



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 14-034

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, Jessica C. Darpino, Esq., of counsel

Law Offices of Lauren A. Baum, PC, attorneys for respondent, Scott M. Cohen, Esq., of counsel

## DECISION

### I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) daughter and ordered it to reimburse the parent for eighty-percent of the cost of the her daughter's tuition at the Cooke School (Cooke) for the 2012-13 school year. The parent cross-appeals from that portion of the IHO's determination which reduced the award of tuition reimbursement based on equitable considerations. The appeal must be sustained in part. The cross-appeal must be sustained in part.

### 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 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]).<sup>1</sup>

### **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.<sup>2</sup> On May 24, 2012, the CSE convened for the student's annual review and to formulate the student's IEP for the 2012-13 school year (see generally Dist. Ex. 9). The parent informed the district of her disagreement with the recommendations contained in the May 2012 IEP as well as with the particular public school site to which the district assigned the student to attend for the 2012-13 school year (see Parent Exs. C; D; E; F). The parent also notified the district of her intent to unilaterally place the student at Cooke (see *id.*). By due process complaint notice dated May 10, 2013, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (see Parent Ex. A).

On July 24, 2013, an impartial hearing convened in this matter and concluded on January 15, 2014 after five nonconsecutive days of proceedings (Tr. pp. 1-683). By decision dated January 22, 2014, 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 because the equitable considerations weighed in favor of the district, reduced the parent's award of tuition reimbursement by 20 percent (see IHO Decision at pp. 24-37). As relief, the IHO ordered the district to reimburse the parents for the cost of the student's tuition at Cooke less 20 percent for the 2012-13 school year (*id.* at p. 37).

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

The following issues presented on appeal must be resolved on appeal in order to render a decision in this case:

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<sup>1</sup> The administrative procedures applicable to the review of disputes 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 are well established and described in broader detail in previous decisions issued by the Office of State Review (e.g., Application of the Dep't of Educ., 12-228; Application of the Dep't of Educ., Appeal No. 12-087; Application of a Student with a Disability, Appeal No. 12-165; Application of the Dep't of Educ., Appeal No. 09-092).

<sup>2</sup> Any additional facts necessary to the disposition of the parties' arguments will be set forth below as necessary to resolve of the issues presented in this appeal.

1. Whether the IHO erred in finding that the parent was afforded meaningful participation in the development of the May 2012 IEP;
2. Whether the CSE relied on adequate evaluative material when developing the student's May 2012 IEP;
3. Whether the May 2012 IEP accurately described the student's needs;
4. Whether the IHO erred in determining that the May 2012 IEP recommended sufficient supports to address the student's management needs;
5. Whether the IHO erred in finding the annual goals appropriate;
6. Whether the IHO erred in determining the May 2012 CSE improperly reduced the frequency of the student's related services;
7. Whether the IHO erred in determining that the 12:1+1 special class placement in a specialized school with a 1:1 paraprofessional was not an appropriate educational placement for the student in the least restrictive environment (LRE);
8. Whether the IHO erred in finding that the testimony regarding the particular public school site to which the district assigned the student was not relevant; and
9. Whether the IHO erred with respect to equitable considerations and directing relief.

## **V. Applicable Standards**

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

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

even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at \*10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at \*7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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

#### **1. Parental Participation**

Turning first to the parent's claim that she was denied meaningful participation in the development of the student's IEP for the 2012-13 school year, a review of the hearing record supports the IHO's determination that the parent fully participated in the May 2012 CSE meeting and expressed her concerns to the CSE (see IHO Decision at p. 29).

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. §1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8

NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation"]; Sch. For Language and Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at \*7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]; Paolella v. District of Columbia, 2006 WL 3697318, at \*1 [D.C. Cir. Dec. 6, 2006]).

Here, minutes from the May 2012 CSE meeting show that the parent commented on proposed IEP goals, identified math skills that she wanted the student to work on, distinguished the student's shyness from low self-esteem, expressed disappointment with the quality of the psychoeducational evaluation, requested a change to the social history, conveyed her belief that the student required one-on-one counseling services, and questioned the appropriateness of the proposed 12:1+1 special class placement (Dist. Ex. 10 at pp. 2, 5-9; Parent Ex. Q at pp. 1-2, 5). In their testimony, the Cooke special education coordinator and the parent confirmed the parent's participation in the CSE meeting, consistent with the CSE meeting minutes (Tr. pp. 442-47, 536-542, 544-60). Based on the above, while the district personnel may not have agreed with the parent's viewpoints, I find that the district did not deny the parent a meaningful opportunity to participate in the development of the IEP.<sup>3</sup>

## **2. Evaluative Information and Present Levels of Performance**

The parent argues that the IHO erred in failing to address her claim that the CSE failed to rely on adequate evaluative material and, consequently, the May 2012 IEP did not fully or accurately describe the student's needs. Further, the parent asserts that the IHO erred in finding that the May 2012 IEP included sufficient supports to address the student's management needs (see IHO Decision at pp. 28-29). However, a review of the hearing record shows that the May 2012 CSE had adequate information to identify the student's educational needs and, furthermore, that the student's needs were accurately detailed in the present levels of performance of the IEP.

