



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 12-160

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:

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Gail M. Eckstein, Esq., of counsel

Kule-Korgood, Roff and Associates, PLLC, attorneys for respondents, Andrea M. Santoro, Esq., of counsel

## DECISION

### I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to pay for the student's tuition costs at the Cooke Center Academy (Cooke) for the 2011-12 school year. The appeal must be sustained.

### II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law. § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; 34 CFR 300.151-300.152, 300.506, 300.511; Educ. Law § 4404[1]; 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**

At the time of the hearing the student was attending the twelfth grade at Cooke and was preparing to graduate from Cooke in June 2012 with a local diploma (Tr. pp. 223-24, 344-45). He has attended Cooke since the beginning of his first grade year (Tr. pp. 344-45).

The student demonstrates delays in the areas of reading, math, writing, fine motor skills, visual perceptual skills, and language skills (Tr. pp. 17-20, 81, 169, 199-202; Dist. Exs. 4-5). In addition, he has received a diagnosis of Down's syndrome and has a history of seizures (Tr. p. 353; Dist. Ex. 1 at pp. 1, 6).

On June 8, 2011, the CSE convened for the student's annual review and to develop his IEP for the 2011-12 school year (Dist. Ex. 1 at p. 1). The CSE continued to find the student eligible to receive special education and related services as a student with a learning disability (Dist. Exs. 1 at p. 1; 3 at p. 1).<sup>1</sup> The June 2011 CSE recommended a 15:1 special class in a community school (Dist. Ex. 1 at p. 13). The CSE also recommended related services of two 45-minute sessions per week of speech-language therapy in a group (5:1), two 45-minute sessions per week of individual occupational therapy (OT), one 45-minute session per week of individual counseling, and one 45-minute session per week of counseling in a group (5:1) (*id.*). The June 2011 CSE also recommended several accommodations related to the student's participation in State and local assessments (*id.*). In addition, to address the student's academic, social/emotional, and physical needs, the IEP contained several accommodations and supports (*id.* at pp. 4-6). The IEP indicated that the student was not exempt from second language instruction (*id.* at p. 12). The June 2011 IEP also included a transition plan for the student including post-secondary pursuits and activities (*id.* at pp. 15-16).

By final notice of recommendation (FNR) dated June 30, 2011, the district notified the parents of the school to which the student was assigned and at which his IEP would be implemented for the 2011-12 school year (Dist. Ex. 6). In reply, the parents sent a letter to the district dated July 28, 2011 raising concerns regarding the IEP including the lack of individualized support in the proposed 15:1 placement, the sufficiency of the transition plan, and the appropriateness of the promotional criteria (Parent Ex. C). The parents also informed the district that they intended to visit the assigned school to see if it would be appropriate for the student and requested a class profile and program description (*id.*). The parents sent the district another letter, dated August 26, 2011, in which they repeated their concerns regarding the IEP and their request for additional information regarding the assigned school and informed the district that they would be enrolling the student at Cooke for the 2011-12 school year (Parent Ex. D).

On September 6, 2011, the parents signed an enrollment contract for the student's attendance at Cooke, a nonpublic school, beginning in September 2011 (Parent Ex. K at pp. 1-2).<sup>2</sup> The parents sent a final letter to the district dated September 30, 2011, in which the parents advised the district that they visited the assigned school and found it inappropriate to meet the student's needs and further advised the district that they intended to request an impartial hearing to obtain public funding for the student's education at Cooke (Parent Ex. E).

### **A. Due Process Complaint Notice**

The parents requested an impartial hearing by a due process complaint notice dated February 22, 2012, challenging the procedural and substantive appropriateness of the student's

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<sup>1</sup> The student's eligibility for special education programs and related services as a student with a learning disability is not in dispute in this appeal (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

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

June 2011 IEP and the district's recommended placement, and seeking tuition reimbursement for the parents' unilateral placement of the student at Cooke for the 2011-12 school year (Parent Ex. A).

Regarding the development of the IEP, the parents allege that the district failed to conduct adequate and sufficient assessments in order to determine the student's needs and abilities (Parent Ex. A. at p. 2). The parents also allege that during the June 2011 CSE meeting, the CSE failed to discuss a classroom observation of the student conducted by the CSE (id.). In addition, the parents argue that the CSE developed the June 2011 IEP pursuant to the district's policies rather than based on the student's educational needs and that the district recommended a program over objections from the parents and personnel from the student's private school (id. at p. 1). The parents assert that the CSE failed to include them in the evaluation process and did not review existing data to determine what additional data or evaluations were required (id. at p. 2). As a further procedural allegation, the parents assert that the June 2011 CSE meeting was untimely because it took place over one year after the student's last annual review (id. at p. 1).

The parents also raise concerns regarding the student's present levels of performance and the student's goals contained in the June 2011 IEP (Parent Ex. A at p. 2). Regarding the June 2011 IEP goals, the parents allege that they are insufficient, inappropriate, and vague, particularly regarding the student's language skills, counseling needs, transitional skills, and daily living skills (id.). The parents further argue that the student's present levels of performance were insufficient, inappropriate and outdated and that the IEP does not contain enough detail regarding the student's strengths, weaknesses, preferences, and needs (id.). The parents raise further concerns, asserting that the description of the student's abilities in expressive, receptive, and pragmatic language contained in the June 2011 IEP are insufficient (id.). The parents also object to the CSE's use of teacher estimates in describing the student's academic levels of performance, asserting that teacher estimates are an insufficient form of assessment (id.). As an additional argument, the parents point out that although the June 2011 IEP recommends OT as a service, the IEP does not set forth that the student has any OT needs or abilities (id.). The parents raised several other concerns regarding the June 2011 IEP, including that it would not be appropriate for the student to take a foreign language, that standard promotional criteria are not appropriate for the student because he is functioning at least four grade levels behind, and that even with accommodations it would not be appropriate for the student to take standardized tests (id.).

The parents also object to the adequacy of the district's recommended placement for the student in a 15:1 classroom (Parent Ex. A at p. 3). The parents allege that a 15:1 staffing ratio would not provide the student with sufficient supports, noting the student's need for individualized instruction (id.). The parents also point out the inclusion in the IEP of small group instruction as a requirement for the student (id. at p. 2).

Additionally, the parents raise concerns regarding the transition plan included in the June 2011 IEP (Parent Ex. A at p. 2). Foremost, the parents contend that the CSE did not have sufficient information to develop a transition plan because the district did not conduct a vocational assessment of the student (id.). The parents also allege that the transition plan contained in the June 2011 IEP: did not include present levels of performance regarding the

student's transition to post-school activities, did not indicate the district's responsibilities for the provision of transition services, did not include sufficient goals (asserting that the goals were vague and unmeasurable), did not consider the student's preferences or interests, and did not provide a service or goals regarding daily living skills (id.).

The parents further argue that the district's offer of placement was insufficient because it did not recommend an actual class (Parent Ex. A at p. 3). The parents then raise a number of allegations regarding the ability of the assigned school to comply with the IEP and address the student's needs (id.). The parents argue that the student would not be appropriately grouped academically or socially at the assigned school (id.). In support of their argument, the parents assert that the students in the assigned school were too advanced, noting that the class the parents observed was reading poetry at grade level, while the student was currently reading five-six grade levels behind (id.).<sup>3</sup> The parents also allege that the students at the assigned school lacked a general awareness about special education students, that the school building is too large and overwhelming for the student, that the student would have difficulty transitioning from a small supportive environment to a large public school, that a significant number of students in the hallways would make it overwhelming for the student to transition between classes, and that the student would have to leave the school after only one year due to his age (id.). Lastly, the parents argue that the assigned school would not be able to implement portions of the June 2011 IEP, including the goal for travel training, opportunities for career related activities as part of the student's transition plan, and provision of the student's related services (id.).

