



The University of the State of New York

The State Education Department

State Review Officer

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No. 14-170

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 [REDACTED]

Appearances:

Law Offices of Lauren A. Baum, P.C., attorneys for petitioners, Carolyn A. Weisman, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Gail M. Eckstein, Esq., of counsel

DECISION

I. Introduction

This appeal, which is related to a previous proceeding that was remanded by an SRO for further administrative action (see Application of a Student with a Disability, Appeal No. 14-039), 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 a decision of an impartial hearing officer (IHO) which determined that respondent (district) had provided their daughter with a free appropriate public education (FAPE) for the 2011-12 and 2012-13 school years.¹ The appeal must be dismissed.

¹ Because this matter comes before me after having been remanded for additional administrative proceedings, there are two IHO decisions in the record: a "corrected" decision dated January 28, 2014 (which was "corrected" on January 29, 2014) and a decision issued post-remand on October 3, 2014. It is this latter decision – which essentially incorporates the IHO's findings from her first decision and addresses additional issues which were considered on remand – which is being reviewed herein. Unless otherwise specified, therefore, all references and citations to an "IHO Decision" are to the October 3, 2014 decision.

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]-[i]).

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

Petitioners are the parents of a student with a disability (student) who, at the time that the IEPs at issue were developed, was 18 (2011-12) and 19 (2012-13) years-old, respectively (Dist. Exs. 5 at p. 1, 3, 17 at pp. 1, 20-21; Tr. pp. 14, 680). The record reflects that the student has been diagnosed with both down syndrome and scoliosis (curvature of the spine), is visually and hearing impaired, and presents with significant academic and cognitive delays (Dist. Exs. 5 at pp. 3-4, 8 at pp. 2-7, 11 at pp. 2-18, 17 at pp. 1-4; Tr. p 376). According to the student's father, the student began receiving special education services when she was three months old, and has generally been educated at the Cooke Center for Learning and Development ("Cooke") since she was five (Tr. pp. 376-379, 433). During the school years at issue, the student attended the Cooke Center Academy (Cooke Academy) which the record reflects is Cooke's high school program (Tr. pp. 379-80, 653). The student has attended Cooke Academy since 2007 (id. at p. 653).

On January 31, 2011, a CSE convened to develop the student's IEP for the 2011-12 school year (Dist. Exs. 5 at p. 1, 15 at p. 1; Parent Ex. G at p. 1; Tr. pp 238, 254, 654). Present at this meeting was the student's father, a district representative who also attended as the special education teacher assigned to the CSE (district representative), a school psychologist from the district, a hearing education related service provider, and various individuals from Cooke Academy, including a student support services representative (who, at the time of the impartial hearing, identified herself as a consulting teacher at Cooke) and, by telephone, the assistant head of school and the student's literacy and math teachers (Dist. Ex. 5 at p. 2; Tr. pp. 237-39, 380, 650, 654, 656).² Finding that that the student remained eligible for special education and related services as a student with mental retardation,³ the January 2011 CSE recommended a 12-month school year program in a 12:1+1 special class (id. at pp. 1, 13). In addition, the January 2011 IEP provided the student with various management supports (id. at pp. 3, 5-6) and recommended, among other things, that the student receive adaptive physical education (id. at p. 6) and related services of speech-language therapy (three times per week in a group of 3), counseling (two times per week in a group of 5), individual occupational theory (OT) two times per week, individual physical therapy (PT) one time per week, and individual hearing educational services two times per week.

By a Final Notice of Recommendation (FNR) dated May 31, 2011, the district summarized the special education and related services recommended in the January 2011 IEP and identified the public school site to which the student was assigned for the 2011-12 school year (Parent Ex. D at p. 2).⁴ On June 16, 2011, the student's father visited this school (Parent Ex. B at p. 1) and, by letter dated September 6, 2011, advised the district that he found the "program"

² While the signature of the student's literacy and math teachers does not appear on the signature page of the January 2011 IEP (see Dist. Ex. 5 at p. 2), testimony in the record indicates that they were present at the meeting (Tr. at pp. 656-57).

³ While the IEP uses the term "mental retardation," State regulations were amended in October 2011 to replace the term "mental retardation" with the term "intellectual disability" while retaining the same definition (compare 8 NYCRR 200.1[zz][7], with 34 CFR 300.8[c][6]). The student's eligibility for special education programs and related services as a student with an intellectual disability is not in dispute in this matter (34 CFR 300.8 [c][6]; 8 NYCRR 200.1[zz][7]).

⁴ The record reflects that by letter dated May 28, 2011, the student was offered a spot at this school in the Summer of 2011, as well (Parent Ex. F. at p. 2).

there to be inappropriate for a number of reasons (*id.* at pp. 1-2). As a result, and while the student's father indicated that he was "willing to visit any appropriate placement offered," he advised the district that he would continue to send the student to Cooke Academy and seek public reimbursement for this expense (*id.* at p. 2). The record reflects that the student attended Cooke Academy throughout the entire 2011-12 school year (Parent Ex. P).

On June 7, 2012, a CSE convened to develop a 2012-13 school year IEP for the student.⁵ As was the case the year before, the student's father attended this meeting along with various individuals from both the district and Cooke Academy, including a student support services representative (i.e., the consulting teacher who testified at the impartial hearing) and the student's functional literacy and math teacher from the 2011-12 school year (Dist. Ex. 17 at p. 24; Tr. a pp. 14, 404, 490-91, 541, 679). Finding that the student remained eligible for special education and related services as a student with an intellectual disability, the June 2012 CSE continued to recommend a 12-month school year program in a 12:1+1 special class (Dist. Ex. 17 at pp. 16-17). In addition, the June 2012 CSE recommended the same related services (and at same frequencies) as the January 2011 IEP did, though rather than provide the student with individual OT and PT, the June 2012 CSE recommended that these services each be provided in a group of three (compare Dist. Ex. 5 at p. 15 with Dist. Ex. 17 at p. 16). In addition, and as was the case in the year before, the June 2012 CSE also recommended that the student be provided with various management supports (Dist. Ex. 17 at p. 3).

By an FNR dated June 19, 2012, the district identified the public school site to which the student was assigned for the 2012-13 school year, which was the same public school site that had been recommended the year prior (Parent Ex. BBB at p. 1).⁶ The record reflects that on July 31, 2012, the student's father visited the school and, by letter dated August 13, 2012, once again rejected it (Parent Ex. W at pp. 1-2). In addition, the student's father raised a number of concerns with the June 2012 IEP, including the date that was reflected for the CSE meeting, that the list of attendees was not accurate, and that the hearing education services, which the IEP indicated should be provided on an individual basis, should have been provided in a group of three (*id.* at p. 2). Accordingly, and while the father again indicated a willingness to visit "any appropriate placement offered," he advised the district that he would continue to send the student to Cooke Academy for the 2012-13 school year and seek public reimbursement for the cost (*id.*). The

⁵ Where there is some ambiguity in the record regarding when the 2012-13 CSE met - with the IEP itself indicating that the meeting took place on May 10, 2012 (Dist. Ex. 17 at p. 21) and the student's father testifying that it occurred on May 30, 2012 (Tr. p. 404) - both the district's school psychologist and a consulting teacher at Cooke testified that the meeting took place on June 7, 2012, and this is consistent with information reflected on the IEP's attendance page (Dist. Ex. 17 at p. 24; Tr. pp. 14, 680). Accordingly, and as acknowledged by the parents in their petition (Pet. at p. 3, FN 1), it appears that the district's CSE met on June 7, 2012, and I will therefore consider that to be the date of the meeting.

⁶ While this FNR also purported to summarize the special education and related services recommended by the June 2012 CSE, a number of discrepancies existed, including the group size of the student's OT and PT services (the FNR indicates that the student would receive these services on an individual as opposed to a group basis) and the fact that the FNR indicates that the student would receive the services of a health paraprofessional. However, since the district does not contend that the student would have received the special education and related services as reflected on the FNR as opposed to the June 2012 IEP, these discrepancies are not relevant for purposes of this appeal.

record reflects that student attended Cooke Academy throughout the entire 2012-13 school year, which was the student's last year there (Parent Ex. JJ; Tr. pp. 427-28).⁷

A. Due Process Complaint Notice

By due process complaint notice dated January 30, 2013, the parents requested an impartial hearing and asserted that the district did not offer the student a FAPE in the 2011-12 school year (Parent Ex. A).⁸ Thereafter, and by an amended due process complaint notice dated April 30, 2013, the parents reiterated their 2011-12 school year claims and asserted additional claims relative to the 2012-13 school year (Parent Ex. V a pp. 1, 6).⁹ In particular, the parents asserted that the district did not have sufficient evaluative data regarding the student to understand her needs and suggested they were not able to adequately participate in the IEP development process for both school years (*id.* at pp. 1-2, 6-7). In addition, and with respect to both IEPs, the parents maintained that each did not sufficiently describe the student (*id.* at pp. 2-3, 7-8), that the goals in each were insufficient and not measurable (*id.* at pp. 3, 8), that each would require that the student be pulled out of class too much in order to receive her related services (*id.* at pp. 3-4, 8-9), that both IEPs lacked "an appropriate transition program from her current placement to a new school placement" (*id.* at pp. 4, 9), that the 12:1+1 "program" recommended by each of the IEPs would not allow the student to make "measureable progress" (*id.*), and that each IEP did not contain an adequate "transition plan" or address the student's post-secondary and/or transition needs, including needs related to vocational training, travel training and the student's adaptive skills (*id.* at pp. 4-5, 9-10). In addition, the parents asserted that the public school to which the district assigned the student (which, as noted above, was the same public school for both school years) was not appropriate for a number of reasons, including that it was too large and unsafe, that the student would not have been grouped appropriately for instructional purposes, that the student would not have received all of her mandated related services, that it lacked an internship program or "integrated travel training," and that the student would not receive enough "academic instruction" there (*id.* at pp. 4, 5-6, 11-12).¹⁰ As relief, the parents requested reimbursement for tuition at Cooke Academy, as well as reimbursement for all costs and fees incurred (including the "costs for appropriate related services and supports"), for both the 2011-12 and 2012-13 school years (*id.* at pp. 12-13). In addition, the parents requested

⁷ While student was eligible to attend Cooke Academy in the 2013-14 school year, the student's father testified that he decided to enroll the student someplace else that year (Tr. pp. 427-28).

⁸ There is also a due process complaint notice in the record dated September 1, 2012, which also raises claims related to the 2011-12 school year (Dist. Ex. 1). The IHO, however, does not reference this due process complaint notice in her decision, and it is not clear from the record what, if any, relevance it has in this matter. Moreover, it appears that this September 1, 2012, due process complaint notice was superseded by the January 30, 2013 notice. Accordingly, the September 1, 2012 due process complaint notice need not be discussed.

