



# The University of the State of New York

## The State Education Department

State Review Officer

[www.sro.nysed.gov](http://www.sro.nysed.gov)

No. 12-010

### **Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability**

#### **Appearances:**

Michael Best, Special Assistant Corporation Counsel, attorneys for petitioner, Lisa R. Khandhar, Esq., of counsel

Law Offices of Neal H. Rosenberg, attorneys for respondent, Karen Newman, Esq., of counsel

### **DECISION**

#### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) daughter and ordered payment for tuition costs at the Cooke Center Academy (Cooke)<sup>1</sup> for the 2010-11 school year. The parent cross-appeals from that part of the IHO's determination which reduced the parent's request for tuition costs based upon equitable considerations. The appeal must be sustained. The cross-appeal must be dismissed.

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

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a school 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

---

<sup>1</sup> Cooke is a nonpublic school that has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

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]; 34 CFR 300.151-300.152, 300.506, 300.511; Educ. Law § 4404[1]; 8 NYCRR 200.5[h]-[l]).

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

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

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

The hearing record reflects that the student has received diagnoses of expressive language disorder, auditory processing disorder, and fine motor, gross motor and graphomotor deficits (District Ex. 4 at p. 1). The student's eligibility for special education programs and related services

as a student with an intellectual disability is not in dispute in this proceeding (see 34 CFR 300.8 [c][6]; 8 NYCRR 200.1[zz][7]).<sup>2</sup>

As relevant to the instant appeal, the CSE convened on January 14, 2010 for the student's annual review, and to develop the student's IEP for the 2010-11 school year (Tr. pp. 18-19, Dist. Exs. 1 at p. 2; 2 at p. 1). The January 2010 CSE recommended that the student attend a 12-month special class in a specialized school with a student-to-teacher ratio of 12:1+1 with related services of speech-language therapy, occupational therapy (OT), and counseling, provided in a separate location (Dist. Exs. 1 at p. 21; 2 at p. 1). The January 2010 CSE also recommended that the student participate in alternate assessment as her "severe disabilities require[d] the use of alternate grade level indicators (AGLIS) to appropriately assess abilities and needs" (Dist. Ex. 1 at p. 21).

In a letter to the parent dated June 23, 2010, the district summarized the January 2010 CSE's recommendations and notified the parent of the particular school to which the student was assigned for the 2010-11 school year (Dist. Ex. 5). By letter to the district dated August 9, 2010, the parent advised that she had visited the particular public school identified by the district on July 6, 2010 and she was rejecting the district's program on the grounds that it was inappropriate to meet the student's social and academic needs (Parent Ex. A). The parent further indicated that the student would continue to attend Cooke for the 2010-11 school year and that she would seek payment of the student's tuition costs from the district (id. at p. 2).

#### **A. Due Process Complaint Notice**

In an amended due process complaint notice dated March 24, 2011, the parent asserted that the student's January 14, 2010 IEP was procedurally and substantively invalid (Dist. Ex. 6 at p. 1). The parent specifically asserted that the CSE was not duly constituted; that the CSE meeting did not comply with appropriate procedure; that the CSE did not review the proper documentation; that the IEP did not accurately reflect the student's learning issues and academic levels; and that the IEP did not include sufficient goals and objectives. In addition, the parent asserted that the district's assigned school was inappropriate for safety reasons; that the student needed a small class in a nurturing environment; that the student would be too anxious in the environment of the assigned school and unable to learn; and that the student would not be appropriately grouped, academically or socially (id. at pp. 1-2). As relief, the parent sought payment for tuition costs at Cooke, transportation, and related services (id. at p. 2).

---

<sup>2</sup> I note that although the student's January 14, 2010 IEP indicates that the student was classified as a student with mental retardation, the term mental retardation is no longer used in State regulations as of revisions in October 2011, but the current definition of the term intellectual disability is the same as the previous definition of mental retardation (see 8 NYCRR 200.1[zz][7]; see also Dist. Ex. 1 at p. 1).

## B. Impartial Hearing Officer Decision

An impartial hearing convened on June 24, 2011, and concluded on October 24, 2011 after five days of proceedings.<sup>3</sup> In a decision dated December 6, 2011,<sup>4</sup> the IHO found that the CSE was "duly constituted" and that the parent had an opportunity to fully participate in the CSE meeting (IHO Decision at pp. 10-11). In addition, the IHO found that the CSE was not required to do its own evaluation or observation of the student, indicating that attendees were asked to update the information contained in reports that were reviewed and that reports prepared within three years of the date of the CSE meeting were acceptable (*id.* at p. 11). Furthermore, the IHO found that regarding the goals and objectives, the inclusion of one goal that the student had mastered did not invalidate the IEP, and that the CSE appropriately considered teacher estimates of the student's functional levels (*id.*). In addition, the IHO found that despite some comments at the hearing generalizing the needs and abilities of students with the same classification as the student, information about the student was relied on to create the IEP, which adequately reflected the student's special education needs and was reasonably calculated to provide the student with educational benefits (*id.*). Next, the IHO indicated that she was not deciding the following issues because they were not included in the due process complaint notice and were therefore outside the scope of the hearing: there was no interpreter at the CSE meeting; the CSE did not consider a vocational assessment of the student; the IEP did not include provision for travel training or practical experience; the timeliness of the district's notice to the parent of the particular school it was assigning the student; and the parent was not shown the class or site of the school (*id.* at pp. 11-12). Regarding the parent's assertions that the assigned class was too restrictive because the student needed stimulation from a larger group of 12 peers and the class only had 6 students in July, and that functional grouping of the class was not appropriate, the IHO found that the issues were speculative because the parent had not enrolled the student in the school and therefore the district was not required to establish that the student had been grouped appropriately, and that moreover, by September, there were 11 students in the class (*id.* at p. 12).