## **B. Impartial Hearing Officer Decision**

An impartial hearing convened on May 25, 2012 and concluded on June 28, 2012 after three days of nonconsecutive hearings (Tr. pp. 1-432). The IHO rendered a decision on July 10, 2012 finding that the district did not offer the student a free appropriate public education (FAPE) for the 2011-12 school year, that the parents' placement of the student at Cooke was appropriate and that equitable considerations favored the parents (IHO Decision). The IHO awarded the parents tuition reimbursement for the 2011-12 school year (id. at p. 12).

Prior to addressing the appropriateness of the district's recommended program for the 2011-12 school year, the IHO found that the parents did not challenge the classification of the student as learning disabled, the related services of OT, speech-language therapy and counseling, or the academic and transitional goals (IHO Decision at p. 9). The IHO also found that the academic and transitional goals were supplied by the educators at Cooke (id.).

Regarding the lack of evaluative data, the IHO determined that an appropriate IEP could not be created due to the lack of objective testing of the student within the three years prior to the June 2011 CSE meeting (IHO Decision at pp. 9-10). The IHO acknowledged the district's position that a November 2010 classroom observation of the student, combined with progress reports from Cooke, was sufficient to provide an accurate picture of the student (id. at p. 9).

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<sup>3</sup> The parents also assert that the assigned school is not an appropriate setting because the student has not taken any regents exams and his IEP reflects that he will receive an IEP diploma (Parent Ex. A. at p. 3). However, it should be noted that the student's IEP does not indicate that he will receive an IEP diploma, and in fact calls for the student to participate in State and local assessments with accommodations (Dist. Ex. 1 at p. 13).

However, the IHO found that the classroom observation was not informative as to the student's cognitive abilities, learning characteristics or specific weaknesses and strengths (id.). The IHO then went on to find that the CSE could not set goals or make program recommendations without a vocational assessment and cognitive and educational evaluations using standardized tests (id. at p. 10). In making her determination the IHO noted the student's communication and social issues and the student's Down's syndrome and learning disabilities, including impairments in memory and organization (id.).

In finding that the district's offered program was substantively inappropriate, the IHO determined that the student required 1:1 attention to a greater degree than he would have received in a classroom with a 15:1 student/teacher ratio (IHO Decision at p. 10). The IHO explained that the student's success in his 10:1+1 classroom at Cooke cannot be used as a reliable indicator that the student would also succeed in a district 15:1 classroom (id.). In finding that there was a significant difference between the quantity and frequency of support available in a 15:1 classroom as opposed to a 10:1+1 classroom, the IHO also found that both the student's Cooke classroom and the district's recommended 15:1 classroom would have included the same multi-sensory emphasis for visual and tactile learners, organizational materials, and educational techniques (id.).

The IHO then determined that the assigned school would not have been capable of addressing the student's vocational needs (IHO Decision at pp. 10-11).<sup>4</sup> The IHO determined that the student required a program with a strong vocational component including instruction in travel training and shopping, which the IHO found to be lacking at the assigned school (id. at p. 11). The IHO noted that the assigned school offered community service, exposed student's to a foreign language, explored future educational opportunities through Regents exams, and offered other impressive opportunities, all of which the IHO found to be commendable (id. at p. 10). However, the IHO also found that because of the student's limitations in expressive and receptive language, memory and executive functioning and his being five to six grade levels behind in reading comprehension, the assigned school was "the wrong educational prescription for this student" (id. at pp. 10-11). The IHO determined that although the assigned school had a career day and community service, it did not offer organized and supervised work experiences or classes designed to address behavior and communication in the workplace (id. at p. 11). The IHO also found that the assigned school lacked travel training, pointing out that although the OT may have provided travel training, OT at the assigned school was unreliable because it was provided through RSA's (id.).

The IHO went on to find that Cooke was an appropriate placement for the student for the 2011-12 school year and that equitable factors weighed in favor of the parents (IHO Decision at pp. 11-12). The IHO noted the small class sizes at Cooke and found that the student received instruction with students similar in age and functional levels (id. at p. 11). The IHO pointed to the student's success at Cooke, in that he passed all six RCT exams in one year, earning a local diploma (id.). In making her determination, the IHO focused on Cooke's strong vocational component, including the opportunity for the student to complete an internship in his area of interest as well as other opportunities to develop skills such as banking and shopping (id.). In

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<sup>4</sup> The IHO did find that the math and ELA goals on the IEP could have been met in the assigned school (IHO Decision at p. 11).

finding that equitable considerations favored the parents, the IHO determined that the parents attended the June 2011 CSE meeting, visited the proposed placement in September 2011 and communicated their objections to the CSE (id.). After making the above determinations, the IHO awarded the parents tuition reimbursement for the cost of the student's education at Cooke for the 2011-12 school year upon submission of proof of payment (id. at p. 12).

#### **IV. Appeal for State-Level Review**

The district appeals from the IHO's decision that it failed to offer the student a FAPE for the 2011-12 school year, that the parents' unilateral placement at Cooke was appropriate, and that equitable considerations favored the parents.

The district asserts that the IHO erred in finding that the district did not have sufficient evaluative data available to determine the student's present levels of performance. The district contends that the CSE relied on two progress reports from Cooke, a classroom observation conducted by the district, and input from Cooke personnel including information provided by the student's teachers at Cooke during the June 2011 CSE meeting.<sup>5</sup> The district points out that no one at the CSE meeting requested a new evaluation of the student. The district also argues that a new psychoeducational evaluation of the student would have only been necessary if the student's classification changed or if a specific question arose that the evaluation would have answered. The district goes on to argue that the CSE decision not to conduct a triennial evaluation was not a denial of FAPE because the IEP adequately described the student and the CSE team had sufficient information available, again referring to the information obtained from Cooke personnel and the Cooke progress report.

The district also asserts that the district's recommendation for placement in a 15:1 classroom was reasonable and that the IHO erred in determining the recommended 15:1 placement would not have provided the student's with sufficient supports. The district argues that the CSE considered placement in a more restrictive 12:1+1 classroom, but determined that the student's academic levels were too advanced to warrant such a placement. In support of the recommendation for placement in a 15:1 classroom the district points to testimony from the district's special education teacher explaining that the student would have benefited from being with typically developing peers in a high school environment. The district also asserts that the student is ready for a less restrictive environment than Cooke and references portions of the Cooke progress report describing the student as exhibiting leadership and being vocal during class. The district then explains that in addition to the 15:1 classroom the student was provided with additional supports, in the form of related services, including counseling, OT, and speech-therapy.

The district then asserts that the IHO also erred in determining that the assigned school did not address the student's vocational needs. According to the district, the assigned school would have appropriately addressed the student's vocational and travel training needs. In support of its position, the district emphasizes that the assigned school offered internships and

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<sup>5</sup> It should be noted that there are two progress reports from Cooke in the record; however, only one of those reports was available at the time of the June 2011 CSE meeting, the other report was dated March 2012 (Dist. Ex. 5; Parent Ex. R).

community service opportunities, classes in government and economics—which included how to make a budget, as well as a variety of extracurricular programs. The district also addresses the lack of a program exclusively dedicated to travel training by explaining that the special needs guidance counselor provided lessons on traveling throughout the city and that the school concentrates on safe travel. The district also points out that the student travels independently to and from Cooke via public transportation on a daily basis and is capable of traveling on his own provided he is given guidance and directions in advance.

