for the student. The hearing record reflects that the recommended 15:1 placement would address the student's below grade level functioning in reading, writing, and math (Tr. pp. 438-39). Testimony by the district representative indicated that the profile of students in a 15:1 class is very similar to the profile of the student in the instant case, and that the 15:1 teacher would break the students into small groups in reading, writing, and math according to their ability and work with them to address their needs (*id.*). Testimony by the ELA teacher in the assigned class reflected that the 15:1 class followed an overall curriculum that was modified for the students and individualized according to students' academic levels and learning styles (Tr. pp. 104, 109). Testimony by the ELA teacher also indicated that the goal of the class was to promote active readers and writers, which included helping students to increase their comprehension; to be able to read, write, organize paragraphs, and create essays and compositions; to get them to diplomas; to help them graduate; to prepare them for the State RCT reading and writing examinations; and to direct them to transition to life after high school (Tr. p. 109).⁵ Testimony by the math teacher in the assigned class reflected that the eleventh grade math curriculum in the 15:1 class is adapted to students' levels and learning styles (Tr. pp. 168-69). She further testified that the goal of the class is to ensure that the students understand the

⁵ I note that the impartial hearing officer found that the 15:1 placement was not appropriate for the student because of its focus on preparing students for taking the Regents Competency Examinations specifically because the student had not yet taken and failed a Regents examination in math which was a pre requisite for taking the Regents Competency Examinations (IHO Decision at p. 12). However, I note that state regulations expressly provide that a student is automatically eligible to sit for a Regents Competency Examination upon failing a Regents Exam (8 NYCRR 100.5[a][5][1]). As such, the student in this case was not required to have previously sat for and failed the Regents exam prior to the CSE considering placement in a 15:1 special class that prepares students for the possibility of taking a Regents Competency Exam.

curriculum, to prepare students to pass the State RCT in math, to help students to connect what they are learning in math with their real life problems, and to use the knowledge after high school (Tr. pp. 167-68).

The hearing record also reflects that the recommended 15:1 placement would have appropriately addressed the student's social/emotional needs. The district ELA teacher testified that when reviewing an IEP she looks at the student's present levels of performance, management needs, strengths, weaknesses, IQ, whether the student requires related services, and anything else that would give her some insight into the student's social background (Tr. p. 121). She further testified that she reviewed the student's IEP and that, based on the IEP, the student would have fit into her 15:1 class (Tr. pp. 122-23). The March 2010 IEP reflects that the CSE considered a 12:1+1 special class in a "specialized program" (special school), but deemed that placement to be too restrictive for the student (Tr. pp. 447-48; Parent Ex. C at p. 12). The CSE determined that the 12:1+1 was not appropriate for the student because the student would not be with other students with similar social functioning (Tr. p. 452). According to the district representative, the student was socially more "on target with her peers," and students in a 12:1+1 generally were not as socially appropriate as the student (*id.*). As noted above, information provided by Cooke staff in developing the student's social/emotional present level of performance on the student's IEP indicated that the student demonstrated typical peer relations, and the February 2010 progress report from Cooke indicated that the student received ratings of 4 for all of her social skills goals related to classroom skills and 3 for all of her social skills goals related to self awareness (Parent Exs. C at p. 5; N at p. 9). The head of school at Cooke indicated that he believed the student demonstrated some social immaturity, but he also indicated that her interpersonal skills were good (Tr. p. 289). Although the student's math teacher at Cooke testified that the student was "very shy," the Cooke head of school testified that the student was involved in many social activities such as dances, prom, clubs, student council, and basketball games; had participated on the track team and in cheerleading; and sits with other students at lunch (Tr. pp. 289, 362, 400, 553). As noted above, the IEP described the student as "chatty" especially when in class with her preferred peer group (Parent Exs. C at p. 5; N at pp. 1, 8). Based on the above, the hearing record supports a conclusion that the student, who demonstrated typical peer relations, would have been appropriately placed in a 15:1 special class in a community school with regard to social/emotional, as well as academic functioning. Accordingly, this portion of the impartial hearing officer's decision must be annulled.