Next, the IHO found that the district's placement of the student in a 12-month program was a denial of a free appropriate public education (FAPE) (IHO Decision at p. 12). Although the IHO determined that the issue of the 12-month program should have been raised in the due process complaint notice, the IHO found that it was raised during the direct testimony of the district's witness and therefore the district "opened the door for consideration" of the issue (*id.*). The IHO reasoned that it was inappropriate for the district "to have recommended a more restrictive environment in a 12-month program for a child whose progress in a 10-month program was significant" (*id.*). The IHO concluded that "[d]espite the team's concern for the student's regression, based on [the student's] successful performance in a 10-month program, ... a 12-month program does not provide [the student] an education in the least restrictive environment" (*id.* at p.

---

<sup>3</sup> Regarding extensions, I remind the IHO to comply with the regulatory requirements governing the granting of extensions, including documenting in writing the reason for which each extension is granted, that the IHO "fully consider[ed]" the relevant factors, and that an extension was not granted solely due to "scheduling conflicts" absent "a compelling reason or a specific showing of substantial hardship" (8 NYCRR 200.5[j][5][i-iv]). Moreover, I find that the IHO has not demonstrated compliance with the 45-day timeline for issuing the decision absent specific extensions of time insofar as the IHO was required to draft a written response for each extension request and enter the response into the hearing record (8 NYCRR 200.5[j][5][iv]).

<sup>4</sup> The decision bears the record close date of December 11, 2011 (*see* IHO Decision).

13). The IHO further found that the district "failed to provide FAPE ... because the recommendation does not satisfy the least restrictive environment requirement of the IDEA" (*id.*). The IHO further determined that the parent's unilateral placement was appropriate, finding the educational program was uniquely suited to the student's special education needs and that the student was progressing academically, socially and emotionally (*id.*). Regarding equitable considerations, the IHO found that the parent did not properly reject the recommended placement and advise the district of her concerns about the January 2010 IEP, and therefore, the IHO reduced the district's obligation for payment of tuition by \$6,500 (*id.*).

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

The district appeals, asserting that the district offered the student a FAPE and specifically that the IHO should not have considered whether the 12-month program was appropriate for the student as the parent did not raise this issue in her due process complaint notice, and that the district did not "open the door" for the IHO to consider the 12-month program recommendation. As an alternative argument, the district asserts that the evidence showed that the recommendation for a 12-month program was appropriate for the student, and that the CSE review and resultant January 2010 IEP were reasonably calculated to provide the student with educational benefits. According to the district, the recommendation of a 12-month program was the least restrictive environment (LRE) for the student. The district also asserts that the purpose of placing a student in the LRE is not related to whether or not a student receives a 12-month program, and that the district recommendation of a special class in a specialized school was appropriate. In addition, the district asserts that the IHO properly determined the issues of CSE composition, goals and objectives, grade estimate versus instructional levels, appropriate CSE process, and that the CSE reviewed the appropriate documentation. The district further asserts that the IHO properly determined that the district did not have a duty to establish how it would functionally group students within the classroom where the parent did not enroll the student in the district's assigned school, and that in any event, the student would have been grouped appropriately academically and socially, and that the classroom was safe. Regarding the parent's unilateral placement, the district asserts that Cooke was not appropriate because it employed "whole class goals" rather than individualized goals and the student did not receive a 12-month program. In addition, the district asserts that the equities favored the district because the parent failed to give adequate notice before rejecting the district's recommended program and the parent did not "seriously intend" to enroll the student in public school. Accordingly, the district asserts that tuition reimbursement should be denied in its entirety, instead of the reduction ordered by the IHO.

The parent answers and cross-appeals. In the answer, the parent asserts general admissions and denials. The parent asserts, among other things, that the district's burden of proof regarding the appropriateness of its recommended program renders the charges alleged in the parent's due process complaint notice irrelevant, as the district must prove that its program was appropriate in all respects. In addition, the parent asserts that the district's placement recommendation was overly restrictive, and that although testimony indicated that students with the same classification as the student regress and need 12-month programs, the student did not regress and was higher functioning than her classification might suggest. The parent further asserted that the IHO's finding that the district failed to offer the student a FAPE should be upheld and that the student did not require a 12-month program, rendering the district placement overly restrictive. In addition, the parent asserts that Cooke was appropriate. In a cross-appeal, the parent asserts that the IHO

incorrectly determined that the parent provided inadequate notice of the parent's unilateral placement, and that the parent should receive the full cost of tuition at Cooke.

The district answers the cross-appeal. In the answer, the district asserts that the parent did not provide adequate notice of the unilateral placement, as the parent did not reject the recommended placement until August 9, 2010, subsequent to the beginning of the 12-month school year.

## V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [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; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (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 a procedural violation is 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]; A.H. v. Dep't of Educ., 2010 WL 3242234, at \*2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at \*7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; 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 P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at \*15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; 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. Dep't 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 enabling him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][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]). 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; 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 M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at \*7 [S.D.N.Y. Aug. 27, 2010]).