⁹ The April 30, 2013 due process complaint notice contains a nearly verbatim recitation of the claims raised in the January 30, 2013 due process complaint notice, plus it contains claims related to the 2012-13 school year (compare Parent Ex. A with Parent Ex. V). Accordingly, this due process complaint notice – which supersedes the January 30, 2013 notice - is the operative due process complaint notice for purposes of this decision and, though not labeled as such, will be referred to herein as the "amended due process complaint notice."

¹⁰ The parents also alleged, with respect to the 2012-13 school year only, that the school did not have a "social skills curriculum" which the student required to make social and emotional progress (Parent Ex. V at p. 11).

that the district be required to provide transportation (or reimburse them for the cost of transportation) to and from Cooke Academy (*id.*).

B. Impartial Hearing Officer Decisions

On June 27, 2013, the parties proceeded to an impartial hearing, which concluded on October 22, 2013, after five non-consecutive days of proceedings (*see* Tr. pp. 1-763).¹¹ By decision dated January 28, 2014 (and corrected on January 29, 2014) (January IHO Decision), an IHO found that the district offered the student a FAPE for the 2011-12 and 2012-13 school years (*see Application of a Student with a Disability*, Appeal No. 14-039; *See also* January IHO Decision at pp. 9-12). Specifically, the IHO essentially held that the district had (and relied upon) sufficient evaluative data for the student in each year, that both IEPs contained a "detailed and appropriate description of the student's characteristics, performance levels, management needs and realistic education goals with adequate measurement criteria," that the location for the provision of related services did not amount to a denial of a FAPE, and that the two IEPs provided a small supportive environment with modifications including repetition, modeling, prompting and the use of checklists and visual cues" which is what the student required (January IHO Decision at pp. 10-12). In addition, the IHO rejected the parents' claims regarding the public school to which the student had been assigned, finding, among other things, that it was able to provide the services, supports and instruction that the student required, and that it would have been able to implement the student's IEPs (*id.* at pp. 11-12).¹² The IHO, therefore, denied the parents' request for relief (*id.* at p. 13).

Subsequent to the issuance of the January IHO Decision, the parents appealed and challenged both a number of findings in that decision, as well as the lack of findings on certain issues raised in their amended due process complaint notice. On May 6, 2014, a State Review Officer sustained the parents' appeal in part and remanded the matter back to the IHO for additional administrative proceedings, including the consideration of additional issues (*see Application of a Student with a Disability*, Appeal No. 14-039).¹³ Accordingly, two additional non-consecutive days of proceedings took place (*see* Tr. pp. 765-837), and by decision dated October 3, 2014 (which, as noted above, is the decision being reviewed here), the IHO again found that the district offered the student a FAPE for the 2011-12 and 2012-13 school years (IHO Decision at pp 11-14). Specifically, the IHO repeated verbatim her findings from her previous decision (*id.* at pp. 11-13) and in addition found that (a) the student was not denied a FAPE due to a lack of parent participation in the IEP development process, (b) that given the "active participation" of the parent and several educators from Cooke Academy, the failure of the district to conduct various assessments of the student (including a vocational assessment) did not raise to the level of a denial of FAPE, and that (c) while the transition plans in the IEPs could "benefit from more detail and a sharper focus," that any inadequacies did not rise to the level of a

¹¹ It appears that a pre-hearing conference also took place in this matter on March 4, 2013 (*see* IHO March 4, 2013 Pre-Hearing Conference Summary).

¹² The IHO also found that Cooke Academy was an appropriate unilateral placement for the student and that there was no equitable impediment to reimbursement in this matter, but these findings are not challenged by the district and, therefore, are not relevant to this appeal.

¹³ This matter was remanded to the IHO for other reasons as well, including to reconstruct portions of the hearing record and to clarify a number of evidentiary issues (*see Application of a Student with a Disability*, Appeal No. 14-039).

denial of FAPE (*id.* at pp. 13-14). In addition, the IHO found that whether a seat in a 12:1+1 class at the assigned public school would have been available to the student was "ambiguous," and reiterated that she did not find the parents' claims regarding the school's ability to implement the student's IEPs to be persuasive (*id.* at p. 14). Accordingly, the IHO once again denied the parents' request for relief (*id.* at p. 15).

IV. Appeal for State-Level Review

The parents appeal and contend that the IHO improperly "discounted" many of their assertions and improperly found that the district provided the student with a FAPE in the 2011-12 and 2012-13 school years. With respect to each school year the parents argue that district lacked sufficient evaluative data for the student (including a vocational assessment), and they assert that they were denied a meaningful opportunity to participate in the IEP development process for various reasons. Further, and with respect to both the January 2011 and June 2012 IEPs, the parents contend the IHO erred in finding that they adequately described the student's needs, erred in finding that the goals in each IEP were adequate and measurable, erred in finding that the inadequacies in each of the IEP's transition plans did not rise to the level of a denial of FAPE, improperly "discounted" their claim that each of the IEPs failed to include any supports or services to facilitate the student's transition from Cooke Academy to the district's assigned public school, and improperly found that the program recommendation (i.e., the 12:1+1 special class recommendation) was appropriate for the student. The parents also contend that the IHO's decision regarding the assigned public school was incorrect for various reasons, including that the district "failed to show that the offered [school] would have been able to appropriately address [the student's] needs and to implement her IEPs . . .," and that the IHO erred in "discounting" the district's alleged failure to "demonstrate that a seat was available for [the student] in an appropriate class" for the school years at issue. The parents also contend that the IHO "improperly discounted" the district's alleged failure to show that the school would have provided the student with "similarly-functioning peers or appropriate peer models," that she "discounted" claims that the school would not have provided the student with sufficient academic instruction, that she erred in finding that the school would have appropriately met the student's transition needs, that she erred in finding that the school "would have appropriately addressed [the student's] need for life skills training and implemented her IEP goals in that area," and that she erred in finding that the school "would have appropriately addressed [the student's] related service needs and would have implemented her IEP mandates." Finally, the parents contend that IHO erred in failing to address their claim that the assigned public school would have been too large for the student. The parents request that the IHO's decision regarding the provision of a FAPE be reversed.

The district, in an answer, generally denies the parents' allegations and contends that the IHO correctly found that the district offered the student a FAPE in both school years. In particular, the district contends that it had sufficient evaluative data concerning the student to develop an appropriate IEP for each year, that the IEPs at issue contain a "detailed and accurate description of the student's performance levels," that the IEPs contained appropriate and measurable goals, and that the program and services in the IEPs were sufficient. In addition, the district contends that the failure to conduct a vocational assessment of the student did not deprive her of a FAPE, that the IEPs each had a sufficient transition plan (including goals) for the student, and that the parents were afforded the right to meaningfully participate in the IEP development processes. Finally, and with respect to the parents' claims regarding the assigned

public school which the student would have attended, the district contends that these claims are speculative and "not persuasive."

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting

Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "academic, developmental, and functional needs" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. Parent Participation

As noted above, the parents claim that they were denied a meaningful opportunity to participate in the development of the January 2011 and June 2012 IEPs. The IHO disagreed, finding that there was "active participation of the parent and several educators from Cooke," and that the two IEPs did not have "procedural inadequacies that significantly impeded the parents' opportunity to participate in the decision-making process" (IHO Decision at pp. 13, 14). For the reasons discussed below, I agree.

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 Comm'n Development 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]).

Contrary to the parents' contentions, I find that the hearing record demonstrates that the parents were provided with appropriate opportunities to participate (and, in fact, did participate) in the development of both the January 2011 and June 2012 IEPs. Initially, I note that it is undisputed that the student's father, as well as individuals from Cooke Academy, were present at (and were members of) both the January 2011 CSE and the June 2012 CSE (Dist. Exs. 5 at p. 2; 17 at p. 24; Tr. pp. 14, 237-39, 380, 404, 490-91, 541, 654, 656, 679). Furthermore, the hearing record is replete with evidence reflecting participation by both the parents (the student's father) and Cooke personnel at each of these meetings. In fact, the record as a whole reflects that both the January 2011 and June 2012 IEPs were developed largely through the exchange of written and oral information (as well as discussions) about the student by and between district personnel, Cooke Academy personnel, and the student's father (Tr. pp 18-26; 47-51, 75, 81-82, 96, 107, 119-20, 240-50, 276, 282-83, 307, 309, 382, 391, 406, 410-412, 434, 438-39, 449-50, 456-57, 463, 465, 544, 549, 583-84, 683-86, 689). In fact, even the student's father acknowledged that he was consulted at various points by members of the CSE and contributed to the meetings (Tr. pp. 382-83, 391-92, 410, 434, 449-50, 456-57, 463), and the hearing record reflects that other meeting participants were given the opportunity to (and did) express concerns that they had (Tr. pp. 28, 251-52, 676, 696). Accordingly, I find that the record amply demonstrates that the

parents were given a sufficient opportunity to participate in the development of the two IEPs at issue.

The parents, however, suggest that they were denied an adequate opportunity to participate in the development of the two IEPs because each CSE did not consider concerns that were raised regarding the 12:1+1 program that was proposed. However, the record reflects that other programs were considered for the student and rejected based upon what was felt to be the student's needs (Dist. Exs. 5 at p. 14, 17 at p. 22; Tr. pp 27-28, 250). Thus, while I understand that the parents disagree with the recommendation of a 12:1+1 class for the student, this alone does not support a claim of a lack of participation (see, e.g., 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 Development 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]). Nor does the fact that the April 2013 CSE may not have considered other class placements which the parents may have found more desirable, as the parents seem to suggest (see, e.g., B.K. v. New York City Dep't of Educ., 12 F.Supp.3d 343, 359 [E.D.N.Y. Mar. 31, 2014] [indicating that "once the CSE determined that a 6:1:1 placement was appropriate for [the student], it was under no obligation to consider more restrictive programs"]; T.G. v. New York City Dep't of Educ., 973 F. Supp. 2d 320, 341-42 [S.D.N.Y. 2010]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *15 [S.D.N.Y. Aug. 19, 2013] [explaining that "under the law, once [the district] determined that [the public school setting] was the least restrictive environment in which [the student] could be educated, it was not obligated to consider a more restrictive environment, such as [the nonpublic school]"; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *8 [S.D.N.Y. Mar. 19, 2013] [finding that "[o]nce the CSE determined that [the public school setting] would be appropriate for the [s]tudent, it had identified the least restrictive environment that could meet the [s]tudent's needs and did not need to inquire into more restrictive options such as nonpublic programs"]). Accordingly, and especially in light of the amount of parental participation reflected in the record as a whole, I do not find that the parents were significantly impeded from participating in the development of the student's IEPs simply because each CSE ultimately recommended a class setting that the parents disagreed with.¹⁴

