



The University of the State of New York

The State Education Department

State Review Officer

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No. 13-201

Application of a STUDENT WITH A DISABILITY, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the XXXXXXXXX

Appearances:

Law Offices of Lauren A. Baum, P.C., attorneys for petitioners, Richard A. Liese, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Francesca J. Perkins, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for the costs of their daughter's tuition at the Cooke Center for Learning and Development (Cooke) for the 2011-12 school year. Respondent (the district) also cross-appeals from the IHO's decision. 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

In this case, the CSE convened on February 10, 2011 to conduct the student's annual review and to develop an IEP to be implemented between July 1, 2011 and June 30, 2012 (see

Dist. Ex. 4 at pp. 1-2).¹ Finding the student eligible for special education as a student with an intellectual disability, the February 2011 CSE recommended a 12-month school year in a 12:1+1 special class placement in a specialized school with related services of individual and group counseling, individual hearing educational services, individual occupational therapy (OT), individual and group physical therapy (PT), and individual and group speech-language therapy (id. at pp. 1, 14, 16-17).² The February 2011 CSE also recommended support for the student's management needs and assistive technology, consisting of an FM unit, and developed a transition plan, as well as 12 annual goals with approximately 48 short-term objectives, addressing the student's needs in the areas of English language arts (ELA), written expression, mathematics, OT, PT, social/emotional functioning, speech-language therapy, and post-secondary transition (id. at pp. 3, 5-13, 18).

After reviewing a copy of the meeting minutes taken during the February 2011 CSE meeting, the parents notified the district, by letter dated March 4, 2011, that the minutes were inaccurate in some respects (Parent Ex. D at p.1). Specifically, the parents noted that: they disagreed with the recommendation that the student attend a district public school; the student's reading level, as reported by the teacher, was higher than that reported by a standardized test score; they were concerned that the student's annual goals would no longer be appropriate by the commencement of the 2011-12 school year; and the student required more "individual professional support" than recommended by the CSE (id. at p. 1).

On April 19, 2011, the parents signed an enrollment contract with Cooke for the student's attendance during the 2011-12 school year from September 2011 through June 2012 (Parent Ex. M at pp. 1-2). Subsequently, on June 8, 2011, the parents signed an enrollment contract with Cooke for the student's attendance during the summer term of the 2011-12 school year (Parent Ex. L at pp. 1-2).

By final notice of recommendation (FNR), dated June 11, 2011, the district summarized the special education program and related services recommended in the February 2011 IEP and identified particular public school site to which the district assigned the student to attend for the 2011-12 school year (see Dist. Ex. 9 at p. 1).³ The parents visited the assigned public school site on June 17, 2011 (see Parent Ex. B at p. 1).

¹ At the time of the February 2011 CSE meeting, the student was attending Cooke (Tr. pp. 672, 918; Dist. Exs. 6; 8 at p. 1). The Commissioner of Education has not approved Cooke as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

² Although the student's February 2011 IEP indicates that the student was deemed eligible for special education as a student with mental retardation, the term "mental retardation" is no longer used in State regulations and has been replaced with the term "intellectual disability," which has the same definition (8 NYCRR 200.1[zz][7]). The student's eligibility for special education programs and related services as a student with an intellectual disability is not in dispute (see 34 CFR 300.8[c][6]; 8 NYCRR 200.1[zz][7]).

³ Although the FNR states that the student was deemed eligible for special education as a student with multiple disabilities, as set forth above, the February 2011 CSE, in fact, determined the student's category of eligibility to be intellectual disability (compare Dist. Ex. 1 at p. 1, with Dist. Ex. 9 at p. 1; see 34 CFR 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

By letter dated June 21, 2011, the parents acknowledged receiving the FNR and indicated that they would notify the district "as soon as possible" regarding their decision as to the appropriateness of the "placement" (Dist. Ex. 10 at p. 1). By subsequent letter dated June 22, 2011, the parents rejected the assigned public school as not appropriate for the student, stated the reasons for their objections, and informed the district that they remained "willing to consider any appropriate program or placement" that the district might offer but that, "in the interim," the parents intended to enroll the student at Cooke and seek public funding for the costs of the student's tuition (Parent Ex. B at pp. 1-2). With respect to their visit to the assigned public school, the parents expressed concerns about: the student's ineligibility for an internship program; the possible composition of the assigned classroom, which the parents were purportedly informed could include students with emotional disturbances, up to age 21, and which could be composed of mostly boys; the distracting, disrupting, and possibly unsafe impact of such a classroom composition on the student; the level of individualized attention and support in the classroom; the behavior problems of the other students and the behavior management methods utilized by the teachers; the presence of a paraprofessional to aid students' transition between classes, which the student did not require; and the school's ability to meet the student's related service mandates (id.).