## VI. Discussion

### A. Scope of Impartial Hearing and Review

As an initial matter, I will address the district's claim that the IHO improperly based her decision on whether the district's recommendation that the student attend a 12-month program was appropriate and the parent's assertion that the charges alleged in a due process complaint notice are irrelevant because the district must prove that its program was appropriate in all respects. A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]; see M.R. v. South Orangetown Cent. Sch. Dist., 2011 WL 6307563, at \*12-\*13 [S.D.N.Y. Dec. 16, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at \*13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at \*6 [S.D.N.Y. Sept. 16, 2011]; W.M. v. Lakeland Cent. Sch. Dist., 2011 WL 1044269, at \*8 [S.D.N.Y. Mar. 10, 2011]; M.P.G., 2010 WL 3398256, at \*8; Application of the Bd. of Educ., Appeal No. 11-111; Application of a Student with a Disability, Appeal No. 11-100; Application of a Student with a Disability, Appeal No. 11-042; Application of the Bd. of Educ., Appeal No. 11-038; Application of a Student with a Disability, Appeal No. 11-008). The parent cites the District Court's decision in M.H. v. New York City Dept. of Educ. (712 F.Supp.2d 125, 149 [S.D.N.Y. 2010]) to support her contention; however, since that case was decided, a greater number of District Court decisions appear to hold a stricter view of this provision. Additionally the parent's assertion that the district must prove that its program was appropriate in all respects regardless of what is contained in the due process complaint is wholly without merit and contracted by statutory and regulatory provisions. As described above, the party requesting an impartial hearing identifies the potential range of issues in the first instance by sufficiently setting them forth in the due process complaint. The range of issues to be decided at the impartial hearing is also subject to the authority of the IHO, who may consistent with basic principles of due process conduct a prehearing conference (i.e. notice and an opportunity to be heard) for the purpose of narrowing and clarifying the issues that he or she will receive evidence on and decide in an impartial hearing (8 NYCRR 200.5[j][3][xi]). After the issues that must be resolved have been identified the Education Law assigns the burden proof on the issues to be decided during the hearing to the school district, except as to those matters related to the unilateral placement of the student where FAPE is at issue (Educ Law § 4404[1][c]). There is a rebuttable presumption in State regulations that each side will have up to one day to present its case on the disputed issues (8 NYCRR200.5[j][3][xiii]) and there is no plenary requirement that a district must prove any and all matters generally related to its obligation to develop special education programming for a student with a disability regardless of the allegations. Discussing the sufficiency requirements prior to the Supreme Court's decision in Schaffer v. Weast (546 US 49 [2005]) at a time when the burden of proof under the IDEA was typically placed on school districts, the Senate Committee indicated that Congress did not intend to "forc[e] the school to prepare for any and every issue that could be possibly raised against it" by merely alleging that a student was denied a FAPE (Individuals with Disabilities Education Act Senate Report No. 108-185 at p. 35).

In this case, I find that the parent's amended due process complaint notice may not be reasonably read as asserting a claim that the 12-month program was not appropriate for the student



(see Dist. Ex. 6). Additionally, while the hearing record contains some testimony relating to the district's recommendation that the student attend a 12-month program, I find that the district did not "open the door" by agreeing to expand the scope of the impartial hearing and the hearing record indicates that the district objected to expanding the scope of the hearing (see Tr. pp. 107, 620-21, 705, 730-31). Thus, the IHO should have confined her determination to the issues raised in the parent's amended due process complaint notice and erred in considering whether the district's recommendation of a 12-month program constituted a denial of a FAPE (see 20 U.S.C. § 1415[c][2]; [f][3][B]; 34 CFR 300.508[b], [d][3]; 300.511[d]; 8 NYCRR 200.5[i][1][iv], [i][7]; [j][1][ii]; B.P. v. New York City Dep't of Educ., 2012 WL 33984, at \*4-\*5 [E.D.N.Y. Jan. 6, 2012]; M.R., 2011 WL 6307563, at \*12-\*13; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at \*12 [S.D.N.Y. Oct. 28, 2011]; C.D., 2011 WL 4914722, at \*13; R.B., 2011 WL 4375694, at \*6-\*7; M.P.G., 2010 WL 3398256, at \*8; Application of the Bd. of Educ., Appeal No. 12-012; Application of the Dep't of Educ., Appeal No. 11-156).<sup>5</sup> Consequently, the IHO's determination with respect to this issue must be reversed.

Regarding the IHO's decision to decline to address five issues raised by the parent at the impartial hearing because they were not included in the due process complaint notice (see IHO

---

<sup>5</sup> Assuming for the sake of argument that the parent had asserted that the 12-month placement recommendation did not satisfy the LRE requirement of the IDEA, I find that the IHO erred in analyzing the LRE requirements of the IDEA by apparently including an extended 12-month school year placement as a point on the continuum and, moreover, the district's analysis is also flawed to the extent that the district asserts that the recommendation of a 12-month placement was the LRE for the student (see IHO Decision at pp. 12-14; Pet. at ¶ 39). I note that, to the contrary, the district also asserts that the LRE requirement is not related to an analysis of a 12-month school year as opposed to a 10-month school year (see Pet at ¶ 40). The IDEA requires that a student's recommended placement must be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 111; Gagliardo, 489 F.3d at 105; Walczak, 142 F.3d at 132; Patskin, 583 F. Supp. 2d at 428). In determining an appropriate placement in the LRE, the IDEA requires that students with disabilities be educated to the maximum extent appropriate with students who are not disabled and that special classes, separate schooling or other removal of students with disabilities from the general educational environment may occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily (20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; Newington, 546 F.3d at 112, 120-21; Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 [3d Cir. 1993]; J.S. v. North Colonie Cent. Sch. Dist., 586 F. Supp. 2d 74, 82 [N.D.N.Y. 2008]; Patskin, 583 F. Supp. 2d at 430; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 144 [N.D.N.Y. 2004]; Mavis v. Sobel, 839 F. Supp. 968, 982 [N.D.N.Y. 1993]). Federal and State regulations require that school districts ensure that a continuum of alternative placements be available to meet the needs of students with disabilities for special education and related services (34 CFR 300.115; 8 NYCRR 200.6). The continuum of alternative placements includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; and the continuum makes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement (34 CFR 300.115[b]). In addition, while the continuum of alternative placements includes special classes, it does not designate special classes with an extended school year as a separate point on the continuum; instead, the 12-month school year is an additional service that may be recommended for students (see <http://www.p12.nysed.gov/specialed/publications/policy/schoolagecontinuum.pdf>). An appropriate inquiry would consider, for example, whether placement of a student in a special class and/or a special school were appropriate for a student (see 34 CFR 300.115; 8 NYCRR 200.6). I note, however, that the IHO did not find that the district recommendation of a special class in a special school was inappropriate (see IHO Decision at pp. 10-13), and, moreover, that the parent did not assert in the March 2011 amended due process complaint notice or her cross-appeal that the district recommendation of a special class in a special school was inappropriate (see Dist. Ex. 6; Answer ¶¶ 57-59). Further, I note that the parent's unilateral placement consists of a special class in a special school (see Tr. pp. 486-87; Parent Ex. L at p. 1).