In addition, the parents suggest that they were denied a meaningful opportunity to participate in the IEP development process because neither they nor the Cooke Academy participants at each of the CSE meetings were provided with evaluative documentation before each meeting, including a copy of a psychoeducational evaluation that the district conducted (Dist. Ex. 8). However, and as noted above, the record reflects that the two IEPs at issue were developed in large part through the exchange of information and discussions about the student by and between the student's teachers, the student's father and the district, and the primary written materials relied upon by each of the CSEs appears to have been the student's previous IEPs and/or progress reports from Cooke Academy, both of the which the parent and/or Cooke Academy would have had access to (Tr. pp. 26, 76, 105-06, 239-41, 246-50, 253, 266, 288-89, 297, 661, 672, 683). Further, and while the record reflects that a psychoeducational evaluation was discussed at the January 2011 CSE (Tr. pp. 243, 276-77, 660), there is no indication in the record that anyone requested a copy of this document (or even expressed a need for a copy of

¹⁴ The sufficiency of this class setting is a different issue which is discussed below.

this document) in order to participate at either the January 2011 or the June 2012 CSE meetings. Accordingly, I am unable to find that anyone was significantly impeded from participating in the development of the student's IEPs as a result of not having received this document (or any document, for that matter) prior to the meeting. This is especially true with respect to the student's father who testified both that (a) he generally left the development of the student's IEPs up to the student's teachers at Cooke Academy since they knew the student's educational needs and progress the best, and that (b) with respect to preparing for CSE meetings, he did not think that there was anything for him, as a parent, to prepare for (Tr. pp. 392, 434, 463).

Finally, the parents suggest that with respect to the June 2012 IEP that they were denied a meaningful opportunity to participate because, while the district's school psychologist - who was also the district representative at the June 2012 CSE (June 2012 district representative) - testified that information provided about the student was directly typed into the IEP during that meeting, neither the student's father nor CSE participants from Cooke Academy were given an opportunity to review this typed material. However, the hearing record reflects that what was being typed by the district's psychologist was information about the student that was being provided orally by Cooke Academy participants, and the June 2012 district representative - who the IHO found to be credible (IHO Decision at p. 11) - testified that she announced to the parent that what was being typed was the IEP (Tr. pp 18-26, 81-82, 125). In addition, and while the June 2012 district representative testified that the parent could have requested to look at her computer screen (Tr. p. 125), there is no indication in the record that such a request was made (let alone denied) at the CSE meeting. Accordingly, I do not find that the parents were significantly impeded from participating in the development of the June 2012 IEP because they may not have been able to see what was being typed into the June 2012 district representative's computer. This is especially true since there is no legal authority even requiring parental presence during the actual drafting of the written IEP document (see, e.g., J.G. v. Briarcliff Manor Union Free Sch. Dist., 682 F. Supp. 2d 387, 394 [S.D.N.Y. 2010]; see also (see E.A.M., 2012 WL 4571794, at * 8 [recognizing that the IDEA does not require that goals be drafted at the CSE meeting]; S.F., 2011 WL 5419847, at *10-*11; Mahoney v. Carlsbad Unified Sch. Dist., 430 Fed. App'x 562, 565-66, 2011 WL 1594547 [9th Cir. Apr. 28, 2011] [declining to find a denial of a FAPE where the goals and objectives were pre-drafted, but not provided to the parents]).

B. Evaluative Information & Present Levels of Performance

The parents also contend that the student was denied a FAPE because the district, in both the 2011-12 and the 2012-13 school years, lacked sufficient evaluative information about the student and created IEPs that did not adequately describe the student's needs. The IHO rejected these claims for both years, finding essentially that the January 2011 and June 2012 CSEs each had adequate information about the student, and that each IEP contained a "detailed and appropriate description" of the student's characteristics, performance levels, and management needs (IHO Decision at p. 11).

In general, a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and the district must conduct one 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]; 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).

In addition, 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, a CSE must generally 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]).

1. January 2011 IEP

As noted above, the record reflects that the January 2011 CSE meeting was attended by a number of individuals, including student's father, a district representative, a school psychologist from the district, a hearing education related service provider, and various individuals from Cooke Academy, including a student support services representative (the consulting teacher who testified at the impartial hearing) and, by telephone, the assistant head of school and the student's literacy and math teachers (Dist. Ex. 5 at p. 2; Tr. pp. 237-39, 380, 654, 656). According to the district representative, a number of documents were reviewed to develop the January 2011 IEP, including a November 2010 psychoeducational evaluation report (Dist. Ex. 8), a December 2010 classroom observation report (Dist. Ex. 10),¹⁵ a December 2010 Cooke Academy progress report (Dist. Ex. 11), as well as a copy of the student's 2010-11 IEP (Dist. Ex. 4) (Tr. pp. 238-39; Dist. Exs. 8; 10-11). In addition, the hearing record reflects that various aspects of the January 2011

¹⁵ The district representative indicated she reviewed the December 2010 classroom observation report prior to the January 2011 CSE, but did not recall if the report was discussed during the meeting (Tr. pp.245, 265). In addition, testimony by Cooke's student support services representative indicates that while this observation was acknowledged at the meeting, it was not discussed (id. at pp. 661-62).

IEP were developed through discussion with the student's teachers and other staff from Cooke that participated at the meeting, and who verbally reported the student's current levels of functioning in the private school (see, e.g., Tr. pp. 239-50, 391, 438, 656-57, 662, 666-67, 672).

The parents' primary contention regarding evaluations (for purposes of both the January 2011 and June 2012 IEPs) appears to relate to the district's heavy reliance on information – both written and oral – provided by Cooke Academy. Specifically, the parents suggest that such reliance is improper, and they contend that the January 2011 CSE lacked sufficient information about the student as a result. However, a district is not required to conduct its own evaluations in developing an IEP and recommending an appropriate program, but may rely on appropriate privately-obtained evaluations (M.H. v. New York City Dep't of Educ., 2011 WL 609880, at *9-*10 [S.D.N.Y. Feb. 16, 2011]). In fact, a district may rely on information obtained from the student's private school personnel, including sufficiently comprehensive progress reports, in formulating the IEP (see D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 329-31 [S.D.N.Y. 2013]; G.W. v. Rye City Sch. Dist., 2013 WL 1286154 at *23 [S.D.N.Y. March 29, 2013]; S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *10 [S.D.N.Y. Nov. 9, 2011]). In addition, a review of the documentation considered by the January 2011 CSE (including the December 2010 Cooke Academy progress report) reflects that, combined, they contain a significant amount of relevant information about the student, including information related to her cognitive abilities, her visual motor functioning, her academic abilities, her behaviors, her health and physical development, her related service needs, her social/emotional performance, her transition skills, her adaptive living skills, and her management needs (Dist. Exs. 4 at pp. 3-5, 8-12, 15; 8 at pp. 2-7, 11 at pp. 1-18). Moreover, and as noted above, the hearing record reflects that this information was supplemented at the January 2011 CSE meeting with oral reports and discussions about the student, including information that was provided by the student's father which included a social history (Tr. pp. 240-50; 253, 297-98, 311, 382-83, 434 656-58, 730-31). Accordingly, the record reflects that the January 2011 CSE had a significant amount of information about the student for purposes of developing an IEP.

In addition, and with respect to the parents' assertion that January 2011 IEP did not adequately describe the student's needs, I agree with the IHO and find that it did. For example, and consistent with testimony by the district representative, the January 2011 IEP reflects the student's present levels of performance noted in the November 2010 psychoeducational evaluation report (Dist. Ex. 5 at pp. 3-4). In addition, the January 2011 IEP also reflects the results of the administration of formal testing that indicated the student's cognitive abilities were within the "extremely low" range of intellectual functioning, and that the student had a number of cognitive deficits that affected her academic performance in all domains of functioning (Tr. p. 243; Dist. Exs. 5 at p. 4; 8 at pp. 2-4, 6).¹⁶ The January 2011 IEP also reflects the results of the November 2010 administration of the Woodcock-Johnson Tests of Academic Achievement (W-J III ACH) (Tr. p. 241; Dist. Exs. 8 at pp. 2, 5; 5 at p. 4) and, consistent with the November 2010 psychoeducational evaluation report, reflects that the student's academic skills were significantly delayed (Dist. Ex. 5 at p. 4; 8 at pp. 5-6). This is consistent with information that was reported orally by Cooke Academy during the CSE meeting which, according to documentary evidence in

¹⁶ The student was administered the Wechsler Adult Intelligence Scale-Fourth Edition (WAIS-IV) (Dist. Ex. 8 at pp. 2-4).

the record, reflects that the student functioned at a second grade level in ELA and below a first grade level in math (Dist. Ex. 5 at p. 3; 6 at p. 1).¹⁷

In addition, the January 2011 IEP includes a detailed narrative specific to the student's then-current teacher reports (Dist. Exs. 5 at p. 3; 11 at pp. 2, 4). The narrative indicates, for example, that academically the student functioned significantly below age/grade expectancy in all academic areas (Dist. Ex. 5 at p. 3). The January 2011 IEP also notes that according to the student's math teacher, the student demonstrated a mixed level of participation in class (Dist. Ex. 5 at p. 3), and indicates that the student became more proficient at recording number sentences and using a calculator to solve problems (Dist. Ex. 5 at p. 3). The IEP further indicates that solving calculation problems was a challenge for the student (Dist. Ex. 5 at p. 3), and that, according to the students' math teacher, the student had an understanding of the concepts of addition and subtraction, but had difficulty with numeration (Dist. Ex. 5 at p. 3). The IEP also reflects that at the time of the January 2011 CSE, the student was working on comparing and contrasting quantities, and was learning time, measurement, and money skills (Dist. Ex. 5 at p. 3). The January 2011 IEP also indicates that in reading the student made progress in and continued to refine her skills related to responding to "wh" questions, questions that require understanding of directionality (left/right), and higher level thinking skill questions involving inference, prediction, and making connections (Dist. Ex. 5 at p. 3). The IEP also notes that the student's listening comprehension skills were a relative strength for her (Dist. Ex. 5 at p. 3).

In regards to the students' academic management needs, the January 2011 IEP indicates the student required small group instruction, directions repeated and rephrased as needed, scaffolding, teacher cues, prompting and redirection, preferential seating, verbal and auditory cues, positive reinforcement, multisensory approach, and graphic organizers/graphs/charts (Dist. Ex. 5 at p. 3).

