



The University of the State of New York

The State Education Department

State Review Officer

www.sro.nysed.gov

No. 12-181

Application of the XXXXXXXXXXXXXXXXXXXXXXXXXXXX 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, Cynthia Sheps, Esq., of counsel

Law Offices of Neal H. Rosenberg, attorneys for respondents, Karen Newman, 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') daughter and ordered it to reimburse the parents for the costs of the student's tuition at the Cooke Center for Learning and Development (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]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

In this case, the student has continuously attended Cooke since the 2006-07 school year (sixth grade) (see Tr. p. 443).¹ On April 20, 2011, the parents executed an enrollment contract with Cooke for the student's attendance for the 2011-12 school year (see Parent Ex. F at p. 1-2).

On June 1, 2011, the CSE convened to conduct the student's annual review and to develop an IEP for the 2011-12 school year (11th grade) (see Dist. Ex. 6 at pp. 1-2; see also Dist. Ex. 5 at p. 1). Having determined that the student remained eligible for special education and related services as a student with an other health impairment, the June 2011 CSE recommended a 12-month school year program in a 12:1+1 special class placement at a specialized school with the following related services: one 45-minute session per week of individual counseling, one 45-minute session per week of counseling in a small group, two 45-minute sessions per week of individual occupational therapy (OT), one 45-minute session per week of individual speech-language therapy, and one 45-minute session per week of speech-language therapy in a small group (see Dist. Ex. 6 at pp. 1-2, 11-13).² The June 2011 CSE also developed annual goals and short-term objectives for the student, as well as a transition plan (id. at pp. 7-10, 14).

In a final notice of recommendation (FNR) dated June 15, 2011, the district summarized the special education and related services recommended in the June 2011 IEP, and identified the particular public school site to which the district assigned the student to attend for the 2011-12 school year (see Dist. Ex. 4).

In a letter dated June 20, 2011, the parents advised the district that they had not received a "placement" for the student for the 2011-12 school year (see Parent Ex. J at p. 1). The parents also indicated that since the student required a 12-month school year program—and "nothing ha[d] been offered to [the student] for the start of the summer"—the student would continue at Cooke for the 2011-12 school year beginning in summer 2011 (id.). The parents also indicated that they would seek reimbursement for the costs of the student's tuition (id.).

On June 21, 2011, the parents visited the assigned public school site accompanied by the assistant head of Cooke (see Parent Exs. L at pp. 1-2; M; see also Tr. pp. 219-20, 244-45, 447-48, 482-83).

In a letter dated June 2011 and sent to the district via facsimile on June 27, 2011, the parents indicated that the assigned public school site was not appropriate for the student (see Parent K at pp. 1-2). The parents noted that based upon information provided during the visit, the student would be "placed directly at work sites" and not attend "school at all" (id. at p. 1). Next, the parent objected to the assigned public school site because it employed one speech-language provider for the entire student body, and did not provide the services of a speech-language provider at "work sites" (id.). Furthermore, the parents expressed concern that the assigned public school site did not have a full-time counselor available at the work sites (id.).

¹ 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).

² The student's eligibility for special education programs and related services as a student with an other health impairment is not in dispute (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

The parents further noted that the "academic program" at the assigned public school site limited instruction to "one and one-half hour" a day (id.). The parents also indicated that due to the student's "cognitive delays and limited experience in such a setting," they were concerned about her "worksite safety" (id.). In addition, the parents noted that the assigned public school site's "program" required students to be "independent travelers," and the student's "distractibility and in ability to accurately perceive space, distance and time," would not allow her to be an independent traveler for "years" (id.). Finally, the parents advised that the student would continue to attend Cooke through summer 2011, as well as through the remainder of the 2011-12 academic school year, and that they would seek reimbursement of the costs of the student's tuition at Cooke from the district (id.).

A. Due Process Complaint Notice

By due process complaint notice dated November 28, 2011, the parents alleged that the district failed to offer the student a FAPE for the 2011-12 school year (see Dist. Ex. 1 at pp. 1-2). The parents asserted that the district failed to convene a timely CSE meeting, the June 2011 CSE was not properly composed, the June 2011 CSE process failed to comply with appropriate "CSE procedure," and the June 2011 CSE failed to appropriately review proper documentation to develop the June 2011 IEP (id. at p. 1). Further, the parents asserted that the annual goals and short-term objectives were not sufficient and that the June 2011 IEP did not accurately reflect the student's learning needs and academic levels (id.).

With respect to the assigned public school site, the parents asserted that it was not appropriate for the student (see Dist. Ex. 1 at p. 1). The parents alleged that during the visit, the assistant principal indicated that the student would be "placed directly at the work sites and not [go] to the school at all" (id.). Next, the parents reasserted the concerns expressed in the June 2011 letter to the district about the assigned public school site (compare Dist. Ex. 1 at pp. 1-2, with Parent Ex. K at p. 1). In addition, the parents noted that the June 2011 IEP specifically indicated that the student was currently working on travel training, and given the student's difficulty maintaining focus, concerns existed related to the student's "safety, especially with regard to crossing the street" (Dist. Ex. 1 at p. 2). According to the parents, the student required a "small, full time special education environment with individualized instruction and a challenging curriculum" to receive educational benefits (id.). As relief, the parents requested reimbursement for the costs of the student's tuition at Cooke for the 2011-12 school year (id.).