Transition Services

Having determined that the recommended 15:1 placement was appropriate placement for the student, I turn to review the transition services portion of the student's March 2010 IEP. Under the IDEA, to the extent appropriate for each individual student, an IEP must focus on providing instruction and experiences that enables the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34]; *see* Educ. Law § 4401[9]; 34 C.F.R. § 300.43; 8 NYCRR 200.1[fff]). Accordingly, pursuant to federal law and regulations, an IEP for a student who is at least 16 years of age must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills (20 U.S.C. § 1414[d][1][A][viii]; 34 C.F.R. § 300.320[b]). It must also include the

transition services needed to assist the student in reaching those goals (*id.*). Taking into account these requirements, "[i]t is up to each child's IEP Team to determine the transition services that are needed to meet the unique transition needs of the child" (Transition Services, 71 Fed. Reg. 46668 [Aug. 14, 2006]; see Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 518 F.3d 18 [1st Cir. 2008]; Virginia S. v. Dept. of Educ., 2007 WL 80814 at * 10 [D. Hawaii, Jan. 8 2007]). Additionally, federal regulations do not require the CSE to include information under one component of a student's IEP that is already contained in another component of the IEP (34 C.F.R. § 300.320[d][2]).

Under State regulations, beginning when the student is age 15, an IEP must include a statement of the student's needs taking into account the student's preferences and interests as they relate to transition from school to post-school activities including postsecondary education, vocational education, integrated employment, continuing and adult education, adult services, independent living, or community participation (8 NYCRR 200.1[fff], 200.4[d][2][ix]). For such students, the IEP is also required to include appropriate measurable postsecondary goals based upon appropriate transition assessments; a statement of the transition service needs of the student; needed activities to facilitate the student's movement from school to post-school activities, including instruction, related services, community experiences, the development of employment and other post-school adult living objectives; as well as a statement of the responsibilities of the school district and, when applicable, participating agencies for the provision of such transition services (8 NYCRR 200.4[d][2][ix]; Application of a Student with a Disability, Appeal No. 10-069, Application of the Dep't. of Educ., Appeal No. 08-080).

Here, the student's IEP states that her future vocational goals should focus on her interest in working with children and contains an updated plan to assist the student in preparing for her transition to post high school (Dist. Ex. 1 at p. 2; Parent Ex. C at pp. 5, 10, 14-15). Although the plan was broad regarding the level of detail, it was nevertheless sufficient to allow the student to progress toward her transition to post high school life. In addition her interests, the transition plan noted the student's diploma objective and delineated specific activities that would assist the student in independent living, including making a shopping list, making a budget, practicing making change, and participating in a travel training program to increase her level of confidence needed for independent travel (Parent Ex. C at pp. 14-15; see D.B. v. New York City Dept. of Educ., 2011 WL 4916435, at *9 [S.D.N.Y. Oct. 12, 2011]; Antonaccio v. Board of Educ. of Arlington Cent. School Dist., 281 F.Supp.2d 710, 720 [S.D.N.Y. 2003]; K.C. v. Mansfield Independent Sch. Dist., 618 F.Supp.2d 568, 582 [N.D.Tex. 2009]).⁶ The IEP noted that the student's transition services would be monitored by the student's teacher during classroom activities and through observation (Parent Ex. C at p. 10). In this instance, I find that any deficiency in the transition services alleged by the parents, even if the plan was not developed with strict adherence to procedural requirements, did not rise to the level of a denial of a FAPE to the student.

⁶ The hearing record does not reflect that, as per regulation, the student was invited to participate in the development of the transition plan (34 CFR § 300.321[b][1]). Although her interests appear to have been taken into account, I remind the district to comply with this requirement.