Decision at pp. 11-12), and the parent's assertion that the failure to allege the charges in the due process complaint notice is not relevant, I find that for the reasons discussed above, the IHO properly decided not to consider those issues as the parent's amended due process complaint notice may not be reasonably read as asserting such claims (see Dist. Ex. 6), and there is no indication in the hearing record that the district agreed to expand the scope of the impartial hearing or requested that the IHO add such claims to the list of issues to be decided (see 20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]).

To the extent that the parent's "answer and cross-appeal" may be construed to include a cross-appeal on the issues of CSE composition, sufficiency of evaluative information, present levels of performance, goals, and appropriateness of the assigned class, I have included a review of those issues below.

## **B. January 2010 IEP**

### **1. CSE Composition**

Next, I turn to the parent's contention that the January 2010 CSE was improperly composed. Participants at the January 2010 CSE meeting included the student's mother, a special education teacher who also served as the district representative, a district school psychologist, a regular education teacher, an additional parent member, two supervisors from Cooke, and the student's head teacher from Cooke who participated by telephone (Dist. Ex. 1 at p. 2).

To the extent that the parent argues that the January 2010 CSE lacked a proper special education teacher, I note that the IDEA requires a CSE to include, among others, one special education teacher of the student, or where appropriate, not less than one special education provider of the student (20 U.S.C. § 1414[d][1][B][ii]-[iii]; see 34 CFR 300.321[a][2]-[3]; 8 NYCRR 200.3[a][1][ii]-[iii]). The Official Analysis of Comments to the federal regulations indicates that the special education teacher or provider "should" be the person who is or will be responsible for implementing the student's IEP (IEP Team, 71 Fed. Reg. 46670 [Aug. 14, 2006]).

The hearing record reflects that a special education teacher from the district and the student's classroom teacher from Cooke participated in the January 2010 CSE meeting as well as two supervisors from Cooke (Dist. Ex. 1 at p. 2). The hearing record reflects that the district's special education teacher previously taught special education, but was not teaching within a classroom at the time of the January 2010 CSE meeting (Tr. pp. 10-15). The hearing record further reflects the active participation of the student's then-current head classroom teacher at the January 2010 CSE meeting; specifically, that the Cooke classroom teacher discussed with the CSE the student's needs and present levels of performance (Tr. pp. 556, 567-68; Dist. Ex. 1 at pp. 3-7). Moreover, the hearing record reflects that at the January 2010 CSE meeting, the CSE considered a teacher report dated November 2009, prepared by the student's Cooke teacher (Tr. pp. 66, 70-75; Dist. Exs. 2 at p. 1; 3). In addition, a review of the hearing record reflects that the concerns of the parent and the student's Cooke teacher were considered by the January 2010 CSE (Tr. pp. 66-67, 70-75, 565, 567).

Although I find that the January 2010 CSE lacked a special education teacher who could have personally implemented the student's IEP had the student attended the district's proposed program, assuming without deciding that this constituted a procedural error, I am not persuaded

by the evidence that it impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process, or caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; see 34 CFR 300.513; 8 NYCRR 200.5[j][4]), particularly in light of the participation of the student's head classroom teacher and two supervisors from Cooke at the January 2010 CSE meeting and evidence in the hearing record which shows that the student's mother participated and expressed her concerns during the meeting (Tr. pp. 66-67, 565, 567; Dist. Ex. 1 at p. 2; see Application of the Dep't of Educ., Appeal No. 11-040; Application of the Dep't of Educ., Appeal No. 08-105).

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

Regarding the parent's contention that the January 2010 CSE lacked crucial data about the student when developing her IEP, 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][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree but at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at \*12 [S.D.N.Y. Nov. 9, 2011]; 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).

The hearing record reflects that the January 2010 CSE reviewed a 2008 psychoeducational evaluation (2008 evaluation),<sup>6</sup> a November 2009 teacher report from Cooke, and a September 2009 medical report (Tr. pp. 25-26; Dist. Ex. 2 at p. 1; see Dist. Exs. 3, 4).<sup>7</sup> Review of the January 14, 2010 IEP and the minutes of the January 14, 2010 CSE meeting in conjunction with the 2008

---

<sup>6</sup> I note that the CSE minutes indicate that the date of the report was March 11, 2008 (Dist. Ex. 2 at p. 1), but that a review of the document indicates a date on the report of August 25, 2008 and that the report is based upon testing that occurred on July 25, 2008, July 30, 2008 and August 22, 2008 (Dist. Ex. 4 at pp. 1, 6). In addition, a review of the report indicates that it is a neurodevelopmental evaluation that includes a physical/neurological evaluation and a psychological/developmental evaluation (id. at pp. 1-3).

<sup>7</sup> The September 2009 medical report is not included in the hearing record.

evaluation and November 2009 teacher report from Cooke reflects that the documents in evidence that were relied upon are "technically sound" and assessed the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (see 20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]) and also incorporated a variety of assessment tools and strategies (see 20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]). In addition, the January 2010 CSE appropriately described the student based on the available reports, identified the student's needs, and developed adequate goals and short-term objectives for the student that were sufficiently aligned to her needs (see Dist. Exs. 1 at pp. 1-28; 2 at pp. 1-2; 3; 4).