Regulations require that a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent

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<sup>3</sup> The parent also alleges that the district failed to ensure that the student's teacher from Cooke, who participated in the May 2012 CSE meeting by phone (see Dist. Ex. 9 at p. 28), had a copy of the psychoeducational evaluation that was before the CSE. State regulations authorize a parent and district representative of the CSE to agree to use alternative means of CSE meeting participation, such as videoconferences and conference calls (8 NYCRR 200.4[d][4][i][d]). Such regulation, effective December 2005, does not incorporate the requirements for telephonic participation that were set forth in a June 1992 State Education Department field memo entitled, "The Use of Teleconferencing to Ensure Participation in Meetings to Develop the Individualized Education Program (I.E.P.)," which provided, among other things, that individuals who participate by telephone at CSE meetings must have access to the same material as other participants (see Application of a Student with a Disability, Appeal No. 10-002; Application of the Dep't of Educ., Appeal No. 09-078; Application of a Child with a Disability, Appeal No. 05-129). In determining whether there has been a denial of a FAPE due to a procedural violation, every member of a body such as a CSE need not read a document in order for the body to collectively consider the document (T.S. v. Board of Educ., 10 F.3d 87, 89 [2d Cir. 1993]); however, I remind the district that it should ensure that all members of the CSE have access to the documents discussed at a CSE meeting.

or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree, but must reevaluate at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things, the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at \*12 [S.D.N.Y. Nov. 9, 2011]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). Management needs for students with disabilities are defined as "the nature of and degree to which environmental modifications and human or material resources are required to enable the student to benefit from instruction" (8 NYCRR 200.1[ww][3][i][d]). A student's management needs shall be determined by factors which relate to the student's (a) academic achievement, functional performance and learning characteristics; (b) social development; and (c) physical development (id.).

In the instant case, the hearing record demonstrates that the May 2012 CSE considered the following documents when developing the student's IEP for the 2012-13 school year: an October 2011 classroom observation, a January 2012 psychoeducational evaluation, a February 2012 social history update, a February 2012 Level 1 vocational interview, and the student's March 2012 second trimester progress report from Cooke (Tr. pp. 443-45, 448; Parent Ex. Q at pp. 1, 5; see Tr. pp. 51-53; Dist. Exs. 4-7). In addition, the parent and the special education coordinator from Cooke attended the entire CSE meeting and provided additional information

regarding the student's educational performance (see Tr. pp. 55-56, 442-43, 536-42, 544-60; Dist. Exs. 9; 10).<sup>4</sup> Also, the student's teacher from Cooke, who instructed her for English language arts (ELA) and history, participated in the CSE meeting by telephone and reported on the student's work in ELA (Tr. p. 444; Dist. Ex. 9 at p. 28). A review of the May 2012 IEP and CSE meeting notes reflects that the May 2012 CSE discussed the student's present levels of performance as well as her progress at Cooke during the 2011-12 school year (Tr. pp. 46- 47; Dist. Exs. 10 at pp. 1, 6-7; Parent Ex. Q at pp. 1-2). Although the parent asserts that the CSE did not consider a social history or classroom observation of the student, the testimony and meeting notes of the Cooke special education coordinator indicate that that both were referenced, if only briefly, at the May 2012 CSE meeting (Tr. pp. 444-45; Parent Ex. Q at pp. 1, 5). The parent acknowledged during testimony that the observation was referred to; however, she did not recall the committee discussing it "at any length" (Tr. p. 542).

The classroom observation, conducted by the district school psychologist, took place in the student's classroom at Cooke on October 25, 2011 (Dist. Ex. 4). The resultant observation report noted that the student was observed in a class of ten students, staffed by two teachers, one teacher assistant, and the student's 1:1 paraprofessional (*id.*).<sup>5</sup> According to the report, the student was initially observed in a travel training lesson, during which she sat quietly at her desk and followed along with instruction (*id.*). Although the student raised her hand in response to a question—"Who has a wallet?"—she did not raise her hand to respond to any additional questions posed during the travel training lesson (*id.*). The observation report indicated that the student did not socialize with either of the other two students seated at her table and that she presented as a passive learner, who required prompts and guidance to remain on task (*id.*). The observation report reflected that, during ELA instruction, the student appeared to follow along during a teacher read aloud/worksheet activity and also appeared to comprehend a summary of the previous chapter provided by other students (*id.*). According to the observation report, the student did not need much assistance to maintain her place in the reading material as she was able to return to the proper page for review of comprehension questions (*id.*). However, the report noted that the student's 1:1 paraprofessional helped the student keep her place in the text and on the worksheet and that the student took slightly longer than her classmates to complete the worksheet (*id.*). During social studies instruction, the student required verbal prompting to recall an historical figure's name, but the student was able to raise her hand and showed three fingers when the class was asked, "How many branches of government?" (*id.*). According to the classroom observation report, the student's teacher confirmed that the student's performance during the observation was "typical" (*id.*).