B. Impartial Hearing Officer Decision

On January 31, 2012, the parties proceeded to an impartial hearing, which concluded on July 16, 2012, after five days of proceedings (see Tr. pp. 1-588). In a decision dated August 3, 2012, the IHO found that the district failed to offer the student a FAPE for the 2011-12 school year, that Cooke constituted an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parents' requested relief (see IHO Decision at pp. 15-19).

In concluding that the district failed to offer the student a FAPE for the 2011-12 school year, the IHO found that the student would have been placed at a "work site"—and not at the assigned public school's main site—notwithstanding testimonial evidence to the contrary (IHO Decision at p. 17). Moreover, the IHO drew a negative inference from the district's failure to respond to the parents' June 2011 letter detailing concerns about the assigned public school site (id.). According to the IHO, the district had "ample opportunity" to address the parents' concerns if the information about the assigned public school site in the June 2011 letter was not correct or if the parents received inaccurate information about the assigned public school site during the visit (id.). Given that the student was offered a "'placement at the work site," the IHO concluded that the district did not establish how the assigned public school site was appropriate, because the district did not offer any evidence to describe the program and how it would provide services to the student in accordance with the June 2011 IEP (id. at p. 18). In addition, the IHO noted that the district failed to offer an "appropriate placement" because the assigned public school site did not offer internship opportunities, as set forth in the June 2011 IEP (id.). In addition, the IHO noted that the assigned public school site only offered OT services through the provision of a related services authorization (RSA), which would have "limited the ability of the provider to collaborate with the other teachers" (id.).³

Next, the IHO concluded that Cooke was an appropriate unilateral placement for the student, in part, because the student received instruction in small classes, which offered the student "substantial support and addressed the [student's] difficulties" remaining on task (IHO Decision at pp. 18-19). The IHO further found that Cooke modified the curriculum to conform to the student's skills, and she received all of her related services on site by providers who collaborated with her teachers, both in and out of the classroom (id. at p. 19). Notwithstanding evidence that the student demonstrated "some regression" in her ability to remain focused in class during the school year, the IHO determined that "[the student] made overall progress in the academic as well as social and emotional domains" (id.). Finally, the IHO concluded that equitable considerations did not preclude an award of tuition reimbursement in this case (id. at p. 19). In view of the foregoing, the IHO directed the district to reimburse the parents for the costs of the student's tuition at Cooke for the 2011-12 school year (id. at pp. 19-20).

IV. Appeal for State-Level Review

The district appeals, and asserts that the IHO erred in finding that it failed to offer the student a FAPE for the 2011-12 school year, that Cooke was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parents' request for tuition reimbursement. Initially, the district argues that it offered the student a FAPE for the 2011-12

³ In a footnote, the IHO found that contrary to the parents' allegation in the due process complaint notice, the failure to include a special education teacher at the June 2011 CSE meeting who would be responsible for implementing the student's IEP—while a procedural violation—would not result in a failure to offer the student a FAPE for the 2011-12 school year (see IHO Decision at p.18 n.1). The IHO similarly concluded that the attendance of a regular education teacher at the June 2011 CSE meeting would not rise to the level of a denial of a FAPE because the June 2011 CSE was not considering placing the student in a general education setting, therefore, the attendance of a regular education teacher was not required (id.).

school year, noting that the June 2011 CSE was properly composed and considered appropriate and current evaluative information, as well as input from the parents and the student's providers, to develop an IEP that was reasonably calculated to provide the student with educational benefits. Next, the district argues that the parents' claims surrounding the assigned public school site were speculative in nature; alternatively, however, the district contends that the evidence established that the assigned public school site could implement the June 2011 IEP. In addition, the district asserts that the IHO lacked the legal and factual authority to draw a negative inference against the district based upon the failure to respond to the parents' June 2011 letter.

The district further asserts that the IHO erred in finding that Cooke constituted an appropriate unilateral placement for the student. In addition, the district alleges that equitable considerations did not support the parents' request for relief in this instance because the parents never intended to enroll the student in a public school and the parents' 10-day notice of unilateral placement did not comply with regulations.

In an answer, the parents respond to the district's allegations and generally argue to uphold the IHO's decision in its entirety. In addition, the parents assert that the district cannot argue that Cooke was not an appropriate unilateral placement because it did not offer the student a 12-month school year program, as the district did not raise this argument at the impartial hearing level. In a reply, the district contends that it was not required to interpose an argument regarding the appropriateness of the unilateral placement prior to the appeal for State-level review.

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. CSE Process

1. June 2011 CSE Composition

Contrary to the district's assertion, the parents indicate that the June 2011 CSE was not properly composed because the special education teacher would not be responsible for implementing the student's IEP.⁴ Based upon a review of the evidence in the hearing record, there is no reason to disturb the IHO's finding and the parents' contentions must be dismissed.

⁴ As noted above, the IHO found that although the special education teacher attending the June 2011 CSE meeting would not be responsible for implementing the student's IEP, this procedural inadequacy did not result in a failure to offer the student a FAPE for the 2011-12 school year (see IHO Decision at p. 18 n.1). As an IHO finding adverse to the parents, the parents' failure to cross-appeal the IHO's determination typically results in the issue being deemed abandoned or waived on appeal (see J.F. v. New York City Dep't of Educ., 2012 WL 5984915, *6-*7 [S.D.N.Y. Nov. 27, 2012]); in this instance, however, the composition of the June 2011 CSE will only being addressed out of an abundance of caution and only with respect to the attendance of the district special education teacher.