In September 2011, the parents again visited the assigned public school site while the school year was in session because they "never received another offer" from the district and wanted a "different perspective" while students were in attendance (Parent Ex. C at p. 1). By letter dated November 12, 2011, the parents again rejected the assigned public school site as not appropriate for the student, stated further reasons for their objections, and again indicated their willingness to consider an appropriate district program or placement but that, in the meantime, the parents intended to enroll the student at Cooke at public expense (id. at pp. 1-2). In addition to reiterating and offering further elaboration to many of their objections set forth in the June 22, 2011 correspondence, the parents also emphasized their concerns about the safety of the public school, as a result of the behaviors of students they observed and the school's manner of addressing such behaviors (id.).

A. Due Process Complaint Notice

In a due process complaint notice dated September 27, 2012, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year (see Parent Ex. A at p. 1). Without elaboration, the parents alleged that the February 2011 CSE was not properly composed (id.). Additionally, the parents asserted that the February 2011 CSE deprived the parents the opportunity to meaningfully participate in the development of the student's IEP (id. at p. 1-2). The parents also alleged that the district failed to adequately evaluate the student and/or failed to consider existing evaluative information and, therefore the February 2011 CSE did not have sufficient information on which to base its recommendations (id.). Next, the parents asserted that the February 2011 IEP did not accurately reflect the student's current levels of performance or identify the student's management needs and that the annual goals listed in the February 2011 IEP were not sufficient to meet the student's needs (id. at pp. 2-3). The parents also alleged that the special education program recommended by the February 2011 CSE did "not offer the level of individual attention and support" that the student required (id. at p. 3). The parents asserted that the district failed to recommend an appropriate

plan to address the student's "needs for successful transition to post-secondary activities" (id.). With respect to the student's related services, the parents asserted that the February 2011 CSE should have consulted with the student's related service providers from Cooke and/or conduct or review standardized testing or assessments prior to modifying the student's related service mandates from the year prior (id.). Furthermore, the parents alleged that the February 2011 CSE failed to recommend transition supports relative to the student's transition from the "setting" the student "was attending at the time of the CSE meeting" to "the recommended program and settings" (id.). The parents also alleged that the assigned public school site was not appropriate for the student because: the student would have been inappropriately grouped in the assigned 12:1+1 special class; the assigned public school site was not ready and able to implement the student's February 2011 IEP recommendations, including related service recommendations; and the assigned public school site presented an unsafe and/or hostile environment (id. at pp. 3-4).

In addition, the parents alleged that the student's unilateral placement at Cooke was appropriate and that equitable considerations weighed in favor of their request for relief (Parent Ex. A at p. 5). As relief, the parents requested that the IHO order the district to pay for the costs of the student's tuition at Cooke for the 2011-12 school year, as well as the costs of related services and transportation (id.).