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<sup>4</sup> Testimony by the district special education teacher assigned to the May 2012 CSE indicated that the special education coordinator from Cooke was "always here" (at CSE meetings) and was "very compliant" in providing information to the CSE (Tr. pp. 53, 55). The district special education teacher also noted that Cooke was "great" as the private school and was "absolutely" forthcoming in providing the CSE with information about its students (Tr. p. 50).

<sup>5</sup> The October 2011 classroom observation report indicated that the travel training class was usually comprised of 12 students, but two students were absent the day the observation was conducted (Dist. Ex. 4). The classroom observation report indicated that the student's ELA teacher remained in the classroom while the travel training teacher instructed the class (*id.*).

In addition to the classroom observation, the May 2012 CSE also considered a January 2012 psychoeducational evaluation conducted as part of the student's mandated three year reevaluation (Dist. Ex. 5 at p. 1).<sup>6</sup> The psychoeducational evaluation included behavioral observations of the student, as well as an assessment of her cognitive abilities, academic achievement, grapho-motor functioning, and social/emotional development (see id. at pp. 1-3). The evaluating psychologist characterized the student's demeanor as "somewhat reserved," but reported that she maintained good eye contact (id. at p. 2). The evaluator noted that the student appeared well-motivated and cooperative throughout the evaluation and that she responded well to praise and encouragement (id.). According to the evaluator, the student displayed "relatively adequate" executive functioning for her age, as she sat in her seat appropriately and interacted adequately with the test materials and spatial environment (id.). The evaluator noted that the student did not display significant attending difficulties, but added that she did not check her work for accuracy (id.). Administration of the Differential Ability Scales-Second Edition (DAS-II) to the student yielded standard scores of: 41 for the verbal core cluster/composite index; 62 for the nonverbal cluster/composite index; 58 for the spatial cluster/composite index; and a general conceptual ability (GCA) score of 51 (id. at pp. 4-5). All of the reported scores fell at or below the first percentile (id. at p. 4). The evaluator stated that, overall, the student scored within the "[v]ery [l]ow range" for her age, cognitively (id. at p. 3). He noted significant intra-test scatter and reported that the student displayed relative strength in the area of visual-perceptual reasoning and that her weakest area was in the verbal domain (id. at pp. 6, 18).

With respect to academic achievement, administration of the "Woodcock-Johnson" to the student yielded standard scores of 64 in letter-word identification; 67 in spelling; 43 in quantitative concepts; 51 in writing fluency; 53 in applied problems; and 30 in passage comprehension (Dist. Ex. 5 at p. 6).<sup>7</sup> The student performed at or below the first percentile on all of the administered subtests and the evaluator concluded that the student demonstrated major deficits in all academic areas with relative strengths in reading decoding and spelling, and a relative deficit in reading comprehension (id.). With regard to the student's grapho-motor functioning, administration of formal testing yielded scores in the deficient range; however, the evaluator reported that the student "held her pencil with an adequate grip" (see id. at p. 3).

As part of his psychoeducational evaluation, the evaluator also provided an assessment of the student's social/emotional functioning. According to the evaluator, the student reported that she had one friend in school and had various personal interests, which included playing softball and going to the movies (Dist. Ex. 5 at p. 3). The evaluator noted that the student expressed her desire to become a baby-sitter or a chef as a career goal (id. at p. 2).

Next, the May 2102 CSE considered the February 2012 social history report (Dist. Ex. 6). The social history report indicated that the student loved music and, prior to a knee injury, enjoyed dance and movement (id. at p. 1). The report described the student as "imaginative" and

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<sup>6</sup> The January 2012 psychoeducational evaluation report contains duplicate copies of most pages comprising the exhibit (see Dist. Ex. 5).

<sup>7</sup> Although the January 2012 psychoeducational evaluation report refers to the Woodcock-Johnson III Tests of Cognitive Abilities (WJ-III COG), the subtests administered reflect subtests included in the Woodcock-Johnson III Tests of Achievement (W-J III ACH) (see Dist. Ex. 5 at p. 20).

"creative" and indicated that she put on her own "shows," during which she functioned as a director, acted in all parts, and provided narration (id.). The report further indicated that the student had friends in school but was most social on a 1:1 basis (id.). According to the social history report, the student experienced some anxiety related to her seizures, academic functioning, and socialization (id.). The student was independent in most activities of daily living, but hand weakness hampered her ability to complete some household chores independently (id.).

The CSE also considered the results of a February 2012 vocational interview completed by the parent (Dist. Ex. 7). According to the student's mother, the student's interests included theater and working with children and her vocational needs included a vocational school or training (id. at p. 1). The parent opined that the student required instruction in travel training, financial management, consumer skills, safety and problem solving (id. at p. 3).

