



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 13-034

**Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the [REDACTED]**

### **Appearances:**

Susan Luger Associates, Inc., special education advocates for petitioner, Lawrence D. Weinberg, Esq., attorney for petitioner

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Ilana A. Eck, 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 parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her daughter's tuition costs at Cooke Center Academy (Cooke) for the 2012-13 school year. Respondent (the district) cross-appeals from the IHO's determination that the parent's unilateral placement of the student at Cooke was appropriate. The appeal must be dismissed. The cross-appeal must be dismissed.

### **II. Overview—Administrative Procedures**

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

process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

### **III. Facts and Procedural History**

This proceeding involves a student who, at the time that the IEP relevant to this matter was developed, was 14 years-old and a ninth-grade student at Cooke (Parent Exs. B at p. 1; E at p. 1). The student began attending Cooke in the 2011-12 school year, after having "aged out" of a district middle school (Tr. pp. 154, 270, 378-79). The record reflects that, although the student is in high school, she functions at a first to second grade level in most academic areas (Tr. pp. 122-23, 131, 271, 279-80, 300-01, 313, 366; Parent Ex. B at pp. 1, 16), and that, according to a

May 2011 psychoeducational evaluation, the student's overall intellectual level was in the "mildly deficient range with associated academic deficits" (Dist. Ex. 5 at p. 4). Despite the student's academic deficits, however, the record reflects that she had relative strengths in computation and listening comprehension, that she was becoming more independent, and that she had become a role model for other students (Tr. pp. 270-71, 296-97; Parent Ex. B at p. 1).

On May 25, 2012, a CSE met to develop a 2012-13 school year IEP for the student (Parent Ex. B).<sup>1</sup> Finding that the student remained eligible for special education and related services as a student with an intellectual disability,<sup>2</sup> the CSE recommended a 12-month school year program<sup>3</sup> and placement in a 12:1+1 special class in a specialized school, with related services of one 45 minute session per week of individual speech-language therapy, one 45 minute session per week of speech-language therapy in a group of four, two 45 minute sessions per week of occupational therapy (OT) in a group,<sup>4</sup> and one 45 minute counseling session in a group of five (*id.* at pp. 1, 13, 16). In addition, the May 2012 CSE recommended approximately 21 annual goals and 107 short term objectives, as well as transition services, to address the student's needs (Parent Ex. B at pp. 3-12, 14-15). The CSE also recommended the student receive adapted physical education and participate in the New York State alternate assessment (*id.* at pp. 15-16).

In a final notice of recommendation (FNR) dated June 19, 2012, the district summarized the special education and related services recommended by the May 2012 CSE and notified the parent of the particular public school site to which the student was assigned for the 2012-13 school year (Dist. Ex. 21). The record reflects that on July 20, 2012, the parent visited the school and felt that it was not appropriate for a number of reasons (Parent Ex. H at p. 1).<sup>5</sup>

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<sup>1</sup> The record reflects that the parent sent a letter to the district dated March 14, 2012 indicating that Cooke required the parent to sign an enrollment contract and pay a deposit for the 2012-13 school year, and requesting that the CSE schedule a meeting to conduct the student's annual review "as soon as possible" (Parent Ex. I at p. 1). However, since the record reflects that the student's annual review was projected to occur in May 2012 anyway (Parent Ex. C at p. 1), it is unclear whether the May 2012 CSE convened as a result of this letter or not. In any event, although the parent indicated in her letter that Cooke required her to sign a contract and pay a deposit, the parent did not execute a contract with Cooke until June 18, 2012, and that contract did not require the parent to pay a deposit (Parent Exs. I at p. 1; K at p. 2).

<sup>2</sup> The student's eligibility for special education programs and related services as a student with an intellectual disability is not in dispute (Parent Ex. R at p. 2; *see* 34 CFR 300.8[c][6]; 8 NYCRR 200.1[zz][7]).

<sup>3</sup> Although the May 2012 CSE recommended a 12-month program, the hearing record indicates that the parent chose not to enroll the student in any program during the summer portion of the 2012-13 school year (Tr. pp. 401-03).

<sup>4</sup> Although the May 2012 IEP recommended OT in a group of two, the hearing record indicates that the group size was an error and the parties had agreed that the student would receive OT in a group of six (Tr. pp. 60-61, 198-99; Dist. Ex. 3 at p. 7).

<sup>5</sup> The parent notified the district of this by letter dated August 8, 2012, which is one day after she filed her due process complaint notice (Parent Ex. H at p. 1). The parent also notified the district in this letter that she would place the student at Cooke for the 2012-13 school year and seek reimbursement if the district did not offer the student "an appropriate program/placement" (*id.*).

## A. Due Process Complaint Notice

By due process complaint notice dated August 7, 2012, the parent requested an impartial hearing, asserting that the district did not offer the student a free appropriate public education (FAPE) for the 2012-13 school year (Parent Ex. A at pp. 1-2). Specifically, the parent challenged the May 2012 CSE meeting and resultant IEP as being both procedurally and substantively flawed for reasons including that the May 2012 CSE team was "not duly constituted," that the parent was denied the ability to meaningfully participate in the development of the IEP, that evaluations relied upon by the May 2012 CSE were insufficient, that the IEP did not meet and/or address all of the student's academic, social/emotional, and behavioral needs, that the goals in IEP (including "transition goals" and "post-secondary goals") were inappropriate, and that the CSE "failed to recommend an appropriate program" (including that it did not provide "enough opportunity for 1:1 instruction") (*id.* at pp. 2-5). In addition, the parent asserted that the district failed to timely provide her with prior written notice or an FNR, and that the specific public school site selected by the district to implement the student's May 2012 IEP was "inappropriate for several reasons," including that it could not implement "the academic management needs, the social/emotional management needs, the physical management needs, behavioral needs and the related services" in the IEP (Parent Ex. A at p. 5). In addition, the parent maintained that the school would not have appropriately grouped the student, that the size of the school (i.e., the presence of "over 200 students and twenty-five classrooms") was "overwhelming," that the school "had a prison like feel,"<sup>6</sup> that there was "no opportunity for 1:1 instruction or attention," and that the school did not employ "the teaching methodologies" that were appropriate for the student (*id.* at pp. 5-6). With respect to this last assertion, the parent claimed that she was told that the proposed school did not differentiate instruction and followed one particular curriculum, that a "paraprofessional" who was "not specially trained" would be responsible for providing small group instruction, that the school had "no particular curriculum" for math, that the school had "no science curriculum," and that science "was not taught unless a lesson in the [curriculum used at the school] happens to be on a science topic" (*id.* at p. 6).

Finally, the parent alleged that Cooke was appropriate for the student for the 2012-13 school year, that the student had made progress at Cooke, that the parent cooperated with the CSE and timely notified the district of her intention to seek tuition reimbursement, and that the parent was unable to pay the cost of the tuition at Cooke (Parent Ex. A at pp. 6-7). As relief, the parent requested reimbursement or prospective payment for the cost of the student's tuition and related services at Cooke for the 2012-13 school year, as well as the cost of transportation and evaluations (*id.* at p. 7).<sup>7</sup>

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<sup>6</sup> As part of her claim that the school had a prison-like feel, the parent included four allegations: (1) that the students were not allowed to use the bathroom without being accompanied by a teacher, (2) that the timeout room was a "locked dark dingy area," (3) that the parent was only permitted to observe classes from outside the classroom, and (4) that the parent was unable to talk to a teacher (Parent Ex. A at pp. 5-6).

<sup>7</sup> While the parent's requested relief was prospective as of the August 7, 2012 due process complaint notice, it is no longer a request for prospective relief as the 2012-13 school year has passed, so I will instead refer to the parent's request as a claim for direct payment to Cooke for the costs of the student's attendance for the 2012-13 school year.