At the time of the June 2011 CSE meeting, the IDEA required a CSE to include, among others, one special education teacher of the student, or where appropriate, not less than one special education provider of the student (20 U.S.C. § 1414[d][1][B][iii]; see 34 CFR 300.321[a][3]; 8 NYCRR 200.3[a][1][iii]; see 8 NYCRR 200.1[xx] [defining "special education provider," in pertinent part, as an "individual qualified . . . who is providing related services" to the student]; 8 NYCRR 200.1[yy] [defining "special education teacher," in pertinent part, as a "person, . . . , certified or licensed to teach students with disabilities"]). In addition, the Official Analysis of Comments to the federal regulations indicates that the special education teacher or provider "should" be the person who is or will be responsible for implementing the student's IEP (IEP Team, 71 Fed. Reg. 46670 [Aug. 14, 2006]).⁵ However, as noted above, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacy (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]).

In this case, the evidence indicates that the following individuals attended the June 2011 CSE meeting: a district special education teacher (who also served as the district representative), a district school psychologist, an additional parent member, a parent, a Cooke representative, and two of the student's then-current teachers from Cooke (mathematics and English language arts [ELA]) who attended telephonically (see Dist. Ex. 6 at p. 2; see also Tr. pp. 41, 84).⁶ It is undisputed, however, that the district special education teacher who attended the June 2011 CSE meeting would not be responsible for implementing the student's IEP because she retired as of July 1, 2011 (see Tr. pp. 27-28, 41, 78). Therefore, the district special education teacher who attended the June 2011 CSE meeting did not meet the regulatory criteria; however, to the extent that this constituted a procedural violation, the hearing record does not provide any basis under these circumstances upon which to conclude that such procedural inadequacy impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits to how or why this procedural violation rose to the level of a denial of a FAPE (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; see Davis v. Wappingers Cent. Sch. Dist., 2011 WL 2164009, at *2-*3 [2d Cir. June 3, 2011]; R.B. v. New York City Dep't of Educ., 2014 WL 1618383, *5-*6 [S.D.N.Y. Mar. 26, 2014] [finding that the CSE's reliance, in part, upon progress reports created by the student's teacher "significantly mitigated" the absence of a special education teacher at the CSE meeting who was not the student's "own special education teacher"]; A.M. v. New York City Dep't of

⁵ The language in the Official Analysis of Comments, which indicates that the special education teacher or provider "should" be the person who is or will be responsible for implementing the student's IEP (IEP Team, 71 Fed. Reg. 46670 [Aug. 14, 2006]), does not constitute a binding requirement, but rather appears to provide aspirational guidance that contemplates circumstances in which the student has been and will continue to be in attendance in a public school placement (see Application of a Student with a Disability, Appeal No. 13-203; Application of the Dep't of Educ., Appeal No. 12-157; Application of the Dep't of Educ., Appeal No. 11-040).

⁶ Only the student's father attended the June 2011 CSE meeting; however, he did not testify at the impartial hearing (see Tr. pp. 1-588).

Educ., 964 F. Supp. 2d 270, 279-80 [S.D.N.Y. 2013]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 646-47 [S.D.N.Y. 2011]).

This is particularly so in light of the fact that the student's then-current Cooke teachers for mathematics and ELA attended, and participated in, the June 2011 CSE meeting (see Tr. pp. 42-45, Dist. Exs. 5 at pp. 1-2; 6 at p. 3). As the Cooke teachers—who were directly acquainted with this student's particular needs—were able to fully participate in the June 2011 CSE meeting, the failure to include a special education teacher "of the student" was of little, if any, consequence in this instance and did not rise to the level of a denial of a FAPE (see Tr. pp. 43-45, 50, 54; A.H., 394 Fed. App'x 718, 720, 2010 WL 3242234, at *2; see S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *7 [S.D.N.Y. Dec. 8, 2011] [finding no denial of educational benefit where the CSE meeting was attended by those who "could contribute the information necessary for the CSE to address [the student]'s educational and therapeutic needs"]; Application of a Student with a Disability, Appeal No. 12-071; Application of the Bd. of Educ., Appeal No. 12-010; Application of the Bd. of Educ., Appeal No. 08-105). In addition, the evidence in the hearing record reveals that the June 2011 CSE relied upon the student's previous IEP as a draft to develop the student's June 2011 IEP, the June 2011 CSE also relied upon information created by the student's Cooke teachers and providers to develop the June 2011 IEP, and the parent had the opportunity to participate in the development of the June 2011 IEP (see Tr. pp. 38-40, 42-64, 77, 103-04 Dist. Exs. 5 at pp. 1-2; 6 at pp. 1-14; 8 at pp. 1-11; 9-10).

2. Evaluative Information and Present Levels of Performance

Contrary to the district's assertions, the parents argue that the June 2011 CSE failed to procure or consider appropriate and current evaluative information about the student in the development of the June 2011 IEP. A review of the evidence in the hearing record does not support the parents' contentions.

Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). Furthermore, although federal and State regulations require that an IEP report the student's present levels of academic achievement and functional performance, those regulations do not mandate or specify a particular source from which that information must come, and teacher estimates may be an acceptable method of evaluating a student's academic functioning. When a student has not been attending public school, it is also appropriate for the CSE to rely on the assessments, classroom observations, or teacher reports provided by the student's nonpublic school (S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *10 [S.D.N.Y. Nov. 9, 2011] [indicating that based upon 20 U.S.C. § 1414 (c)(1)(A), a CSE is required in part to "review existing evaluation data on the child, including (i) evaluations and information provided

by the parents of the child; (ii) current classroom-based, local, or State assessments, and classroom-based observations; and (iii) observations by teachers and related services providers").