B. Impartial Hearing Officer Decision

On January 5, 2013, an impartial hearing was convened and it concluded on June 13, 2013, after six days of proceedings (Tr. pp. 1-980). By decision dated September 11, 2013, the IHO found that the district offered the student a FAPE for the 2011-12 school year and that Cooke was not an appropriate unilateral placement for the student (IHO Decision at pp. 21-31). Therefore, the IHO denied the parents' request for relief (id. at p. 31). Initially, the IHO determined that the district provided the parents and the representatives from Cooke an opportunity to meaningfully participate in the development of the student's February 2011 IEP, noting that, although the "Cooke staff participating by phone did not have access to the same material available to all the other CSE members," this did not "seriously infringe[] the parent's opportunity to participate in the IEP formulation process" (id. at pp. 23-24). Next, the IHO concluded that the February 2011 CSE relied upon timely evaluative materials and sufficiently considered such materials in the development of the student's IEP, noting specifically that the October 2009 psychoeducational evaluation report "was still timely under State regulations," that the hearing record did not establish "that the student's educational needs warranted a reevaluation or that the parents . . . requested a reevaluation," and that the February 2011 CSE was entitled to rely on teacher estimates or observations in developing the student's IEP (id. at pp. 24-25). The IHO also held that "the input of Cooke staff provided present levels of academic achievement and social and emotional functional performance" sufficient for the February 2011 CSE "to determine [the student's] skill level for her academics, related service and management needs" (id. at p. 25). Next the IHO determined that the occupational therapist and physical therapist from Cooke "were present during the change in related services" (id.). With respect to the annual goals listed in the February 2011 IEP, the IHO noted they were developed from Cooke reports and verbal input from Cooke participants at the CSE meeting, and that the annual goals and short-term objectives "corresponded to [the student's] needs and were appropriate" and measurable (id. at pp. 26-27). Next, the IHO determined that the CSE's recommendation for a

12:1+1 special class "was sufficient to address [the student's] special education needs" (id. at p. 26). The IHO also found that, based on the information provided by Cooke staff, the student's "lack of compliance did not require" that the February 2011 CSE conduct an FBA or develop a BIP (id.). Finally, the IHO determined that the transition plan included on the February 2011 IEP was developed to prepare the student for independence and long term employment, the transition plan was appropriate, and the "lack of a functional vocational assessment [did not result] in a loss of educational opportunity" (id. at pp. 25-26).

With respect to the assigned public school site, the IHO agreed with the district that the parents' claims were speculative since the parents unilaterally placed the student prior to the time that the district became obligated to implement the student's IEP (IHO Decision at pp. 27-28). Nonetheless, the IHO made alternative findings with respect to the public school site, holding that the public school would have been able to implement the student's IEP and that the student would have been functionally grouped with students with similar needs in the assigned classroom (id. at p. 28).

Although the IHO determined that the district offered the student a FAPE for the 2011-12 school year, she went on to determine that the parents failed to establish that the unilateral placement was appropriate for the student (IHO Decision at pp. 28-31). Specifically, the IHO found that the parents presented no evidence to establish how Cooke met the student's unique needs for the summer months of the 12 month school year (id. at pp. 29-30). Furthermore, the IHO determined that the parents did not establish that the program and Cooke was "tailored to the student's unique special education needs in academics and related services" during the 2011-12 school year as a whole, citing the lack of evidence regarding how much special education was provided to the student or how the student "progressed in light of the modification" of the assessments utilized by Cooke to evaluate the student's progress (id. at p. 30). The IHO also noted a lack of testimony regarding "the inconsistent success of behavioral modification to address [the student's] non-compliant behavior" and the fact that "the student continued to struggle academically, behaviorally and socially" (id. at pp. 30-31). Consequently, the IHO denied the parents' request for the costs of the student's tuition for the 2011-12 school year (id. at p. 31).

IV. Appeal for State-Level Review

The parents appeal, seeking to overturn the IHO's determinations that the district offered the student a FAPE for the 2011-12 school year and that Cooke was not an appropriate unilateral placement for the student. The parents assert that the IHO erred in concluding that the parents and the Cooke participants at the February 2011 CSE meeting were afforded a meaningful opportunity to participate in the development of the student's IEP. Contrary to the findings of the IHO, the parents also assert that the February 2011 CSE failed to ensure that it had sufficient evaluative material in developing the student's IEP, particularly given the CSE's decision to change the student's 12:1+1 special class in a community school placement from September 2010 IEP to a 12:1+1 special class in a specialized school; the IEP inaccurately and inadequately described the student's needs and deficits; the student's annual goals set forth in the IEP were inappropriate; the 12:1+1 special class recommendation would not have met the student's needs; and the February 2011 CSE failed to set forth appropriate transition services or goals.