## B. Impartial Hearing Officer Decision

An impartial hearing convened on October 25, 2012, and concluded on January 4, 2013, after three days of proceedings (Tr. pp. 1-429). In a decision dated January 29, 2013, the IHO addressed the parties' claims relating to the May 2012 IEP and its development and found that the IEP was appropriate for the student (IHO Decision at pp. 5-8). In addition, the IHO addressed the parent's claims regarding the specific public school to which the student was assigned, and at which her IEP would have been implemented (*id.* at pp. 8-12). With respect to these claims, the IHO found that although the district "gave only the barest information about the program" at the school, there was sufficient information in the hearing record to find that the school would have been able to implement the IEP, and that the parent's objections did "not rise to the level of an inability to implement the May 25, 2012 IEP" (*id.* at p. 12). In this regard, the IHO made a number of specific findings regarding the school, including that the school was not "too restrictive," that locked bathrooms were "part of [the school's] safe environment," and that the school would help the student "develop independence and provide her with appropriate transition and academic services" (*id.* at pp. 10-11).<sup>8</sup> In addition, the IHO rejected concerns expressed by the parent during the hearing that the student would see other students with 1:1 paraprofessionals in her classroom at the proposed school, reasoning that the student's classes at Cooke also contained students with 1:1 paraprofessionals, and the parent conceded that the student "seem[ed] to be okay" (*id.* at p. 10). The IHO also rejected the parent's allegations regarding the provision of related services, finding that "[d]ata indicating that a school has not always delivered full related services to its students at the school does not mean that the school would have been unable to provide the services to another student," and that although it is "not a best practice," the use of related service authorizations (RSAs) is an acceptable method of delivering related services (*id.* at pp. 10-11).<sup>9</sup> Finally, the IHO found that concerns raised by the parent at the hearing that the public school did not require students to change classrooms did not "go to the implementation of the IEP" (*id.* at p. 11). The IHO, therefore, found that the district offered the student a FAPE for the 2012-13 school year (*id.* at p. 12).

In addition, the IHO made a number of additional findings "to complete the record," including that Cooke was an appropriate placement for the student (IHO Decision at p. 13). The IHO also held that equitable considerations weighed against granting the requested relief and addressed what she described as three equitable issues (*id.*). Specifically, the IHO found that, while the parent provided the district with sufficient, timely notice of her intention to enroll the student at Cooke at public expense (*id.* at p. 17), to be entitled to direct or prospective payment, the parent needed to establish an inability to pay the full tuition, which she did not do (*id.* at p. 13-14). In addition, the IHO found that the parent's contract with Cooke was "illusory" because

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<sup>8</sup> In fact, the IHO found that the hearing record indicated that two of the things the school did well was providing work experiences and transitioning students into the world of work (*id.* at p. 11). In addition, the IHO rejected the parent's arguments relating to the school's alleged academic weakness, reasoning that although academic weakness was a concern, the student functioned on a first and second grade level with respect to her academic skills and the IEP included academic goals to appropriately address her needs (*id.*).

<sup>9</sup> Although not defined in the hearing record, RSA is a common acronym for the term "Related Service Authorization."

it did not obligate the parent to make payments toward the cost of the student's tuition and that the contract was "merely a mechanism to permit payment of an unapproved private school by the [district]" (*id.* at pp. 14-15). Finally, the IHO found that the participation of a Cooke representative at the CSE meeting was over-reaching because she had no direct knowledge of the student's needs, and that while this matter did not "go to equity," it "impacts whether the private school has 'clean hands'" (*id.* at pp. 15-17).

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

The parent appeals the IHO's decision. However, rather than appeal this decision in its entirety, the parent acknowledges that the IHO found that the May 2012 IEP was appropriate and explicitly does not appeal from this finding. Rather, the parent appeals from the IHO's decision that "[the IHO] had sufficient information to determine that the proposed school would implement the IEP and was appropriate despite the fact that no testimony was presented that the proposed school could implement the IEP." In addition, the parent appeals from the portion of the IHO's decision which found that she was not entitled to the direct payment of tuition, and that equitable considerations barred her requested relief. The parent also argues that she was provided a late "placement notice" (FNR) by the district.<sup>10</sup>

The district answers, denying the substance of the parent's allegations and cross-appeals the IHO's determination that the parent's unilateral placement of the student at Cooke was appropriate. Specifically, the district asserts in its answer that the parent's allegations relating to whether the district's proposed school could have implemented the IEP are entirely speculative and that alternatively, the IHO's findings that the school was appropriate and could implement the IEP should be upheld. In addition, the district argues that equitable considerations require a denial of the parent's requested relief, asserting—in addition to the IHO's findings—that the parent did not seriously consider a public school placement and was seeking to "manufacture a claim." In its cross-appeal, the district asserts that the parent's unilateral placement was inappropriate because the student required a 12-month program and the parent did not enroll the student in a summer program at Cooke even though one was available.

The parent replies and alleges that the fact that the student only attended Cooke for 10 months does not render the parent's placement of the student at Cooke inappropriate. As support the parent alleges that the student made progress at Cooke and did not exhibit any regression during the summer portion of the 2012-13 school year.

#### **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

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<sup>10</sup> The parent also provided further details explaining why Cooke is an appropriate placement for the student in her petition, including that the student made significant progress at Cooke during the 2012-13 school year, the school develops independence, addresses the student's academic and social-emotional needs, teaches self-advocacy skills and travel training, and that the student is integrated into the community and participates in an internship program. However, these assertions are not relevant to the issues appealed by the parent.

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, 180-83 [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. Preliminary Matters—Scope of Review**

As an initial matter, I must decide what claims are properly before me. As noted above, the parent does not appeal from the IHO's determination that the May 2012 IEP was appropriate to meet the student's needs (IHO Decision at pp. 5-8). In fact, the parent explicitly states that she does not appeal the IHO's finding that the IEP was appropriate (Pet. ¶ 26). Accordingly, this issue is final and binding on the parties and need not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

In addition, while the parent appeals the IHO's finding that the hearing record contained sufficient information to determine that the recommended school was appropriate and could implement the May 2012 IEP (Pet. ¶ 27), she does not explicitly appeal any of the IHO's specific findings regarding the recommended school. This includes the IHO's finding that the recommended school was not "too restrictive," that the parent's concern regarding the student being placed in a classroom with students who received 1:1 paraprofessional support was without merit,<sup>11</sup> and that claims related to the fact that the student would not need to change classrooms at the assigned school do not relate to the implementation of the May 2012 IEP (IHO Decision at pp. 10-11).<sup>12</sup> Accordingly, these findings have become final and binding on the parties as well and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*6-\*7, \*10 [S.D.N.Y. Mar. 21, 2013]).<sup>13</sup>

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<sup>11</sup> Even if this matter were properly preserved on appeal, I agree with the IHO's reasoning on this issue, as the parent acknowledged that the student's class at Cooke included four students with 1:1 paraprofessionals and admitted that the student "seems to be okay" in that class (Tr. pp. 409-10).

<sup>12</sup> The parent makes three assertions in her petition related to this issue, including (1) her concern that students do not move around for different classes at the assigned school, (2) that there would be "no integration and no passing other classes in the hall," and (3) that being in the classroom all day would make the student "less independent." Even if I were to consider these assertions (and further, assuming that they relate to claims raised in the parent's due process complaint notice), I would find that they do not provide a basis for relief in this matter. In short, there is nothing in the student's uncontested IEP which requires that the student change classes, nor is there any indication in the IEP that the student needs to change classes in order to receive an educational benefit. To that extent, and assuming the truth of these assertions, I would not be able to find that they establish that the student's IEP would not have been implemented and/or that the student would otherwise have been denied a FAPE.

<sup>13</sup> Further, and with respect to the IHO's other findings regarding the assigned school, the petition does not specify any basis on which to conclude that the IHO erred with respect to these findings. Counsel for the parent is reminded that parties appealing from the decision of an IHO must "clearly indicate the reasons for challenging the impartial hearing officer's decision, identifying the findings, conclusions and orders to which exceptions are taken" (8 NYCRR 279.4[a]). The failure to identify the IHO's errors notwithstanding, I will read the parent's petition as an appeal from these findings to the extent that they relate to issues raised in her due process complaint notice.