The hearing record shows that the most recent evaluation of the student prior to the January 2010 CSE meeting occurred in August 2008 (see Dist. Ex. 4). Regarding the August 2008 private evaluation jointly conducted by a private school psychologist and professor of clinical pediatrics, the hearing record reflects that it was prepared as the result of testing on July 25, July 30, and August 22, 2008 (Dist. Ex. 4 at p. 1). The following evaluation tools and methods were used: Beery-Buktenica Developmental Test of Visual-Motor Integration (VMI), clinical observations, expressive one-word picture vocabulary test (ROWPVT), physical and neurological examination, receptive one-word picture vocabulary test (ROWPVT), and the Wechsler Individual Achievement Test – 2nd Edition (WIATT-II) (id.). The evaluators' observations were based upon watching a videotape of the student during the psychological evaluation and interacting with the student during the physical and neurological examination (id. at p. 2). Part one of the evaluation included a physical/neurological evaluation (id. at p. 2) and part two included a psychological developmental evaluation (id. at p. 3). The psychological developmental part of the evaluation included notations regarding the student's test behavior, communication, socialization, and attention/activity (id.). Although the parent apparently asserts that psychological testing should have been employed for this part of the evaluation, and that clinical observations were not sufficient, I find that the hearing record supports a finding that the CSE had and reviewed appropriate evaluative information that enabled it to gather the relevant functional, developmental, and academic information about the student. I further note that the 2008 evaluation included a summary of test findings pertaining to academic skills, fine motor and graphomotor skills, and adaptive behavior skills (id. at pp. 3-4). In addition, part three of the evaluation included a summary of the neurodevelopment and psychological evaluations with diagnosis and recommendations (id. at pp. 4-5). Pertaining to the summary and recommendations section of the 2008 evaluation, I note that the evaluators recommended, among other things, a 12-month program for the student, and that the evaluators' recommendation is consistent with the CSE recommendation of a 12-month school year for the student (see Dist. Exs. 4 at p. 5; 1 at p. 8).

Regarding the November 2009 progress report from Cooke, as to English language arts (ELA), the student was in a group of five students for reading, in a group of 11 students for word study, in a group of five students for writing, and in a group of six students for math (Dist. Ex. 3 at pp. 2-9). As to reading skills, the student was able to identify short story elements such as characters and setting and could identify the main idea of a story (id. at p. 3). The November 2009 progress report indicated that the student would continue to develop these reading skills by engaging in pre-reading, reading, and after reading activities (id.). With support, the student was able to add specific details to classroom discussions (id.). The student benefited from rereading, prompting, and teacher modeling of appropriate classroom expectations during reading discussions (id.). Regarding word study, the student participated in a developmental approach whereby she analyzed phonemic and orthographic patterns in order to read and write words, and

was required to demonstrate mastery of each skill before a new skill was introduced (id. at p. 4). The progress note indicated at the time that the student was learning skills at the "within a word stage," which was described to be at the third stage of spelling development (id. at p. 5). The student was able to differentiate between long and short "a" vowels; was able to recognize and spell words that contained long "a" vowels; and benefited from teacher support that included prompting to use strategies such as breaking the word apart and sounding out the word to assist in spelling (id.). Regarding writing, the progress report indicated that the student was able to brainstorm ideas in order to develop written responses to her reading, and that when given a question prompt the student was able to generate two to three sentences that were on topic and effectively answered the question (id. at p. 7). The progress note indicated that in general, students were supported in the organization and structure of their writing through use of a variety of graphic organizers to develop effective pre-writing techniques and additional strategies to add description and detail to their writing (id. at p. 6). Regarding math, the November 2009 progress report from Cooke indicated that at the time of the report, the students were working on computation skills and money concepts (id. at p. 8). At the time, the student was able to add and subtract two and three-digit numbers; the student displayed relative strength in demonstrating the process necessary in order to add or subtract a given math problem; the student benefited from explaining her process as she worked through each step of a problem; and the student used manipulatives, modeling, and self-check strategies (id. at p. 9).

The November 2009 progress report from Cooke indicated that the student received related services of counseling, speech-language, and OT (Dist. Ex. 3 at pp. 12-18). In group counseling, the student worked on increasing her socialization skills by engaging her peers in more direct dialogue, and in expressing herself in more complex back-and-forth exchanges with peers in order to more directly assert herself (id. at pp. 12-13). The progress report noted that the student had clear desires and ideas and was becoming more aware of using her voice in order to get her wants met by others (id. at p. 13). In addition, the student participated in health and social skills groups whereby she learned and practiced concrete strategies for interpersonal engagement and developed an understanding of basic health principles (id. at p. 14). The report described the student as a contributing member of the group (id.). Regarding speech-language therapy, the progress note indicated that the student learned best and strengthened her semantic knowledge of words when a discussion about new words/concepts occurred (id. at p. 16). Narrative goals targeted comprehension and production of stories after listening to them and telling oral narratives in sequential order (id.). Auditory processing goals focused on completing two to three step directions with multisensory cues (verbal, visual, written) (id.). Social pragmatic goals targeted the student's use of full sentences and repair of communication breakdowns (id.). The report noted that the student benefited from use of pictures to organize stories, multisensory cues, and requesting repetition/rephrasing of information not understood (id.). Regarding OT which addressed the student's gross motor, fine motor, and daily living skills, the progress report indicated that the student used her left hand for the majority of daily activities and her right hand for hand writing only (id. at p. 18). The student required cues and modeling to incorporate her right hand into daily activities such as stabilizing the paper when writing or opening a heavy door (id. at p. 16). The student required training to use both sides of her body for carrying her school bag and was given prompts, and also worked on postural alignment for improved energy, body mechanics, and independents when performing handwriting activities (id.). The progress note indicated that the student's grooming skills were below age level due to her need for assistance when combing and caring for her hair (id.).

Based on the foregoing, I find that the January 2010 CSE had sufficient information relative to the student's present levels of academic achievement and functional performance at the time of the CSE meeting to develop an IEP that accurately reflected the student's special education needs (see 34 CFR 300.306[c][2]; 8 NYCRR 200.4[d][2]; see also Application of a Student with a Disability, Appeal No. 11-043; Application of the Dep't of Educ., Appeal No. 11-025; Application of the Dep't of Educ., Appeal No. 10-099; Application of the Dep't of Educ., Appeal No. 08-045).

Among 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]).