With respect to the assigned public school site, the parents assert that the IHO erred in concluding that the district was not required to show that it could have implemented the student's February 2011 IEP. The parents also allege that, contrary to the IHO's decision, the district would not have had a seat in an appropriate class for the student with similarly functioning and appropriate peers and that the public school site would not have been able to implement the student's February 2011 IEP, including the related services recommendations. Finally, the parents assert that the IHO erred in failing to address the parents' claim that the school environment would have been inappropriate and unsafe for the student.

The parents also assert that the IHO erred in finding that Cooke was not an appropriate placement, alleging that the IHO held the parents to a higher standard of proof than the law requires. Finally, the parents assert that equitable considerations weigh in favor of their request for the costs of the student's tuition. Consequently, the parents seek an order reversing the IHO's decision in its entirety.

In an answer and cross-appeal, the district responds to the parents' petition by denying the parents' positions and asserting that the IHO correctly determined that the district offered the student a FAPE and that Cooke was not an appropriate placement for the student. The district also alleges that equitable considerations do not weigh in favor of the parents' request because the parents had no intention of enrolling the student in a district public school and provided inadequate notice to the district of their intention to unilaterally place the student. The district also interposes a cross-appeal alleging that the IHO erred in stating that the district bore the burden of demonstrating that it could implement the student's IEP at the assigned public school site.

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 v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

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

indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 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, 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, 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., 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

Upon careful review, the hearing record reflects that the IHO, in a well-reasoned and well-supported decision, correctly held that the district sustained its burden to establish that it offered the student a FAPE for the 2011-12 school year (see IHO Decision at pp. 20-28). The IHO accurately recounted the facts of the case, addressed the specific issues identified in the parent's due process complaint notice,⁴ and set forth the proper legal standard to determine whether the district offered the student a FAPE for the 2011-12 school year, and applied that

⁴ The IHO did make a sua sponte finding that the student's behavior did not require that the district conduct a functional behavioral assessment (FBA) or develop a behavioral intervention plan (BIP), in that the parents' due process complaint notice cannot reasonably be read to allege that the February 2011 CSE failed to conduct an FBA or develop a BIP for the student (see 20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d]; 8 NYCRR 200.5[j][1][ii]); see also IHO Decision at p. 26; Parent Ex. A). However, the parents do not assert on appeal that the IHO erred in this finding and the district does not assert on appeal that the IHO erred by sua sponte raising the issue. Therefore, the issue will not be addressed.

standard to the facts at hand (*id.* at pp. 3-28). The decision shows that the impartial hearing officer carefully considered the testimonial and documentary evidence presented by both parties, and further, that she weighed the evidence and properly supported her conclusions (*id.*). Furthermore, an independent review of the entire hearing record reveals that the impartial hearing was conducted in a manner consistent with the requirements of due process and that there is no reason appearing in the hearing record to modify the determinations of the IHO (*see* 20 U.S.C. § 1415[g][2]; 34 CFR 300.514[b][2]). Thus, except whether otherwise indicated below, the findings and conclusions of the IHO are hereby adopted. In particular, the findings and conclusions of the IHO with respect to the following findings are adopted without further discussion: that the district afforded the parents a meaningful opportunity to participate in the development of the student's February 2011 IEP, the February 2011 CSE reviewed sufficient evaluative information in developing the student's IEP, and the February 2011 IEP adequately identified the student's present levels of performance and management needs, and developed appropriate annual goals (IHO Decision at pp. 23-27).

A. Elaboration on the IHO's Decision

1. 12:1+1 Special Class in a Specialized School

Although the parents assert that the IHO did not support her conclusion that the 12:1+1 special class in a specialized school was appropriate for the student, a review of the evidence in the hearing record supports the IHO's finding. The parents allege that the February 2011 CSE's recommendation that the student attend a special class in a specialized school was a significant change in placement, relative to the September 2010 CSE's recommendation that the student attend a special class in a community school, and that the February 2011 CSE did not have adequate updated evaluative information to support the change.