The district also appeals the IHO's determinations that Cooke was an appropriately placement for the student and that equitable considerations weighed in favor of the parents' claim for tuition reimbursement. The district alleges that the student's Cooke program is not specially designed to meet all of his unique needs because it does not provide sufficient related services. In particular, the district asserts that Cooke does not provide individual OT, but only provides OT in a group setting during the student's cooking class, which only meets once a week for one and a half hours. The district also asserts that Cooke is too restrictive for the student as it is exclusively for special education students and does not provide any mainstreaming opportunities. Regarding equitable considerations, the district argues that the parents did not seriously consider enrolling the student in public school. The district focuses its argument on the parents entering into a contract with Cooke in July 2011, prior to visiting the proposed placement in September 2011. The district also stresses the fact that this was the student's twelfth and final year at Cooke as an indication that the parents did not intend to enroll the student in public school.

## **V. Applicable Standards**

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v.

Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at \*10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at \*7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at \*15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the 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; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at \*6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "academic, developmental, and functional needs" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her

to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also 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]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at \*7 [S.D.N.Y. Aug. 27, 2010]).

## **VI. Discussion**

### **A. Scope of Review**

Prior to addressing the merits of the instant case, I note that neither party has appealed the IHO's findings that the parents have not challenged the classification of the student as a student with a learning disability, the related services of OT, speech, and counseling, or the academic and transitional goals (IHO Decision at p. 9).<sup>6</sup> Although a review of the parents' due process complaint notice indicates that the parents initially raised the sufficiency and appropriateness of the academic and transitional goals included on the student's June 2011 IEP as an issue, the parents have not cross-appealed the IHO's determination that the parents have not challenged these goals and have similarly not raised any arguments regarding goals in their answer (Parent Ex. A at p. 2). Accordingly, the IHO's determinations on these matters 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, \*10 [S.D.N.Y. Mar. 21, 2013]).

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<sup>6</sup> Regarding the related services included in the IEP, it should be noted that the parents expressly waived all claims regarding related services during the hearing (Tr. pp. 30, 380).

## **B. Timing of CSE Meeting**

I first address the parents' argument that the June 2011 CSE meeting was untimely because it was held more than one year after the student's prior annual review in February 2010. The IDEA requires a CSE to review and, if necessary, revise a student's IEP at least annually (see 20 U.S.C. § 1414[d][4][A]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]) and a school district must have an IEP in effect at the beginning of each school year for each student with a disability within its jurisdiction (20 U.S.C. § 1414 [d][2][A]; 34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]). Although the June 2011 CSE meeting took place more than one year after the student's prior annual review in February 2010, the delay was not significant and it did not prejudice the student, especially considering that there was an IEP formulated prior to the start of the 2011-12 school year (see Grim, 346 F.3d at 382; E.H., 2008 WL at \*10).

## **C. Sufficiency of Evaluative Data and Present Levels of Performance**

I next address the IHO's decision regarding the sufficiency of the evaluative information utilized by the June 2011 CSE in developing the student's IEP for the 2011-12 school year and the adequacy of the student's present levels of performance as set forth in the June 2011 IEP.<sup>7</sup> In her decision, the IHO noted the district's argument that the June 2011 Cooke progress report combined with the district's November 2010 classroom observation provided an accurate picture of the student at the time of the June 2011 CSE meeting; however, in determining that an appropriate IEP could not be developed without a vocational assessment and standardized tests the IHO focused solely on deficiencies in the district's classroom observation—specifically that it did not provide information regarding the student's cognitive abilities, learning characteristics, specific weaknesses, and strengths (IHO Decision at pp. 9-10).<sup>8</sup> Unfortunately, in making this determination, the IHO overlooked substantial evaluative data that was utilized by the CSE in developing the June 2011 IEP.

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parents or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parents and the district otherwise agree and at least once every three years unless the district and the parents agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities

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<sup>7</sup> I note that the IHO did not make a ruling on the adequacy of the present levels of performance contained in the June 2011 IEP, but only found that the lack of a "vocational assessment" and "cognitive and educational evaluations using standardized tests" prevented the CSE from setting goals and making program recommendations for the 2011-12 school year (IHO Decision at pp. 9-10). I also note that although the district did not conduct a specific vocational assessment as part of the annual review, the June 2011 CSE did develop a transition plan, the adequacy of which is discussed in further detail below (Dist. Ex. 1 at p. 15).

<sup>8</sup> Although the district references two Cooke progress reports in its petition and there are two reports in the hearing record, only the June 2011 report was available to the CSE at the time of the June 2011 CSE meeting and is the only report considered herein (Dist. Ex. 5; Parent Ex. Y).

(8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parents, that may assist in determining, among other things, the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see E.A.M v. New York City Dep't of Educ., 2012 WL 4571794, at \*9-\*10 [S.D.N.Y. Sept. 29, 2012]; S.F., 2011 WL 5419847, at \*12; Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

Although the district did not conduct its own evaluation of the student within the three years prior to the June 2011 CSE meeting, the hearing record reflects that the June 2011 CSE had sufficient evaluative data relative to the student's present levels of academic achievement and functional performance.<sup>9</sup> In addition to the district's November 2010 classroom observation, the CSE referred to the student's June 2010 IEP, gathered information from the student's parents and Cooke personnel during the June 2011 CSE meeting, and relied heavily on a June 2011 progress report produced by Cooke personnel, which contained detailed information regarding the student's academic and social/emotional functioning (Tr. pp. 13-20; 44-45, 47, 251; Dist. Exs. 1; 3-5). In addition, Cooke personnel conducted a Group Mathematics Assessment and Diagnostic Evaluation (GMADE) and a Group Reading Assessment and Diagnostic Evaluation (GRADE) in May 2011, which was used by the CSE in identifying the student's math and reading levels on the June 2011 IEP (Dist. Ex. 1 at pp. 3-4; Parent Exs. W; X).

As described below, the June 2011 Cooke progress report provided the June 2011 CSE with a current and detailed description of the student's needs and abilities regarding both academics and vocational training, reported directly from the student's teachers (Dist. Ex. 5). It should be noted that a district is not required to conduct its own evaluations in developing an IEP and recommending an appropriate program, but may rely on appropriate privately obtained evaluations (M.H. v. The New York City Dep't of Educ., 2011 WL 609880 at \*9-10 [S.D.N.Y. Feb. 16, 2011]). The district may also rely on information obtained from the student's private school personnel, including sufficiently comprehensive progress reports, in formulating the IEP (see S.F., 2011 WL 5419847, at \*10; G.W. v. Rye City Sch. Dist., 2013 WL 1286154 at \*23 [S.D.N.Y. March 29, 2013]; see also Application of a Student with a Disability, Appeal No. 12-165). In this instance, the June 2011 Cooke progress report was comprehensive and included

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<sup>9</sup> Although I do not find, in this instance, that the district's failure to conduct an evaluation of the student within the three years prior to the June 2011 CSE meeting resulted in the denial of a FAPE for the student, I remind the district that it is the district's responsibility to either conduct a comprehensive reevaluation of the student every three years, or to obtain the parent's written agreement that a reevaluation is not necessary (34 CFR 300.303[b][2]; 8 NYCRR 200.4[b][4]).

reports from the student's Cooke teachers regarding the student's progress and present levels of performance in English language arts (ELA), mathematics, global studies, biology, art, career seminar, internship, study skills, language skills and independent living (Dist. Ex. 5).