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 parent 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 parent and the district otherwise agree and at least once every three years unless the district and the parent 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 (8 NYCRR 200.4[b][3]). In addition, State and federal regulations require a CSE to consider "[o]bservations by teachers and related services providers" as part of an initial evaluation or a reevaluation of a student (34 C.F.R. § 300.305[a][1][iii]; see 8 NYCRR 200.4[b][1][iv] [requiring an "observation of the student in the student's learning environment . . . to document the student's academic performance and behavior in the areas of difficulty" as part of a student's initial evaluation]; 8 NYCRR 200.4[b][5][i], [ii][b] [requiring that the CSE, as part of an initial evaluation or reevaluation, review "existing evaluation data of the student including . . . classroom-based observations" to identify, what if any, additional evaluation data is needed to determine, among other things, the "present levels of academic achievement and related developmental needs of the student"]).

In this case, the evidence in the hearing record indicates that the June 2011 IEP accurately reflected evaluative information and descriptions of the student consistent with an October 2010 classroom observation, a Cooke Center Academy progress report 2010-11 (June 2011 progress report), and information provided to the June 2011 CSE by the student's then-current Cooke teachers (see Tr. pp. 43-45, 66-69; compare Dist. Ex. 6 at pp. 3-6, with Dist. Ex. 5 at pp. 1-2, and Dist. Ex. 8 at pp. 2-5, 8-9, 12-13, 17, and Dist. Ex. 9). Prior to the June 2011 CSE meeting, the district special education teacher and the district school psychologist—who both attended the June 2011 CSE meeting—reviewed the student's file, which, in addition to the October 2010 classroom observation and the June 2011 Cooke progress report, included a February 2008 vocational assessment, an August 2009 social history update, an October 2009 psychological report/educational report (October 2009 psychoeducational report), and the student's 2010-11 IEP (see Tr. pp. 35-40; Dist. Exs. 10-11; Parent Ex. P at pp. 1-29).

Consistent with the June 2011 Cooke progress report, the present levels of academic performance and learning characteristics section of the June 2011 IEP reflected that the student was working on "functional math, such as personal finances, budgeting and shopping" (compare Dist. Ex. 8 at p. 4, with Dist. Ex. 6 at p. 3, and Dist. Ex. 5 at p. 1). Based upon information provided by the student's then-current mathematics teacher at Cooke, the June 2011 IEP indicated that the student performed on a "first grade level" in class, even though her testing results fell within a "kindergarten level" (Dist. Ex. 6 at p. 3; see Tr. pp. 43-45; Dist. Ex. 5 at p. 1). The June 2011 IEP also reflected the student's most recent testing results, which included the administration of the "Starr" (sic) mathematics assessment to the student in March 2011 to measure her computation skills (kindergarten instructional level) and an administration of the

Group Mathematics Assessment and Diagnostic Evaluation (GMADE) to the student in October 2010 to assess her problem solving skills (kindergarten instructional level) (id.).⁷

Also consistent with the June 2011 Cooke progress report, the June 2011 IEP present levels of academic performance and learning characteristics section indicated that the student was working on using supporting details and vivid language in her writing (compare Dist. Ex. 8 at p. 3, with Dist. Ex. 6 at pp. 3-4). Based upon information provided by the student's then-current ELA teacher at Cooke, the June 2011 IEP described the student's "instructional reading ability" at the "beginning of third grade level," but noted her listening comprehension was "weaker" because the student was "easily distracted and los[t] focus" (Dist. Ex. 6 at p. 3; see Tr. pp. 43-45; Dist. Ex. 5 at p. 1). The June 2011 IEP further reflected the student's most recent testing results, which included an administration of the "A-Z reading assessment" to the student in May 2011 ("beginning second grade level") and an administration of the "Slosson" to the student—indicating the student could read "184 of 200 words" (Dist. Ex. 6 at p. 3; see Tr. pp. 43-45; Dist. Ex. 5 at pp. 1-2). In addition, the June 2011 IEP reported that, based upon the administration of the Group Reading Assessment and Diagnostic Evaluation (GRADE) to the student in May 2011, her instructional level in decoding was at a "[f]ifth" grade level and her instructional level in reading comprehension was at a "[t]hird" grade level (Dist. Ex. 6 at p. 3; see Tr. pp. 43-45; Dist. Ex. 5 at p. 1; compare Dist. Ex. 6 at p. 3, with Dist. Ex. 15 at p. 1).