Moreover, the parent asserts in her petition, through the recitation of testimony provided during the hearing, that the school to which the student was assigned would not have been appropriate for a variety of reasons (Pet. ¶¶ 38-39). However, many of the assertions made in the petition, including allegations of inappropriate interactions between students and staff at the school, and that the school does not teach social studies, do not appear to relate to any claims raised in the parent's due process complaint notice. In fact, at least one assertion (i.e., that the Cooke CSE coordinator "has never observed small group instruction" at the assigned school) appears to suggest a claim (i.e., that there is no small group instruction at the school) that directly contradicts the due process complaint notice inasmuch as that notice alleges that students would be "split into four groups" at the school, and that a paraprofessional "would be responsible for instructing a small group" (Parent Ex. A at p. 6 [emphasis added]). Moreover, it is at best unclear whether other assertions made in the petition (including assertions regarding the changing of classes, the lack of a social skills program, the lack of "travel training," and the lack of internships at the school) even relate to claims made in the due process complaint notice. Inasmuch as a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]; see N.K. v. New York City Dep't of Educ., 961 F.Supp.2d 577, 584-85 [S.D.N.Y. 2013]; J.C.S. v Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at \*8-\*9 [S.D.N.Y. Aug. 5, 2013]; see K.L. v. New York City Dep't of Educ., 530 Fed., App'x 81, 87 [2d Cir. July 24, 2013]), and the parent did not seek the district's agreement to expand the scope of the impartial hearing or seek to include these assertions in an amended due process complaint notice, they are not properly subject to review. To hold otherwise would inhibit the development of the hearing record for the IHO's consideration, and render the IDEA's statutory and regulatory provisions meaningless (see 20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i]; 300.511[d]; 8 NYCRR 200.5[j][1][ii]; see also B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012] [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by (the opposing party)"]; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at \*12-\*13 [S.D.N.Y. Dec. 16, 2011]). "By requiring parties to raise all issues at the lowest administrative level, IDEA affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children" (R.B. v. Dep't of Educ., 2011 WL 4375694, at \*6-\*7 [S.D.N.Y. Sept. 16, 2011] [internal quotations omitted]; see C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at \*13 [S.D.N.Y. Sept. 22, 2011] [holding that a transportation issue was not properly preserved for review because it was not raised in the party's due process complaint notice]).

## **B. Final Notice of Recommendation**

In addition, the parent alleges that the district failed to issue a timely FNR, arguing in the petition that the district was required to send the parent notice of the recommended school on or before June 15, 2012 pursuant to a stipulation reached in a class action suit. To the extent the

parent argues that the district violated that stipulation, I note that the remedy provided by the stipulation is intended to address those situations in which a student has not been evaluated within 30 days or placed within 60 days of referral to the CSE (Jose P. v. Ambach, 553 IDELR 298, No. 79 Civ. 270 [E.D.N.Y. Jan. 5, 1982]; see R.E., 694 F.3d at 192, n.5; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 279 [E.D.N.Y. 2010]). Further, jurisdiction over class action suits and consent orders (and by extension, stipulations containing injunctive relief) issued by the lower federal courts rests with the district courts and circuit courts of appeals (see 28 U.S.C. § 1292[a][1]; Fed. R. Civ. P. 65; see, e.g., Weight Watchers Intern., Inc. v. Luigino's, Inc., 423 F.3d 137, 141-42 [2d Cir. 2005]; Wilder v. Bernstein, 49 F.3d 69 [2d Cir. 1995]; Pediatric Specialty Care, Inc. v. Arkansas Dep't of Human Serv., 364 F.3d 925 [8th Cir. 2004]; M.S., 734 F. Supp. 2d at 279; E.Z.-L. v. New York City Dep't of Educ., 763 F. Supp. 2d 584, 594 [S.D.N.Y. 2011], aff'd sub nom. R.E., 694 F.3d 167 [2d Cir. 2012]). Therefore, I lack the jurisdiction to resolve a dispute regarding whether the student is a member of the class in Jose P., the extent to which the district may be bound or may have violated the consent order issued by a district court, or the appropriate remedy for the alleged violation of the order (R.K. v. New York City Dep't of Educ., 2011 WL 1131492, at \*17 n.29 [E.D.N.Y. Jan. 21, 2011] ["the remedy for a violation of a consent order lies with the court that entered that order, not in a separate proceeding"], adopted at 2011 WL 1131522, at \*4 [Mar. 28, 2011], aff'd sub nom. R.E., 694 F.3d 167 [2d Cir. 2012]; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 289-90 n.15 [S.D.N.Y. Apr. 15, 2010] ["To the extent that the Parents are alleging a violation of a consent order in a separate proceeding, they might be better advised to seek relief from the court that entered that order"]; see F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at \*11-\*12 [S.D.N.Y. Oct. 16, 2012] ["it has been held that violations of the Jose P. consent decree must be raised in the court that entered the order"], aff'd, 2014 WL 53264 [2d Cir. Jan. 2, 2014]; P.K. v. New York City Dep't of Educ., 819 F. Supp. 2d 90, 101 n.3 [E.D.N.Y. 2011] [an allegation that the Jose P. consent decree has been violated should be raised in the Jose P. action], aff'd, 526 Fed. App'x 135 [2d Cir. May 21, 2013]); M.S., 734 F. Supp. 2d at 279 [addressing the applicability and parents' rights to enforce the Jose P. consent order]).<sup>14</sup>

### C. Appropriateness of the Recommended Public School

As noted above, the IHO found that the May 2012 IEP developed by the district was appropriate, and the parent expressly does not appeal this decision (Pet. at ¶ 26). Instead, the sole basis of the parent's appeal in this matter (at least with respect to whether a FAPE was offered) is that the district "provided no evidence whatsoever that [the school to which the

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<sup>14</sup> In any event, there is no allegation (and the hearing record does not support the conclusion) that the timing of the FNR in this matter had any bearing on the parent's decision to reject the May 2012 IEP and/or to unilaterally place the student. Accordingly, even if the FNR (which is not required by the IDEA) were untimely per the above stipulation, I would be unable to find that this, by itself, in any way prejudiced the parent, or caused a deprivation of educational benefit (or denial of a FAPE) to the student. Furthermore, to the extent the parent references the district's standard operating procedures manual to support this claim, this too would not support the parent's request for relief for the same reason. Moreover, I am unable find that deviations from a district's internal policies that do not constitute a violation of State or federal law would, by themselves, constitute a denial of a FAPE warranting tuition reimbursement (see, e.g., M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at \*9-\*10 [S.D.N.Y. Aug. 27, 2010]; Application of the Dep't of Educ., Appeal No. 13-032; Application of the Dep't of Educ., Appeal No. 12-103).

student was assigned] could implement the IEP," and that the district therefore "failed to meet its burden of proof that the proposed placement was appropriate" (Pet at ¶ 35). Specifically, and though not entirely clear, the parent appears to contend that since she raised allegations in the due process complaint notice regarding the assigned school's ability to implement the May 2012 IEP, the district bore the burden of proving that the assigned school could have implemented the IEP, and that, further, since the district chose not to present any evidence regarding how the IEP would have been implemented at the assigned school, it failed to demonstrate that the student was offered a FAPE for the 2012-13 school year. For the reasons discussed below, however, I am unable to find that this argument supports an entitlement to the relief that the parent seeks (i.e., payment for the student's private school tuition).

As an initial matter, where an IEP is rejected by a parent before a district has had an opportunity to implement it,<sup>15</sup> the sufficiency of a district's offered program must be determined on the basis of the IEP itself. In R.E., for example, the Second Circuit was confronted with a situation where the parents of a student rejected an IEP prior to the time it was required to be implemented, yet "[did] not seriously challenge the substance of the IEP" (694 F.3d at 195). Instead, those parents argued simply that "the written IEP would not have been effectively implemented at [the assigned public school site]" (id.). This claim, however, was rejected by the Court, which noted in relevant part that its "evaluation [of the parents' claims] must focus on the written plan offered to the parents," and that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (id.).