Initially, regarding the parents' claim that the district's change in recommendation from a special class in a community school to a special class in a specialized school required a reevaluation of the student, it should be noted that at the time of the February 2011 CSE meeting, the student did not have access to a general education setting as she was attending Cooke, which is attended solely by special education students (Tr. pp. 672, 771-72). Accordingly, the district was not recommending a significant change in the student's placement. Thus, while the parent is correct to assert that it would be inappropriate for the district to recommend that the student attend a specialized school, simply because the district did not programmatically offer a 12:1+1 special class in a community school (Tr. pp. 297-99), the hearing record reveals that the recommendation was appropriate independent of such considerations.⁵

⁵ Placement decisions must be based on a student's unique needs as reflected in the IEP, rather than based on the existing availability of services in the district (34 CFR 300.116[b][2]; 8 NYCRR 200.6[a][2]; *see Adams v. State*, 195 F.3d 1141, 1151 [9th Cir. 1999]; *Reusch v. Fountain*, 872 F. Supp. 1421, 1425-26 [D. Md. 1994]; *Placements*, 71 Fed. Reg. 46588 [Aug. 14, 2006] ["Although the Act does not require that each school building in an LEA be able to provide all the special education and related services for all types and severities of disabilities[, i]n all cases, placement decisions must be individually determined on the basis of each child's abilities and needs and each child's IEP, and not solely on factors such as . . . availability of special education and related services, configuration of the service delivery system, availability of space, or administrative convenience"]; *see Letter to Clarke*, 48 IDELR 77 [OSEP 2007] [stating that service delivery determinations must be made by the CSE "based on a child's individual and unique needs, and cannot be made as a matter of

The Cooke director of student support services, who attended the February 2011 CSE meeting testified that the recommended 12:1+1 special class was not appropriate for the student because such a class would not provide the student with the appropriate academic, social/emotional, or therapeutic supports, and that the student required a "much more intensive, coordinated support structure" (Tr. p. 857). However, similar to the recommended special class, the Cooke director of student support services also testified that, during the 2010-11 school year, the student attended a class at Cooke that consisted of 12 students and 2 teachers (Tr. pp. 899-900). A review of the December 2010 Cooke progress report reflects that the student was making slow, incremental progress commensurate with her cognitive abilities (see generally Dist. Ex. 8), except that progress report indicated that the student's performance in math reflected the student's lack of understanding of the subject, which, according to the hearing record, was due to the student's absences as a result of her refusal to leave the school bus in the morning (Tr. 320, 326-27; Dist. Ex. 5 at p. 1).

State regulations contemplate a 12:1+1 special class for those students whose management needs interfere with the instructional process, an 8:1+1 special class for students whose management needs are determined to be intensive, and a 6:1+1 for student whose management needs are determined to be highly intensive (8 NYCRR 200.6[h][4][i]-[ii]). State regulations define management needs 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]). The regulations further define management needs for students with disabilities 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" (id.).

The February 2011 IEP recommended academic and social/emotional strategies to address the student's management needs, including small group instruction, directions repeated and rephrased as needed, manipulatives, scaffolding, teacher modeling/cues/redirection, a multisensory approach, visual and auditory cues, preferential seating, graphic organizers/checklists, positive reinforcement, and redirection (Dist. Ex. 4 at p. 3). To further support the student's needs, the IEP recommended that she receive two sessions of PT, one session of OT, two sessions of speech-language therapy, two sessions of hearing education services, and two sessions of counseling per week (id. at pp. 16-17). The hearing record shows that the human or material resources, including the related services, recommended in the February 2011 IEP addressed the student's identified needs in receptive and expressive language, executive functioning, and working memory, and further targeted the student's cognitive and academic delays, gross and fine motor deficits, fluctuating bilateral hearing loss, difficulties sustaining attention, initiating and completing tasks, noncompliance, and social/emotional delays (see Tr. pp. 63-68, 73, 640-41, 685-87; 845, 850; Dist. Exs. 4 at pp. 3-6, 16; 5 at pp. 1-2; 6; 7 at p. 4; Dist. Ex. 8 at pp. 2, 5, 7).