The January 2011 IEP also describes the student's social/emotional performance at the time of the January 2011 CSE, and reflects information consistent with the December 2010 progress report (Dist. Exs. 5 at p. 5; 11). For example, the January 2011 IEP reflects that student tended to engage in self-talk and, consistent with the December 2010 Cooke Academy progress report, that she needed to continue to work on interactions with peers (Dist. Exs. 5 at p. 5; 11 at pp. 4, 13-14). In addition, the January 2011 IEP reflects that the student needed to work on joining conversations, and needed prompts to engage (Dist. Exs. 5 at p. 5; 11 at p. 14). The January IEP also indicates that the student needed to work on using an appropriate voice and on improving her assertiveness (Dist. Exs. 5 at p. 5; 11 at pp. 4, 14, 16), and that her behavior did not seriously interfere with instruction and could be addressed by the special education teacher and through the related service of counseling (Dist. Ex. 5 at p. 5). Recommended social/emotional management needs were for prompting and reinforcement (Dist. Ex. 5 at p. 5; see Dist. 11 at p. 4). The January 2011 CSE also recommended small group (3:1) speech-language therapy (Dist. Ex. 5 at p. 15).

¹⁷ While the parents contend that the January 2011 IEP does not accurately reflect the scores that were reported by Cooke Academy, and while there is evidence in the record which suggests that the student's math scores that are reflected on the IEP may, in fact, have been higher than what testing showed (compare Dist. Ex. 5 at p. 3 with Dist. Exs. 6 at 1; 15 at p. 1), none of this detracts from the fact that the student, who was 18 years old at the time that the IEP was developed, presented with significant academic delays, which the January 2011 IEP reflects.

The parents, however, suggest that the student was denied a FAPE because the January 2011 CSE did not review a medical assessment (Pet. at ¶ 24). However, and while the hearing record reflects the January CSE did not have an updated medical report available (Tr. pp. 269-70, 382), the parents do not offer much explanation in this regard, other than to state that the district did not "understand how [the student's] curvature of the spine impacted her participation in school activities" (*id.*). In terms of the student's present health status and physical development, however, the January 2011 IEP indicates the student had Downs' Syndrome, permanent bilateral conductive hearing loss, and curvature of the spine (Dist. Ex. 5 at p. 6). The same IEP further notes that the student wore glasses, had an awkward gait, and was vulnerable to neck injuries (Dist. Ex. 5 at p. 6). The January 2011 IEP also reflects that the student wore hearing aids, required assistive technology of an "FM unit" for use with every teacher and service provider (as well as the services of an audiologist) and took no medication (Dist. Ex. 5 at pp. 1, 6).¹⁸ The January 2011 CSE recommended that the student attend a (physically) accessible program, and that she receive adaptive physical education (APE) in a small group (12:1+1) where her physical activity would be particularly monitored (Dist. Ex. 5 at p. 6). The January 2011 IEP also indicates the CSE recommended hearing educational services, occupational therapy (OT), and physical therapy (PT) to address the student's health and physical development needs (Dist. Ex. 5 at p. 15). Accordingly, I am unable to find that the January 2011 CSE's failure to review a medical assessment resulted in a denial of FAPE.

In addition, the parents also suggest that the student was denied a FAPE because the January 2011 CSE did not consider any related service assessments, including an assessment of the student's audiological functioning (Pet. at ¶ 23). However, the hearing record reflects that the student's hearing provider attended the January 2011 CSE meeting, and that the student's related service needs (including those related to the student's hearing) were discussed (Dist. Ex. 5 at p. 2; Tr. pp. 248-49, 250, 253, 297-98, 438-39, 660, 675). Moreover, and as noted above, the January 2011 reflects that the CSE recommended various related services for the student, including speech three times per week in a group of 3, counseling two times per week in a group of 5, individual OT two times per week, individual PT one time per week, and individual hearing educational services two times per week, and there is nothing in the record to suggest that student's related service needs were not have been adequately addressed by these recommendations. This is especially true since, other than to suggest in their amended due process complaint notice that the student would have been pulled-out of class too much for related services (Parent Ex. V. at p. 4; Tr. pp. 31-32),¹⁹ no suggestion is made that the type of services offered are inappropriate, or that the frequency of services was too infrequent to provide a benefit to the student. Accordingly, I am unable to find that the student was denied a FAPE simply because the January 2011 CSE did not consider formal related service assessments.

Finally, the parents contend that the student was denied a FAPE because the January 2011 CSE did not conduct a formal vocational assessment or an assessment of the student's daily living skills (Pet. at ¶ 23). As noted above, however, the January 2011 CSE had both transitional and adaptive skills information about the student before it and, with respect to the student's vocational interests, the district representative testified that while she did not have a vocational

¹⁸ The hearing record reflects the FM unit addressed the student's hearing difficulties in the classroom as it required that the teacher wear a microphone to (amplify) his/her voice, thus helping the student hear better in the classroom (Tr. p. 246; Dist. Ex. 5 at p. 6).

¹⁹ This claim is not asserted as a basis for relief in the parents' petition.

assessment at the meeting, questions that would have been part of such an assessment were asked of the parent at the meeting (Dist. Ex. 11 at pp. 12, 15; Tr. pp. 251). In addition, I note that with regard to the student's vocational present levels, the January 2011 IEP indicates the student's interest in working with children and animals, that she participated in a transition program that prepares students for post-secondary life, and that she started an internship (Dist. Exs. 5 at p. 5; 11 at p. 12). In addition, the January 2011 IEP includes an annual goal and seven short term objectives aligned to that goal specific to transition, independent living and vocational life (Dist. Ex. 5 at p. 11) and, as discussed further below, it also includes a transitional plan which focuses, in part, on the student's need to prepare for post-secondary work (*id.* at pp. 16-17). Accordingly, and while I agree with the parent that the district should have conducted a vocational assessment of the student and that it is technically a procedural violation to have not done so (see 8 NYCRR 200.4[b][6][viii]), I find, as did the IHO, that the failure to do so in this case does not amount to a denial of FAPE.

2. June 2012 IEP

With respect to the June 2012 IEP, the parents raise many of the same issues that they raised regarding the January 2011 IEP. However, and for essentially the same reasons discussed above, I find that the IHO's decision that June 2012 CSE had sufficient evaluative data about the student, and that the June 2012 IEP adequately described her present levels, is supported by the record.

As was the case in January 2011, the June 2012 CSE meeting was attended by a number of individuals, including the June 2012 district representative, a district special education teacher, an additional parent member, a hearing educational services provider, the student's father, the student, as well as from Cooke, the student support services representative (*i.e.*, the consulting teacher), and by telephone, the student's ELA/math teacher (Tr. p. 18; Dist. Ex. 17 at p. 24). The hearing record reflects that while the June 2012 district representative indicated she reviewed everything in the student's CSE file, including the previous IEP for 2011-12 and the documents that went into developing that IEP (Tr. p. 17), the primary sources of data used to draft the June 2012 IEP were written and oral reports about the student from both the student's father and Cooke Academy (Dist. Ex. 16; Tr. pp. 18-27, 75-76, 683-84), which collectively provided a significant amount of relevant information about the student. For example, the Cooke Academy report provides information about the student's academics, transition needs and activities (including vocational skills), the student's adaptive and social skills, and even information related to the student's related services activities and needs (Dist. Ex. 16 a pp. 1-16). In addition, the record reflects that oral reports at the meeting provided information relevant to areas such as academics, related services (including hearing-related services), the student's social/emotional status, the student's physical development, and the student's transition needs (Tr. pp. 18-24, 26, 34-35, 50, 410-12, 544-45, 583-84, 682, 684-85, 687-89, 694-95, 697-88, 734-35).

Moreover, a review of the June 2012 IEP reveals a highly detailed narrative about the student's needs that was developed based on information that Cooke Academy and the student's father provided to the June 2012 CSE (Tr. pp. 22-24; Dist. Ex. 17 at pp. 1-3). For example, the IEP reflects that academically, the student was functioning well below her grade level and indicates, among other things, that the student continued to develop her math skills to support her ability to function as a member of the community, was developing her skills in addition and

subtraction, was learning how to count groups of objects using addition and subtraction up to 10, was learning how to apply basic math concepts in real life contexts, had difficulty with word problems and applying them into context, had difficulty answering questions that involved "addition and subtraction facts to 10," was learning to independently follow classroom routines and work cooperatively with peers, is able to summarize text by answering "wh" questions with increased independence, was able to construct short paragraphs about a topic of her choice, could summarize text, could independently track text, was able to respond to comprehension questions about books at her instructional level, and could decode functional sight words in class and the community, as well as decode by breaking words into chunks (Dist. Ex. 17 at pp. 1-2). Further, and in regards to the student's social development, the June 2012 IEP reflects that student was cheerful and friendly, that she could appropriately greet peers and was socially motivated, but that she struggled to engage with peers and continued to work on her social interactions and to extend the variety and scope of her social and leisure activities (Dist. Ex. 17 at p. 2). The IEP also indicates that the student benefited from group sessions, particularly sessions that addressed her social deficits, and reflects that she was working on introducing conversations that were interesting to peers, maintaining a conversation, interpreting social cues to take turns to a conversation, terminating a conversation, producing and identifying nonverbal cues, and building community vocabulary and integration (*id.*). In addition, and specific to the student's speech-language communication, the June 2012 IEP reflects that the student demonstrated weakness in initiating and maintaining interaction with a variety of partners, and that she benefited from prompting and active listening skills, as well as flexible eye gaze to initiate, maintain, and terminate a conversation (Dist. Ex. 17 at pp. 1-2) In terms of behavior, the IEP reflects that the student was easily distracted and required support, redirection and prompting in a number of areas, and it reflects various methods and techniques to address the student's needs (*id.* at pp. 1, 3).

As they did with respect to the January 2011 IEP, the parents suggest that the student was denied a FAPE in the 2012-13 school year because the June 2012 CSE did not review a medical assessment. However, and as noted above, the record reflects that information about the student's physical development was discussed at the June 2012 CSE meeting, and the June 2012 IEP indicates that, according to the student's father, the student had several medical professionals that she continued to see (Dist. Ex. 17 at p. 2). In addition, the IEP also reflects that the student had received diagnoses of Downs Syndrome, hearing impairment, and visual impairment (Dist. Ex. 17 at p. 2). The IEP further reflects that the student had been diagnosed with scoliosis (curvature of the spine), and notes that this "refrains her from doing activities that require tumbling, jumping [and/or doing summersaults]" (*id.*) The IEP also includes a "medical alert" indicating that the student has physical limitations which affect her participation in school activities and, like the January 2011 IEP, recommends that the student receive APE (*id.* at pp. 20, 22). Likewise, the June 2012 IEP also carries over all of the related services that were offered in the January 2011 IEP, including related services intended to, at least in part, address the student's health and physical needs (*id.* at pp. 2, 16). Accordingly, and for much the same reason discussed with respect to the January 2011 IEP, I unable to find that the lack of a formal medical assessment resulted in a denial of FAPE in the 2012-13 school year.