Likewise, in K.L., the Second Circuit again addressed the issue of "school placements" when it addressed allegations that a recommended public school site was "inadequate and unsafe" (530 Fed. App'x at 87). As it did in R.E., the Court rejected these claims as a basis for unilateral placement and, quoting R.E., noted that the "'appropriate inquiry [was] into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (id., quoting R.E., 694 F.3d at 187). This sentiment was further espoused in F.L. v. New York City Dep't of Educ. (2014 WL 53264 [2d Cir. Jan. 8, 2014]), where the Second Circuit rejected allegations that a recommended school would not have provided adequate speech-language therapy or OT to the student at issue, noting that these claims challenged "the [district's] choice of school, rather than the IEP itself" (id. at \*6). Citing to R.E., the Court reiterated that "[s]peculation that [a] school district will not adequately adhere to [an] IEP is not an appropriate basis for unilateral placement" (id. at \*6, citing R.E., 694 F.3d at

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<sup>15</sup> The record indicates that the parent did not attempt to enroll the student at the assigned school, and instead requested an impartial hearing on August 7, 2012, prior to the start of the 10-month school year (Parent Ex. A at p. 1). In addition, on August 13, 2012, the parent sent a letter dated August 8, 2012 to the CSE informing the district that the parent visited the recommended school and found it to be inappropriate specifying a number of reasons (Parent Ex. H at p. 1, 2). In that letter the parent informed the district that she would enroll the student at Cooke for the 2012-13 school year and seek tuition reimbursement from the district "if an appropriate program/placement is not offered in a timely manner" (id. at p. 1). The parent also referenced a June 2012 letter to the CSE as indicating the parent had previously informed the district she intended to seek reimbursement for the student's tuition at Cooke (id.). Although there is no June 2012 letter in the hearing record, the parent may have been referring a March 2012 letter to the CSE in which the parent requested a CSE meeting and indicated she would enroll the student at Cooke and seek tuition reimbursement "if an appropriate program/placement is not offered" (Parent Ex. D).

195), and held that the "appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a [FAPE] 'because necessary services included in the IEP were not provided in practice' (id., citing R.E., 694 F.3d at 187 n.3). Since the parent's claims in this appeal all relate to the district's "choice of school" rather than the student's IEP, therefore, I cannot find that they constitute an appropriate basis for unilateral placement.

Along these same lines, I am unable to find that the district's decision to not present any evidence with respect to the school to which the student was assigned entitles the parent to the relief that she seeks (see, e.g., M.O. v. New York City Dep't of Educ., 2014 WL 1257924, at \*2 [S.D.N.Y. Mar. 27, 2014] [noting that "it would be inconsistent with R.E. to require . . . 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"], citing R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]). In support of this position, the parent raises a number of arguments, including that an IEP "is only a document" which "must be implemented in a classroom to provide a special needs child with a [FAPE]" (Parent Mem. of Law at p. 1 [emphasis in original]). In this regard, the parent appears to suggest that the classroom in which a district proposes to implement the student's IEP is synonymous with his or her "educational placement," which may be the subject of an impartial hearing under the IDEA (Parent Mem. of Law at p. 4). However, the Second Circuit has made clear that the term "educational placement" does not refer to the "bricks and mortar" of a specific school, but rather refers only to "the general educational program—such as the classes, individualized attention and additional services a child will receive" (see T.Y. v. New York City Dep't of Education, 584 F.3d 412, 419 [2d Cir. 2009]; see also C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753 [2d Cir. 1980] [holding that "'educational placement' refers only to the general type of education program in which the child is placed"]). Evidence about a specific school or classroom, therefore, is not necessary to establish an appropriate "educational placement."

In addition, the parent (and the IHO, for that matter) cite to the Second Circuit's declaration in T.Y. that districts do not have "carte blanche to assign a child to a school that cannot satisfy the IEP's requirement" (584 F.3d at 420) to argue that a district must establish that it can implement an IEP in a recommended school. However, while I agree that an IEP must be implemented as written, it does not necessarily follow from T.Y. that districts must prove that an IEP that has been rejected, and which a district has not been given an opportunity to implement, would have been properly implemented in order to establish that a FAPE has been offered to a student. This is especially true since T.Y. itself does not explicitly hold as such, and such an interpretation is inconsistent with the Court's subsequent holdings which bar unilateral placements based on speculation that a district will not adequately adhere to an IEP (which is essentially what is required when an IEP has not been implemented) and expressly provide that "the appropriate forum for such [claims] 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, 195 [emphasis added]). Thus, and when read together with the Second Circuit's other decisions, T.Y. is more reasonably read as simply acknowledging that districts must implement the IEPs that they create, while the Court's subsequent decisions indicate that to the extent that they do not,

they may be held liable in a "later proceeding" in which a district's alleged failure to implement that IEP may be a basis for finding that a student was denied a FAPE.<sup>16</sup>

Likewise, the parent appears to rely on the Second Circuit's decision in M.H. (685 F.3d 217 [2d Cir. 2012]) to support the position that claims pertaining to assigned schools are permissible in cases like this, but I am unable to find that M.H. provides such support. In particular, the parent appears to suggest that since the issue of "methodology" was raised "in the context of classroom placement" in the district court's decision in that matter (see M.H. v. New York City Dep't of Educ., 712 F.Supp2d 125, 149 [S.D.N.Y. 2010]), and further since the Second Circuit "examined whether a parent could argue that the proposed classroom's methodology was inappropriate when the issue of methodology was not pled in the impartial hearing request" (Parent Mem. of Law at p. 4), that this supports a finding that claims related to a particular school or classroom (as opposed to an IEP) are proper. However, and as noted by the parent, while the district court may have treated the issue of "methodology" as a challenge to the district public school at issue in that matter, the Second Circuit's decision, which was primarily focused on whether the issue of methodology was appropriately considered at all, treated this issue as part of the "substantive adequacy" of the student's IEP (compare M.H., 685 F.3d at 250-52, with M.H., 712 F. Supp. 2d at 160-63). The Second Circuit's decision in M.H., therefore, is consistent with cases like R.E., K.L., and F.L., in that it is focused on the IEP (and not the district's choice of school), and to that extent does not support the parent's position.

Finally, while I recognize that there are numerous district court decisions that suggest that claims related to a district's choice of school (as opposed to claims that relate to a student's IEP) may be raised in proceedings such as this, these decisions, to the extent that they discuss this issue, were generally either decided without the benefit of much (if not all) of the Second Circuit precedent discussed above (see, e.g., J.F. v. New York City Dep't of Educ., 2013 WL 1803983 [S.D.N.Y. Apr. 24, 2013]; E.A.M. v New York City Dep't of Educ., 2012 WL 4571794 [S.D.N.Y. Sept. 29, 2012]; J.S. v. Scarsdale Union Free Sch. Dist., 826 F.Supp.2d 635 [S.D.N.Y. 2011]; W.T. v. Bd. of Educ., 716 F.Supp.2d 270 [S.D.N.Y. 2010]), or simply do not address this precedent (see, e.g., Scott v. New York City Dep't of Educ., 2014 WL 1225529 [S.D.N.Y. Mar. 25, 2014]). As such, I do not find that these cases necessitate the outcome that the parent's seek. In fact, there are many cases that have considered this issue in light of the Second Circuit

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<sup>16</sup> The parent also suggests that R.E. supports her position in that the Court "reaffirmed" T.Y. by noting that a district may select a specific school without the advice of the parents so long as it conforms to the program offered in a student's IEP (Parent Mem. of Law p. 6, citing R.E., 694 F.3d at 191-92). However, and as suggested by the parent, this statement is simply a reiteration of what the Court stated in T.Y. which, as discussed above, does not explicitly require that a district prove that an IEP would have been implemented in every instance. In addition, the parent suggests that R.E. supports her position because, while prohibiting the use of testimony that alters an IEP at a hearing, the Court went on to note that testimony may be received that explains or justifies the services listed in the IEP (Parent Mem. of Law at p. 6). In this regard, the parent notes that R.E. provides that "[i]n determining the adequacy of an IEP, both parties are limited to discussing the placement and services specified in the written plan, and therefore reasonably known to the parties at the time of the placement decision" (694 F.3d at 187). However, it is notable that the "placement" that is referred to in this statement is the one "specified in the written plan," which, as noted above, is the general type of education program in which a child is placed. In fact, T.Y. explicitly holds that an IEP need not specify a specific school site (see T.Y., 584 F.3d at 419-20). Accordingly, rather than support the parent's position, this statement actually reaffirms R.E.'s ultimate holding (discussed above) that the focus in cases like this must be on the IEP.

precedent discussed above that have held otherwise (see, e.g., M.L. v. New York City Dep't of Educ., 2014 WL 1301957 at \*12 [S.D.N.Y. Mar. 31, 2014]; B.K. v. New York City Dep't of Educ., 2014 WL at 1330891 at \*20 [E.D.N.Y. Mar. 28, 2014]; M.O. v. New York City Dep't of Educ., 2014 WL 1257924 at \*2 [S.D.N.Y. Mar. 27, 2014]; R.B. v. New York City Dep't of Educ., 2014 WL 1618383 at \*13 [S.D.N.Y. Mar. 26, 2014]; M.S. v. New York City Dep't of Educ., 2013 WL 7819319 at \*16 [E.D.N.Y. Nov. 5, 2013]; 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 Dep't of Educ., 2013 WL 4834856 at \*5 [S.D.N.Y. Aug. 14, 2013]; A.M. v. New York City Dep't of Educ., 964 F.Supp.2d 270, 286 [S.D.N.Y. Aug. 9, 2013]).

Notwithstanding the above, I recognize that there are district court cases suggesting that a parent may rely on evidence outside of the written plan which is known to the parent at the time the decision to unilaterally place a student is made (see, e.g., D.C. v. New York City Dep't of Educ., 950 F.Supp.2d 494, 510-11 [S.D.N.Y. 2013]; B.R. v. New York City Dep't of Educ., 910 F.Supp.2d 670, 677-79 [S.D.N.Y. 2012]). While the Second Circuit recently left open the question as to whether one such case (B.R.) "properly construes R.E." (see F.L., 2014 WL 53264, at \*2), the Court has not explicitly addressed this issue. In this instance, most of the parent's allegations do not relate to such evidence and instead would require an analysis of the type of evidence rejected by the Second Circuit, retrospective evidence requiring the district to explain how it would have executed the student's May 2012 IEP (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186, 195). Considering the Second Circuit's tentativeness in fully addressing this issue, as an alternative to the above, I will address each of parent's allegations related to the district's recommended school below. However, I must first address a preliminary issue.

In the petition the parent references the testimony of Cooke's CSE coordinator as supporting the parent's position that the district's recommended school was inappropriate (Pet. ¶ 38). However, upon review of the hearing record Cooke's CSE coordinator did not visit the school with the parent, but visited with parents of other students (Tr. pp. 207, 228-29, 255-56, 385). Although the Cooke CSE coordinator was present at the May 2012 CSE meeting, the record reflects that the parent and Cooke's CSE coordinator never discussed the district's recommended school or its appropriateness for the student (Tr. pp. 230, 422). Consequently the parent could not have relied on any of the information presented by Cooke's CSE coordinator in making the decision whether or not to enroll the student in the district's recommended school, and thus the testimony of Cooke's CSE coordinator could not have factored into the parent's decision. Accordingly, I decline to consider this testimony in assessing the parent's claims.<sup>17</sup>

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<sup>17</sup> In any event, much of the testimony of the Cooke CSE coordinator referenced in the petition consists of conclusory statements (i.e., the student would regress at the recommended school; the curriculum would not address the student's needs), or a recitation of things that she did not observe being used during her visits to the recommended school. For example, the petition refers to testimony by the Cooke CSE coordinator indicating she "never observed small group instruction," "never observed differentiated instruction or differentiated materials being used," and "never [saw] any evidence of teaching higher order thinking" at the assigned school (Pet. ¶ 38). Accordingly, and also considering the Cooke representative also testified that she was "obstructed" from fully observing classes at the district's recommended school (Tr. pp. 211-12), her testimony carries little if any weight in assessing whether the claims raised by the parent in her due process complaint notice are speculative and/or have any merit.

## 1. Management/Behavioral Needs

The parent alleges in her due process complaint notice that "upon information and belief" the district's recommended school could not implement the student's IEP, including certain management and behavioral needs identified in the IEP (Parent Ex. A at p. 5). However, the parent did not specify in her due process complaint notice which management needs the school would not be able to implement, and there is no indication in the hearing record as to which such needs would not have been implemented, other than possibly the use of a "spiral curriculum," which was included as a parent concern in the IEP (Parent Ex. B at p. 2), and which the hearing record does not establish was not used at the assigned school, or would not have been used with the student.<sup>18</sup> In addition, the May 2012 IEP (the sufficiency of which is expressly not challenged) indicated that the student did not have behaviors that interfered with learning and that the student did not need a behavioral intervention plan, thus it is unclear what the parent was referring to in terms of "behavioral needs" (*id.* at pp. 2-3). Accordingly, to the extent the parent asserts generally that the assigned school would not have implemented the student's management or behavioral needs, such an assertion is based on mere speculation and is not a basis on which to find that the district did not offer the student a FAPE in this instance.

## 2. Related Services

The parent also alleges in her due process complaint notice that the district's recommended school could not implement certain related services included in the May 2012 IEP (Parent Ex. A at p. 5). In support of this allegation, the parent submits a quality review report indicating that the recommended school did not provide its students with all of their recommended related services during the 2011-12 school year (Parent Ex. Q at p. 9). The parent also testified that, during her visit to the recommended school, a staff member from the school told her that the school could not provide all of the student's recommended related services and that the parent "would have to go through an RSA guide in order to get occupational therapy and some speech" (Tr. pp. 391-92).

Initially, reports indicating that a school has not always delivered full special education services to every student does not mean that the school would have denied the student a FAPE by failing to provide the services to the student whose IEP is being challenged in a due process proceeding (see M.S., 734 F. Supp. 2d at 278-79). Rather, allegations that a district's recommended school could not provide related services in accordance with an IEP based on reports that the school had failed to provide related services in the past is exactly the type of speculative argument that has been rejected by the Second Circuit (see F.L., 2014 WL 53264, at \*6; R.E., 694 F.3d at 195).<sup>19</sup>

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<sup>18</sup> While there is testimony indicating only that there was no "evidence" or "indication" of a spiral curriculum at the school (Tr. p. 217), this does not establish that a "spiral curriculum" was, in fact, not used (or would not have been used) at the school.

<sup>19</sup> As an analogous argument, the Cooke CSE coordinator testified that the recommended school's quality review report indicated that the school does not address "higher-level thinking skills," which she described as being a "central part of [the student's] academic program" (Tr. p. 214-15). However, similar to the allegations

Furthermore, and to the extent that the parent challenges the use of RSA's to implement the related services required by the student's IEP, as determined by the IHO, while the use of RSAs "is not a best practice" it is an acceptable method of providing related services (IHO Decision at p. 11). In fact, a June 2, 2010 "Q and A document" issued by the State Education Department to district superintendents clarifies that it is permissible for a school district to contract for the provision of special education related services in limited circumstances and with qualified individuals over whom the district has supervisory control. According to the document:

[S]chool districts also have obligations under the IDEA and Article 89 of the Education Law to deliver the services necessary to ensure that students with disabilities receive FAPE. The Department recognizes that there will be situations in which school districts will not be able to deliver FAPE to students with disabilities without contracting with independent contractors. Where a school district is unable to provide the related services on a student's individualized education program ("IEP") in a timely manner through its employees because of shortages of qualified staff or the need to deliver a related service that requires specialized expertise not available from school district employees, the board of education has authority under Education Law §§1604(30), 1709(33), 2503(3), 2554(15)(a) and 4402(2)(b) to enter into contracts with qualified individuals as employees or independent contractors to provide those related services (see also §§1804[1], 1805, 1903[1], 2503[1], 2554[1]).

("Questions and Answers Related to Contracts for Instruction," Question 5, P-12 Education Mem. [Jun. 2, 2010], available at <http://www.p12.nysed.gov/resources/contractsforinstruction/qa.html>; see <http://www.p12.nysed.gov/resources/contractsforinstruction>). Moreover, caselaw also supports a finding that it is permissible for the district to offer parents vouchers to obtain related services in response to a recognized shortage of service providers (see A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 503 [S.D.N.Y. 2011]). Therefore, the use of RSAs, alone, would not have denied the student a FAPE.

I do, however, note that the May 2012 IEP specifies that related services be provided to the student in a "[s]eparate [l]ocation therapist room" (Parent Ex. B at p. 13). While it is not entirely clear whether the "separate location" specified in the IEP refers to a separate location within the public school, assuming that it does (and further assuming that the related service providers would not have come to the school to provide services), the use of RSAs to fill the mandated level of related services would not constitute such a material or substantial deviation from the student's IEP that she was denied a FAPE thereby (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010]; see 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.

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regarding the provision of related services, the reliance on a report indicating a school had difficulty providing instruction in a certain area in the past does not mean that the school will have the same difficulty in a subsequent school year (see F.L., 2014 WL 53264, at \*6).

2000]). This is especially true since there is no compelling evidence within the hearing record suggesting that the student specifically required that related services be provided during the school day. Therefore, even if the district provided the student with an RSA for related services, the hearing record does not support a finding that it would have denied the student a FAPE.

### 3. Functional Grouping

The parent further alleges in her due process complaint notice that the recommended school, upon information and belief, would not have grouped the student appropriately according to the student's academic, social/emotional, and behavioral needs (Parent Ex. A at p. 5). As noted above, the district chose not to present any evidence regarding the assigned school or the classroom to which the student would have been assigned (Tr. p. 7), and the IHO did not explicitly address this issue in her decision. However, it is possible that the IHO deemed the issue to be speculative, as she found it would be "improper to present evidence concerning a specific classroom" (IHO Decision at p. 9). To the extent that the IHO may have deemed the issue of "functional grouping" to be speculative (and thus not a proper basis for unilateral placement), I agree.

As discussed in detail above, the Second Circuit has made clear that in cases like this, where an IEP is rejected before a district has an opportunity to implement it, the sufficiency of the district's offered program must be determined on the basis of the IEP itself, and mere speculation that an IEP would not have been properly implemented is not an appropriate basis for unilateral placement (F.L., 2014 WL 53264, at \*6; K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 195). To that extent, I note that "functional grouping" does not directly relate to a student's IEP, and is rather a requirement imposed upon school districts by State regulations (see 8 NYCRR 200.1[ww][3][ii]; 200.6[a][3], [h][3]). Furthermore, and to the extent that this issue is related to the implementation of a student's IEP, since there is no indication in the hearing record regarding how the student would have been grouped at the assigned school,<sup>20</sup> and further since the student never enrolled at the district's recommended school, the parent's claim that the student would not have been appropriately grouped is entirely speculative. Accordingly, any analysis of this issue would require the use of retrospective evidence by the district, explaining how the district would have executed the student's May 2012 IEP, which the Second Circuit has determined is not appropriate (see K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186, 195). I, therefore, cannot find that the parent's "grouping" claim is sufficient to support the parent's unilateral placement of the student in this matter (see, e.g., R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at \*17 [S.D.N.Y. Sept. 27, 2013]; N.K., 961 F.Supp.2d at 588-89; A.M. v. New York City Dep't of Educ., 964 F.Supp.2d 270, 286 [S.D.N.Y. 2013]).

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<sup>20</sup> Although the record reflects that the parent visited the district's recommended school and met with staff from the school for approximately two hours, there is nothing in the record indicating that the parent had any information as to how the student would have been grouped for instructional purposes at the school (Tr. pp. 385-93). In any event, since the grouping of students in classrooms is something which may change over time (see, e.g., M.S., 2013 WL 7819319, at \*16 n.10; Application of the Dep't of Educ., Appeal No. 13-220), even if there were evidence in the record that students were not appropriately grouped at the time of the parents' visit to the public school site, this alone would not necessarily make the "grouping" claims any less speculative.

As an aside, I note the hearing record indicates that the parent objected to the recommended school because she was told that there were a few students in the school who "act up" and she did not want the student to be "in a school where kids were able to act out because [the student] was already past that kind of situation" (Tr. pp. 392-93). While it is not clear from the hearing record that this assertion relates to the parent's "functional grouping" claim in her due process complaint notice, assuming it does, it is not a sufficient basis to find a denial of FAPE. While state regulations require that students be appropriately grouped for purposes of special education, they do not provide that students must be grouped with students of similar needs across the entirety of the public school environment (8 NYCRR 200.1[ww]; 200.6[a][3]), and whether the student would have been grouped in class with anyone who "acted up" is speculative at best. Further, the student was recommended for a 12:1+1 special class which, according to State regulations, is for "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]). Therefore, the recommendation of the student for a 12:1+1 classroom (which the parent does not challenge) presupposes that there is at least the possibility that the student will be grouped with other students whose management needs interfere with instruction. Although I can understand that a loving parent would not want her child to be in a school where there are students with behavioral problems, the "IDEA affords the parents no right to participate in the selection of . . . their child's classmates" and even "private school is no guarantee of non-disruptive peers" (*J.L. v. City Sch. Dist. of New York*, 2013 WL 625064, at \*11 [S.D.N.Y. Feb. 20, 2013]). Accordingly, while a student's management needs may factor into grouping (8 NYCRR 200.1[ww][3][i][d]; 200.6[a][3]), the fact that the assigned public school may have contained a few students who "act up" is not contrary to the recommendation for placement in a 12:1+1 special class and is not an indication that the district would have deviated from the May 2012 IEP or State regulations.

#### **4. Public School Size and Environment**

The parent also makes allegations in her due process complaint which relate to the physical characteristics of the assigned public school, including that the school would be "overwhelming with over 200 students and twenty-five classrooms," and that the school had a "prison like feel" for a number of reasons. Regarding the former allegation, this claim is speculative in that the student did not attend the assigned school and it is, therefore, difficult to determine how the student would have reacted to the school's size (*see, e.g., N.K.*, 961 F. Supp. 2d at 591-92). This is especially true in light of the fact that the parent indicated that she believed that the class size (12:1+1) recommended by the May 2012 CSE, which was similar to the student's class size at Cooke,<sup>21</sup> was appropriate for the student (Tr. pp. 402-03), and that although there were 115 students attending Cooke at the time of the hearing, in contrast with 521 students attending the assigned school during the 2011-12 school year, there was no indication in the record that the student could not function in a larger school setting such as the assigned school (Tr. p. 108, Parent Ex. Q at p. 9). In fact, the student's IEP (which, again, is not challenged) did not recommend things which might have indicated that the student could not

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<sup>21</sup> The May 2012 CSE recommended a 12:1+1 class, while the student attended a 12:1+1 class at Cooke for all classes except math, in which the student was in a 9:1+1 class (Tr. p. 122; Parent Ex. B at p. 13).

function in a large school setting, like testing accommodations, program modifications/accommodations, or even the assistance of a paraprofessional to assist the student in large group settings (see Parent Ex. B at pp. 1-2, 13-14). Accordingly, there is nothing in the record from which I can conclude that the student would not have obtained an educational benefit at the district's recommended school because of its size (see generally N.K., 961 F. Supp. 2d at 591-92).

Likewise, I am unable to find that the parent's claims regarding the "prison-like feel" at the school constitute a sufficient basis for unilateral placement. In this regard, the parent made a number of allegations, including that the bathrooms were kept locked and students were not permitted to use the bathroom without being accompanied by a teacher, that the timeout room was a "locked dark dingy area," that the parent was only permitted to observe classes from outside the classroom, and that the parent was unable to talk to a teacher (Parent Exs. A at pp. 5-6; H at p. 1). However, the parent did not allege in her due process complaint notice that the student had any particular needs related to these allegations or how they may have contributed to a denial of a FAPE to the student (Parent Ex. A at pp. 5-6). Accordingly, without any explanation in the parent's due process complaint notice, petition, or memorandum of law, or any testimony adduced or argument made at the impartial hearing, as to how those factual allegations might have impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits, they are not a sufficient basis on which to grant the parent's requested relief on appeal. Although the district bears the burden of proving the appropriateness of its offered program, it does not bear the burden of disproving every allegation a parent may assert, no matter how bare and unrelated it may be to the provision of a FAPE to the student (see, e.g., N.K., 961 F.Supp.2d at 587 [parents' failure to specify which assessments were not conducted by the district and failure to address the claim on appeal resulted in a waiver of that claim]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at\*14-\*15 [S.D.N.Y. Mar. 28, 2013] [noting that "a negative can often be proven only by the absence of the evidence," and holding that where the hearing record contains no evidence of a particular need relating to the provision of a FAPE, "a school district may meet its burden of showing the absence of a need" thereby]). Nor is it the SRO's role to research and construct the appealing parties' arguments or guess what they may have intended (see, e.g., Gross v. Town of Cicero, Ill., 619 F.3d 697, 704 [7th Cir. 2010] [appellate review does not include researching and constructing the parties' arguments]; Fera v. Baldwin Borough, 2009 WL 3634098, at \*3 [3rd Cir. Nov. 4, 2009] [a party on appeal should at least identify the factual issues in dispute]; Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 841 [10th Cir. 2005] [generalized assertion of error on appeal is not sufficient]; see generally, Taylor v. Am. Chem. Council, 576 F.3d 16, 32 n.16 [1st Cir. 2009]; Lance v. Adams, 2011 WL 1813061, at \*2 [E.D. Cal. May 6, 2011] [the tribunal need not guess at the parties' intended claims]; Bill Salter Adv., Inc. v. City of Brewton, 2007 WL 2409819, at \*4 n.3 [S.D. Ala. Aug. 23, 2007]).

### **5. Opportunity for 1:1 Instruction**

In the due process complaint notice, the parent also alleges that "there is no opportunity for 1:1 instruction or attention" at the district's recommended school (Parent Ex. A at p. 6). This assertion was also raised by the parent in her due process complaint notice as an IEP claim, the

sufficiency of which is, again, not being challenged in this matter (Pet. ¶ 26). Accordingly, and since the May 2012 IEP does not contain any provision for 1:1 instruction,<sup>22</sup> and further the parent does not challenge the appropriateness of the IEP to offer the student a FAPE, I am unable to find that there is an obligation to provide the student with 1:1 instruction, and the public school, therefore, cannot be found inappropriate for not providing the student with services not required by her IEP. To the extent that the parent alleges lack of opportunity for 1:1 instruction as an "implementation" claim, therefore, there is no indication in the record before me that the district would have deviated from the student's IEP in a material or substantial way (A.P., 370 Fed. App'x at 205; see Van Duyn, 502 F.3d at 822; Bobby R., 200 F.3d at 349). Nor am I able to find, as a practical matter, that even if 1:1 instruction were required and provided for in the student's IEP, that there is any indication that the student would not have received any 1:1 instruction at the district's recommended placement, and to that extent the claim is speculative.

## 6. Methodology/Curriculum

The parent next alleged in her due process complaint notice that the district's recommended school did not employ appropriate teaching methodologies (Parent Ex. A at p. 6). Specifically, the parent raised objections to a number of things, including the school's use of the "Unique Curriculum," the lack of a specific math curriculum, and the lack of a science curriculum (id.).<sup>23</sup>

Generally, while an IEP must provide for specialized instruction in a student's areas of need, a CSE is not required to specify methodology on an IEP, and the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher (Rowley, 458 U.S. at 204; M.H., 685 F.3d at 257; M.M. v. Sch. Bd. of Miami-Dade County, 437 F.3d 1085, 1102 [11th Cir. 2006]; Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 [7th Cir. 1988]; A.S. v New York City Dep't of Educ., 10-CV-00009 [E.D.N.Y. May 26, 2011] [noting the "broad methodological latitude" conferred by the IDEA]; L.K. v. Dep't of Educ., 2011 WL 127063, at \*11 [E.D.N.Y. Jan. 13, 2011]). However, where the use of a specific methodology is required for a student to receive an educational benefit, the student's IEP should indicate this (see, e.g., R.E., 694 F.3d at 194 [finding an IEP substantively inadequate where there was "clear consensus" that a student required a particular methodology, but where the "plan proposed in [the student's] IEP" offered "no guarantee" of the use of this methodology]). Here, the student's IEP does not require the use of a specific methodology, and again the sufficiency of the IEP has not been appealed. Accordingly, there is no basis upon which to find that the

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<sup>22</sup> While the May 2012 IEP indicates that the student benefitted from a small class and addressed the student's need for "individual attention" (Parent Ex. B at pp. 1, 2), this is not the same as requiring 1:1 instruction.

<sup>23</sup> The parent also alleged that the school "does not differentiate instruction." However, "differentiation of instruction" is not a methodology per se, but is rather the process of tailoring instruction by teachers to the needs of individual students (see, e.g., "Quality Indicator Review and Resource Guides for Literacy," at p. 5, Office of Special Educ. [April 2011], available at <http://www.p12.nysed.gov/specialed/techassist/LiteracyQI-411.pdf>). In that regard, it is not precluded by the use of one curriculum or similar materials for all students. In any event, this claim is speculative in that, while there is testimony in the hearing record that Cooke's CSE coordinator had never "observed" differentiated instruction at the assigned school, there is no indication that teachers at this school do not differentiate instruction, or that they would not have done so for the student.

assigned school, by not using a specific methodology, would have deviated from the student's IEP in a material or substantial way (A.P., 370 Fed. App'x at 205; see Van Duyn, 502 F.3d at 822; Bobby R., 200 F.3d at 349). Furthermore, there is insufficient evidence in the hearing record, and there was certainly insufficient evidence in front of the CSE,<sup>24</sup> to indicate that the student could only be educated using one particular methodology (or curriculum for that matter) (M.L., 2014 WL 1301957, at \*12 [S.D.N.Y. Mar. 31, 2014]). Accordingly, I cannot find that the student would have been denied a FAPE on this basis.

In addition, the parent's allegations that the recommended school lacked a math and science curriculum are unpersuasive. Regarding a math curriculum, the parent admitted during the hearing that the school "teaches basic math" (Tr. p. 389). In addition, the May 2012 IEP included three annual goals and 12 short-term objectives directly related to teaching the student math skills and additional short-term objectives related to teaching the student to use math skills in conjunction with learning activities of daily living, such as making correct change and practicing budgeting (Parent Ex. B at pp. 9, 11-12). Further, and regarding the parent's allegation that the school has "no science curriculum," the accuracy of this allegation is at best unclear since the parent also alleges in her due process complaint notice that science "is not taught unless a lesson in the Unique curriculum happens to be on a science topic," which indicates that the school's "Unique curriculum" included instruction in science (Parent Ex. B at p. 6).<sup>25</sup> Moreover, while the parent testified that the student was interested in learning science, the parent never indicated the student could not obtain an educational benefit from the "Unique Curriculum" (Tr. pp. 389-90). Instead, the parent testified that she did not want the student to "deviate from [the] particular learning environment" at Cooke (id. at p. 390). In this regard, while the parent may have viewed the curriculum used at Cooke to be superior to the "Unique curriculum" used at the recommended school, the district is not required to provide everything that a loving parent might desire (Walczak, 142 F.3d at 130), and the district cannot be required to replicate the identical setting used in the private school (see, e.g., Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at \*6 [N.D.N.Y. Jun. 19, 2009]; Watson v. Kingston City Sch. Dist., 325 F.Supp.2d 141, 145 [N.D.N.Y. 2004]). In light of the above, I am unable to find that the teaching methodology and curriculum used at the district's recommended school would have deprived the student of a FAPE (see F.L., 2012 WL 4891748, at \*9).