Regarding the student's academic performance and learning characteristics, the January 14, 2010 IEP and the minutes of the January 2010 CSE meeting reflect information consistent with the aforementioned November 2009 progress report from Cooke, particularly in the areas of reading comprehension, math, and speech-language (see Dist. Exs. 1 at pp. 3-4; 3 at pp. 3-9). According to the minutes of the January 2010 CSE, the student's teacher from Cooke reported at the CSE meeting that at that time, decoding was a strength for the student and that she was able to decode in context, but that the student's language delays interfered with comprehension; that the student's "best class" was the word study class, but she displayed difficulty using those words in her writing skills; that although she was a good writer, she had difficulty with topic maintenance, and was working on editing and using transition words (Dist. Ex. 2 at p. 2). In addition, the IEP included management strategies for these areas of ELA from which the student benefited at Cooke, such as pre-reading, prompting, modeling, scaffolding, repetition, and a multiple choice format (Dist. Ex. 1 at pp. 3-4).

Regarding math, the minutes of the January 14, 2010 CSE indicate that the student displayed difficulty with executing math problems and specifically confused borrowing and carrying (Dist. Ex. 2 at p. 2). The minutes of the CSE meeting further note that the student performed better with math problems in isolation, but became confused when problems were mixed; that word problems were difficult for the student but she benefited from visual aids; that she was working on concepts pertaining to money and telling time (id.). The January 2010 IEP indicates that the student showed relative strength in adding and subtracting two and three-digit numbers and benefited from explaining her process as she worked through each step of the problem (Dist. Ex. 1 at pp. 3-4). Additional management strategies specific to math included in the IEP were use of manipulatives, modeling, and self-check techniques (id. at p. 3).

Regarding speech-language therapy, the January 14, 2010 IEP reflected almost word for word, evaluative performance and goal related information included in the November 2009 progress report from Cooke (see Dist. Exs. 1 at p. 3; 3 at p. 16). The January 2010 IEP indicates that the student required "a great deal of scaffolding," prompting, and repetition; that a multiple choice format for answering questions should be provided whenever possible (Dist. Ex. at p. 4).

Regarding the student's social/emotional present level of performance and her health and physical development, the January 14, 2010 IEP reflected almost word for word, portions of the November 2009 progress report from Cooke relevant to counseling and OT (Dist. Ex.1 at pp. 5-6). The CSE indicated on the January 2010 IEP that the student needed cues, prompts and modeling specific to OT (id. at p. 6). The IEP indicated that socially/emotionally, the student

needed encouragement to self advocate and to speak up during class discussions and peer interactions (id. at p. 5).

Regarding the parent's assertion that the student's IEP did not accurately reflect the student's academic levels, I note that the hearing record reflects that the IEP includes estimates of the student's grade level provided by the student's teacher at the time, as well as instructional levels (see Dist. Ex. 1 at p. 4). Regarding the instructional levels, the hearing record reflects that the instructional level is a level at which the district would like the child to be instructed, based upon considerations such as the New York State alternate assessment and that the New York State alternate assessment is based upon standards (Tr. pp. 116-17). Although the parent asserts that it was not appropriate to conduct the CSE meeting in January 2010 because the date is too remote in time to the next school year and does not reflect change in the student's functional levels, I find that the timing of the January 2010 CSE meeting did not impede the student's right to a FAPE, significantly impede the parent's opportunity to participate in the decision-making process, or cause a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; see 34 CFR 300.513; 8 NYCRR 200.5[j][4]). The IDEA requires a CSE to review and if necessary revise a student's IEP at least annually (see 20 U.S.C. § 1414[d][4][A][i]; 34 CFR 300.324[b][1][i]; 8 NYCRR 200.4[f]). At the beginning of each school year a school district must have an IEP in effect for each child with a disability within its jurisdiction (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]), but there is no regulation requiring that an IEP be produced at the time of a parent's demand (Cerra 427 F.3d at 194) and no indication that the timing in the instant case resulted in a loss of educational opportunity for the student. I also note that the hearing record does not reflect that at the time of the CSE meeting the parent even objected to the timing of the CSE meeting, requested to meet later in the school year, that the district thereafter denied a request by the parent for another CSE meeting or that the parent requested another CSE meeting. In addition, I note that the district representative testified that no one indicated that information on the student's IEP was incorrect, that functional levels were incorrect, and that, moreover, the parents are always told that if there is a change, the parents are welcome to come back and ask for another review (Tr. pp. 56, 77-78). Accordingly, I decline to find under the circumstances of this case a denial of a FAPE on the basis that the CSE lacked sufficient evaluative information or that the IEP did not adequately reflect the student's present levels of performance.

### **3. Annual Goals and Short-Term Objectives**

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

The January 2010 IEP included 16 annual goals and multiple short-term objectives for each goal in the areas of daily living skills, math, gross motor, fine motor, phonemic awareness/word study, reading, semantics, narrative skills, writing, adaptive living skills, social pragmatic language

and socialization skills (see Dist. Ex. 1 at pp. 9-18, 24-28). Upon review, I find that the goals and short-term objectives as a whole included anticipated skills and success levels in the presence of identified supports such as verbal and visual support and teacher modeling (see Dist. Ex. 1 at pp. 9-18). In addition, I find that goals and short-term objectives were based primarily on the student's November 2009 Cooke progress report and information from the student's teacher, aligned with the student's needs at the time of the January 2010 CSE, incorporated a variety of strategies to assist the student, and were measurable (see Dist. Exs. 1 at pp. 9-18, 24-28; 3; see also Tr. pp. 66, 122, 237, 245-46). Moreover, I note testimony by the district representative that parents and teachers were always consulted at CSE meetings to determine if goals were appropriate and asked about whether there were other areas to work on, and that depending on responses, goals were kept, revised or added (Tr. pp. 66, 75, 122).<sup>8</sup> Accordingly, based upon review of the hearing record, I find that the student's January 2010 IEP includes the requisite annual goals and short-term objectives (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], [iv]) and further find that the timing of the January 2010 CSE meeting and drafting of goals did not impede the student's right to a FAPE, significantly impede the parent's opportunity to participate in the decision-making process, or cause a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; see 34 CFR 300.513; 8 NYCRR 200.5[j][4]). In view of the forgoing evidence, the parent's claims that the district failed to offer the student a FAPE because the IEP was inadequate must be dismissed.