Likewise, the parents also suggest (again as they did with respect to the 2011-12 school year) that the student was denied a FAPE because the June 2012 CSE did not consider any related service assessments (Petition ¶¶ 36, 38). However, the record reflects that information concerning the student's related services was discussed at the June 2012 CSE meeting (Tr. pp.

21, 694). In addition, the June 2012 IEP reflects information regarding the student's present levels in speech, OT and PT (Dist. Ex. 17 at pp. 1-2) and, like the January 2011 IEP, recommends various related services for the student, the general substance of which, as discussed above, is not in dispute. Accordingly, I am unable to find on the record before me that the student was denied a FAPE in the 2012-13 school year because of a lack of related service assessments.

Finally, the parents again suggest that the student was denied a FAPE because the June 2012 CSE did not conduct a formal functional vocational assessment or an assessment of the student's daily living skills (Pet. at ¶ 23). However, the record reflects that information related to the student's transitional needs, including her vocational and adaptive living skills, were considered by June 2012 CSE (Dist. Ex. 16 at pp. 7-15; Tr. pp. 47-55, 689). In addition, the June 2012 IEP includes a goal (with corresponding short term objectives) that targets the student's participation in a vocational program (i.e.; vocational skills class, internship),²⁰ and reflects that the student was working on adaptive skills (morning routines, preparing for the day, reviewing planner/calendar), was learning to develop her ability to complete functional fact cards (checking her balance, using ATM, planning a trip using a subway map, calculator to solve for two-digit addition questions), and continued to practice skills associated with counting (Dist. Ex. 17 at p. 2). The June 2012 IEP also notes that the student was eager to participate in activities, enjoyed being involved with adaptive daily life (ADL), and that she was able to complete some daily routines independently (*id.* at p. 3). As discussed further below, the June 2012 IEP also included a transition plan for the student. Accordingly, and while the lack of a vocational assessment is, again, technically a procedural violation (8 NYCRR 200.4[b][6][viii]), I am unable to find that it is one that amounts to a denial of FAPE in this case.

C. Goals

The parents also suggest that the goals in the two IEPs at issue are insufficient. The IHO rejected this contention, finding that the IEPs contained "realistic educational goals with adequate measurement criteria" (IHO Decision II at p. 11).

State and federal regulations require that 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]).

²⁰ Additional goals and short term objectives address the student's social/emotional, language, and communication difficulties that could hinder her success in the workplace (see Dist. Ex. 17 at p. 6).

1. January 2011 IEP

A review of the January 2011 IEP reflects that it included approximately 11 annual goals and, consistent with the CSE's determination that the student would participate in the alternate assessment, approximately 45 short term objectives aligned to the annual goals.²¹ Areas addressed by these goals and objectives include ELA (reading comprehension, vocabulary development, "wh-questions," use of context clues, higher level thinking questions involving inference, making connections, prediction, and classification, compare/contrast reading samples, sequence/order of events), writing (sentence construction of various types of sentences using correct mechanics and structure and checking for accuracy, paragraph writing with topic sentence and three supporting sentences), mathematic calculation and problem solving (round-off and use of calculator, money concepts), transition (plan for post-secondary life, skills associated with independent living and vocational preparation including skills related to functional vocabulary, critical thinking, problem solving, self-advocacy, personal strengths and weaknesses), counseling (self-advocacy skills, resolution of peer conflicts, share emotions with others), hearing education (increase receptive language skills through use of auditory training strategies, involving listening to oral passages and answering content based questions, speech reading, self-advocacy related to amplification needs involving hearing aids and FM unit), speech-language therapy (conversational pragmatics, use of assorted receptive and expressive language skills strategies), OT (fine motor skills through activities involving categorization, socially appropriate pragmatics, body awareness, crossing midline, spatial orientation for functional independence at home and in community) and PT (gross motor skills, overall strength) (Dist. Ex. 5 at pp. 7-12). Further, a review of the hearing record demonstrates that the goals in the January 2011 IEP were, for the most part, prepared by the student's teachers from Cooke and were discussed by all of the members at the June 2011 CSE, including the parent (Tr. pp. 274, 391-92).²² Moreover, while I would agree that some of the annual goals in the January 2011 IEP are not measurable, I find that the short term objectives aligned with each goal were measurable and clarified each goal (Dist. Ex. 5 at pp. 7-12).²³ Accordingly, when considering the goals and short term objectives as a whole, I find that they meet the requisite State and federal guidelines for including evaluative criteria (e.g. 80 percent, 4/5 samples), evaluation procedures (e.g. class activities and teacher/provider observations), and a schedule used to measure progress (e.g. three

²¹ Short-term objectives are required for students who take New York State alternate assessments (8 NYCRR 200.4[d][2][iv]).

²² A review of the relevant evidence demonstrates that the student's goals and short term objectives were also aligned with the information presented in the December 2011 Cooke progress report which was utilized by the January 2011 CSE, (compare Dist. Ex. 5 at pp. 7-12, with Dist Ex. 11 at pp. 2, 4-8, 10, 12-18).

²³ While the parents suggest that the goals in the January 2011 IEP are not measurable because the goals themselves lack a "baseline," the IDEA and State regulations do not require a CSE to develop goals that are expressed in terms of a specific "grade level" or a "baseline" (see Lathrop R-II School Dist. v. Gray, 611 F.3d 419, 424-25 [8th Cir. 2010] [noting that a school district cannot be compelled to put more in an IEP than is required by law]; R.B. v New York City Dept. of Educ., 15 F.Supp.3d 421 [S.D.N.Y. 2014] [measurable goals do not require a baseline]; Hailey M. v. Matayoshi, 2011 WL 3957206, at *23 [D. Haw. Sept. 7, 2011] [rejecting the claim that goals are inadequate because they lack baseline levels or grade levels and are appropriate if they are capable of measurement and directly relate to student's areas of weakness identified in the present levels of educational performance]. This is especially true where, as here, the hearing record reflects that the student's goals/short term objectives were developed with the student's present levels in mind (Tr. p. 290, 309) (see, e.g., D.G. v. Cooperstown Cent. Sch. Dist., 746 F.Supp.2d 435, 446-47 [N.D.N.Y. 2010] [noting that the CSE took into account baseline information located in the student's evaluations when developing the student's IEP]).

times during the year) (Dist. Ex. 5 at pp. 7-12; see 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]).

In addition to the above, I also note that the January 2011 CSE recommended the provision of a number of supports aligned to the student's goals in order to address her needs related to learning style, academics and attention, social/emotional, and health/physical development. These include (1) small group instruction, (2) directions repeated and rephrased as needed, (3) scaffolding, teacher cues, prompting and redirection, (4) preferential seating, (5) verbal and auditory cues, (6) positive reinforcement, (7) multisensory approach, (8) graphic organizers/graphs/charts, (9) FM unit used with every teacher and related service provider, (10) monitoring of physical activities-particularly in gym, and (11) audiology services (Dist. Ex. 5 at pp. 3, 5-6). Accordingly, and while every deficit area of the student's functioning may not have had a corresponding goal, I find that, in light of the above, the goals contained in the January 2011 IEP adequately addressed the student's main areas of need and were sufficient to offer the student a FAPE (see, e.g., J.L. v. New York City Dep't of Educ., 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013] [failure to address all areas of need though goals not a denial of FAPE]).

2. June 2012 IEP

Similar to the previous school year's IEP, the June 2012 IEP includes goals and short term objectives aligned to the student's needs (Dist. Ex. 17 at pp. 1-15). According to the district representative, Cooke submitted the student's goals to the June 2012 CSE through a progress report from Cooke and through verbal reports about the student's needs in ELA and math by the Cooke teacher and about related services by the Cooke representative (Tr. p. 26). The district representative indicated that after the student's goals were submitted to the CSE during the meeting, the CSE discussed, reviewed, modified if necessary, and adopted the goals for inclusion in the June 2012 IEP (Tr. p. 26). The June 2012 IEP includes approximately 21 annual goals and approximately 89 short term objectives that target the areas of self-awareness and self-advocacy, self-help, transition to post-secondary adult life (personal, social, vocational), adaptive daily life skills, travel training, reading, math, writing, counseling, PT, OT, and speech-language (Dist. Ex. 17 at pp. 4-15). In addition, a review of the goals and corresponding short-term objectives in the June 2012 IEP reveals that, considering the two as a whole, the goals and short term objectives met the requisite State and federal guidelines for including evaluative criteria (e.g. 80 percent, 4/5 samples), evaluation procedures (e.g. class activities and teacher/provider observations), and a schedule used to measure progress (e.g. three times during the year) (Dist. Ex. 5 at pp. 7-12; see 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]).

Furthermore, the June 2012 CSE recommended the provision of multiple supports aligned to the student's goals in order to address the student's needs related to learning style, academics and attention, social/emotional needs, and health/physical development (Dist. Ex. 17 at p. 3). For example, the June IEP includes the student's management needs for directions to be read and reread, scaffold examples of new problems and scenarios, visual cues, use of graphic organizers along with written instruction, repetition of instruction using multiple modalities, the introduction of new concepts in chunks giving enough time to practice before moving on to new problems, frequent modeling and guidance and independent practice, opportunities to form connections between instruction and personal interest, support in the area of vocabulary

development, strategies to build vocabulary (visual cues, acting out words), instruction modification to facilitate the students' understanding, verbal prompting and modeling to assist her with verbal and written expression, vocabulary instruction, questioning and verbal guidance to select appropriate books for nightly reading, concise and direct instruction, review of instruction and expectation for assignments, reading aspects of text to facilitate comprehension, frequent teacher conferences to check for understanding, structured classroom routine, frequent positive reinforcement for on task behavior, the use of checklists, repetition of auditory information presented, verbal prompts and cues to remain focused, extended time to respond to questions and review, social scripts, social skills training with opportunities to practice, and use of manipulatives (Dist. Ex. 17 at p. 3). Accordingly, and for reasons similar to those explained above regarding the January 2011 IEP, I find that the goals contained in the January 2011 IEP were sufficient to offer the student a FAPE.

D. 12:1+1 Program

The parents also suggest on appeal that the student was denied a FAPE in both the 2011-12 and 2012-13 school years because the 12:1+1 "program recommendation" recommended by both the January 2011 and June 2012 IEPs was inappropriate. The IHO disagreed, finding that while the program at Cooke Academy provided the student with smaller classes and more individualized attention, the IDEA does not require a district to match a better program, but rather requires that a student be provided with a "recommendation likely to produce progress rather than regression," which is what the two IEPs at issue did (IHO Decision at p. 12). I agree.