The June 2011 Cooke progress report provides that in the area of ELA, the student demonstrated partial understanding of subject matter in reading comprehension, reading fluency, and written language (Dist. Ex. 5 at p. 2). The ELA teacher indicated that the student continued to "show high levels of responsibility and leadership" including consistent completion of homework assignments and solid preparation for class (id.). The report indicated that the student continued to exhibit progress regarding constructing small paragraphs with complete sentences that expressed a complete thought (id.). The report reflected that the ELA teacher often reminded the student to use words known to the student rather than using larger words beyond the scope of his vocabulary because he often used these words out of context within his writing (id.). According to the report, the student continued "to be a strong voice during class discussion and [wa]s always willing to participate and share his opinion in large or small group activities" (id. at pp. 2-3). The ELA teacher noted that although the student exhibited difficulties with some of the figurative language and abstract concepts in the novel under study, the student continued to be "very engaged" and "contributed greatly to classroom discussions" (id. at p. 3). The report indicated that the student required support in making inferences and using contextual cues regarding reading comprehension (id.). The report also indicated that the student usually worked collaboratively with peers and organized/managed materials necessary for class as well as followed directions and rules (id.).

The June 2011 Cooke progress report also detailed the student's functioning and progress in junior mathematics class (Dist. Ex. 5 at p. 4). Overall, the student exhibited an understanding of math at his instructional level with support (id.). The report indicated that the student added and subtracted fractions with like and unlike denominators, converted improper fractions to mixed numbers, converted mixed numbers to fractions, and created equivalent fractions given a fraction with support (id.). The math teacher indicated that the student's ability to work independently continued to advance as well as his ability to ask for assistance when needed (id.). The math teacher also indicated that the student always collaborated well with peers, participated in class discussions and activities, completed work in a timely manner, organized and managed his class materials, and followed directions and rules (id. at p. 5).

Information regarding the student's performance in his career seminar is also included in the June 2011 Cooke progress report (Dist. Ex. 5 at p. 11). In career seminar, the students identified and completed plans regarding vocational pursuits including engaging in activities such as interviewing, resume writing, and learning professional skills regarding employment (id.). The report indicated that the student identified skills, abilities, and likes/dislikes related to work and identified corresponding career fields with support (id.). The report also indicated that the student sometimes participated in class discussions and activities (id.). The student always completed homework in a timely manner, organized/managed class materials, and followed directions and rules (id.). The student was attentive in class and by the spring semester, he engaged in all activities related to identification of a career (id.).

According to the June 2011 Cooke progress report, the student's internship program provided him with a guided experience within an internship placement in which the student learned prevocational and vocational skills (Dist. Ex. 5 at p. 13). The student interacted well with his supervisors and co-workers at his internship (id.). The student exhibited overall improvement regarding his internship duties and attention to task (id.). In study skills class, the student worked well with peers, participated in class discussions and activities, managed class materials, and followed directions and rules (id. at p. 14). In language skills class, the student performed several skills with support such as formulating questions that included the reader's perspective, production of varied types of figurative language, and utilizing information from a variety of sources when writing (id. at pp. 15-16).

Additionally, Cooke personnel administered the GMADE and GRADE tests in May 2011 in order to identify the student's academic levels in the areas of reading and math and his scores on those tests were included in the June 2011 IEP (Dist. Ex. 1 at pp. 3-4; Parent Exs. W; X).<sup>10</sup> With respect to the May 2011 GMADE results, the student earned standard scores (percentile rank) of 88 (21) in concepts and communication, 96 (39) in operations and computation, 87 (19) in process and applications, and 93 (32) in the total test area (Parent Ex. W). The GMADE score summary indicated that the student demonstrated weaknesses in concepts and communication as well as process and applications (id.). The GMADE scores summary further indicated that the student exhibited average skills in operations and computation (id.). In regards to the May 2011 GRADE, the student achieved standard scores (percentile rank) of 79 (21) in comprehension, 78 (19) in vocabulary, and 78 (19) in the total test area (Parent Ex. X). The GRADE score summary indicated that the student demonstrated weaknesses in passage comprehension, vocabulary, and listening comprehension but exhibited average skills in sentence completion (id.).

In developing the June 2011 IEP, the CSE also considered a November 3, 2010 classroom observation conducted by the district's special education teacher during the student's math class at Cooke (Dist. Ex. 4 at p. 1). The class consisted of seven students who were learning strategies to solve word problems (id.). During the lesson, the student maintained his attention to task (id.). When provided with the homework assignment for the next day, the student raised his hand and stated he found it confusing (id.). The teacher explained the assignment providing clarification for the student (id.). The student participated in the group math activity (id.). The classroom teacher indicated that the student's behavior that day was typical of the student (id. at p. 2). The teacher also reported that the student exhibited difficulties with organization and that he developed lists to assist with organization (id.).

A review of the June 2011 IEP, minutes of the June 2011 CSE meeting, the November 2010 classroom observation, and June 2011 Cooke progress report indicates that the June 2011 CSE appropriately described the student based on the available reports, identified the student's needs, and developed adequate goals for the student that were sufficiently aligned with his needs (Dist. Exs. 1-2; 4-5).

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<sup>10</sup> The June 2011 IEP also references a STARR test as the basis for identifying the student's calculations level in math with a score of 7.7 (Dist. Ex. 1 at p. 4). The hearing record does not include the report from the STARR test; however, the student's Cooke math teacher testified that the student scored an 8.1 on the test and described it as an adaptive assessment that describes the student's computational skills more accurately than the GMADE (Tr. p. 207).

As noted by the IHO, the classroom observation, by itself, was not sufficient to describe the student in all of his need areas; however, when considered in conjunction with the comprehensive Cooke progress report and the other available evaluative data, described in detail above, the June 2011 CSE had sufficient information to identify all of the student's special education needs. The district special education teacher testified that the June 2011 CSE considered sufficient evaluative information regarding the development of the student's IEP including input from the parents, Cooke personnel, the Cooke progress report, and the classroom evaluation (Tr. pp. 25-28, 29-30, 46; Dist. Exs. 4-5). Having considered the June 2011 IEP and the evaluative information available to the June 2011 CSE, I also find that the CSE carefully and accurately described the student's present levels of academic achievement, social development, physical development, and management needs. In addition, the description of the student's needs was consistent with the evaluative information, including the 2011 Cooke progress report and the 2010 classroom observation, before the CSE at the time of the meeting. Although State regulations require that an IEP report the student's present levels of academic achievement and functional performance, State regulations do not mandate precisely where that information must come from (see 8 NYCRR 200.4[d][2][i]; Application of a Student with a Disability, Appeal No. 11-043). Nor is there any support for the proposition that "teacher estimates" or "teacher observations" are an improper source of information for developing a student's IEP or determining the student's skill levels (S.F., 2011 WL 5419847, at \*10). In developing the student's academic functional levels, the CSE was justified in relying on the June 2011 Cooke progress report, as well as the student's Cooke teachers' participation at the CSE meeting.

Both the parents and Cooke personnel participated in the CSE meeting and contributed to the development of the student's IEP (Tr. pp. 23-24, 29-30, 45). Participants in the June 2011 CSE included one of the student's parents, a district representative who also acted as the special education teacher, a district school psychologist, a parent member, a representative from Cooke, and the student's math and ELA teachers from Cook who both participated via teleconference (Tr. pp. 22-25; Dist. Ex. 1 at p. 2). Minutes from the June 2011 CSE meeting reflect the participation of the student's mother and Cooke staff in the development of the student's June 2011 IEP (Dist. Ex. 2 at pp. 1-2). The student's Cooke teachers provided the academic grade equivalents that were included on the student's IEP (Tr. p. 47).