Regarding the student's social/emotional and behavior needs, the June 2011 IEP described the student's difficulty with attention and focus, and her need for prompting and redirection, consistent with the June 2011 Cooke progress report and information obtained from the student's then-current Cooke teachers (compare Dist. Ex. 8 at pp. 3-4, 17, with Dist. Ex. 6 at pp. 3-5, and Dist. Ex. 5 at pp. 1-2). More specifically, the present levels of social/emotional performance in the June 2011 IEP reflected the student's susceptibility to both internal and external distractions, and her ability to respond to redirection by a teacher (compare Dist. Ex. 6 at p. 5, with Dist. Ex. 5 at p. 2, and Dist. Ex. 8 at pp. 3-4, 17; see generally Tr. pp. 47-48). In addition, the June 2011 IEP noted that the student was "more engaged" when working with a teacher, she completed tasks when focused, and she benefitted from a "visual checklist" to help keep her focused, as well as "small breaks" (compare Dist. Ex. 6 at p. 5, with Dist. Ex. 5 at pp. 1-2, and Dist. Ex. 8 at pp. 3-4, 17). The present levels of social/emotional performance also reflected that the student could be off task "50" to "70" percent of the time, and when off-task, she could be a distraction to herself and others (compare Dist. Ex. 6 at p. 5, with Dist. Ex. 5 at pp. 1-2). In addition, the June 2011 CSE noted that the student could become "very distracted by social situations," which often created an "internal distraction" for the student (Dist. Ex. 6 at p. 5).⁸

The district special education teacher who attended the June 2011 CSE meeting also conducted the October 2010 classroom observation of the student (compare Dist. Ex. 6 at p. 2,

⁷ The "STAR" Math assessment is an online system administered to students three times a year, which "evaluate[d] students' independent level of mathematical functioning . . . to inform instruction and remedial work" (Parent Ex. N at p. 1).

⁸ The June 2011 IEP further noted that although the student had been diagnosed as having an attention deficit hyper activity disorder (ADHD), she did not take medication (see Dist. Ex. 6 at p. 6).

with Dist. Ex. 9). Consistent with the information provided by the student's then-current Cooke teachers attending the June 2011 CSE meeting, the October 2010 classroom observation reflected the internal distraction caused by the student's "line of thinking" during mathematics lab, which manifested in the student verbally disparaging her own work and her own abilities (Dist. Ex. 9). To provide "behavioral support" to the student, the June 2011 CSE recommended counseling services (Dist. Ex. 6 at p. 5). In addition, the district special education teacher testified that the counseling services would also help the student focus on tasks, deal with social situations, help the student learn to express herself, understand how she affected others in her environment, and to develop strategies to reduce distraction in the classroom (see Tr. pp. 49-50; Dist. Ex. 6 at p. 5).

Also consistent with the June 2011 Cooke progress report, the June 2011 IEP indicated that although the student had been working on travel training, her safety remained a concern, especially when "crossing the street" and "maintaining her focus" (compare Dist. Ex. 8 at pp. 12-13, with Dist. Ex. 6 at p. 5). As part of the student's transition services, the June 2011 CSE recommended that the student continue to work on skills such as "safe, independent travel"—which was also consistent with a recommendation in the June 2011 Cooke progress report that the student would benefit from "independent travel training" (compare Dist. Ex. 6 at p. 14, with Dist. Ex. 8 at p. 12).

However, notwithstanding that the June 2011 IEP accurately reflected the student's travel training needs, the June 2011 IEP did not include information about the student's visual motor and visual perceptual processing needs as indicated in an October 2009 psychoeducational report, or how the student's needs in these areas may related to travel training or to the concerns noted in the IEP regarding safety when crossing the street (see Dist. Ex. 6 at pp. 3-5; see also Parent Ex. P at pp. 25-26).⁹ For example, according to the October 2000 psychoeducational report the student exhibited "considerable difficulty scanning and tracking" (Parent Ex. P at pp. 18-19). In addition, an administration of the Bender Visual-Motor Gestalt Test, Second Edition (Bender-Gestalt II) to the student in October 2009 yielded percentile scores below the first percentile, which reflected the possibility of a "minimal brain dysfunction" and further suggested that a "neurological anomaly" may be contributing to the student's "poor perceptual reasoning skills and poor visual processing and organizational skills" (id. at pp. 25-26). In this case, while the June 2011 CSE did not identify the student's visual motor and visual perceptual processing needs in the present levels of performance sections of the June 2011 IEP, the June 2011 CSE nonetheless sufficiently addressed these needs by recommending OT services and by developing an annual goal with corresponding short-term objectives targeting, among other things, the student's ability to use organizers, to do lists, and planners to organize school material; use safe and effective motor planning to navigate a busy, cluttered environment; demonstrate smooth tracking with both eyes for school-based tasks; copy three sentences from the board or paper draft without omissions, reversals, or other visual motor errors; locate and retrieve objects from a moderately cluttered environment; use a proofreading checklist to ensure proper spatial

⁹ At the impartial hearing, the district special education teacher testified that although the June 2011 CSE did not specifically rely upon the October 2009 psychoeducational report to develop the student's June 2011 IEP, both she and the district school psychologist reviewed it as part of the student's educational file prior to the June 2011 CSE meeting (see Tr. pp. 39-40, 98).

awareness, punctuation, and capital letter use; and identify and utilize sensory regulation strategies (see Dist. Ex. 6 at pp. 3-6, 9). A review of the evidence in the hearing record reveals that the June 2011 CSE derived the abovementioned short-term objectives related to the student's visual motor and visual perceptual skills directly from the June 2011 Cooke progress report documenting the student's OT needs (compare Dist. Ex. 6 at p. 9, with Dist. Ex. 8 at p. 18).