A review of the both the hearing record and the petition reflects that the basis of the parents' contentions regarding the recommended 12:1+1 program is, in part, a belief that the student would not have been able to remain focused in such a setting. However, a 12:1+1 special class is designed for students, like the student here, "whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students" (8 NYCRR 200.6[h][4][i]). Moreover, and while there is evidence in the record that the student is distractible and requires redirection (see, e.g., Dist. Exs. 8 at p. 2; 16 at p. 4), a 12:1+1 class is, by its nature, a very small class with both a teacher and an "additional adult," the latter of which can be a teacher aide or a teaching assistants (see 8 NYCRR 80-5.6[a], [b]), 200.1[hh], 200.6[h][4][i]). A 12:1+1 class, therefore, contains two adults, either one of which could refocus the student and help her attend to tasks (see, e.g., 8 NYCRR 80-5.6 [defining the roles of a teacher aide and teacher assistant]). This is especially true since there is no indication in the record that the student presents with any significant behavioral issues, and evidence suggests that the student could be redirected with relative ease.²⁴

²⁴ For example, while the November 2010 psychoeducational evaluation indicates that the student was frequently distracted by external factors, it also indicates she presented as polite and cooperative, and was oriented to time, place, and person (Dist. Ex. 8 at p. 2). In addition, a classroom observation report indicates, among other things, that throughout the observation the student was a quiet, though an active participant, that she handed in homework and transitioned to the classroom community meeting portion of the observation, and that she was cooperative throughout the observation (Dist. Ex. 10 at pp. 1-2). Likewise, a December 2011 Cooke Academy progress report indicates things like the student performed an array of ELA skills either independently or with a minimum level of prompts/cues (Dist. Ex. 11 at p. 2) and that, while more difficulty was noted in mathematics, the student demonstrated a basic understating of the concepts being covered in class and that with "some assistance" she understands certain mathematical principals (*id.* at p. 4). Likewise, and similar to the 2011-12 school year, a review of the March 2012 Cooke progress report considered by the June 2012 CSE indicates that while the student required verbal prompting and modeling in order to participate in

In addition, the parents suggest that a 12:1+1 program would not provide the student with enough "individual attention" to meet her needs. However, and as explained by the June 2012 district representative, a 12:1+1 program is a small, structured program that allows students to be divided into small groups and receive individual attention as necessary (Tr. pp. 55-56). In addition, and to the extent that the parents suggest that the "additional adult" in the classroom would not be qualified to assist the student in this regard, I note that State regulations indicate that in a 12:1+1 special class the role of the "additional adult" is "to assist in the instruction" of students (8 NYCRR 200.6[h][4][i]). Accordingly, and especially since the record reflects that the student's IEPs each required an array of specific individualized supports for the student, including small group instruction, teacher cues, prompting and redirection, verbal and auditory cues, repetition of instruction and directions, and frequent teacher conferences to check for understanding (see Dist. Exs. 5 at pp. 3, 5; 17 at pp. 1-3), I am unable to find that the student's need for individualized instruction would not have been met in a 12:1+1 setting.

Finally, the parents suggest that their contentions regarding the 12:1+1 programs recommended for the student are supported by evidence in the record "attesting" to such "inappropriateness." A review of this evidence, however, reflects that while a number of witnesses who testified on the parents' behalf expressed an opinion that a 12:1+1 setting would not be appropriate for the student, much of this testimony is conclusory and/or does not clearly explain the basis for the conclusions reached. Moreover, and while some of this testimony does provide a basis for the opinions expressed (see, e.g., Tr. pp. 553-57), the testimony in general appears to focus on a 12:1+1 setting in isolation and ignores the various other services and supports (including the various management supports) provided to the student by the IEPs at issue. Accordingly, and in light of the nature of a 12:1+1 setting and what the record reflects about the student as discussed above, and further considering the various supports and services provided to the student by her IEPs, I am not persuaded by the evidence cited by the parents, and find that a 12:1+1 setting, while perhaps not desirable from the parents' perspective, was reasonably calculated to enable the student to receive an educational benefit.²⁵ This is especially true where, as here, it appears that the student was able to receive a benefit in a similar type of setting during the summers at Cooke Academy (see, e.g., Tr. at pp. 356-57, 360, 363).²⁶

E. Transition Plan

The parents also raise concerns regarding the adequacy of the transition plans provided in both the January 2011 and June 2012 IEPs. In particular, the parents contend that the IHO erred in finding that the "combined inadequacies" of each transition plan "did not rise to the level to constitute a denial of FAPE" (Pet. at ¶¶ 33, 47).

group activities with peers in her "Skills Lit 5.2" class, that when provided with a choice the student preferred to complete tasks independently (Dist. Ex. 16 at pp. 2-3).

²⁵ As noted above and eluded to by the IHO, the IDEA ensures an "appropriate" education and "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).

²⁶ I note that while the record reflects that there were three paraprofessionals in the student's Summer 2011 classroom in addition to a teacher and an assistant teacher, it also reflects that these paraprofessionals were in the class to assist other students on an individual basis, and were not there to help the student (Tr. pp. 356-57).

Under the IDEA, to the extent appropriate for each individual student, an IEP must focus on providing instruction and experiences that enable the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34]; 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 (20 U.S.C. § 1414[d][1][A][i][VIII]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]). In addition, State regulations require districts to conduct vocational assessments of students age 12 to determine their "vocational skills, aptitudes and interests" (8 NYCRR 200.4[b][6][viii]).

An IEP must also include the 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]). In this regard, State regulations require that an IEP include a statement of a student's needs as they relate to transition from school to post-school activities (8 NYCRR 200.4[d][2][ix][a]), as well as the transition service needs of the student that focuses on the student's course of study, such as participation in advanced placement courses or a vocational education program (8 NYCRR 200.4[d][2][ix][c]). The regulations also require that the student's IEP include needed activities to facilitate the student's movement from school to post-school activities, including 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 a functional vocational evaluation (8 NYCRR 200.4[d][2][ix][d]), as well as a statement of responsibilities of the school district (or participating agencies) for the provision of services and activities that "promote movement" from school to post-school.

1. January 2011 IEP

As noted above, while it appears from the record that January 2011 CSE did not have and/or rely upon a formal vocational assessment of the student when developing the January 2011 IEP, the record reflects that it did have both transitional and adaptive skills information about the student before it and, with respect to the student's vocational interests, that the CSE did question the student's father about such (Dist. Ex. 11 at pp. 12, 15; Tr. pp. 251). Further, and while I agree that the "transition" portion of the January 2011 IEP, as a whole, is not perfect and could have been more robust, it is generally consistent with what is reflected in the transition skills and adaptive skills portions of the December 2010 Cooke progress report (compare Dist. Ex. 5 at p. 16 with Dist. Ex. 11 at pp. 12, 15), and provides for instruction and experiences with a focus of enabling the student to prepare for post-school activities. For example, the IEP indicates that the student's diploma objective was to earn an IEP diploma and identifies long term adult outcomes for her related to the student's eventual community integration with maximum support, attendance at a vocational training program, living independently with support, and obtaining employment with maximum support (Dist. Ex. 5 at p. 16). Further, and in order to progress toward these long term adult outcomes, the January IEP requires that the student receive academic instruction to support her plan for post-secondary placement, that the student integrate into the community by learning about community agencies and their function by participating in community service in order to gain experience for post-secondary life, and that the student explore post-secondary options commensurate with her abilities and interests (*id.*). In addition,

the IEP recognizes the student's need to address independent living skills by increasing her knowledge and skills relative to safe and independent urban travel (travel training) and by developing budgeting and shopping skills, and it also recognizes her need to acquire daily living skills in order to prepare for work and independent living (*id.* at p. 17). The IEP further identifies the school and the student as the responsible parties that would participate in the implementation of these transition services/activities. Moreover, the "transition" portion of the January 2011 IEP is augmented by an annual goal and multiple measurable short term objectives that address the student's needs related to independent living and vocational skills, work-related self-advocacy, travel training, and communication (*id.* at p. 11), as well as by the provision of various related services and other annual goals which, in part, address skills like communication and self-expression and advocacy, which relate to the student's post-secondary needs (*id.* at pp. 7, 10-13, 15). Thus, viewing the January 2011 IEP as a whole, I find that any deficiencies that existed with the transition plan and/or transition services do not lead to a conclusion that the student would be unable to receive an educational benefit from the IEP.²⁷

2. June 2012 IEP

With respect to the January 2012 IEP, the parents contend that the IHO erred in her decision regarding the transition plan because it did not indicate the level of support that the student would need in a work study program, did not indicate or how long the student was capable of "functioning" daily in an internship or work site setting, did not describe the skills the student would need to acquire for purposes of travel training, and fails to indicate who would implement the IEP's travel training requirement (Petition at ¶ 47). However, the hearing record reflects that the student's transitional needs were discussed by the June 2012 CSE and were identified, in large part, though information provided about the student by Cooke Academy's consulting teacher who had prepared a transition document (Dist. Ex. 18) and orally presented it (or at least portions of it) at the June 2012 CSE (Tr. pp. 47--55, 119-20, 412, 683, 688-92, 734-35). In this regard I note that among other things discussed were transition-specific goals and objectives which were provided by Cooke Academy to the June 2012 CSE (compare Dist. Ex. 17 at pp. 5-9, 12-13 with Dist. Ex. 18 at pp. 1-3. See also Tr. pp. 734-35).²⁸ This includes, as is relevant to the claims made by the parents, a travel training goal which identifies the student's need to practice using maps, to use trouble shooting strategies to solve problems with using mass transit, and to plan a journey on mass transportation to complement chosen leisure activities (Dist. Exs. 17 at p. 7, 18 at p. 3; Tr. pp. 734-35).

²⁷ In this regard, and while the January 2011 IEP (as the parents contend) does not explicitly mandate vocational training or an internship, I find that the January 2011 CSE, which among other things recognized that the student was participating in an internship, had certain vocational interests, and also mandated a program that included a focus on vocational preparation (Dist. Ex. 5 at pp. 5, 11, 16), adequately indicated its intent to allow the student to develop vocational skills in the January 2011 IEP. In addition, and while not dispositive, I also note that testimony by the district representative indicated that there were no objections to the long term adult outcomes or transition services discussed relative to the transition plan during the January 2011 CSE (Tr. pp. 249-50).