Assigned School

Assigned Class and Functional Grouping

I will next address the impartial hearing officer's finding that the student was not sufficiently like the other students in the assigned classes. State regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii], 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [approving an IEP that placed a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]; Application of a Student with a Disability, Appeal No. 09-082; Application of the Dep't of Educ., Appeal No. 08-095; Application of the Dep't of Educ., Appeal No. 08-018; Application of a Child with a Disability, Appeal No. 07-068; Application of a Child with a Disability, Appeal No. 05-102). State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to: levels of academic or educational achievement and learning characteristics; levels of social development; levels of physical development; and the management needs of the students in the classroom (8 NYCRR 200.6[h][2]; see 8 NYCRR 200.1[ww][3][i][a]-[d]). The social and physical levels of development of the individual students shall be considered to ensure beneficial growth to each student, although neither should be a sole basis for determining placement (8 NYCRR 200.6[a][3][ii], [iii]). Further, the management needs of students may vary and the modifications, adaptations and other resources are to be provided to students so that they do not detract from the opportunities of the other students in the class (8 NYCRR 200.6[a][3][iv]). State regulations also require that a "district operating a special class wherein the range of achievement levels in reading and mathematics exceeds three years shall, . . . , provide the [CSE] and the parents and teacher of students in such class a description of the range of achievement in reading and mathematics, . . . , in the classes, by November 1st of each year" (8 NYCRR 200.6[h][7]). However, State regulations do not preclude a grouping of students in a classroom when the range of achievement levels in reading and math would exceed three years (see Application of the Dep't of Educ., Appeal No. 08-018; Application of the Bd. of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 01-073).

In this case, a meaningful analysis with regard to functional grouping would require me to determine what might have happened had the district been required to implement the student's IEP. While parents are not required to try out the school district's proposed program (Forest Grove, 129 S.Ct. at 2496), I note that neither the IDEA nor State regulations require a district to establish the manner in which a student will be grouped on his or her IEP, as it would be neither practical nor appropriate. The Second Circuit has also determined that, unlike an IEP, districts are not expressly required to provide parents with class profiles (Cerra, 427 F.3d at 194). The IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, but they do not permit parents to direct through veto a district's efforts to implement each student's IEP (see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420, cert. denied, 130 S. Ct. 3277 [2010]). A delay in implementing an otherwise appropriate IEP may form a basis for finding a denial of a FAPE only where the student is actually being educated under the plan, or would be, but for the delay in implementation (see E.H., 2008 WL 3930028, at *11 [N.D.N.Y. Aug. 21, 2008], aff'd 2009 WL 3326627 [2d Cir.

Oct. 16, 2009]). The sufficiency of the district's offered program in this case is determined on the basis of the IEP itself (see R.E. v. New York City Dept. of Educ., 785 F. Supp. 2d 28, 42 [S.D.N.Y. 2011]). If it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement it (id.; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined appropriate, but the parents chose not to avail themselves of the public school program]).

Thus, in this case, the issue of the functional levels of the students in the assigned school is in part speculative because the parent did not accept the services recommended by the district in the IEP or enroll the student in the public school and the district was not required to establish that the student had been grouped appropriately upon the implementation of her IEP in the proposed classroom. Even assuming for the sake of argument that the student had attended the district's recommended program, the evidence in the hearing record nevertheless shows that the 15:1 classes at the assigned district school provided the student with suitable grouping for instructional purposes that was designed to meet the student's needs.

The ELA teacher testified that the student's profile was "quite familiar," and that she deals with that type of student every day (Tr. p. 122). The hearing record reveals that students in the 15:1 classes received speech-language and counseling services, as would the student in the instant case (Tr. pp. 119, 180-81). As mentioned above, the ELA teacher testified that when reviewing an IEP she looks at the student's present levels of performance, management needs, strengths, weaknesses, IQ, whether the student requires related services, and anything else that would give her some insight into the student's social background (Tr. p. 121). The math teacher indicated that she looks at "everything" when reviewing a student's IEP (Tr. p. 183). She further stated that, among other things, she looks at the IEP recommendations, grade level, type of disability, student's needs with regard to having directions and questions read, answers recorded, need for a calculator, visual needs, testing accommodations, and social/emotional functioning (Tr. pp. 183-84).

The hearing record supports a conclusion that the student was similar to the students in the assigned 15:1 classes and that the assigned school would have provided for appropriate age and functional grouping for the student. The ELA teacher testified that she had three eleventh grade 15:1 ELA classes, and most of the students in the classes were functioning at the fourth and fifth grade level although some were functioning on a first or second grade level and some on a sixth or seventh grade level (Tr. pp. 136-37). She testified that she taught the class at a level between fourth grade and sixth grade (id.). In September 2010, at least one of her classes reportedly contained nine students ranging in age between 16 and 18 years (Tr. p. 106). The math teacher also testified that she had three eleventh grade 15:1 classes, and that most of the students in her math classes ranged in functioning between third and seventh grade although one was at the second grade level and one was at the eighth grade level (Tr. pp. 163, 165-66). The math teacher further testified that all three 15:1 math classes had availability for additional students at the beginning of the 2010-11 school year, and all contained students ranging in age from 15 and 17 years (Tr. pp. 163-165).