The February 2011 CSE considered other 12 month programs for the student, including a 6:1+1, an 8:1+1, or a 12:1+4 special class in a specialized school, which were determined to be inappropriate, given the student's cognitive, academic, and social/emotional delays (Dist. Exs. 4

general policy by administrators, teachers or others apart from the IEP Team process").

at p. 15; 5 at p. 2; see Tr. p. 180). The district special education teacher testified that the February 2011 CSE determined that a smaller class ratio would be too restrictive for the student, that the students in those class sizes had different types of disabilities, and that the 12:1+1 special class was designed for students with similar cognitive and academic levels as the student in the instant case (Tr. p. 115).

Given the level of human and material resources to support the student's management needs included in the February 2011 IEP, it was reasonable for the CSE to conclude that the student's needs were of such a substantial nature so as to "interfere with the [student's] instructional process" but not so substantial that they should be deemed "intensive" or "highly intensive" (8 NYCRR 200.6[h][4][i]-[ii]; see Dist. Ex. 4 at pp. 3-6). Thus, the hearing record shows that consistent with the student's needs as reflected in the evaluations and reports before the February 2011 CSE, as well as the information provided by the student's Cooke teachers and providers, and applicable State regulations, the February 2011 CSE appropriately recommended a 12:1+1 special class in a specialized school placement (Dist. Ex. 4 at p. 1). Based on the foregoing, there are no grounds to modify the IHO's decision.

2. Transition Services

With respect to the February 2011 CSE's development of the transition plan, the IHO certainly utilized poor language when drafting her decision, which could easily be read as a misallocation of the burden of proof (see IHO Decision at pp. 25-26). Specifically, the IHO stated that the "parents failed to establish that the transition plan was inappropriate and the lack of a functional vocational assessment resulted in a loss of educational opportunity" (id.). However, a review of the IHO's decision in its entirety and of the complete impartial hearing transcript, taken together, demonstrates that the IHO appeared to be properly placing the burden on the district to prove that it offered the student a FAPE (see id. at pp. 20, 22; see also Educ. Law § 4404[1][c]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *5 [S.D.N.Y. Dec. 11, 2012; M.P.G., 2010 WL 3398256, at *7). Even if the IHO had allocated the burden of proof to the parents, the harm would be only nominal insofar as there is no indication that the IHO believed that this was one of those "very few cases" in which the evidence was equipoise (Schaffer v. Weast, 546 U.S. 528 58 [2005]; T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 933 F. Supp. 2d 554, 565 n.6 [S.D.N.Y. 2013]; A.D. v. New York City Dept. of Educ., 2013 WL 1155570 at *5 [S.D.N.Y. Mar. 19, 2013]). Moreover, upon an independent examination of the evidence in the entire hearing record (see 34 CFR 300.514[b][2]), regardless of which party bore the burden of proof, the evidence in the hearing record demonstrates that the district offered the student a FAPE for the 2011-12 school year (M.W. v. New York City Dep't of Educ., 725 F.3d 131, 135 n.1 [2d Cir. 2013]). Nonetheless, out of an abundance of caution, the appropriateness of the student's recommended transition, plan beyond the discussion set forth in the IHO's decision, will be addressed.

The IDEA—to the extent appropriate for each individual student—requires that an IEP must focus on providing instruction and experiences that enables the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34][A]; see Educ. Law § 4401[9]; 34 CFR 300.43; 8 NYCRR 200.1[fff]). Accordingly, pursuant to federal law and State regulations, an IEP for a student who is at least 16

years of age (15 under State regulations), or younger if determined appropriate by the CSE, must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills, as well as transition services needed to assist the student in reaching those goals (20 U.S.C. § 1414[d][1][A][i][VIII]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]). Transition services must be "based on the individual child's needs, taking into account the child's strengths, preferences, and interests" and must include "instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation" (20 U.S.C. § 1401[34][B]-[C]; 34 CFR 300.43[a][2]; 8 NYCRR 200.1[fff]).