The June 2011 IEP present levels of academic performance also reflected the 2011 Cooke progress report and the student's Cooke teacher's input, indicating that the student exhibited excellent decoding and sight word vocabulary skills but that inferential thinking was an area of weakness (Dist. Ex. 1 at p. 3). The June 2011 IEP indicated that the student demonstrated difficulties with writing including content, sequencing, and editing (id.). The IEP reflected that the student demonstrated "good progress" in math including math calculations and word problems (id.). The student's math teacher at Cooke testified that the June 2011 IEP and CSE meeting minutes accurately reflected what he discussed during the meeting, except that the student was not working on solving algebraic equations as stated in the June 2011 IEP and was instead working on variables (Tr. pp. 219-22; Dist. Exs. 1 at p. 3; 2 at p. 1). The IEP also reflected the student's instructional level of a 5.6 grade equivalent in reading comprehension, a fifth/sixth grade independent reading level, a seventh grade instructional reading level, and math calculation and problem solving grade equivalents of 7.7 and 5.0 respectively as well as overall

math skills at a seventh grade level (*id.* at p. 4).<sup>11</sup> Overall, the student's ELA teacher at Cooke testified that the IEP accurately represented the student's areas of strengths and delays regarding ELA (Tr. pp. 261-62; Dist. Ex. 1 at p. 3).

The June 2011 IEP also adequately depicted the student's social/emotional present levels of performance and the student's physical development. Information regarding the student's social/emotional performance was taken from the Cooke progress report, which indicated that the student was "well behaved," related well with others, and was a "hard worker" (*compare* Dist. Ex. 1 at p. 5, *with* Dist. Ex. 5 at pp. 2-4). In the area of health status and physical development, the June 2011 IEP indicated that the student received a diagnosis of Down's syndrome, had a history of seizures, reportedly was in good health, took medication for asthma, and exhibited delays in fine motor skills (Tr. pp. 34-35; Dist. Ex. 1 at p. 6).

Accordingly, based on the foregoing, I find that the June 2011 CSE had sufficient information relative to the student's present levels of academic achievement and functional performance as well as social/emotional functioning and physical development at the time of the CSE meeting to develop an IEP that accurately reflected the student's special education needs designed to help the student make progress. (34 CFR 300.306[c][2]; 8 NYCRR 200.4[d][2]; see Application of the Dep't of Educ., Appeal No. 12-096; Application of a Student with a Disability, Appeal No. 11-043; Application of the Dep't of Educ., Appeal No. 11-025; Application of the Dep't of Educ., Appeal No. 10-099; Application of the Dep't of Educ., Appeal No. 08-045).

#### **D. June 2011 IEP Issues**

##### **1. Appropriateness of 15:1 Special Class in a Community School**

Upon a review of the hearing record, the June 2011 CSE's recommendation of a 15:1 special class in a community school with a combination of related services was reasonably calculated to address the student's special education needs.<sup>12</sup>

Based on the student's need for individualized support and attention as well as to provide him with opportunities to interact with his nondisabled peers, the CSE recommended placement in a 15:1 special class in a community school with related services (Tr. pp. 29, 32, 37-38, 53, 70, 81). The district representative explained that in the recommended program the student would have attended the five academic periods in a 15:1 classroom and would have been in general education for classes like music and art (Tr. p. 68). 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

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<sup>11</sup> The student's ELA teacher testified that the fifth/sixth grade independent reading level listed on the June 2011 IEP may have been too high for the student, but that the seventh grade instructional level was appropriate (Tr. p. 263; Dist Ex. 1 at p. 4).

<sup>12</sup> I note that the parents expressly waived all claims regarding related services during the hearing and only challenge the level of support available in a classroom with a 15:1 student-to-teacher ratio (Tr. pp. 30, 380).

achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993] J.S. v. North Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson, 325 F. Supp. 2d at 144; Mavis v. Sobel, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]).

In recommending a 15:1 special class in a community school, the CSE also considered but rejected placement in a 12:1+1 special class in a specialized school, reasoning that such a placement would have been too restrictive for the student (Tr. pp. 69-70; Dist. Ex. 1 at p. 12). State regulations provide that a special class placement with a maximum class size not to exceed 15 students is designed for "students whose special education needs consist primarily of the need for specialized instruction which can best be accomplished in a self-contained setting" (8 NYCRR 200.6[h][4]). A 12:1+1 special class contains "students whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students" (8 NYCRR 200.6[h][4][i]). Management needs for students with disabilities are defined as "the nature of and degree to which environmental modifications and human or material resources are required to enable the student to benefit from instruction" (8 NYCRR 200.1[ww][3][i][d]). A student's management needs shall be determined by factors which relate to the student's (a) academic achievement, functional performance and learning characteristics; (b) social development; and (c) physical development (id.).

The CSE discussed the student's strengths and weaknesses as well as instructional academic levels to determine the appropriate placement (Tr. pp. 25-26, 28-29). As a basis for recommending a 15:1 classroom, the district representative explained that the student would have benefited from a small classroom with a teacher and from access to his typically developing peers (Tr. pp. 29, 69-70). She also explained that the student's academic levels and social skills indicated that he did not require the amount of support provided in a 12:1+1 classroom (Tr. p. 69). Specifically, the district representative testified that the student exhibited strong decoding and sight word vocabulary but demonstrated difficulties with critical thinking skills as well as delays in math and writing skills (Tr. p. 25-26). The student's difficulties were further identified in the academic performance section of the student's June 2011 IEP, which also incorporated accommodations and supports—including small group instruction, graphic organizers, visual aids/manipulatives, extended time to complete tasks, working on teams, positive reinforcement, and scaffolding (Tr. p. 28; Dist. Ex. 3 at pp. 3-5). The district's special education teachers, who would have taught the student's math and ELA classes at the assigned school, each testified that they would have been able to implement the student's academic management needs in their 15:1 classrooms (Tr. pp. 145-46; 163).

To address the student's writing and tracking skills in the classroom, the CSE recommended OT for the student (Tr. p. 38). The CSE recommended counseling to support the student regarding his disability (id.). The CSE also recommended speech and language services to strengthen his writing and listening skills (id.). The June 2011 CSE also provided the student with testing accommodations including a separate location, extended time limits with breaks as needed, and directions read and reread aloud (Dist. Ex. 3 at p. 13). Additionally, the student's

IEP indicated that the student would have fully participated in school activities with nondisabled students (id.).

The June 2011 CSE, including the Cooke teachers, also discussed the student's social/emotional development including discussions regarding the student's average attention and behavioral skills as well as his positive motivation and effort (Tr. p. 32). The hearing record shows that the student related well with peers and adults including working collaboratively with others (Dist. Exs. 2 at p. 2; 5 at pp. 2-5). The hearing record also shows that the student followed classroom rules and routines as well as completed his homework assignments in a consistent manner (id. at pp. 5, 11, 14). The student's social abilities show that he would have benefitted from interactions with typically developing peers, as indicated by the district representative, and that he could have been successful in a small classroom with one teacher (Tr. pp. 69-70).

Although the hearing record indicates that the Cooke providers believed Cooke to be a more appropriate placement for the student, based on the hearing record as a whole, and in particular based on the student's social skills and progression in terms of his independence, the student did not require significant supports that would have prevented him from gaining educational benefit in a small classroom with a maximum of fifteen students and one teacher (Tr. p. 29-30, 69, 208-209, ; Dist. Ex. 2 at p. 2; 5 at pp. 2-4).<sup>13, 14</sup> Pertinently, the Cooke progress report portrays a student that was functioning independently and did not require a significant amount of support (Dist. Ex. 5) The report describes the student as continuing to show "high levels of responsibility and leadership," as "a strong voice during class discussions," as able to "share his opinions in large or small group activities," and as continuing to grow in terms of his ability to work independently and his willingness to ask for help when needed (id. at pp. 2-4).