Based on the foregoing, including the instructional levels in the student's IEP, which were provided by Cooke, and on the testimony by the teachers in the assigned school, the student would have been appropriately grouped for age and academic functional level in the eleventh grade 15:1 ELA and math classes at the assigned school (Tr. pp. 136-37, 163-166; Parent Ex. C at p. 3). Accordingly, I find that the hearing record, in its entirety, does not support the conclusion that, the district, upon implementing the student IEP and grouping the student for instructional purposes, would have deviated from substantial or significant provisions of the student's IEP in a material way and thereby precluded the student from the opportunity to receive educational benefits (Rowley, 458 U.S. at 206-07; A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; Cerra, 427 F.3d at 192; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston Independent School District v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]; see also D.D.-S. v. Southold U.F.S.D., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]; A.L. v. Dep't of Educ., 2011 WL 4001074, at *9 [S.D.N.Y. Aug. 19, 2011]; Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D.D.C. 2007]).

Health and Physical Management Needs

The parent also contends in her cross-appeal that the impartial hearing officer erred in not determining whether the assigned school was too large for the student based upon her health needs and the risk of sustaining head trauma. However, as noted above, the evidence in the hearing record reflects that the student's health needs related to her shunt did not warrant further consideration on the IEP. Specifically, testimony by the district representative indicated that the parent was given the opportunity to discuss concerns regarding the student's health and indicated that the IEP did not need to reflect anything further about the student's condition (Tr. p. 446). The student reportedly participated in cheerleading and track at Cooke (Tr. pp. 362, 553). Further, despite her concern over a crowded hallway that she observed at the assigned school, the parent testified at the impartial hearing that the student traveled to and from school each day by herself on mass transit (Tr. pp. 247, 259). Based on the foregoing, the hearing record does not support that the size of the assigned school was inappropriate for the student and I decline to find a denial of a FAPE based on a material failure to implement the student's IEP, especially when the student never attended the district's program.

Foreign Language Instruction

As stated above, the IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, but the district need not specify the location of services on the IEP (see T.Y., 584 F.3d 412). The sufficiency of the district's offered program in this case is determined on the basis of the IEP itself (see R.E., 785 F. Supp. 2d at 42; but see C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *8 [S.D.N.Y. Oct. 28, 2011]). However, the IDEA requires the district to provide special education services by implementing them in conformity with the student's IEP (20 U.S.C. § 1401[9]; 8 NYCRR 200.4[e][7]). In T.Y. the Second Circuit also cautioned school districts do not have carte blanche to assign a student to a school that cannot satisfy the IEP requirements and that, with regard to the implementation of a student's IEP, a denial of a FAPE occurs if the district deviates from substantial or significant provisions of the student's IEP in a material way and thereby precluded the student from the opportunity to receive educational benefits (T.Y., 584 F.3d at 420; A.P., 2010 WL

1049297; see Van Duyn v. Baker Sch. Dist. 5J ____, 502 F.3d 811 [9th Cir. 2007]; Houston Independent School District v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]). In this case, the parent rejected the IEP and enrolled the student at Cooke prior to the time that the district became obligated to implement the student's IEP in this case.