Next, a review of the June 2011 IEP indicates that the June 2011 CSE recommended various strategies within the present levels of performance to address the student's academic and social/emotional needs, which the June 2011 CSE obtained from the June 2011 Cooke progress report, the student's previous IEP, and the student's then-current Cooke teachers (see Tr. pp. 44-45, compare Dist. Ex. 6 at pp. 3, 5, with Dist. Ex. 8 at pp. 3-4, 8-9, 17). For example, the June 2011 CSE indicated in the IEP that the student benefitted from small group instruction; a multisensory approach to instruction; redirection back to task; the use of graphic organizers, charts, graphs, and checklists; extra time to complete tasks; instructions repeated and rephrased as needed; verbal and visual cues; one-to-one reteaching; use of manipulatives and visual aids; preferential seating; the provision of notes and outlines; the use of a daily visual chart for refocusing; teacher check-ins to ascertain understanding; work breaks at the teacher's discretion; scaffolding; and direct teacher modeling (*id.*). The district special education teacher testified that the June 2011 CSE discussed the academic management needs, as well as the social/emotional management needs, incorporated into the June 2011 IEP, and no one in attendance objected (see Tr. pp. 45, 50-52). In addition, the district special education teacher testified that the student's Cooke teachers provided the June 2011 CSE with a visual checklist used with the student at Cooke to help the student stay on target in the classroom and remain on task (see Tr. pp. 50-51). The student's then-current Cooke teachers also suggested preferential seating as a classroom modification that would benefit the student (*id.*).

In summary, while the June 2011 CSE did not specifically identify the student's visual motor and visual perceptual processing needs in the June 2011 IEP, the evaluative information relied upon by the June 2011 CSE and the input from the CSE participants during the meeting provided the June 2011 CSE with sufficient functional, developmental, and academic information about the student and her individual needs to enable it to develop her IEP (*D.B. v. New York City Dep't of Educ.*, 2011 WL 4916435, at *8 [S.D.N.Y. Oct. 12, 2011]; *Application of a Student with a Disability*, Appeal No. 11-041; *Application of a Student with a Disability*, Appeal No. 10-100; *Application of a Student with a Disability*, Appeal No. 08-015; *Application of the Dep't of Educ.*, Appeal No. 07-098; *Application of a Child with a Disability*, Appeal No. 94-2). Based upon a review of the evidence, the hearing record does not otherwise indicate that the omission of information regarding the student's visual motor and visual perceptual processing needs from the June 2011 IEP altered the accuracy of the IEP, where, as here, the June 2011 IEP, when read as a whole, contained sufficient information to provide the student with educational benefits under the plan (*Karl v. Bd. of Educ.*, 736 F.2d 873, 877 [2d Cir. 1984] [finding that although a single component of an IEP may be so deficient as to deny a FAPE, the educational benefits flowing from an IEP must be determined from the combination of offerings rather than the single components viewed apart from the whole]). Moreover, even assuming that this error constituted a procedural violation, the hearing record does not support a finding that the error impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or

caused a deprivation of educational benefit upon which to conclude that the district did not offer the student a FAPE for the 2011-12 school year (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii] M.H. v. New York City Dep't of Educ., 2011 WL 609880, at *11 [S.D.N.Y. Feb. 16, 2011]). To find otherwise, would be to "exalt form over substance" (M.H., 2011 WL 609880, at * 11).

B. June 2011 IEP

1. Annual Goals

Turning next to the parents' contentions regarding the sufficiency of the annual goals and short-term objectives in the June 2011 IEP, a review of the evidence in the hearing record supports a finding that the annual goals and short-term objectives in June 2011 IEP were appropriate and aligned with the student's identified special education needs.

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]). Short-term objectives are required for a student who takes New York State alternate assessments (8 NYCRR 200.4[d][2][iv]; see 20 U.S.C. §1414[d][1][A][i][I][cc]; 34 CFR 300.320[a][2][ii]).¹⁰

In this case, the June 2011 IEP included approximately 8 annual goals and 42 corresponding short-term objectives to address the student's identified needs in the following areas: problem solving and computational skills, listening comprehension, reading comprehension, written expression, visual perception and perceptual motor skills, expressive language skills, transition, and social and self-advocacy skills (see Dist. Ex. 6 at pp. 7-10). The hearing record reflects that the June 2011 CSE developed the student's annual goals and short-term objectives during the June 2011 CSE meeting based on input from the parent and the student's then-current Cooke teachers (see Tr. pp. 43-45; Dist. Ex. 5 at p. 1). The district special education teacher testified that the June 2011 CSE derived the annual goals from the student's 2010-11 IEP, which she read to the June 2011 CSE members, and she asked the student's then-current Cooke teachers whether the annual goals should "remain" and what annual goals the student should "work on for the next year" (see Tr. pp. 43-44; see also Tr. pp. 53-59). In addition, the district special education teacher testified that she reviewed the student's transition goals, and the parent requested that the June 2011 CSE add a mathematics annual goal pertaining to "time" (Tr. pp. 43-44, 57-58; see Dist. Ex. 5 at p. 1). The district special education teacher

¹⁰ An alternate assessment has been described as a "datafolio-style assessment in which students with severe cognitive disabilities demonstrate their performance toward achieving the New York State P-12 Common Core Learning Standards in English language arts and mathematics" (<http://www.p12.nysed.gov/assessment/nysaa>).

also testified the annual goals and corresponding short-term objectives in the June 2011 IEP addressed the student's academic and social/emotional needs because the annual goals came "directly" from Cooke and the Cooke reports, and Cooke personnel "kn[ew] the student best because they work[ed] with the student" (Tr. p. 59; see Tr. pp. 76-77). Moreover, she noted that no one in attendance at the June 2011 CSE disputed the annual goals and short-term objectives (see Tr. pp. 58-59). Finally, a review of the June 2011 IEP indicates that the annual goals included the following: the specific criteria for mastery for each annual goal (i.e., requiring four out of five samples with 80 percent mastery), the specific methods to be used to measure the student's progress (i.e., teacher or provider observations and classroom activities), and how the student's progress toward each annual goal would be measured (i.e., three times per year) (see Dist. Ex. 6 at pp. 7-10; see also Tr. pp. 55-56).