Lastly, the May 2012 CSE considered the student's March 2012 second trimester progress report from Cooke when developing her IEP for the 2012-13 school year (Dist. Ex. 8). The Cooke progress report provided a narrative overview of the content of the student's academic courses and related service therapies (id.). In addition, the report included goals for each course, along with proficiency ratings and instructor comments (id.). Notably, the student's ELA teacher indicated that the student continued to be engaged as a reader and was practicing reading comprehension strategies (id. at p. 3). According to the teacher, the student was able to identify story elements and with support could state the main idea of a text (id.). In response to a text read aloud to the whole class, the student was able to identify opinions and infer feelings (id.). With respect to writing, the teacher reported that the student continued to improve her ability to write multiple sentences on one topic (id.). In mathematics, the teacher described the student as "generally successful" during the geometry and graphing unit (id. at p. 4). The progress report indicated that the student "showed an understanding at her instructional level with support" on goals related to problem solving, recognizing geometric shapes in the environment, and collecting and recording data, among other things (id.). In science, the student's teacher reported that the student showed a deepening understanding of the connection between plants and their environment, as evidenced through her scientific drawings, written work and one-on-one conversations (id. at p. 7). With respect to life skills, the progress report indicated that, as the trimester progressed, the student began to make a social connection with another student in the class (id. at p. 14). The student's instructors noted that, at the beginning of the leisure unit, the student required numerous prompts and consistent support from staff to seek interaction with her peers (id.). They also noted that, at the end of the unit, the student was less reliant on staff and more responsive to peers' invitations to join leisure activities (id.). The student's language skills teacher reported that the student followed multi-step directions and asked and answered relevant "wh" questions during small group discussions (id.). According to the teacher, the student demonstrated improved accuracy and rate during script reading and her comprehension of short scripts had improved (id. at p. 17). In occupational therapy (OT), the student's reported proficiency levels showed that she had difficulty with handgrip strength, demonstrating proper pressure gradation when using a pencil and when using a safe, functional grasp on kitchen utensils (id. at p. 18). The physical therapy (PT) progress note indicated that the student continued to work on the development of gross motor skills including body awareness, motor planning, strength and endurance (id. at p. 21). While some of the student's teachers reported

that she was an active participant in class, others noted that the student's participation was minimal and she required prompting to engage in classroom tasks and activities (id. at pp. 3, 4, 7, 9, 12, 14, 17).

In addition to the evaluations and progress report considered by the May 2012 CSE, minutes from the CSE meeting show that there was ample discussion regarding the student's then current educational abilities and needs (see Dist. Ex. 10). The district special education teacher assigned to the May 2012 CSE reported that she took notes during the CSE meeting (Tr. p. 47). The notes reflect discussion of the student's test scores, learning style, academic skills, social/emotional development, management needs and annual goals (Dist. Ex. 10). Similarly, notes created by Cooke's special education coordinator reflect CSE members' discussion of the student's evaluation results, present levels of performance, management needs, and annual goals (Parent Ex. Q; see Tr. p. 273).

Moreover, a review of the hearing record shows that the present levels of performance in the May 2012 IEP accurately detail the information considered by the CSE. Specifically, the present levels of performance include the scores from recently administered evaluations, as well as a narrative description of the student based on documents considered by the CSE and the discussion that took place during the CSE meeting (compare Dist. Ex. 9 at pp. 1-4, with Dist. Exs. 4-8; 10; Parent Ex. Q). Thus, contrary to the parent's assertions, the hearing record shows that the May 2012 CSE had sufficient evaluative information to develop an IEP for the student for the 2012-13 school year and that the present levels of performance adequately described the student's educational needs. To the extent that the parent argues that the IEP does not describe the student's medical needs, I find the hearing record does not support the parent's claim. Here, the IEP notes that the student had received a diagnosis of Down Syndrome, and had a seizure disorder and hormonal imbalance (Dist. Ex. 9 at p. 3). In addition, the IEP notes that the student required surgery for a dislocated knee, wore a knee brace, and required the use of an elevator to prevent fatigue (Dist. Ex. 9 at pp. 3-4; see Tr. pp. 104-06). The IEP also states that the student's hearing and vision were within in normal limits (Dist. Ex. 9 at p. 3).

As to the student's management needs, the hearing record supports the IHO's determination that the May 2012 IEP provided adequate resources to address the student's needs (IHO Decision at pp. 28-29). Notably, the May 2012 CSE recommended the following environmental and human or material resources to address the student's management needs: a 1:1 paraprofessional for safety; visual and verbal cues; preferential seating; directions presented in simple, clear language; use of graphic organizers: editing templates and checklists for instruction and individual task completion: modified instructional materials; multisensory instruction; review of key concepts; resting foot board; use of elevator; calculator; opportunities for generalization of skills; use of social scripts; opportunities to practice language skills in a variety of contexts; cueing and prompts; use of coping strategies to address feelings of anxiousness; prompts to answer and initiate conversations; and a small, highly structured environment with significant educational management (Dist. Ex. 9 at p. 4). The recommended resources were generally consistent with those provided to the student during the 2011-12 school year at Cooke, in which she reportedly made progress, and also consistent with the student's needs as discussed by the May 2012 CSE (compare Dist. Ex. 9 at p. 4 with Dist. Exs. 8; 10; Parent Ex. Q at p. 2).