Despite the fact that the parent rejected the IEP and enrolled the student at Cooke prior to the time the district became obligated to implement the student's IEP in this case, I note that the district in this case recommended that the student attend a 15:1 foreign language class, yet the district's witness essentially conceded during the impartial hearing that the district assigned the student to a school that could not satisfy that requirement of the student's IEP. Specifically, the principal of the offered school indicated that there was a 15:1 program for eleventh grade students in the school that provided 15:1 classes in the four major content areas including English, social studies, science and math, and that the block was not full during the 2010-11 school year (Tr. pp. 43-44). The school also had related services providers on staff, including "speech" teachers and social workers who provided counseling services, for students like the student in the instant case who have services delineated on their IEPs (Tr. pp. 34-35). However, with respect to foreign language, the principal conceded that the assigned school did not have a self-contained Spanish or French class and that the student would "more or less get mainstreamed for that," or it would be provided in a "team teaching situation," or the student could take foreign language online (Tr. pp. 58-60). The hearing record reflects that the online option would entail the student "sit[ting] in front of a computer with a teacher and complet[ing] the required work" (Tr. pp. 78, 81). While I appreciate the candor of the witness, I cannot overlook this defect in view of the Second Circuit's holding that a proposed school to which a district assigns a student must at least be capable of implementing a student's IEP (T.Y., 584 F.3d at 420). Although the district argues that the any deviation from the student's IEP for the student to enroll in the 1:1 online computer class would not have precluded the student from the opportunity to receive educational benefits and characterize the issue as de minimis, I disagree and find it was a material failure of the district to assign the student to a school that did not offer access to special education services consistent with the IEP with regard to the foreign language portion of the curriculum.

In view of the conceded inability of the district to implement the special class aspects of the student's March 2010 IEP with regard to foreign language, I find that the district denied the student a FAPE. The parent's cross appeal is therefore sustained to that extent. Since the parties have not appealed the finding by the impartial hearing officer regarding the appropriateness of Cooke for the student for the 2010-11 school year, I now review whether equitable considerations favor an award of tuition reimbursement to the parent in this matter.

Equitable Considerations

The final consideration in determining whether—and in what amount—reimbursement for a unilateral placement is appropriate requires balancing of the relevant equitable considerations which apply to the parents' claim. 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, 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 S.W. v. New York City Dep't of Educ., 2009 WL 857549, at *13-14 [S.D.N.Y. March 30, 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, 2006 WL 2335140 [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]; Application of the Dep't of Educ., Appeal No. 07-079; Application of the Dep't of Educ., Appeal No. 07-032).

The IDEA allows that reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 C.F.R. § 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G. v. Bd. of Educ., 459 F.3d 356, 376 [2d Cir. 2006]; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist., 2007 WL 3085854, at * 13 [E.D. Pa. Oct. 22, 2007]).

The district contends that equitable considerations do not favor the parent because she enrolled the student at Cooke prior to visiting the assigned school and voiced concerns about the student's safety in the assigned school but permits the student to ride mass transit alone on a daily basis while attending Cooke. Upon review, I find that the hearing record does not support overturning the impartial hearing officer's award of reimbursement to the parent on these bases. The hearing record reflects that the parent visited the assigned school three times, the first being the same day that she signed the enrollment contract with Cooke, and that she visited the school to speak with the principal and teachers to determine its appropriateness for the student (Tr. pp. 238, 262-63, 269-70; Parent Ex. I). I find that the parent acted cooperatively insofar as she visited the district's assigned school when offered the opportunity and she advised the district in a letter dated August 24, 2010 that she disagreed with the district's recommended program (Parent Ex. P), which provided the district with an opportunity to discuss the parent's concerns with her. Accordingly, the parent's actions in this case are clearly distinguishable from cases in

which tuition reimbursement should be denied due to a delay in notifying the CSE of rejection of a district's IEP or due to misconduct, obfuscation or a lack of cooperation in identifying an appropriate public school placement warranting a limitation or denial of relief (see S.W., 646 F.Supp.2d at 364; Carmel, 373 F. Supp. 2d at 417-18), and I find no basis in the hearing record to reasonably infer that the parent would not have considered placing the student in a district program. I am also not persuaded that the evidence in the hearing record supports that equitable considerations do not favor the parent in this matter where the parent voiced concerns about the student's safety in the assigned school but permits the student to ride mass transit alone on a daily basis while attending Cooke. I therefore find that the district's arguments as set forth above with respect to equitable considerations do not in this instance warrant limitation or denial of the parent's request for tuition for Cooke. Accordingly I will not disturb the impartial hearing officer's decision to grant the parent the tuition costs for Cooke.

Conclusion

I have considered the parties' remaining contentions and find them unnecessary to address in light of my determinations herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the portion of the impartial hearing officer's decision dated July 27, 2011 that determined that placement of the student in a 15:1 special class setting for the 2010-11 school year was not appropriate is hereby annulled.

Dated: Albany, New York
November 21, 2011



JUSTYN P. BATES
STATE REVIEW OFFICER