Based on the above, the evidence contained in the hearing record suggests that the district provided that student with the appropriate amount of support. The hearing record demonstrates that the district's recommendation for placement in a 15:1 special class in a community school combined with related services of speech-language therapy, counseling, and OT, as well as the provision of a transition plan and accommodations, was appropriate to address the student's needs.

## **2. Transition Plan**

Although the parents and IHO are correct in pointing out that the hearing record does not include a transitional or vocational assessment of the student, the June 2011 IEP did contain an adequate postsecondary transition plan developed based on information provided by the student's parents and private school teachers (Dist. Ex. 1 at p. 15). Under the IDEA, to the extent appropriate for each individual student, an IEP must focus on providing instruction and

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<sup>13</sup> I note that the parent's testimony is ambiguous as to whether or not he objected to the recommendation of a 15:1 classroom. At one point the parent testified that he disagreed with the staffing ratio on the IEP, in that it would not provide sufficient support; however, the IHO interrupted multiple follow up questions by the district attorney attempting to elicit a response as to whether the parent was willing to place the student in a 15:1 classroom (Tr. pp. 387-91).

<sup>14</sup> The hearing record indicates that the student attended a math class at Cooke within a 9:1+1 setting and an ELA class at Cooke within a 10:1+1 setting during the 2011-12 school year (Tr. pp. 196, 231-32).

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

State regulations further require that an IEP include a statement of the transition service needs of the student that focuses on the student's course of study, such as participation in advanced placement courses or a vocational education program (8 NYCRR 200.4[d][2][ix][c]). The regulations require that the student's IEP include needed activities to facilitate the student's movement from school to post-school activities, including instruction, related services, community experiences, the development of employment and other post-school adult living objectives and, when appropriate, acquisition of daily living skills and a functional vocational evaluation (8 NYCRR 200.4[d][2][ix][d]).

In this instance, the June 2011 IEP included a transition plan for the student that identified long-term adult outcomes and transitional services with respect to the student's instructional activities, community integration, post high school activities, and independent living (Tr. pp. 40-41; Dist. Ex. 1 at p. 15). Specifically, the transition plan indicated that the student would integrate into the community with minimal supports, investigate post-secondary options, develop skills for independent living, and explore employment opportunities of his interest (Dist. Ex. 1 at p. 15). The transition plan also indicated that the student would earn a local diploma, which was consistent with the testimony during that the student intended to graduate with a local diploma (Tr. pp. 223-24; Dist. Ex. 1 at p. 15). Additionally, the transition plan provided that the student would participate in academic activities in preparation for post-secondary education, participate in volunteer community services to become aware of community employment and service opportunities, and network with friends and family to explore post-secondary options (Dist. Ex. 1 at p. 15). The transition plan further reflected that the student, district, and parents were responsible for implementation regarding transition services (id.). As a supplement to the transition plan, the June 2011 IEP also included an annual goal related to transition stating that the student would improve his independent living skills related to safe travel throughout the city, personal banking, money management, and household maintenance (Dist. Ex. 1 at p. 9).

The transition plan was discussed during the June 2011 CSE meeting and was based on information obtained from the student's parents and from the student's teachers at Cooke (Tr. pp. 40-42, 287-88, 347-48). The district representative testified that the June 2011 CSE reviewed and updated the student's transition plan with input from the parents and Cooke staff (Tr. p. 40-42). The CSE also had the student's prior year transition plan available for review (Tr. pp. 31, 34, 49; Dist. Ex. 3 at pp. 14-15). The minutes of the CSE meeting indicated the student's preferences of computers and electronics that were also included on the transition plan (Dist. Exs. 1 at pp. 15; 2 at p. 2). In addition, the minutes of the CSE meeting indicated that the CSE

updated the transition plan, specifying that the student traveled to school independently but continued to require assistance with travel training regarding safety and that the student engaged in an internship (Tr. p. 41; Dist. Ex. 2 at p. 2). The Cooke representative at the June 2011 CSE meeting also testified that during the meeting she discussed the student's internship and the duties the student was undertaking at the internship (Tr. pp. 307-08). However, there is no indication in the hearing record that the student's postsecondary goals were based upon appropriate transition assessments related to training, education, employment, or independent living skills in developing the student's transition plan and postsecondary goals (see 8 NYCRR 200.4[d][2][ix][b]). Although there is no indication that transition or vocational assessments were completed, based on the input provided by the student's parents and Cooke personnel regarding the development of the transition plan—including the student's aptitudes, interests, transition services, and transition related goals—the June 2011 CSE had sufficient information regarding the student to develop an appropriate transition plan (Tr. pp. 51-52; 307-08).

In conclusion, to the extent that the CSE may have failed to conduct an assessment of the student, any deficiency in the development of the transition plan did not rise to the level of a denial of a FAPE as the transition plan was based on current information provided by the parents and the student's teachers and the transition plan provided sufficient details regarding the student's postsecondary goals and transition services (see A.D. v. New York City Dep't of Educ., 2013 WL 1155570 at \*11 [S.D.N.Y. Mar. 19, 2013]; D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at \*9 [S.D.N.Y. Oct. 12, 2011]).

### **3. Foreign Language Requirement**

The parents also object to the June 2011 IEP to the extent that the parents believes it would not have been appropriate for the student to take a foreign language class and the student was not exempted from the second language requirement (Dist. Ex. 1 at p. 12; Ans. ¶ 78).

State regulations require that a student complete at least two units of study in a language other than English (8 NYCRR 100.2[d][1]; see Tr. pp. 95-96). State regulations also provide that a student identified as having a disability which adversely affects the student's ability to learn a language may be excused from the language other than English requirement if such student's individualized education program indicates that such requirement is not appropriate (8 NYCRR 100.2[d][1][iii]). In this instance, although the student was entering the 12<sup>th</sup> grade and had not yet taken classes in a language other than English, the student's June 2011 IEP did not indicate an exemption from the second language requirement (Tr. p. 393; Dist. Ex. 1 at pp. 1, 12). However, under the circumstances of this matter, I cannot find that exposure to a second language would have been inappropriate for the student. In particular, the student's parent testified that the student "more or less" spoke fluent Nepali at home (Tr. p. 393). In addition, the principal at the assigned school explained the foreign language requirement (Tr. pp. 96-97). She explained that students were not required to become proficient in the language but that the foreign language classes offered the student exposure to a language and an opportunity to learn basic vocabulary (Tr. p. 97). She also explained that the student would not have been required to pass a foreign language test, but only "do well enough in the class" to earn credit (Tr. p. 97).

I find that the CSE decision, not to exempt the student from the foreign language requirement, was appropriate in light of the student's experience in speaking another language, his instructional reading level of seventh grade, and the description of the foreign language requirement (Tr. p. 393; Dist. Ex. 1 at pp. 4, 12).

### **E. Assigned School Issues**

Regarding the assigned public school site, the parents assert that the assigned public school site would not have been able to implement the student's June 2011 IEP, asserting that the functional levels of the students in the assigned classroom at the beginning of the school year would have prevented the student from making educational progress, that the number of other students at the assigned public school site would have been too overwhelming for the student, and that the assigned public school site did not offer transition services as required by the student's June 2011 IEP.

Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[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 F.L., 553 Fed. App'x at 9; see also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. July 24, 2013]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom a student would be placed in where the parent rejected an IEP before the student's classroom arrangements were even made"]).

The Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141 [2d Cir. May 21, 2013]) and, even more clearly, that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 530 Fed. App'x at 87, quoting R.E., 694 F.3d at 187; see C.F., 746 F.3d at 79). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. Therefore, 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 the IEP (R.E., 694 F.3d at 186-88; 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 to be appropriate, but the parents chose not to avail themselves of the public school program]).<sup>15</sup> When the Second Circuit spoke recently with

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<sup>15</sup> While the IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, the assignment of a particular school is an administrative decision that must be made in conformance with the CSE's educational placement recommendation (T.Y. v. New York City Dep't of Educ.,

regard to the topic of assessing the district's offer of an IEP versus later acquired school site information obtained and rejected by the parent as inappropriate, the Court disallowed a challenge to a recommended public school site, reasoning that "the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'" (F.L., 553 Fed. App'x at 9, quoting R.E., 694 F.3d at 187 n.3).

In view of the foregoing, the parents cannot prevail on their claims regarding implementation of the June 2011 IEP because a retrospective analysis of how the district would have implemented the student's June 2011 IEP at the assigned public school site is not an appropriate inquiry under the circumstances of this case (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Here, it is undisputed that the parents rejected the assigned public school site that the student would have attended and instead chose to enroll the student in a nonpublic school of their choosing prior to the time the district became obligated to implement the June 2011 IEP (see Parent Ex. D).<sup>16</sup> Therefore, the district is correct that the issues raised and the arguments asserted by the parents with respect to the assigned public school site are speculative. Furthermore, in a case in which a student has been unilaterally placed prior to the implementation of an IEP, it would be inequitable to allow the parents to acquire and rely on information that post-dates the relevant CSE meeting and IEP and then use such information against a district in an impartial hearing while at the same time confining a school district's case to describing a snapshot of the special education services set forth in an IEP (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at \*13 [S.D.N.Y. Dec. 23, 2013] [stating that in addition to districts not being permitted to rehabilitate a defective IEP through retrospective testimony, "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]). Based on the foregoing, the district was not obligated to present retrospective evidence at the impartial hearing regarding

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584 F.3d 412, 420 [2d Cir. 2009]; see K.L.A. v. Windham Southeast Supervisory Union, 371 Fed. App'x 151, 154 [2d Cir. Mar. 30, 2010]). A school district "may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement" (Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]). Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). The Second Circuit recently reiterated that while parents are entitled to participate in the determination of the type of placement their child will attend, the IDEA confers no rights on parents with regard to school site selection (C.F., 746 F.3d at 79). However, the Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular public school site or classroom location on a student's IEP, the district is not permitted to choose any school and provide services that deviate from the provisions set forth in the IEP (see R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 420 [the district does not have carte blanche to provide services to a child at a school that cannot satisfy the IEP's requirements]). The district has no option but to implement the written IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan.

<sup>16</sup> The parents advised the district in August 2011 that, although they had not yet visited the assigned school, they were rejecting the district's offered program, and that the student would begin the 2011-12 school year at Cooke (Parent Ex. D). I find that this constitutes a rejection of the June 2011 IEP prior to the time that the district became obligated to implement the student's IEP.

the execution of the student's program or to refute the parents' claims (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Accordingly, the parents cannot prevail on their claims that the assigned public school site would not have properly implemented the June 2011 IEP.<sup>17</sup>

However, even assuming for the sake of argument that the parents could make such speculative claims or that the student had attended the district's recommended program at the assigned public school site, the evidence in the hearing record does not support the conclusion that the district would have violated the FAPE legal standard related to IEP implementation—that is, that the district would have deviated from the student's IEP in a material or substantial way (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205, 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]; see D. D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at \*13 [E.D.N.Y. Sept. 2, 2011]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 495, 502-03 [S.D.N.Y. 2011]).

### 1. Functional Grouping

Assuming for the sake of argument that the student had attended the assigned public school site, the evidence does not support the parents' assertion that the district's assigned class lacked a suitable grouping regarding the student's academic and social needs. With regard to the parents' claim related to grouping the student at the public school site, 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

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<sup>17</sup> While some district courts have found that parents have a right to assess the adequacy of a particular school site to meet their children's needs, the weight of the relevant authority supports the approach taken here (see B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at \*20-\*22 [E.D.N.Y. Mar. 31, 2014]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957 [S.D.N.Y. Mar. 31, 2014]; M.O. v. New York City Dept. of Educ., 2014 WL 1257924, at \*2 [S.D.N.Y. Mar. 27, 2014]; E.H. v. New York City Dep't of Educ., 2014 WL 1224417, at \*7 [S.D.N.Y. Mar. 21, 2014]; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at \*17 [S.D.N.Y. Sept. 27, 2013]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at \*26 [E.D.N.Y. Aug. 19, 2013]; M.R. v. New York City Bd. of Educ., 2013 WL 4834856, at \*5 [S.D.N.Y. Aug. 14, 2013]; A.M., 964 F. Supp. 2d at 286; N.K., 961 F. Supp. 2d 577, 588-90 [S.D.N.Y. 2013]; Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at \*5 [E.D.N.Y. Mar. 21, 2013], aff'd, 556 Fed. App'x 1 [2d Cir Dec. 23, 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at \*13 [S.D.N.Y. Mar. 19, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at \*10 [S.D.N.Y. Feb. 20, 2013]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at \*15 [W.D.N.Y. Sept. 26, 2012], adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at \*12-\*14 [S.D.N.Y. June 16, 2014] [holding that "[a]bsent non-speculative evidence to the contrary, it is presumed that the placement school will fulfill its obligations under the IEP"]; but see V.S. v. New York City Dep't of Educ., 2014 WL 2600313, at \*4 [E.D.N.Y. June 10, 2014]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at \*14-\*16 [S.D.N.Y. May 27, 2014]; Scott v. New York City Dep't of Educ., 2014 WL 1225529, at \*19 [S.D.N.Y. Mar. 25, 2014]; D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13 [S.D.N.Y. 2013]; B.R. v. New York City Dep't of Educ., 910 F.Supp.2d 670, 676-78 [S.D.N.Y. 2012]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at \*11 [S.D.N.Y. Sept. 29, 2012]).

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 class, by November 1st of each year" (8 NYCRR 200.6[g][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).

The 15:1 special class ELA teacher at the assigned school testified that the ELA class consisted of 10 students with learning disabilities (Tr. pp. 158-59). The students' instructional levels ranged from the seventh to eighth grade in the area of English (Tr. p. 159). The ELA teacher stated that the student's skills were similar to the students in the assigned class (Tr. pp. 166-69). The class profile indicated that the students in the ELA class demonstrated age appropriate social/emotional functioning and physical development (Parent Ex. T at p. 2). With respect to the ELA class, the class profile indicated that two of students demonstrated below average learning abilities and seven of the students demonstrated average aptitude (id.). The ELA class profile also indicated that the students demonstrated average to above average oral expressive language skills, oral receptive language skills, and writing skills (id. at p. 1). The ELA teacher stated that she provided students with instructional techniques such as a multisensory approach, one-to-one instruction, small group instruction, concept maps, independent reading, read alouds, graphic organizers, and real life examples (Tr. pp. 160-63).