## **B. May 2012 IEP**

### **1. Annual Goals**

The hearing record also supports the IHO's finding that the annual goals and short-term objectives recommended by the May 2012 CSE were appropriate (see IHO Decision at p. 28). An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

Here, a review of the recommended May 2012 IEP shows that it includes approximately 27 annual goals and 170 short-term objectives designed to address the student's needs (Dist. Ex. 9 at pp. 5-20). Each of the annual goals had the same criteria for mastery "75% accuracy" and indicated that mastery would be measured using teacher made materials, class activities, portfolios, teacher/provider observations and checklists, among other things (*id.*). The annual goals and short-term objectives addressed the student's needs to: increase awareness of her learning needs; develop self-advocacy skills; increase executive functioning skills; practice work preparedness skills; increase travel readiness skills; practice life skills such as using a library, budgeting, preparing a snack and performing household tasks; plan leisure activities; improve academic skills in reading, writing and math; improve social skills and emotional awareness; develop language skills; improve mobility and motor planning; increase endurance and range of motion; and improve fine motor, sensory processing and ADL skills (*id.*). Although the parent asserts that the goals were copied from the Cooke progress report and written for the 2011-12 school year, the CSE meeting minutes indicate that many of the IEP goals were reviewed with the parent, who agreed with the goals and in some instances recommended objectives for the student to work on, which were included in the IEP (Dist. Ex. 10 at pp. 1-7; see Dist. Ex. 9 at pp. 19-20). In addition, the meeting notes created by the Cooke special education coordinator indicate that some of the IEP goals were taken from the Cooke progress report, while others were based on teacher and clinician notes (Parent Ex. Q at p. 3). The parent also asserts that the goals were written to be measured using the Cooke rubric; however, I find no reason why the student's progress toward the goals and objectives cannot be effectively measured using a percentage of accuracy as opposed to the rubric preferred by Cooke. Lastly, the parent asserts that the goals were written to be implemented in a more supportive class than that recommended by the May 2012 CSE. I find this assertion unpersuasive as the student was participating in a 12:1+1 special class at Cooke for numerous subjects (Tr. pp. 67-70, 455). Based on the above, I find the recommended annual goals and short-term objectives recommended by the May 2012 CSE were appropriate.

## 2. Related Services

Turning next to the CSE's recommendation to reduce the frequency of the student's counseling and PT services, for the reasons that follow, the evidence in the hearing record demonstrates that the IHO erred in finding that the level of services recommended by the May 2012 CSE was inappropriate for the student (see IHO Decision at pp. 28, 30-31). While the student may have benefitted from additional related services, the district's recommendation to reduce the frequency related services does not provide a basis for finding a denial of FAPE in this instance.

With respect to the student's social/emotional needs, the May 2012 IEP indicated that the student needed to increase her social skills, especially with peers; continue to work on overcoming shyness and build confidence, and develop strategies to cope with anxiety (Dist. Ex. 9 at pp. 3-4).<sup>8</sup> During the May 2012 CSE meeting, the district recommended reducing the number of counseling sessions for the 2012-13 school year from two (provided by Cooke during the 2011-12 school year) to one (Tr. p. 109). According to the district special education teacher, the reduction was justified because the speech-language pathologist could address the student's needs with respect to emotional expression and self-confidence (Tr. pp. 110-11). In addition, the district special education teacher expressed the need to balance the number of pull-out related services the student received with her need to remain in class for instruction (see Tr. pp. 258-59). The teacher confirmed that the Cooke special education coordinator, who reported on the student's counseling needs, did not recommend a reduction in the student's counseling services (Tr. pp. 230-31; see Tr. pp. 459). CSE meeting minutes indicate that both the student's mother and the Cooke special education coordinator believed that the student could benefit from one-to-one counseling (Tr. pp. 249-50; Dist. Ex. 10 at p. 8; Parent Ex. Q at p. 2). The Cooke special education coordinator offered to provide the CSE with additional information supporting the student's need for both group and individual counseling and reported that she did so after the meeting, but did not receive a response from the district (Tr. p. 459).<sup>9</sup> The student's mother confirmed that there was a discussion regarding the student's counseling needs at the May 2012 CSE meeting and reported that the district representative did not want to grant individual counseling to the student (Tr. p. 537). The parent testified she believed "very strongly" that, because the student was suffering from anxiety and a lack of confidence, she needed to talk with someone one-on-one (id.; see Parent Ex. Q at p. 2). The parent opined that group counseling was not enough and that the student needed someone to guide her individually (Tr. pp. 537-38). The special education coordinator's notes from the CSE meeting clarify that the student had not

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<sup>8</sup> The parent testified that she felt that the student needed to talk to someone individually because the student suffered from anxiety and a lack of self-confidence (Tr. pp. 537-38). As noted above, the May 2012 IEP adequately addressed the student's needs related to anxiety and self-confidence (Dist. Ex. 9 at pp. 3-4, 14-16).

<sup>9</sup> The hearing record contains a June 7, 2012 e-mail from the Cooke special education coordinator to the district representative regarding increasing the student's PT and counseling frequencies (Parent Ex. P). Although the special education coordinator references the student's "Trimester 3 progress report" and states "thought this may be useful for reference" the progress report is not attached to the e-mail or otherwise entered into evidence (Parent Ex. P).

received a diagnosis of anxiety but, rather, that the student experienced feelings of anxiousness (Parent Ex. Q at p. 2).