Thus, overall, the evidence in the hearing record supports a finding that the annual goals and corresponding short-term objectives in the June 2011 IEP targeted the student's identified areas of need, appropriately addressed the student's needs, and were sufficiently specific and measurable to guide instruction and to evaluate the student's progress over the course of the school year (see D.A.B. v. New York City Dep't of Educ., 973 F. Supp. 2d 344, [S.D.N.Y. 2013]; E.F. v. New York City Dept. of Educ., 2013 WL 4495676, at *18-*19 [E.D.N.Y. Aug. 19, 2013]; D.B. v. New York City Dep't of Educ., 2013 WL 4437247, at *13-*14 [S.D.N.Y. Aug. 19, 2013]; S.H., 2011 WL 6108523, at *8; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 288-89 [S.D.N.Y. 2010]; Tarlowe, 2008 WL 2736027, at *9; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *11 [S.D.N.Y. Sept. 29, 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 146-47 [S.D.N.Y. 2006]; Application of the Dep't of Educ., Appeal No. 12-108 [finding annual goals appropriate where the goals addressed the student's areas of need reflected in the present levels of performance]).

2. Academic Needs and Instruction

The parents contend that the student would only receive 90 minutes a day of academic instruction at the assigned public school site. To the extent that the parents' contention could be interpreted to challenge whether the June 2011 IEP adequately addressed the student's academic needs or academic instruction, a review of the evidence in the hearing record does not support the parents' assertion.

As noted above, the June 2011 CSE recommended a 12-month school year program in a 12:1+1 special class placement at a specialized school for the 2011-12 school year, along with related services of counseling, OT, and speech-language therapy (see Dist. Ex. 6 at pp. 1-2, 11, 13).¹¹ In addition, the district special education teacher testified that the annual goals and short-term objectives in the June 2011 IEP could be appropriately addressed in the 12:1+1 special class placement as well as during the student's related services' instruction, and further, that the academic and social/emotional management needs could be appropriately addressed in the 12:1+1 special class placement (see Tr. pp. 43-58; Dist. Ex. 6 at pp. 3, 5, 7-10). Furthermore, the annual goals and short-term objectives in the June 2011 IEP enabled the student to access the academic curriculum (see Dist. Ex. 6 at pp. 7-10). More specifically, the annual goal and short-

¹¹ No one at the June 2011 CSE meeting disagreed with the related services recommendations in the June 2011 IEP (see Tr. p. 71; Dist. Ex. 6 at p. 13).

term objectives related to the student's OT needs enabled he student to organize school material; copy from the board or paper draft; use punctuation, capitalization, and proper spacing in her writing; and identify and utilize sensory regulation strategies (*id.* at p. 9). Additionally, the June 2011 IEP contained a speech-language annual goal and short-term objectives designed to help the student identify the need for clarification, use strategies to improve listening and reading comprehension, request clarification when needed, engage in active listening, improve conversational skills with peers, follow multistep directions in a variety of contexts, and use a checklist to identify and correct errors in written expression (*id.*). Finally, the annual goal and short-term objectives for counseling in the June 2011 IEP supported the student's academic functioning by improving her self-awareness so she could approach tasks using strategies, and by targeting the student's ability to recognize the cause and effect relationship between her actions and behaviors and the way she is perceived by others, improve her ability to stay on task without distraction, and enter a learning environment prepared to learn and develop strategies to transition into a work space (*id.* at p. 10). Furthermore, the district special education teacher testified that the many of the skills targeted in the annual goals and short-term objectives carry over into the classroom, noting that the classroom teacher would work "hand-in-hand" with the student's occupational therapist, speech-language provider, and counselor in working on the student's annual goals (Tr. pp. 56-58).

C. Challenges to the Assigned Public School Site

Finally, the district asserts that the IHO erred in finding that the district failed to offer the student a FAPE for the 2011-12 school year based upon the parents' speculative allegations regarding the assigned public school site and regardless of the information the parents obtained during the visit to the assigned public school site. The district argues that the assigned public school site could properly implement the June 2011 IEP, and contrary to the parents' assertions, the student would have been placed at the main site given her age and the information in the June 2011 IEP—not at a work site; the student would have participated in the travel training program; and the assigned public school site could address the student's academic management needs, reading levels, and assessments; and finally, the assigned public school site could meet the student's related services recommended in the June 2011 IEP. As argued by the district and as explained more fully below, the parents' claims with respect to the assigned public school are speculative, and the IHO's determination must be reversed.