²⁸ While testimony in the record reflects that the transition document prepared by Cooke Academy (Dist. Ex. 18) was not made available to the district at the June 2012 CSE meeting, the 2012 district representative indicated that this document was sent to her subsequent to the CSE meeting and was used to develop the June 2012 IEP (Tr. p. 52).

In addition, a review of the June 2012 IEP reflects that the IEP includes a coordinated set of transition activities which, again, were largely provided to the CSE by Cooke Academy (compare Dist. Ex. 17 at pp. 18-19 with Dist. Ex. 18 at pp. 4-5). With respect to this coordinated set of transition activities, a review of the IEP reflects that these address a number of transition needs, including transition-related instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and the acquisition of daily living skills (compare Dist. Ex. 17 at pp. 18-19 with Dist. Ex. 18 at pp. 4-5). For example, the IEP specifically provides for four instructional services/activities (including "participation in person-centered planning," "participation in a work study program," "instruction in adaptive daily life skills," and "instruction in travel training instruction"), as well as for counseling, speech-language therapy, OT, and PT to specifically address transition-related needs (Dist. Exs. 17 at p. 18; 18 at p. 4). In addition, and with respect to community experiences, the transition plan indicates the student would participate in money handling and budgeting in a community setting, would practice personal finance skills (i.e., banking), and would practice travel readiness skills (id.). The same transition plan reflects that in order to develop employment skills, the student would participate in small group vocational activities, as well as in a work-study program to develop on-the-job work skills (Dist. Exs. 17 at pp. 18-19; 18 at p. 4). Moreover, and with respect to the acquisition of daily living skills, the transition plan requires participation in community projects with sequences of life skills activities (i.e., planning and budgeting [for] a community activity), participation in an ADL program to practice both self-care routines and the use of household utilities and routines, and participation in money-handling and budgeting activities in the community (Dist. Exs. 17 at pp. 18-19; 18 at 4-5). Accordingly, and while the parents may have preferred that the IEP include more specific or detailed information about the student, I am unable to find that the transition plan in June 2012 IEP, especially when viewed in the context of the IEP as a whole, would have prevented the student from receiving an educational benefit.²⁹

F. Transition Support Services

The parents also raise an issue regarding the alleged lack of "supports or services" in the January 2011 and June 2012 IEPs "to facilitate [the student's] transition from her then-current placement to the larger, less supported setting contemplated by the [CSEs'] recommendations" (Pet. at ¶¶ 32, 46). Specifically, the parents allege that the IHO "improperly discounted" their claims in this regard (id.).

As an initial matter, the IDEA does not specifically set forth provisions requiring a school district to formulate a "transition plan" in an IEP for purposes of assisting a student with a move from one school to another (see, e.g., E.Z.-L v. New York City Dep't of Educ., 763 F.Supp. 2d 584, 598 [S.D.N.Y., 2011]).³⁰ Further, and while separate State regulations do

²⁹ In this regard, while the parents are correct in that the June 2012 IEP does not indicate who would implement the travel training requirements of the IEP, I do not find that this alone would result in a denial of FAPE. This is especially true since, ultimately, it is the district that is responsible for ensuring that an IEP gets implemented (see 20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]), and as discussed further below, speculation that an IEP will not be implemented does not constitute an appropriate basis for relief (see, e.g., R.E., 694 F.3d at 195).

³⁰ As discussed above, while districts are required to provide "transition services" in some cases, such services focus on facilitating a student's movement from school to post-school activities, as opposed to focusing on a student's move from one secondary school to another (see 8 NYCRR 200.1[fff]).

require that "transitional support services" be specified in a student's IEP in certain instances, such services are defined as "temporary services . . . *provided to a regular or special education teacher to aid in the provision of appropriate services to a student with a disability transferring to a regular program or to a program or service in a less restrictive environment*" (8 NYCRR 200.1[ddd]) (emphasis added). Such conditions do not exist in this case.³¹

Moreover, the parents do not set forth any specific claims in their petition regarding the student's needs with respect to transitioning from one environment to another, and upon a review of the hearing record I am unable to find any evidence to suggest that the student demonstrated a particular difficulty with respect to such transitions. In this regard I note that while the record reflects that the student had, in the past, transitioned between various Cooke Center programs and locations (including programs smaller than Cooke Academy), there is no indication that any of these transitions were problematic for the student. Likewise, it appears from the record that subsequent to the 2012-13 school year, the student was removed from Cooke Academy and was placed in a different program (Tr. pp. 427-29), and there is no indication that there were any significant problems with this transition either. Moreover, and as discussed at length above, both the January 2011 and June 2012 IEPs included various services and supports that, should they have been needed, could have assisted the student (who, again, does not present with significant behavioral issues) with a transition from Cooke Academy to the district's school, including the placement of a student in a small, structured setting, the provision of various individualized and multisensory academic management needs, and the provision of various related services (including counseling and speech-language therapy) which could assist the student with her social and emotional needs. Accordingly, and on the totality of the record before me, I cannot find that the student was denied a FAPE in either school year due to issues related to transitioning from Cooke Academy to the district.

G. Assigned School

Finally, in addition to the claims regarding the two IEP's at issue, the parents also make allegations in their petition concerning the public school to which the district assigned the student, essentially contending that the district failed to show that the school would have addressed the student's needs or implemented her IEPs. The IHO rejected these claims and, while not entirely for the same reasons, I agree that they do not provide a basis for relief in this matter.

As an initial matter, the Second Circuit Court of Appeals has held that where, as here, an IEP is rejected by a parent before a district has had an opportunity to implement it, the sufficiency of a district's offered program must generally be determined on the basis of the IEP itself. In R.E., for example, the Court was confronted with a situation where the parents of a student rejected an IEP prior to the time it was required to be implemented, yet "[did] not

³¹ Generally, and consistent with the IDEA's "least restrictive environment" requirements, a move to a "less restrictive environment" is one in which a student moves to an environment in which he or she has greater access to non-disabled peers (see generally 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 also Application of the Dep't of Educ., Appeal No. 12-159 at FN 11 [noting that the term "least restrictive environment" does not refer to the student-to-adult ratio in a classroom]; Application of a Student with a Disability, Appeal No. 12-119, citing Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d at 108) [noting that LRE requirements do not relate to the number of students in a classroom, but rather focus on access to non-disabled peers]. There is no indication in the record that this would have occurred in this case.

seriously challenge the substance of the IEP" (694 F.3d at 195). Instead, those parents argued simply that "the written IEP would not have been effectively implemented at [the assigned public school site]" (*id.*). This claim, however, was rejected by the Court, which noted in relevant part that its "evaluation [of the parents' claims] must focus on the written plan offered to the parents" and that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (*id.*).

Likewise, in K.L. v. New York City Dep't of Educ., the Second Circuit again addressed the issue of "school placements" when it addressed allegations that a recommended public school site was "inadequate and unsafe" (530 Fed. App'x 81, 87 [2d Cir. 2013]). As it did in R.E., the Court rejected these claims as a basis for unilateral placement and, quoting R.E., noted that the "'appropriate inquiry [was] into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (*id.*, quoting R.E., 694 F.3d at 187). This sentiment was further espoused in F.L. v. New York City Dep't of Educ. (553 Fed. App'x 2 [2d Cir. 2014]), where the Second Circuit rejected allegations that a recommended school would not have provided adequate speech-language therapy or OT to the student at issue, noting that these claims challenged "the [district's] choice of school, rather than the IEP itself" (*id.* at 9). Citing to R.E., the Court reiterated that "[s]peculation that [a] school district will not adequately adhere to [an] IEP is not an appropriate basis for unilateral placement" (*id.*, citing R.E., 694 F.3d at 195), and held that the "appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a [FAPE] 'because necessary services included in the IEP were not provided in practice'" (*id.*, citing R.E., 694 F.3d at 187 n.3).

In light of the above, two general principals are clear: (1) the sufficiency of a special education program offered to a student must generally be assessed based on the sufficiency of the IEP offered to the student, and (2) speculation that a school district will not adequately adhere to that IEP does not, alone, constitute an appropriate basis for unilateral placement. In that regard, to the extent that the parents suggest that the district was required to prove that the public school that it assigned the student to was appropriate, I am unable to agree since imposing such a requirement would both (a) require that one look past the April 2013 IEP in assessing the sufficiency of the program offered to the student, and (b) require one to speculate—absent evidence to the contrary—that the district would not adequately adhere to the April 2013 IEP (see, e.g., M.O. v. New York City Dep't of Educ., 2014 WL 1257924, at *2 [S.D.N.Y. Mar. 27, 2014] [noting that "it would be inconsistent with R.E. to require . . . evidence regarding the actual classroom [the student] would have attended, where it had become clear that [the student] would attend private school and not be educated under the IEP"], citing R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]). Thus, while I recognize that some district courts have reached conclusions which suggest otherwise, the weight of the relevant authority, consistent with the Second Circuit precedent discussed above, supports the approach taken here (see B.P. v. New York City Dep't of Educ., 2014 WL 6808130, at *12 [S.D.N.Y. Dec. 3, 2014], B.K., 12 F.Supp.3d at 370-372; M.L., 2014 WL 1301957, at *12; M.O., 2014 WL 1257924, at *2; E.H. v. New York City Dep't of Educ., 2014 WL 1224417, at *7 [S.D.N.Y. Mar. 21, 2014]; M.S. v. New York City Dep't of Educ., 2 F.Supp.3d 311, 331-32 [S.D.N.Y. 2013]; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *26 [E.D.N.Y. Aug. 19, 2013]; M.R. v. New York City Bd. of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 286 [S.D.N.Y. 2013]; N.K. v. New York City Dep't of Educ., 961 F.Supp.2d 577, 588-90 [S.D.N.Y. 2013]; J.L., 2013 WL 625064, at *10; Ganje v.

Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012], adopted at 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at *12-*14 [S.D.N.Y. June 16, 2014] ["Absent non-speculative evidence to the contrary, it is presumed that the placement school will fulfill its obligations under the IEP."]; but see V.S. v. New York City Dep't of Educ., 2014 WL 2600313, at *4 [E.D.N.Y. June 10, 2014]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16 [S.D.N.Y. May 27, 2014]; Scott v. New York City Dep't of Educ., 2014 WL 1225529, at *19 [S.D.N.Y. Mar. 25, 2014]; J.F. v. New York City Dep't of Educ., 2013 WL 1803983 [S.D.N.Y. Apr. 24, 2013]; D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13 [S.D.N.Y. 2013]; B.R. v. New York City Dep't of Educ., 910 F.Supp.2d 670, 676-78 [S.D.N.Y. 2012]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012)].³²

Further, and in light of the above, I am unable find that the parents' claims that the public school to which the student was assigned would not have appropriately addressed the student's life skills training needs, implemented her IEP goals in that area, or that it would not have implemented the student's related service mandates, constitute a basis for relief.³³ Such claims are essentially suggestions that the assigned public school would not have been able to implement various mandates in the student's IEPs and, since the student never attended the school, require the very type of speculation that has been rejected by courts (see, e.g., R.E., 694 F.3d at 195 [rejecting as speculative - and thus as a basis for unilateral placement - the suggestion that a student may not receive IEP-mandated services at an assigned school; see also, e.g., F.L. 553 Fed. App'x at 9 [same]). The same is also true for the "concern" that the parents claim to have that the transition program would not offer opportunities to generalize skills in the community since, as noted above, both IEPs offer the student a community integration component (Dist. Exs. 5 at p. 16; 17 at p. 18).