### **C. Assigned School**

#### **1. Functional Grouping and Assigned Classroom**

Turning to the parent's claims regarding the implementation of the IEP, the IHO found that the issue of the functional levels of the students in the assigned class was speculative because the parent did not enroll the student in the district school (IHO Decision at p. 12). With regard to grouping, State regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii], 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [approving an IEP that placed a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]; Application of a Student with a Disability, Appeal No. 09-082; Application of the Dep't of Educ., Appeal No. 08-095; Application of the Dep't of Educ., Appeal No. 08-018; Application of a Child with a Disability, Appeal No. 07-068; Application of a Child with a Disability, Appeal No. 05-102). State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to: levels of academic or educational achievement and

---

<sup>8</sup> The student's January 2010 IEP listed as an annual goal that the student would demonstrate progress by displaying growth and internalizing stratagems in writing, and as a short-term objective, the IEP indicates that the student shall write using a complete sentence (Dist. Ex. 1 at p. 16). While the student's teacher for the 2010-11 school year testified that this goal underestimated the student's ability because she was able to write a complete sentence at the beginning of the school year, I note that the teacher also testified that the student was still working on writing sentences correctly during the 2010-11 school year and that the student had difficulty at times with sentence structure and punctuation (Tr. pp. 478-79, 510-11). I further note that although testimony of a supervisor from Cooke who participated at the January 2010 CSE meeting indicated that the goal for phonemic awareness/word study was inappropriate because the student had mastered reading aloud with fluency and letter sound cues by June 2010 (but had not mastered word structure cues) (Tr. pp. 597-600; see Dist. Ex. 1 at p. 12), such information was not available to the January 2010 CSE.



learning characteristics; levels of social development; levels of physical development; and the management needs of the students in the classroom (8 NYCRR 200.6[h][2]; see 8 NYCRR 200.1[ww][3][i][a]-[d]). The social and physical levels of development of the individual students shall be considered to ensure beneficial growth to each student, although neither should be a sole basis for determining placement (8 NYCRR 200.6[a][3][ii], [iii]). Further, the management needs of students may vary and the modifications, adaptations and other resources are to be provided to students so that they do not detract from the opportunities of the other students in the class (8 NYCRR 200.6[a][3][iv]). State regulations also require that a "district operating a special class wherein the range of achievement levels in reading and mathematics exceeds three years shall, . . . , provide the [CSE] and the parents and teacher of students in such class a description of the range of achievement in reading and mathematics, . . . , in the class, by November 1st of each year" (8 NYCRR 200.6[g][7]). However, State regulations do not preclude a grouping of students in a classroom when the range of achievement levels in reading and math would exceed three years (see Application of the Dep't of Educ., Appeal No. 08-018; Application of the Bd. of Educ., Appeal No. 06-010; Application of a Child with a Disability, Appeal No. 01-073).

In this case, the IHO is correct because a meaningful analysis of the parents' claim with regard to functional grouping would require me to determine what might have happened had the district been required to implement the student's IEP. While parents are not required to try out the school district's proposed program (Forest Grove, 129 S.Ct. at 2496), I note that neither the IDEA nor State regulations require a district to establish the manner in which a student will be grouped on his or her IEP, as it would be neither practical nor appropriate. The Second Circuit has also determined that, unlike an IEP, districts are not expressly required to provide parents with class profiles (Cerra, 427 F.3d at 194 [finding that the district did not violate its procedural obligations under the IDEA when it did not provide the parents with requested class profiles of the student's proposed reading class and resource room sessions, "which would identify the other students in the classes" and the student did not attend the district's recommended public school placement]). The IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, but they do not permit parents to direct through veto a district's efforts to implement each student's IEP by, for instance, personally viewing and approving the classroom or classmates of their own choosing (see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420, cert. denied, 130 S. Ct. 3277 [2010]; C.F., 2011 WL 5130101, at \*8). A delay in implementing an otherwise appropriate IEP may form a basis for finding a denial of a FAPE only where the student is actually being educated under the plan, or would be, but for the delay in implementation (see E.H., 2008 WL 3930028, at \*11). The sufficiency of the district's offered program is to be determined on the basis of the IEP itself (see R.E. v. New York City Dept. of Educ., 785 F. Supp. 2d 28, 42 [S.D.N.Y. 2011]). If it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement it (id.; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined appropriate, but the parents chose not to avail themselves of the public school program]).

Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if the district deviates from substantial or significant provisions of the student's IEP in a material way and thereby precludes the student from the

opportunity to receive educational benefits (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston Independent School District v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]). In this case, the parent rejected the IEP and enrolled the student at Cooke prior to the time that the district became obligated to implement the student's IEP. Thus, the district was not required to establish that the student had been grouped appropriately upon the implementation of her IEP in the proposed classroom. Even assuming for the sake of argument that the student had attended the district's recommended program, the evidence in the hearing record nevertheless shows that the 12:1+1 special class at the assigned district school provided the student with suitable grouping for instructional purposes and the evidence does not support the conclusion that the district would have deviated from the student's IEP in a material or substantial way (A.P., 2010 WL 1049297 [2d Cir. March 23, 2010]; Van Duyn, 502 F.3d at 822; Houston Indep. Sch. Dist., 200 F.3d at 349 see T.L. v. Dep't of Educ. of City of New York, 2012 WL 1107652, at \*14 [E.D.N.Y. Mar. 30, 2012]; D.D.-S. v. Southold U.F.S.D., 2011 WL 3919040, at \*13 [E.D.N.Y. Sept. 2, 2011]; A.L. v. Dep't of Educ., 812 F.Supp.2d 492, 503 [S.D.N.Y. 2011]).