With regard to the parties' arguments pertaining to assigned public school site, such challenges 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. v. New York City Dep't of Educ.*, 2014 WL 53264 [2d Cir. Jan. 8, 2014]; *B.K. v. New York City Dep't of Educ.*, 2014 WL 1330891, at *20-*22 [E.D.N.Y. Mar. 31, 2014]; *E.H. v. New York City Dep't of Educ.*, 2014 WL 1224417, at *7 [S.D.N.Y. Mar. 21, 2014]; *Ganje v. Depew Union Free Sch. Dist.*, 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012] [finding the parents' pre-implementation arguments that the district would fail to adhere to the IEP were speculative and therefore misplaced], adopted at 2012 WL

5473485 [W.D.N.Y. Nov. 9, 2012]; see also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. July 24, 2013]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *12 [S.D.N.Y. Mar. 31, 2014]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *7 [S.D.N.Y. Dec. 11, 2012]; 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"]; Peter G. v. Chicago Pub. Sch. Dist. No. 299 Bd. of Educ., 2003 WL 121932, at *19 [N.D. Ill. Jan. 13, 2003] [noting that the court would not speculate regarding the success of the student's services where the parent removed student from the public school before the IEP services were implemented]).

While several district courts have, since R.E. was decided, continued to wrestle with this difficult issue regarding challenges to the implementation of an IEP made before the student begins attending the school and taking services under the IEP (see V.S. v. New York City Dep't of Educ., 2014 WL 2600313, at *4 [E.D.N.Y. June 10, 2014] [finding that the parents were denied the "right to evaluate" the assigned public school site]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16 [S.D.N.Y. May 27, 2014] [same]); Scott v. New York City Dep't of Educ., 2014 WL 1225529, at *19 [S.D.N.Y. Mar. 25, 2014] [finding that the "proper inquiry . . . is whether the alleged defects of the placement were reasonably apparent" to the parent or the district when the parent rejected the assigned public school site]; D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13 [S.D.N.Y. 2013] [holding that the district must establish that it can implement the student's IEP at the assigned school at the time the parent is required to determine whether to accept the IEP or unilaterally place the student]; B.R. v. New York City Dep't of Educ., 910 F. Supp. 2d 670, 676-78 [S.D.N.Y. 2012] [same]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012] [holding that parents may prospectively challenge the adequacy of a "placement classroom" when a child has not enrolled in the school because districts are not permitted to assign a child to a public school that cannot satisfy the requirements of an IEP]), I continue to find it necessary to depart from those cases. Since a number of these prospective implementation cases were decided in the district courts, 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 [rejecting as improper the parents' claims related to how the proposed IEP would have been implemented]). 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 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]).¹²

As explained most recently, "[i]t would be inconsistent with R.E. to require the [district] to proffer evidence regarding the actual classroom [the student] would have attended, where it had become clear that [the student] would attend private school and not be educated under the IEP" (M.O. v. New York City Dep't of Educ., 2014 WL 1257924, at *2 [S.D.N.Y. Mar. 27, 2014]). Instead, "[t]he Second Circuit has been clear . . . that where a parent enrolls the child in a private placement before the time that the district would have been obligated to implement the IEP placement, the validity of proposed placement is to be judged on the face of the IEP, rather than from evidence introduced later concerning how the IEP might have been, or allegedly would have been, implemented" (A.M., 964 F. Supp. 2d at 286; see R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; E.F., 2013 WL 4495676, at *26; M.R. v New York City Bd. of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013] [finding that the argument that the assigned school would not have been able to implement the IEP was "entirely speculative"]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 588-89 [S.D.N.Y. 2013] [citing R.E. and rejecting challenges to placement in a specific classroom because "[t]he appropriate inquiry is into the nature of the program actually offered in the written plan"]). When the Second Circuit spoke most recently with 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., 2014 WL 53264, at *6, quoting R.E., 694 F.3d at 187 n.3).

In view of the foregoing, the parents cannot prevail on the claims that the district would have failed to implement the June 2011 IEP at the assigned public school site because a retrospective analysis of how the district would have executed 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 program recommended by the CSE and instead chose to enroll the student in a nonpublic school of their choosing (see generally Parent Exs. J-M).¹³ Therefore, the district is correct that the issues raised and the arguments asserted by the parents

¹² The Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular 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. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [noting that 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.

¹³ Assuming without deciding that the IHO properly—and with the appropriate legal authority—drew a negative inference against the district based upon the district's failure to respond to the parents' June 2011 letter, the evidence in the hearing record reveals that the parents indicated their intentions to unilaterally place the student at Cooke for the 2011-12 school year and to litigate the matter in the same letter, which, undoubtedly, had a chilling effect on the continued collaborative process between the parents and the district at that time (see IHO Decision at p. 17; see also Parent Ex. K at pp. 1-2).

with respect to the assigned public school site are speculative. Furthermore, 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 "[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 the execution of the student's program at the particular public school site to which to student was assigned by the district 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 district correctly argues that the parents cannot prevail on their claims that the assigned public school site would not have properly implemented the June 2011 IEP—including that the student would have been placed at a work site with academic instruction limited to 90 minutes per day; that the assigned public school site could not address the student's academic management needs, reading levels, and assessments; or that the assigned public school site could not provide the student's related services. Consequently, the IHO's decision must be reversed.

VII. Conclusion

In summary, having determined that the evidence in the hearing record demonstrates that the district sustained its burden to establish that it offered the student a FAPE in the LRE for the 2011-12 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether the student's unilateral placement at Cooke was an appropriate placement or whether equitable considerations supported the parents' requested relief (see Burlington, 471 U.S. at 370; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated August 3, 2012, is modified by reversing that portion which found that the district failed to offer the student a FAPE for the 2011-12 school year; and

IT IS FURTHER ORDERED that the IHO's decision dated August 3, 2012, is modified by vacating that portion which ordered the district to reimburse the parents for the costs of the student's tuition at Cooke for the 2011-12 school year.

Dated: Albany, New York
July 9, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER