



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 13-079

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

### **Appearances:**

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Francesca J. Perkins, Esq., of counsel

Advocates for Children of New York, attorneys for respondent, Erika J. Palmer, Esq., of counsel

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to provide a free appropriate public education (FAPE) to respondent's (the parent's) daughter and ordered the district to provide retroactive, direct payment of the tuition costs at the Cooke Center Grammar School (Cooke) for the 2012-13 school year. The parent cross-appeals from the IHO's determination that the 12:1+1 special class placement recommended for the student for the 2012-13 school year was appropriate. The appeal must be sustained. The cross-appeal must be dismissed.

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

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 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]).

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

The parties' familiarity with the detailed facts and procedural history of the case and the IHO's decision is presumed and will not be recited here. The CSE convened on February 28, 2012, to formulate the student's IEP for the 2012-13 school year (see generally Dist. Ex. 7). The parent disagreed with the particular public school site to which the district assigned the student to attend for the 2012-13 school year, and as a result, notified the district of her intent to unilaterally place the student at Cooke and seek tuition payment from the district (Parent Ex. P at p. 1-2; see Dist. Ex. 9; Parent Ex. N at p. 1). In a due process complaint notice dated December 18, 2012, the parent alleged that the district failed to offer the student a FAPE for the 2012-13 school year (Dist. Ex. 1 at p. 1-5).

An impartial hearing convened on January 23, 2013 and concluded on February 27, 2013 after 2 days of proceedings (Tr. pp. 1-220). In a decision dated April 3, 2013, the IHO determined that the district failed to offer the student a FAPE for the 2012-13 school year, that Cooke was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parent (IHO Decision at pp. 7-10). As relief, the IHO ordered the district to provide retroactive, direct payment of tuition at Cooke for the 2012-13 school year (IHO Decision at p. 10).

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

The issues presented on appeal which must be resolved are as follows: 1) whether the IHO erred in determining that the educational placement recommended by the February 2012 CSE, and included in the February 2012 IEP, was appropriate to address the student's needs; 2) whether the IHO erred in determining that the district failed to prove that the particular public school site was appropriate for the student; and 3) whether the IHO erred in determining that equitable considerations favored the parent's claim for retroactive direct payment at Cooke for 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

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaronck 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 [citation 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).

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

## **VI. Discussion**

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

The district does not appeal the IHO's adverse determination that Cooke was an appropriate placement for the student (Pet. at pp. 8-19). Therefore this determination is final and binding upon the parties (34 C.F.R. 300.514[a]; 8 NYCRR 200.5[j][5][v]).

## **B. April 2012 IEP, 12:1+1 Placement**

Turning first to the parent's contention, asserted in the cross-appeal, that the IHO erred in finding that the February 12 CSE's recommendation of a 12:1+1 special class for the 2012-13 school year was appropriate, I agree with the IHO's conclusion that the February 2012 IEP, including the recommendation of a 12:1+1 special class, was both procedurally and substantively appropriate and was "crafted" to meet the individual educational needs of the student (IHO Decision at p. 7).

Specifically, the parent alleges that the recommended 12:1+1 special class is substantially similar to the program the student attended during her first four years of elementary school, during which she did not make academic progress. The CSE is charged with developing recommendations annually for the student's IEP by considering the "most current" evaluations and data (8 NYCRR 200.1[d][2]). As detailed below, the evidence in the record reveals that, based upon the relevant evaluative data available to the February 2012 CSE, the student was functioning well within a 12:1+1 class ratio.

The November 2011 Cooke progress report, considered by the February 2012 CSE, indicated that the student was functioning "with her homeroom class of 12 students" for some of her subject areas and the district's school psychologist, present at the CSE meeting, noted that none of the Cooke teachers indicated that the student had any significant challenges with that class size (Tr. pp. 37, 60-61, 69; Dist. Ex. 4 at pp. 7-8). Indeed, the testimony of Cooke's head of school supports a finding that the student was in a program which functioned, for all intents and purposes, as a 12:1+1 classroom (Tr. p. 74). Specifically, Cooke's head of school stated that all of the classrooms are no larger than 12 students and typically each classroom in the middle school has 10 or 11 students and is staffed with a head teacher and a teaching assistant (Tr. p. 74).

In addition, the Cooke report stated that the Cooke staff noticed that the student demonstrated an increased sense of independence and a willingness to attempt tasks prior to seeking assistance (Dist. Ex. 4 at p. 2). The report also stated that the student was displaying an ability to turn her behavior around more quickly than the prior year (Dist. Ex. 4 at p. 2). Accordingly, the current data before the CSE described a student who was functioning and making progress in a 12:1+1 setting.

The parent also contends that the February 2012 IEP did not call for the "small group instruction" and additional teacher support the student required in order to progress academically (see Dist. Exs. 4 at pp. 3-6; 6 at p. 14). The 2010 neuropsychological evaluation, available to the February 2012 CSE, stated that the student required a "small specialized classroom setting" (Dist. Ex. 6 at p. 14).

In describing the program recommended for the student, the district psychologist stated the February 2012 CSE recognized that the student needed extra supervision and attention and was responsive to adult redirection (Tr. p. 60). He explained that at a class with 12 students, a teacher and extra adult support was recommended because the CSE felt the student's management needs, as indicated on the February 2012 IEP, would be "picked up" by the

paraprofessional (Tr. p. 60, see Dist. Ex. 7 at p. 2). The district psychologist further indicated that the February 2012 CSE was aware that at Cooke the student was receiving instruction in some subject areas in groups of 4, yet he stated that the CSE didn't feel there was anything in the November 2011 Cooke report which indicated that the student could only receive instruction within that type of ratio (Tr. pp.69-70, see Dist. Ex. 4 at pp. 1-14). Rather, the school psychologist stated that the general structure of a 12:1+1 special class allows for small group instruction at times, for instance, when the paraprofessional implements instructional activities designed by the special education teacher, while the special education teacher engages in instruction with another group within the same classroom (Tr. p. 68).<sup>1</sup> This description comports with State regulations which provide that a 12:1+1 special class placement is appropriate 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]). Management needs are defined as "the nature of and degree to which environmental modifications and human or material resources are required to enable the student to benefit from instruction" (8 NYCRR 200.1[ww][3][i][d]). In this case, although the February 2012 IEP does not include the words "small group instruction," State regulations indicate that in a 12:1+1 special class the role of the "additional adult" within the classroom is "to assist in the instruction" of students and therefore provides for the opportunity for instructional groups smaller than 12 (8 NYCRR 200.6[h][4][i], see Dist. Ex. 7). Moreover, I note that often what is considered "small" or "limited" in terms of class size is subjective, imprecise and subject to differing interpretations. Accordingly, I am unable to find that the CSE's recommendation of a 12:1+1 special class in a district school would constitute a denial of FAPE, since the additional adult in the classroom would have enabled the student to receive instructional support appropriate to her needs.

Finally, the school psychologist stated that according to the meeting minutes, at the time of the February 2012 CSE meeting, no one objected to the 12:1+1 special class recommendation nor did anyone reach out after the meeting to request a change (Tr. pp. 61, 65-66; see Dist. Ex. 8). The parent also testified that neither she nor her attorneys, who were present at the February 2012 CSE meeting, offered an opinion regarding the 12:1+1 special class recommendation (Tr. p. 195).

Accordingly, akin to the IHO's determination, I find that the evidence in the hearing record supports a finding that the February 2012 IEP, including the 12:1+1 special class recommendation, was reasonably calculated to enable the student to receive educational benefits.

### **C. Assigned School**

With respect to the petition, the district contends that the IHO erred in finding that it was required to prove that the assigned school in question could implement the IEP. For the reasons

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<sup>1</sup> Based on her testimony the parent was aware that small group instruction was a component of a 12:1+1 special class. The parent stated that during her visit to the assigned school site, the assistant principal mentioned to her that the class broke up into small groups and that paraprofessionals taught lessons (Tr. pp. 202-03).

explained more fully below, the district's appeal must be sustained and the IHO's decision must be reversed.

Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L., 553 Fed. App'x at 9; see also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. July 24, 2013]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom a student would be placed in where the parent rejected an IEP before the student's classroom arrangements were even made"]).

The Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141 [2d Cir. May 21, 2013]) and, even more clearly, that "[t]he appropriate inquiry is into the nature of the program actually offered in the written plan, not a retrospective assessment of how that plan would have been executed" (K.L., 530 Fed. App'x at 87, quoting R.E., 694 F.3d at 187; see C.F., 746 F.3d at 79). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]).<sup>2</sup> When the Second Circuit spoke recently with regard

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<sup>2</sup> While the IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, the assignment of a particular school is an administrative decision that must be made in conformance with the CSE's educational placement recommendation (T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009]; see K.L.A. v. Windham Southeast Supervisory Union, 371 Fed. App'x 151, 154 [2d Cir. Mar. 30, 2010]). A school district "may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement" (Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]). Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 14 01[9][D]; 34 C.F.R. 300.17[d]; see 20 U.S.C. § 1414[d]; 34 C.F.R. 30.0320). The Second Circuit recently reiterated that while parents are entitled to participate in the determination of the type of placement their child will attend, the IDEA confers no rights on parents with regard to school site selection (C.F., 746 F.3d at 79). However, the Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular public school site or classroom location on a student's IEP, the district is not permitted to choose any school and provide services that deviate from the provisions set forth in the IEP (see R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 420 [the district does not have carte blanche to provide services to a child at a school that can not satisfy the IEP's

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

In view of the foregoing, the IHO's determination that the district failed to offer the student a FAPE for the 2012-13 school year based upon its failure to provide sufficient evidence regarding the assigned school site or whether the assigned school could have implemented the student's IEP cannot stand, because a retrospective analysis of how the district would have implemented the student's February 2012 IEP at the assigned public school site is not an appropriate inquiry under the circumstances of this case (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Here, it is undisputed that the parent rejected the assigned public school site—which the student never attended—and instead chose to enroll the student in a nonpublic school of her choosing (see Parent Exs. L; N; P). Therefore, the district is correct that the issues raised and the arguments asserted by the parents with respect to the assigned public school site are speculative. Furthermore, in a case in which a student has been unilaterally placed prior to the implementation of an IEP, it would be inequitable to allow the parents to acquire and rely on information that post-dates the relevant CSE meeting and IEP and then use such information against a district in an impartial hearing while at the same time confining a school district's case to describing a snapshot of the special education services set forth in an IEP (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at \*13 [S.D.N.Y. Dec. 23, 2013] [stating that in addition to districts not being permitted to rehabilitate a defective IEP through retrospective testimony, "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE"]). Based on the foregoing, the district was not obligated to present retrospective evidence at the impartial hearing regarding the execution of the student's program or to refute the parents' claims (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Accordingly, the IHO's decision cannot stand on the claims that the district failed to offer sufficient evidence about the assigned public school site and whether it would have properly implemented the February 2012 IEP.<sup>3</sup>

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requirements]). The district has no option but to implement the written IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan.

<sup>3</sup> While some district courts have found that parents have a right to assess the adequacy of a particular school site to meet their children's needs, the weight of the relevant authority supports the approach taken here (see B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at \*20-\*22 [E.D.N.Y. Mar. 31, 2014]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957 [S.D.N.Y. Mar. 31, 2014]; M.O. v. New York City Dep't of Educ., 2014 WL 1257924, at \*2 [S.D.N.Y. Mar. 27, 2014]; E.H. v. New York City Dep't of Educ., 2014 WL 1224417, at \*7 [S.D.N.Y. Mar. 21, 2014]; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at \*17 [S.D.N.Y. Sept. 27, 2013]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at \*26 [E.D.N.Y. Aug. 19, 2013]; M.R. v. New York City Bd. of Educ., 2013 WL 4834856, at \*5 [S.D.N.Y. Aug. 14, 2013]; A.M., 964 F. Supp. 2d at 286; N.K., 961 F. Supp. 2d 577, 588-90 [S.D.N.Y. 2013]; Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at \*5 [E.D.N.Y. Mar. 21, 2013], *aff'd*, 556 Fed. App'x 1 [2d Cir Dec. 23, 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at \*13 [S.D.N.Y. Mar. 19, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at \*10 [S.D.N.Y. Feb. 20, 2013]; Reyes v. New York City Dep't of Educ., 2012

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

## **VII. Conclusion**

Having determined that the evidence in the hearing record supports a determination that the February 2012 IEP was reasonably calculated to enable the student to receive educational benefits and that the district offered the student a FAPE for the 2012-13 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether equitable considerations weighed in favor of the parents' request for relief.

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

**THE APPEAL IS SUSTAINED.**

**THE CROSS-APPEAL IS DISMISSED.**

**IT IS ORDERED** that the IHO's decision, dated April 3, 2013, is hereby modified by reversing that portion which found that the district failed to offer the student a FAPE for the 2012-13 school year; and,

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WL 6136493, at \*7 [S.D.N.Y. Dec. 11, 2012]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at \*15 [W.D.N.Y. Sept. 26, 2012], adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at \*12-\*14 [S.D.N.Y. June 16, 2014] [holding that "[a]bsent non-speculative evidence to the contrary, it is presumed that the placement school will fulfill its obligations under the IEP"]; but see V.S. v. New York City Dep't of Educ., 2014 WL 2600313, at \*4 [E.D.N.Y. June 10, 2014]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at \*14-\*16 [S.D.N.Y. May 27, 2014]; Scott v. New York City Dep't of Educ., 2014 WL 1225529, at \*19 [S.D.N.Y. Mar. 25, 2014]; D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13 [S.D.N.Y. 2013]; B.R. v. New York City Dep't of Educ., 910 F. Supp. 2d 670, 676-78 [S.D.N.Y. 2012]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at \*11 [S.D.N.Y. Sept. 29, 2012]).

**IT IS FURTHER ORDERED** that the IHO's decision, dated April 3, 2013, is hereby modified by reversing that portion which directed the district to provide retroactive, direct payment of the tuition at Cooke for the 2012-13 school year.

**Dated:**           **Albany, New York**  
**November**           **12, 2014**

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**CAROL H. HAUGE**  
**STATE REVIEW OFFICER**