## 7. Supplementary Support Personnel

While the parent alleged in the due process complaint notice that a "paraprofessional" at the district's recommended school was responsible for providing students with instruction in

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<sup>24</sup> Per the Second Circuit's directive in R.E., IEPs must be evaluated prospectively as of the time of their drafting (R.E., 694 F.3d at 186). In this regard I note that the district representative testified that, other than a discussion regarding the student's need for scaffolding or a spiral curriculum (which was included on the May 2012 IEP), no one at the CSE meeting indicated that the student required a specific type of teaching methodology or a specific curriculum (Tr. pp. 45-46; see Parent Ex. B at p. 2).

<sup>25</sup> Testimony by the Cooke CSE coordinator also indicated that science was taught at the recommended school, but that the recommended school did not have "a specific curriculum in science" or "facilities that enable them to address science," which she further explained as her not having seen any "equipment or facilities to teach science" during her visits to the school (Tr. pp. 230-31, 264).

small groups, there is nothing in the hearing record that explains this allegation. In that regard, although the parent uses the term "paraprofessional" in her due process complaint notice, in describing the composition of a 12:1+1 special class, such as the one the student was recommended for, State regulations allow for one or more "supplementary school personnel" to be in the classroom with a teacher, which includes both teacher aides and teaching assistants (see 8 NYCRR 200.1[hh], 200.6[h][4][i]).<sup>26</sup> This is not insignificant, as while teacher aides cannot provide direct instruction, teaching assistants may provide direct instructional services under the supervision of a licensed or certified teacher (8 NYCRR 80-5.6[a], [b]). Accordingly, and assuming that by referring to a "paraprofessional" the parent was referring to the "supplementary school personnel" that are allowed to assist teachers in 12:1+1 classes, it is unclear exactly to what type of "supplementary school personnel" the parent was referring,<sup>27</sup> and as the parent has not explained this allegation any further in the pleadings on appeal, it is not sufficient to support a claim that the student was denied a FAPE.

Additionally, to the extent that the parent's allegation can be read as alleging that a "teacher aide" would be providing instruction to students at the assigned school, as State regulations do not allow for instruction by teacher aides, this claim is similar to the grouping claim above in that it calls for speculation that the district will not comply with a requirement imposed by State regulations, which is not an appropriate basis for unilateral placement (see K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186, 195).

## **8. Additional Assertions in Petition**

Finally, to the extent that the parent asserts in her petition (through the recitation of testimony) that the district's recommended school would be inappropriate (a) because she did not want the student to go to the bathroom with a paraprofessional, or (b) that the school did not offer "travel training" or internships, I find that these assertions (to the extent that they are even properly considered) do not provide a basis for the relief that the parent seeks.<sup>28</sup>

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<sup>26</sup> Part 200 of the Regulations of the Commissioner of Education were amended as of August 12, 2004 to replace the term "paraprofessional" with the term "supplementary school personnel" to align the terminology used in State regulations with the federal No Child Left Behind Act ("Supplementary School Personnel Replaces the Term 'Paraprofessional' in Part 200 of the Regulations of the Commissioner of Education," VESID Mem. [Aug. 2004], available at <http://www.p12.nysed.gov/specialed/publications/policy/suppschpersonnel.pdf>).

<sup>27</sup> While the parent suggested in a memorandum of law to the IHO that these "paraprofessionals" were not "assistant teachers" (Parent Ex. R at p. 7), and further although the petition indicates that the parent testified that the paraprofessionals at the recommended school "are not certified assistant teachers," it is not clear whether this is a reference to "teaching assistants" per the above described regulation. This is especially true since, despite the description of the parent's testimony in the petition (i.e., that she was told that the paraprofessionals were not "certified assistant teachers"), the parent never used the term "assistant teachers" during the hearing, and her testimony in fact indicated that she was informed the paraprofessionals were not "certified teachers" (Tr. p. 388).

<sup>28</sup> The parent makes a number of other assertions about the assigned school in her petition through the recitation of her testimony, but those assertions are encompassed by the discussion above and need not be repeated here.

As an initial matter, and with respect to the assertion by the parent that she did not want the student to go to the bathroom with a paraprofessional, it appears from the hearing record that this concern arose because the parent was told that some students at the school had paraprofessionals and the parent did not want the student to have a paraprofessional (Tr. pp. 399-89). However, and as noted above, the student's IEP does not recommend a 1:1 paraprofessional for the student, and the parent acknowledged at the hearing that she knew that the student would, in fact, not have a paraprofessional assigned to her at the school (Tr. pp. 408-409). Accordingly, there is no basis to believe that the student would have had a 1:1 paraprofessional assigned to her, and therefore this concern is not a basis for relief.

Likewise, to the extent that the parent asserts in the petition that the recommended school did not provide travel training or internships (Pet. ¶ 39), I find that these assertions, as well, do not provide a basis for relief. Notably, the parent does not explain how those allegations might have resulted in a denial of FAPE. Further, the hearing record reflects that the school offers students "vocational training," and it is not clear how, if at all, this is functionally different from an "internship" (Tr. p. 390; 410).<sup>29</sup> Moreover, to the extent the parent contends that the assigned public school site was not appropriate because it did not offer a program in "travel training," I note that the IEP does not require such a program, but rather provides for the student to receive services relating to "travel readiness skills" (Parent Ex. B at pp. 3, 14-15). Inasmuch as the parent concedes that the IEP was appropriate, and since the IEP does not specifically require a "travel training" program, there is no basis to find that there would have been a material or substantial deviation (or any deviation) from the student's IEP on this basis (A.P., 370 Fed. App'x at 205; see Van Duyn, 502 F.3d at 822; Bobby R., 200 F.3d at 349). Nor is there any indication in the hearing record that the district would not have provided the student with the instruction in travel readiness skills required by her IEP.

## VII. Conclusion

Based on the foregoing, the parent cannot prevail on her claims that the district would have failed to implement the May 2012 IEP at the recommended school. Accordingly, it is unnecessary to address the appropriateness of Cooke, whether equitable considerations weigh in

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<sup>29</sup> In this regard the parent appears to use the term "vocational training" and "internship" interchangeably during her testimony, indicating at one point that she kept referring to the "vocational training" offered at the school as an internship because "that's what it's referred to at Cooke" (Tr. p. 410). In addition, the parent described this "vocational training" as something where "students are taken to whatever their assignment is and they are brought back" (Tr. p. 390), and indicated that "the same thing is done with Cooke, but Cooke is done a little bit differently" (Tr. pp. 390-91). Specifically, the parent's testimony suggests that at Cooke, travel training is incorporated into the internships by teaching students how to get back and forth to their assignments "independently" (Tr. pp. 390-91, 410). In fact, it is this aspect of the vocational training available at the school (i.e., the alleged lack of travel training associated with it), that the parent appears to have objected to at the hearing, as opposed to the lack of "internships" themselves (id.). Further, the district school psychologist indicated that the district did not use the same terminology as Cooke but offered comparable services to address student's needs with respect to work, travel, and activities of daily living skills (Tr. pp. 70-73; compare Parent Ex. B at pp. 5-9, with Dist. Ex. 10 at pp. 1-4).

favor of the parent, or the appropriateness of the direct payment of tuition (Burlington, 471 U.S. at 370; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

**THE APPEAL IS DISMISSED.**

**THE CROSS-APPEAL IS DISMISSED.**

**Dated:**           **Albany, New York**  
                  **May 9, 2014**

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**HOWARD BEYER**  
**STATE REVIEW OFFICER**