A review of the student's IEP shows that it contains numerous annual goals and short-term objectives, in addition to counseling goals and objectives, that address the student's social/emotional needs and target the student's self-awareness, advocacy skills, and pragmatic language development (Dist. Ex. 9 at pp. 5, 6, 15). In addition to the small group counseling session, the May 2012 CSE recommended the student receive one 45-minute session of individual speech-language therapy and two 45-minute sessions of small group (3:1) speech-language therapy per week (*id.* at p. 20). The IEP also identifies the student's need to use coping strategies to address feelings of anxiousness (*id.* at p. 4). Based upon the student's needs, these supports were adequate and appropriate for the student.

With respect to PT, the hearing record shows that the May 2012 CSE recommendation for two 45-minute individual PT sessions per week was appropriate to address the student's school-based mobility needs (Dist. Ex. 9 at p. 20). Initially, the May 2012 IEP indicated that the student was independently mobile (*id.* at p. 4). At the time of the CSE meeting, the student received PT that targeted her deficits in motor planning, coordination, and "processing" (*id.* at p. 3). The May 2012 IEP also noted the student needed surgery for a knee dislocation that resulted in balance deficits, gait deviations, impaired stair negotiation and quadriceps weakness (*id.*). The IEP indicated the student wore a knee brace, but also that she was able to walk up to six city blocks, negotiate curbs and stairs with supervision, and was able to ascend and descend two to three flight stairs (*id.*). However, the student also needed access to an elevator to prevent fatigue (*id.* at pp. 3-4). A review of the PT annual goals and short-term objectives included in the May 2012 IEP reveal recommendations that the student work on balance, body awareness, motor planning, and mobility, endurance, range of motion and strength, with assistance and guidance from the PT related service provider (*id.* at pp. 17-18). Testimony by the district special education teacher indicated the purpose of the student's school-based PT was to address her mobility, motor planning, and coordination (Tr. pp. 117-18). In addition to PT, the May 2012 CSE recommended a full-time 1:1 orientation and mobility paraprofessional to support the student in light of her difficulties with balance and unanticipated seizures (Dist. Ex. 9 at p. 21; *see* Tr. pp. 120-21). The student's IEP also indicated that she required adapted physical education (Dist. Ex. 9 at p. 24). The May 2012 IEP addressed most if not all of the PT areas that were addressed by the student's physical therapist at Cooke during the 2011-12 school year. Notably the CSE's recommendation for 1:1 paraprofessional for mobility and orientation addressed the student's need for supervision during physical transitions as well as her physical needs including strength, balance, and endurance on stairs (Tr. pp. 506-07; Dist. Ex. 9 at pp. 17-18, 21).

While the student likely benefited from the related services provided at Cooke and while the parent may have preferred the greater frequency thereof, districts are not required to replicate the identical setting or services used in private schools (*see, e.g., Z.D. v. Niskayuna Cent. Sch. Dist.*, 2009 WL 1748794, at \*6 [N.D.N.Y. June 19, 2009]; *Watson v. Kingston City Sch. Dist.*, 325 F.Supp.2d 141, 145 [N.D.N.Y. 2004]). After reviewing the evidence I find, that the need to balance related service frequencies with class instruction presents legitimate educational concerns about which reasonable minds could differ and that the May 2012 CSE overall

prescribed related services to meet the student's areas of need and, further, that there is no evidence in the hearing record that leads me to the conclusion that the student was unlikely to experience progress and attain merely trivial advancement with the type and frequency of related services recommended and, therefore, the distinction in related services delivery did not result in a denial of a FAPE to the student.

### **3. 12:1+1 Special Class Placement and LRE Considerations**

The district asserts that the IHO erred in determining that the 12:1+1 special class placement in a specialized school with a 1:1 paraprofessional was not an appropriate educational placement for the student in the LRE (see IHO Decision at pp. 27-28, 30). Review of the IHO's decision reveals that his decision rested largely on LRE considerations and not on the student-to-adult ratio of the recommended special class placement. The evidence in the hearing record supports a finding that the 12:1+1 special class with a 1:1 paraprofessional offered the student sufficient support to address her needs related to academics, social/emotional functioning, and grapho-motor and mobility skills (Dist. Ex. 9 at pp. 1-4, 25-26). However, the recommended 12:1+1 special class program in a specialized school was too restrictive of an environment for the student.

The IDEA requires that a student's recommended program must be provided in the 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 111; Gagliardo, 489 F.3d at 105; Walczak, 142 F.3d at 132; Patskin, 583 F. Supp. 2d at 428). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; M.W. v. N.Y.C. Dep't of Educ., 725 F.3d 131, 144 [2d Cir. 2013]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. N. Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson, 325 F. Supp. 2d at 144; Mavis v. Sobol, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). The placement of an individual student in the LRE shall "(1) provide the special education needed by the student; (2) provide for education of the student to the maximum extent appropriate to the needs of the student with other students who do not have disabilities; and (3) be as close as possible to the student's home" (8 NYCRR 200.1[cc]; 8 NYCRR 200.4[d][4][ii][b]; see 34 CFR 300.116). Consideration is also given to any potential harmful effect on students or on the quality of services that they need (34 CFR 300.116[d]; 8 NYCRR 200.4[d][4][ii][c]). Federal and State regulations also require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 CFR 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and the continuum makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 CFR 300.115[b]).