The 15:1 special class math teacher at the assigned school testified that as of September 2011 the math class consisted of eight students in grades nine through eleven (Tr. p. 138). The students' math functional levels ranged from sixth to seventh grade (Tr. p. 138). The students in the math class were mostly students with a learning disability (Tr. p. 148). The math teacher testified that the student appeared to be at a similar level as to the other students in the class (Tr. p. 139). The math teacher also stated that the students in the assigned class exhibited average social/emotional skills (Tr. p. 139). The math teacher testified that the assigned class worked on algebraic concepts during the 2011-12 school year (Tr. p. 143). According to the math teacher supports were offered to the student including the use of small group instruction, charts, tables, visual cues, manipulatives, peer learning, mixed grouping, use of graphic organizers, chunking information, repetition, and multiple modalities (Tr. pp. 141-48).

The student's functional levels were within the range of the students in the assigned class. The student's reading level ranged from fifth to seventh grade and his math levels ranged from fifth to seventh grade (Tr. p. 28). In addition, with respect to social/emotional functioning, the hearing record showed that the student related well with peers and adults (Tr. p. 81; Dist. Ex. 5 at pp. 4-5). The testimony of the principal at the assigned school supports finding that the student would have been appropriately grouped in the assigned class, as she testified that the students within the 15:1 special class functioned similarly to the student demonstrating math instructional levels at approximately sixth/seventh grade and English instructional levels at approximately the seventh/eighth grade (Tr. p. 98).

As shown above, I find that the student's overall functioning was similar to the students in the class in both academics and social skills and I also find that the assigned school teachers could have modified instruction, based on the supports discussed during the hearing, to further address the student's needs (Tr. pp. 141-48, 160-63). Accordingly, I find that the evidence in the hearing record indicates that, in the event the student had attended the public school, the district was capable of complying with State regulations requiring functional grouping in the proposed class as there were students who were functioning on or close to the same level as the student and who demonstrated similar academic and social/emotional needs.

## **2. Size of Assigned School**

Although the parents assert that the physical environment at the assigned school would have been too large and overwhelming for the student and would have been challenging for the student considering his executive functioning and organizational deficits, the student's Cooke progress report and classroom observation both indicated that the student interacted well with peers and adults and engaged in positive behaviors such as consistent class participation and collaboration (Tr. pp. 17-20; Dist Ex. 4-5). The hearing record reflects that the student would have attended lunch in the assigned school with his 15:1 special class as well as general education students under the supervision of school aides and school administrators (Tr. pp. 120, 131). The student would have attended physical education class with approximately 35 students including general education students and the student would have also attended nonacademic subjects such as music and art with general education students (Tr. p. 68, 114). Further, as stated above, the student's IEP indicated that the student would fully participate in school activities with nondisabled students (Dist. Ex. 1 at p. 13). Based on the student's IEP indicating full participation in school activities and the student's pro-social behaviors, I find it appropriate for the student to participate in activities and non-academic classes with general education students.

## **3. Transition Services at Assigned School**

The hearing record does not support the IHO's determination that the assigned school would have been unable to implement the student's transition plan and travel training goal contained in the June 2011 IEP.

Contrary to the determination of the IHO, the assigned school provided sufficient post-secondary services to implement the student's transition plan and to help the student integrate into the community and develop skills for independent living. The principal at the assigned

school testified that the school staff provided supports to all students to assist with post-secondary life including provision of career related services and instruction regarding independent living skills (Tr. p. 91). The assigned school offered a career day during the school year and a full internship program for students in a variety of settings (Tr. pp. 91, 130). The students at the assigned school were also required to complete 100 hours of community service prior to graduation, which assisted the students with transition to post-secondary pursuits (Tr. pp. 92, 107). The assigned school offered numerous extracurricular activities, a course in economics and government including budgeting skills, and a health education class including nutrition instruction (Tr. pp. 93-94, 116-17).

Pertinently, the IHO appears to have overlooked or discounted the internship programs and community service offered at the assigned school. In determining that the assigned school was inappropriate the IHO focused on the lack of vocational training at the assigned school, stating that the student needed "a program with a strong vocational component" (IHO Decision at p. 11). Federal regulations define vocational education as "organized educational programs that are directly related to the preparation of individuals for paid or unpaid employment, or for additional preparation for a career not requiring a baccalaureate or advanced degree" (34 CFR 300.39[b][5]). Comments to the federal regulations further provide that "organized education programs" in the definition of vocational education may be educational programs that are available for all children if the student will benefit from them (Vocational Education, 71 Fed. Reg. 46578 [August 14, 2006]). As mentioned above, the assigned school offered both a full internship program and a community service program to all of its students (Tr. pp. 91-92). Although the Cooke internship specialist testified that she believed the student needed support to complete tasks and to complete a job proficiently, she also described the student, as of the beginning of the 2011-12 school year, as a hard worker who follows directions well and is a pleasure to work with (Tr. pp. 324, 338-39).<sup>18</sup> Based on consistent descriptions of the student as exhibiting responsibility and leadership and progressing in his independence, the evidence in the hearing record supports finding that the student could have benefitted from the internship program and community service programs at the assigned school (Tr. pp. 231, 275, 324, 343; Dist. Ex. 5 at pp. 2-4).

Based on the hearing record, I also find that the IHO erred in determining that the student's transition goal of "safe travel throughout the city", included in the June 2011 IEP, could not have been implemented at the assigned school (Dist. Ex. 1 at p. 9). The Cooke internship specialist testified that after receiving some support the student was able to travel independently to and from his internship; however, she also testified that he would require additional support to travel to any other destination (Tr. pp. 334-35). Although the assigned school does not offer an exclusive travel training program, the assigned school principal testified that based on the student's needs the school would accommodate what was contained in the student's IEP (Tr. p. 93). In addition, the guidance counselor at the assigned school, who was assigned exclusively for the benefit of the school's special education students, conducted lessons regarding travel training for the junior and seniors several times a school year (Tr. pp. 118-19). The assigned

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<sup>18</sup> The Cooke internship specialist also identified recognition as to when to ask for help as a big goal for the student; however, it should be noted that the Cooke progress reports showed that the student had made significant progress in his ability to function independently and willingness to ask for help when needed (Tr. pp. 336; Dist. Ex. 5 at pp. 2-4).

school principal also indicated that the guidance counselor could provide individual travel training, but that none of the student's in the assigned school had travel training on their IEP's (Tr. p. 119). The assigned school also conducted class field trips, during which teachers provided students with instruction regarding navigating the community (Tr. p. 94). Considering that the student was able to travel independently to and from his internship, the travel training provided at the assigned public school could have appropriately addressed the student's needs as set forth in his IEP, if the student had attended the assigned public school.

## **VII. Conclusion**

Based on the evidence contained in the hearing record, I find that the district offered the student a FAPE for the 2011-12 school year. The district's recommended educational program, consisting of a 15:1 special class in a community school together with related services and IEP accommodations and supports, was, at the time of its development, reasonably calculated to enable the student to receive educational benefits for the 2011-12 school year.

Having determined that the district offered the student a FAPE for the 2011-12 school year, it is not necessary for me to consider the appropriateness of Cooke or whether the equities support the parents' claim for the tuition costs at public expense (see M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at \*12 [S.D.N.Y. Oct. 28, 2011]; D.D-S., 2011 WL 3919040, at \*13).

I have also considered the parties' remaining contentions and find that I need not reach them in light of my determination herein.

### **THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the IHO's decision dated July 10, 2012 is modified by reversing those portions which determined that the district failed to offer the student a FAPE for the 2011-12 school year and ordered tuition reimbursement for the cost of Cooke for the 2011-12 school year.

**Dated:**            **Albany, New York**  
                         **July 31, 2014**

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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**