The IHO acknowledged that the district did not perform a vocational assessment of the student (IHO Decision at p. 26). State regulations require a vocational assessment by age 12 (8 NYCRR 200.4[b][6][viii]). The student was over the age of 12 at the time of the February 2011 CSE meeting (see Dist. Ex. 6). However, as the IHO found, the hearing record does not reveal that the district's failure to conduct a vocational assessment resulted in a denial of a FAPE. The district special education teacher, who attended the February 2011 CSE meeting, testified that, according to the Cooke staff who attended the CSE meeting, the student participated in a program at Cooke which encouraged her to function independently within the community (Tr. p. 62-63). She further explained that the transition plan in the February 2011 IEP was derived from input from Cooke staff and the parent, as well as information provided by the Cooke progress report (Tr. p. 111-112, 152-153, compare Dist. Ex. 4 at p. 12 with Dis. Ex. 8 at p. 14). The Cooke progress report identified the student's needs with respect to her ability to adjust her behaviors and attitudes, which could affect the student's job retention (Dist. Ex. 8 at p. 15). The progress report also indicated that the student required constant prompting to greet her supervisor and socialize in an appropriate manner at work (id.).

In order for the student to develop positive work skills, the February 10, 2011 IEP included one long term goal and six corresponding short term objectives, to address the student's transition needs (Dist. Ex. 4 at p. 12). Consistent with the Cooke progress report, the short term objectives required the student to address the following skills: identify behaviors and attitudes that affect job retention, ask for help when needed, alter work performance based on constructive criticism, interact appropriately with coworkers, show improvement in work tasks, and participate in travel training (compare Dist. Ex. 4 at p. 12, with Dist. Ex. 8 at p. 15). The February 2011 IEP also included four long term adult outcomes, to address the student's needs in the area of transition (Dist. Ex. 4 at p. 18). Specifically, the long term adult outcomes contemplated that the student would attend a vocational training program, integrate into the community, live independently, and become employed with maximum support (id.). In addition, the transition services on the February 2011 IEP indicated that the student would: "receive academic and lifeskill instruction commensurate with her long-term objectives toward independence;" "learn about community agencies and their functions" and "participate in school sponsored internships;" "acquaint herself with agencies necessary for post-secondary opportunities;" "learn life skills, such as personal banking and household management" and "skills necessary for independent travel" (id.). Although required by State regulations, the transition plan neglected to designate the party responsible for implementing each transition

service and the applicable time frame for such implementation (i.e., whether the service would be provided in the fall, spring, or summer) (*id.*).

Based on the foregoing, while the district failed to conduct a vocational assessment and the transition plan developed by the January 2012 CSE contained some deficiencies, such inadequacies, by themselves, constitute technical defects that do not render the transition plan or the January 2012 IEP, as a whole, inappropriate (*M.Z. v. New York City Dep't of Educ.*, 2013 WL 1314992, at *6 [S.D.N.Y. Mar. 21, 2013] [observing that a deficient transition plan is a procedural flaw]; *K.C. v. Nazareth Area Sch. Dist.*, 806 F. Supp. 2d 806, 822-26 [E.D. Pa. 2011]; see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

B. Challenges to the Public School Site

Both the parents and the district assert that the IHO misstated the district's burden with respect to demonstrating that it would be able implement the student's February 2011 IEP at the assigned public school site.⁶ The parents interpret the IHO's decision to state that the district was not required to make such a showing; whereas, the district views the IHO's decision as stating the opposite. For the reasons discussed below the district prevails.

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. v. New York City Dep't of Educ.*, 2012 WL 4891748, at *14-*16 [S.D.N.Y. Oct. 16, 2012]; *Ganje v. Depew Union Free Sch. Dist.*, 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012] [finding the parents' pre-implementation arguments that the district would fail to adhere to the IEP were speculative and therefore misplaced], adopted at 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also *K.L. v. New York City Dep't of Educ.*, 2013 WL 3814669, at *6 [2d Cir. July 24, 2013]; *Reyes*, 2012 WL 6136493, at *7; *R.C. v. Byram Hills Sch. Dist.*, 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom a student would be placed in where the parent rejected an IEP before the student's classroom arrangements were even made"]; *Peter G. v. Chicago Pub. Sch. Dist. No. 299 Bd. of Educ.*, 2003 WL 121932, at *19 [N.D. Ill. Jan. 13, 2003] [noting that the court would not speculate regarding the success of the student's services where the parent removed student from the public school before the IEP services were implemented]).