To apply the principles described above, the Second Circuit adopted a two-pronged test for determining whether an IEP places a student in the LRE, considering (1) whether education in the general classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given student, and, if not, (2) whether the school has mainstreamed the student to the maximum extent appropriate (Newington, 546 F.3d at 119-20; see M.W., 725 F.3d at 143-44; J.S., 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048-50 [5th Cir. 1989]). A determination regarding the first prong, (whether a student with a disability can be educated satisfactorily in a general education class with supplemental aids and services), is made through an examination of a non-exhaustive list of factors, including, but not limited to "(1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class" (Newington, 546 F.3d at 120; see M.W., 725 F.3d at 144; J.S., 586 F. Supp. 2d at 82; Patskin, 583 F. Supp. 2d at 430; see also Oberti, 995 F.2d at 1217-18; Daniel R.R., 874 F.2d at 1048-50). If, after examining the factors under the first prong, it is determined that the district was justified in removing the student from the general education classroom and placing the student in a special class, the second prong requires consideration of whether the district has included the student in school programs with nondisabled students to the maximum extent appropriate (Newington, 546 F.3d at 120).

In fashioning a test to assess a student's placement in the LRE, the Court acknowledged that the IDEA's "strong preference" for educating students with disabilities alongside their nondisabled peers "must be weighed against the importance of providing an appropriate education" to students with disabilities (Newington, 546 F.3d at 119, citing Walczak, 142 F.3d at 122, and Briggs v. Bd. of Educ. of Conn., 882 F.2d 688, 692 [2d Cir. 1989]; see Lachman v. Ill. State Bd. of Educ., 852 F.2d 290, 295 [7th Cir. 1988]).<sup>10</sup> In recognizing the tension created between the IDEA's goal of "providing an education suited to a student's particular needs and its goal of educating that student with his non-disabled peers as much as circumstances allow," the Court explained that the inquiry must be fact specific, individualized, and on a case-by-case analysis regarding whether both goals have been "optimally accommodated under particular circumstances" (Newington, 546 F.3d at 119-20, citing Daniel R.R., 874 F.2d at 1044).<sup>11</sup>

The parties do not articulate any meaningful arguments relating to the first prong of the Newington test and the hearing record supports the May 2012 CSE's recommendation to place the student in a special class, as opposed to a general education class setting. However, turning to the second prong of the Newington LRE test—whether the district mainstreamed the student

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<sup>10</sup> In 1994, the Office of Special Education (OSEP) for the United States Department of Education issued a policy memorandum to provide guidance regarding the IDEA's LRE requirement, which opined that the "overriding rule in placement [was] that each student's placement must be individually-determined based on the individual student's abilities and needs" (OSEP Memorandum 95-9, 21 IDELR 1152 [Nov. 23, 1994]; see Letter to Vergason, 17 IDELR 471 [OSERS 1991] [emphasizing that a student's "educational placement . . . must be determined by the contents of that child's IEP"]; Letter to Lott, 16 IDELR 84 [OSEP 1989] [same]).

<sup>11</sup> The Second Circuit left open the question of whether costs should be taken into account as one of the relevant factors in the first prong of the LRE analysis (Newington, 546 F.3d at 120 n.4).

to the maximum extent appropriate—review of the hearing record shows that district failed to include the student in school programs with nondisabled students to the maximum extent appropriate.

The hearing record shows that the student was receiving integrated co-teaching services (ICT) in a general education class placement prior to transferring to Cooke in September 2011 (see Tr. p. 238; Dist. Exs. 6 at p. 1; 9 at p. 1). Further, with respect to participation with students without disabilities, the student's May 2012 IEP indicates that the student would "participate in extracurricular and nonacademic activities" (Dist. Ex. 9 at p. 24). Yet, the May 2012 CSE included no indication as to how the student could so participate in such activities with nondisabled peers given the recommendation for a specialized school. While the IEP indicates that the CSE considered placing the student in a special class in a community school setting, the stated reason for rejecting this option was that a 10-month program would not provide the student with the support she required (Dist. Ex. 9 at . 27).<sup>12</sup> The student's purported need for an extended school year is not an appropriate basis for the specialized school placement recommendation because, even if the student required a 12-month school year program, the IDEA's LRE requirement applies in the same way to the summer portion of the school year (T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 163 [2d Cir. 2014]).

For the reasons stated herein, I find that the evidence supports the IHO's ultimate determination that the August 2012 IEP was deficient and that the district failed to offer the student a FAPE in the LRE.