The parents also argue that (a) the student would not have been appropriately grouped for instructional purposes at the assigned public school, (b) that the student would not have received sufficient academic instruction at the assigned public school, (c) that the school was too large and overwhelming for the student, and that (d) the student's transition needs would not have been met at the assigned public school. However, and even assuming as the parents contend that information known about an assigned public school at the time that a placement decision may be used to justify a decision to unilaterally place a student,³⁴ I find that these assertions do not

³² I note that in T.Y. v. New York City Dep't of Education, 584 F.3d 412, 419 [2d Cir. 2009], the Second Circuit held that districts do not have "carte blanche to assign a child to a school that cannot satisfy [an] IEP's requirement[s]" (584 F.3d at 420), and this is often cited in support of the position taken by the parents herein. However, while I agree that an IEP must be implemented as written, it does not necessarily follow from this (or T.Y.) that districts must prove that an IEP that has been rejected, and which a district has not been given an opportunity to implement, would have been properly implemented in order to establish that a FAPE has been offered to a student. This is especially true since T.Y. itself does not explicitly hold as such, and such an interpretation is, again, inconsistent with the Court's subsequent holdings, including F.L.'s finding 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' (F.L., 553 Fed. App'x at 9).

³³ The former allegation is apparently based on a belief that the student might not have access to the "daily living skills shop" at the school (Petition at ¶58), while the latter appears to be based on publically available statistical data which the parents allege shows that not all students received all of their related services at the school (id. at ¶59).

³⁴ While there are district court cases suggesting that a parent may rely on evidence outside of an IEP which is

support their claim for relief in this matter.

Regarding the parents' claims related to functional grouping, for example, I initially note that despite the Second Circuit's mandate that the sufficiency of a program be determined on the basis of the IEP itself, such claims do not directly relate to a student's IEP (they rather relate to a requirement imposed upon school districts by State regulations [see 8 NYCRR 200.1[ww][3][ii]; 200.6[a][3], [h][3]). Further, and to the extent that the issue of functional grouping can be deemed to be related to the implementation of a student's IEP, any analysis of this issue would necessarily require the use of retrospective evidence by the district, explaining how the district would have executed the student's IEPs, which the Second Circuit has determined is not appropriate (see K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186, 195). Moreover, even if there were evidence in the record that students were not appropriately grouped at the time of the parents' visit to the public school site, this alone would not necessarily make the parents' claims any less speculative since the grouping of students in classrooms is something which may change over time (see, e.g., M.S., 2 F.Supp.3d, at 332 n.10; Application of the Dep't of Educ., Appeal No. 13-220). Accordingly, I cannot find that the parents' "grouping" claims are sufficient to support the unilateral placement of the student (see B.K., 12 F.Supp.3d at 371 [holding that the Plaintiffs' functional grouping argument in that case fell "squarely within the realm of impermissible 'speculative' objections to an unimplemented IEP, which the court need not and will not entertain as grounds for establishing the denial of a FAPE"]; E.H., 2014 WL 1224417 at *7 [argument that children at the assigned public school at issue were functionally different than the student deemed speculative]; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; N.K., 961 F.Supp.2d at 588-89; A.M. v. New York City Dep't of Educ., 964 F.Supp.2d 270, 286 [S.D.N.Y. 2013]).

Likewise, I am unable to find that the parents' claims regarding academic instruction (or the alleged lack of academic instruction) support their claim for relief. In particular, it appears from the petition that the basis of this claim is the parents' belief that the student would receive "only 50 minutes of academic instruction daily" at the school (Pet. at ¶ 55). However, the only testimony in the hearing record regarding this came from the consulting teacher at Cooke who testified that during a visit to the school, she was told by the parent coordinator that there was approximately 50 minutes of academics a day "prior to the worksite placement" (Tr. p. 700). It is not clear from the record, therefore, that the student's academic instruction would have been limited to a total of 50 minutes per day. This is especially true since academic instruction need not be limited to a classroom environment. In addition, and according to Cook's consulting teacher, the "concern" expressed with respect to the alleged lack of academic instruction was that the student's academic goals in the IEP would not be met with only 50 minutes per day of academic instruction (Tr. p. 700). To that extent, this allegation is akin to the parents' other allegations that the assigned public school would not have been able to implement the student's IEP which, again, is speculative and not an appropriate basis for unilateral placement.

The parents also contend that the assigned public school was too large for the student and

known to the parent at the time the decision to unilaterally place a student is made to justify a unilateral placement (see, e.g., D.C. v. New York City Dep't of Educ., 950 F.Supp.2d 494, 510-11 [S.D.N.Y. 2013]; B.R. v. New York City Dep't of Educ., 910 F.Supp.2d 670, 677-79 [S.D.N.Y. 2012]), this issue has not been addressed by the Second Circuit which left open the question as to whether one such case (B.R.) "properly construes R.E." (see F.L., 2014 WL 53264, at *2).

suggest (at least in their amended due process complaint notice) that she would be overwhelmed and confused at the school, which would lead to anxiety and an inability to focus, attend, and learn (Pet. at ¶ 60; Parent Ex. V at p. 5). However, the hearing record reflects that the assigned public school site to which the student was assigned only had 120-125 students in 2011-12 and 135 students in 2012-13 (Tr. pp. 204-205), and the principal of that school testified that this school was the only school located in the building (*id.*).³⁵ Further, and as discussed above, the student would have been in a 12:1+1 class at the school and had IEPs that provided various supports and services to her. Accordingly, and as the student never attended the school, I am unable to find that the student would not have been able to receive educational benefits at the school based on its size, alone (*see, e.g., N.K.*, 961 F. Supp. 2d at 591-92). This is especially true since other than testimony by the student's father indicating that the assigned public school was larger than Cooke Academy and that the student tends to "shy away" from large crowds and environments (Tr. pp. 395-96, 419-20), the parents do not point to anything in the hearing record (other than letters noting a general belief that the school was too large and a memorandum of law submitted to the IHO post-remand which does not appear to address this issue) to support this assertion (*see* Pet. at ¶ 60).³⁶

Lastly, and with respect to the parents' claims regarding the assigned public school's ability to meet the student's transition needs, I note that this claim appears to be based, not on what the parents knew about the assigned public school, but rather on what they did not know about it. Specially, while the parents asserted in their amended due process complaint notice that they were told that the assigned public school did not have an internship program or integrated travel training (Parent Ex. V at p. 6), the basis of this statement is not clear from the record. In fact, the student's father actually testified that it "wasn't clear" to him what internship opportunities existed at the school (Tr. pp. 444-45), and the district put on a witness (the principal of the assigned public school) who testified that the school, in fact, offers both travel training and internships, though the latter is apparently referred to by the district as a "work study" (Tr. pp. 54, 178-82). In addition, in their petition the parent do not allege that they were told that the assigned public school lacked certain transitional elements, but rather contend that they were not advised that these elements existed, and appear to rely on the fact that the district did not respond to a letter that they wrote in which the above-described concerns were raised (Pet. at ¶ 57). However, the parents do not cite to any authority explicitly requiring a response to these letters and, since as discussed above a district is not obligated to preemptively prove that IEP will be implemented, I am unable to find an implied obligation to do so. Accordingly, I do not find the parents claims in this regard be an appropriate basis for relief.³⁷

³⁵ While the student's father testified that he observed the school to have "300 plus students in it" (Tr. pp. 419-20), this testimony is contradicted by the testimony above, and the basis of this statement is not clear. That being said, it is possible that what the student's father was referring to was the total enrollment at all sites operated by the school, since the hearing record reflects that the school operated at six different sites and, in total, enrolled around 300 students (Tr. p. 203).

³⁶ The parents also suggested in their amended due process complaint notice that that the size of the school posed a safety risk to the student due to the curvature of her spine. However, I am unable to find that such is the case without speculating since, again, the student never attended the assigned school, and the record reflects that the student is able to safely do things like travel on the subway and engage in other physical activities despite her condition (Tr. pp. 364, 366, 527, 614-15).

³⁷ The parents also suggest that the assigned public school would not meet the student's transition needs because she would have been in a 12:1+1 class, but this claim is essentially a reiteration of claims that are discussed above.

Finally, the parents suggest that they are entitled to relief because the district failed to show that a seat was available for the student in the assigned public school, contending that since there was testimony indicating that the 12:1+1 classes at the assigned public school were full during the 2011-12 school year, that this called into question whether space would have been available. However, to meet its legal obligations, a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; Tarlowe, 2008 WL 2736027, at *6 [stating a district's delay does not violate the IDEA so long as a placement is found before the beginning of the school year]). The IDEA does not require districts to maintain classroom openings for students enrolled in private schools (E.H. v. Bd. of Educ., 2014 WL 1224417, at *7 [S.D.N.Y. Mar. 24, 2014] [finding that the parent's argument that the student was denied a FAPE because the proposed classroom did not have a space for the student was without merit and that the district public school was not obligated to hold a seat open for the student after the parent rejected the district's offered public school placement prior to the start of the school year]; see M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *7 [S.D.N.Y. Mar. 31, 2014]; M.O. v. New York City Dep't of Educ., 2014 WL 1257924, at *2 [S.D.N.Y. Mar. 27, 2014]; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; N.K., 961 F. Supp. 2d at 590). Here, the record reflects that the district developed two IEPs for the student prior to the beginning of each respective school year (Dist. Exs. 5 and 17), and that the parents rejected these IEPs before giving the district an opportunity to implement them. Accordingly, the district was not obligated to hold a seat for the student as the parent rejected the offered placement prior to the implementation of each IEP. Accordingly, the assertion that there was no showing that there was a seat available for the student at the assigned public school is not a basis for relief.

VII. Conclusion

For the reasons discussed above, I find that the January 2011 and June 2012 IEPs offered the student a FAPE.

THE APPEAL IS DISMISSED.

Dated: Albany, New York
January 20, 2015

HOWARD BEYER
STATE REVIEW OFFICER