⁶ A review of the IHO's decision indicates that the district was not aggrieved by the alternative findings regarding IEP implementation and, therefore, is not entitled to assert a cross-appeal on that issue (see IHO Decision at pp. 27-28; see also 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k], 279.4[b]; *J.F. v. New York City Dep't of Educ.*, 2012 WL 5984915 [S.D.N.Y. Nov. 27, 2012], reconsideration denied, 2013 WL 1803983, at *9-*10 [S.D.N.Y. Apr. 24, 2013] [noting that parties are entitled to appeal only to the extent that they are aggrieved]). However, as stated above, since the parents appeal the issue, it is duly addressed.

While several district courts have, since R.E. was decided, continued to wrestle with this difficult issue regarding challenges to the implementation of an IEP made before the student begins attending the school and taking services under the IEP (see D.C. v. New York City Dep't of Educ., 2013 WL 1234864, at *11-*16 [S.D.N.Y. Mar. 26, 2013] [holding that the district must establish that it can implement the student's IEP at the assigned school at the time the parent is required to determine whether to accept the IEP or unilaterally place the student]; B.R. v. New York City Dep't of Educ., 910 F.Supp.2d 670, 677-78 [S.D.N.Y. 2012] [same]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012] [holding that parents may prospectively challenge the adequacy of a "placement classroom" when a child has not enrolled in the school because districts are not permitted to assign a child to a public school that cannot satisfy the requirements of an IEP]), I now find it necessary to depart from those cases. Since these prospective implementation cases were decided in the district courts, the Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v New York City Dep't of Educ., (Region 4), 2013 WL 2158587, at *4 [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., 2013 WL 3814669, at *6 [rejecting as improper the parents claims related to how the proposed IEP would have been implemented]). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see 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]).

As explained more recently, "[t]he Second Circuit has been clear, however, that where a parent enrolls the child in a private placement before the time that the district would have been obligated to implement the IEP placement, the validity of proposed placement is to be judged on the face of the IEP, rather than from evidence introduced later concerning how the IEP might have been, or allegedly would have been, implemented" (A.M. v. New York City Dep't of Educ., 2013 WL 4056216, at *13 [S.D.N.Y. Aug. 9, 2013]; see R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; E.F. v New York City Dept. 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] [finding that the argument that the assigned school would not have been able to implement the IEP is "entirely speculative"]; see also N.K. v. New York City Dep't of Educ., 2013 WL 4436528, at *9 [S.D.N.Y. Aug. 13, 2013] [citing R.E. and rejecting challenges to placement in a specific classroom because "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan'"").

In view of the forgoing, the parents in this instance cannot prevail on claims that the district would have failed to implement the February 2011 IEP at the public school site because a retrospective analysis of how the district would have executed the student's February 2011 IEP at the assigned school is not an appropriate inquiry under the circumstances of this case (K.L., 2013 WL 3814669 at *6; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). In this case, these

issues are speculative insofar as the parents did not accept the February 2011 IEP containing the recommendations of the CSE or the programs offered by the district and instead chose to enroll the student in a private school of their choosing (see Parent Exs. B at p. 2; C at p. 2). 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 parent 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 School Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [stating that "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE]). Thus, under the facts presented in this case, the district is confined to defending its IEP in view of R.E. and the subsequent district court cases discussed above, and it would be inequitable to allow the parent to challenge the IEP services through information she acquired after the fact. Therefore, the district in these particular circumstances was not required to demonstrate that the services were in fact delivered to the student in conformity with her IEP at the public school site when the parent rejected it and unilaterally placed the their daughter at Cooke before the IEP went into effect.

VII. Conclusion

In summary, the hearing record supports the conclusion that the district offered the student a FAPE for the 2011-12 school year on the grounds set forth in the IHO's decision dated September 11, 2013, as well the additional grounds set forth in the body of this decision (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). It is therefore unnecessary to reach the issue of whether Cooke was an appropriate unilateral placement for the student or whether equitable considerations weighed in favor of the parents' request for relief, and the necessary inquiry is at an end (Burlington, 471 U.S. at 370; M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *12 [S.D.N.Y. Oct. 28, 2011]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [Sept. 2, 2011]).

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

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: Albany, New York
January 10, 2014



JUSTYN P. BATES
STATE REVIEW OFFICER