### **C. Challenges to the Assigned Public School Site**

The parent claims that the IHO erred in finding evidence relating to the assigned public school site irrelevant based on his determination that any unavailability of a seat was the consequence of the parent's delay in visiting the school (IHO Decision at p. 36). For the reasons set forth in other State-level administrative decisions resolving similar disputes (e.g., Application of the Dep't of Educ., Appeal No. 14-025; Application of the Dep't of Educ., Appeal No. 12-090; Application of a Student with a Disability, Appeal No. 13-237), I find the parent's assertions regarding the appropriateness of the assigned public school site or the school's ability to implement the student's May 2012 IEP to be without merit. The parent's claims turn on how the May 2012 IEP would or would not have been implemented. Because it is undisputed that the student did not attend the district's assigned public school site (see Parent Exs. C; D; E; F; K), the parent cannot prevail on these speculative claims (R.E., 694 F.3d at 186-88; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9, 2014 WL 53264 [2d Cir. Jan. 8, 2014] [citing R.E. and explaining that "[s]peculation that [a] school district will not adequately adhere to [an] IEP is not an appropriate basis for unilateral placement" and 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'"]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL 3814669 [2d Cir. July 24, 2013]; P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141, 2013 WL 2158587 [2d Cir. May 21, 2013]; see also

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<sup>12</sup> The district's rationale in this regard is particularly questionable given evidence that the CSE was aware that the student would not have attended the summer portion of the 12-month school year since she generally spent part of the summer in another state with her father (Dist. Ex. 6 at p. 1; see Tr. pp. 561-62).

C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. Mar. 4, 2014]; B.P. v. New York City Dep't of Educ., 2014 WL 6808130, at \*12 [S.D.N.Y. Dec. 3, 2014]; C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at \*13 [S.D.N.Y. Dec. 23, 2013]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012])

#### **D. Equitable Considerations**

Having determined that the district failed to offer the student a FAPE in the LRE for the 2012-13 school year and, given that the district did not appeal the IHO's finding that Cooke constituted an appropriate unilateral placement, I now turn to the final criterion for a reimbursement award—equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185; M.C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 362-64 [S.D.N.Y. 2009]).

Here, the IHO conducted a cogent analysis and reached a factual conclusion that the parent never intended to send the student to school other than Cooke; therefore, the IHO concluded that equitable considerations warranted a reduction in tuition reimbursement (IHO Dec. at pp. 34-35, 37). However, at the time of his decision, the IHO did not have the benefit of a recent decision from the Second Circuit, holding that parents' "pursuit of a private placement [i]s not a basis for denying the[m] tuition reimbursement, even assuming . . . that the parents never intended to keep [the student] in public school" (C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 840 [2d Cir. 2014]). Thus, notwithstanding the IHO's supported factual conclusions that the parent never intended to enroll the student in the public school, the IHO's reduction of the tuition reimbursement award must be reversed.

#### **E. Relief**

The district argues that the parent provided no evidence regarding the financial status of the student's father or his ability or inability to pay the tuition and, therefore, that the parent was not entitled to direct funding of the student's tuition at Cooke.

With regard to fashioning equitable relief, courts have addressed determined that it is appropriate under the IDEA to order a school district to make retroactive tuition payment directly to a private school where: (1) a student with disabilities has been denied a FAPE; (2) the student has been enrolled in an appropriate private school; and (3) the equities favor an award of the costs of private school tuition; but (4) the parents, due to a lack of financial resources, have not made tuition payments but are legally obligated to do so (Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 406 [S.D.N.Y. 2011] see E.M. v. New York City Dep't of

Educ., 758 F.3d 442, 453 [2d Cir. 2014] [noting that "the broad spectrum of equitable relief contemplated [by] the IDEA encompasses, in appropriate circumstances, a direct-payment remedy" [internal quotation marks omitted]).

Here, notwithstanding information that the student spent at least a significant portion of the summer with her father out-of-state (see Tr. pp. 561-62; Dist. Ex. 6 at p. 1), the hearing record does not offer any information regarding the father's income, financial resources, or whether the father is responsible for and is supporting the student in this case. In short, when a one parent seeks direct funding due to a lack of financial resources, there should be at least some minimal testimonial or other evidence showing why the other parent's financial resources, or lack thereof, should or should not be considered before determining that the student's placement should be directly funded at public expense due to the parents' financial circumstances. Under these circumstances, the district is correct that the parent has not established that there were insufficient financial resources to "front" the student's tuition costs for the 2011-12 school year (Mr. and Mrs. A., 769 F. Supp. at 428). Accordingly, the parent is awarded relief in the form of reimbursement of the costs of the student's tuition at the Cooke upon proof of payment.

## **VII. Conclusion**

In summary, the evidence in the hearing record supports the IHO's determination that the district failed to offer the student a FAPE for the 2012-13 school year in the LRE, the IHO's determination that Cooke constituted an appropriate unilateral placement for the student is final and binding on the parties, and equitable considerations weigh in favor of the parent's request for relief. I have considered the parties' remaining contentions and find them to be without merit.

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that the IHO's decision dated January 22, 2014, is modified by reversing that portion which reduced the amount of tuition reimbursement based on equitable considerations and which ordered the district to pay the costs of the student's tuition directly to Cooke; and

**IT IS FURTHER ORDERED** that, upon proof of payment, the district shall reimburse the parent for the full costs of the student's tuition and the 1:1 paraprofessional at Cooke for the 2012-13 school year.

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

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