Here the available evidence does not support the parent's claims, even if the student had been enrolled in the public school by the parent and the district had been required to prove how the IEP had actually been implemented. The hearing record indicates that, according to testimony of the special education teacher of the assigned class, as of the first day of the 2010-11 12-month school year, the assigned 12:1+1 class consisted of six students and three paraprofessionals, in addition to the special education teacher (Tr. pp. 200-01, 205).<sup>9</sup> He noted that as the summer program continued the enrollment rose to 11 students in the class (Tr. p. 201). Overall, the special education teacher opined that based on the student's present levels of performance, academic growth, and related services goals per the January 2010 IEP, the assigned classroom was appropriate for the student and her needs and goals would have been addressed there (Tr. pp. 248-49, 291-92). The student's January 2010 IEP indicates that the student's teacher estimated the student's grade level as 3.5 in decoding; 1 in reading comprehension; 1 in listening comprehension; 2.8 in writing; and 2 in computation (Dist. Ex. 1 at p. 4).<sup>10</sup> Although the CSE minutes indicate that, regarding mathematics, the student was in a third grade group, I note that the hearing record reflects that the student was between level 2 and 3 for math skills (Tr. pp. 572-75, 584-85; Dist. Ex. 2 at pp. 1-2). Regarding the student's reading level, I note that the CSE minutes indicate that the student's overall reading level was 1.8 and that commentary discussed her strengths and weaknesses (Dist. Ex. 2 at pp. 1-2). Similar to the student in the instant case, the special education

---

<sup>9</sup> Testimony by the special education teacher of the assigned class indicates that one individual was a classroom paraprofessional (Tr. p. 201). The other two individuals in the classroom were one-to-one paraprofessionals assigned to specific students (Tr. pp. 265-67).

<sup>10</sup> I note that one of the supervisors of Cooke who participated in the January 2010 CSE meeting testified that at the time of the CSE meeting, the student functioned at level 1 in reading comprehension, level 3 in listening comprehension, level 5 in decoding, and level 3 in computation (Tr. pp. 556-59, 570-71). I note that the supervisor also testified, however, that the final Cooke report from June 2010 (which is not in evidence) indicated the student's math level as 2, and then explained that the student was between level 2 and 3 for math skills (Tr. pp. 572-75, 584). Although the supervisor testified that the student was at level 5 in decoding at the time of the January 2010 CSE meeting, the student's teacher for the 2010-11 school year testified that at the beginning of the school year the student was probably at level 3 for decoding (Tr. p. 493). The student's teacher for the 2010-11 school year also testified that at the beginning of the school year the student was at about level 1 for reading comprehension, a higher level 1 for writing, with some skills in the level two range (Tr. pp. 493-94).

teacher's testimony reflected that the six students were between the ages of 14 to 16 and were all eligible for special education programs and services with the same classification as the student (Tr. pp. 205, 264-65). In addition, the special education teacher testified that he had a student in the class whose ELA functioning level was between third and fourth grade; that there was "definitely another student" in the class with whom the student would have been grouped specific to skills and goals; and that as the school year progressed the class contained more students appropriate for that grouping (Tr. pp. 206-07, 292). According to the special education teacher, the math instructional levels of the students in the class varied, but there was at least one student who entered the class "later on" that was at the second grade level in math (Tr. p. 207). Testimony by the special education teacher of the assigned class indicated that had the student attended his class she would not have been grouped with students whose academic instructional level was at a pre-kindergarten level (Tr. p. 292). Instead, the student would have been grouped with students closer to her ability (id.).

Accordingly, upon review of the hearing record, I find that the evidence shows that the district was capable of implementing the student's IEP with suitable grouping for instructional purposes in the 12:1+1 special class at the assigned district school.<sup>11</sup>

## **2. Safety**

Regarding the parent's assertion that the assigned school was not safe,<sup>12</sup> once more while an analysis of this issue would require me to determine what might have happened had the parent consented to the district's provision of special education services and the district been required to implement the student's IEP (see 20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320), I note that the hearing record does not support a finding that the assigned school was unsafe. Testimony of the special education teacher of the assigned class indicated that in his classroom "safety is first," his students were "very safe," and that the recommended school was "a very safe place" (Tr. pp. 246, 290). The teacher noted that school deans and four safety officers and a supervisor "constantly" patrolled all the floors of the school as a matter of routine (Tr. pp. 246, 290-91). Although the assigned school shared a large building with two other schools that used the same entrance to the building, the special education teacher of the assigned class testified that all students were supervised when they entered the building; that his students never interacted with students from the other schools; that each school occupied its own side of the building and did not come to the side of the building that was not part of their own school; and the individual schools were separated by double doors and a partition (Tr. pp. 246-47, 270, 295).<sup>13</sup> Furthermore, the teacher indicated that his students were supervised at all times and escorted by the paraprofessionals to the cafeteria, where they were supervised by paraprofessionals

---

<sup>11</sup> I have considered the parent's assertion that the presence of three students on the first day of the program performing at a pre-kindergarten level renders the district assigned class inappropriate and find that based upon the evidence in the hearing record as discussed above, the student would have been suitably grouped for instructional purposes with other students having similar individual needs.

<sup>12</sup> The IHO did not address this issue in the December 6, 2011 decision.

<sup>13</sup> The special education teacher of the assigned class indicated that on occasion, the only time the three schools were together in the auditorium was during emergency drills (Tr. pp. 293-94). However, the students from all of the schools were highly supervised by all building staff, sat in specified separate areas of the auditorium, and were dismissed in a structured and supervised manner (id.).

during breakfast and lunch (and a unit coordinator during lunch), when traveling and transitioning from classroom to classroom, and during special activities (Tr. pp. 216-18, 247-48). In the classroom, all of the students in the assigned class were supervised by the special education teacher and the paraprofessionals (Tr. p. 248). The teacher also noted that he had never observed behavioral incidents involving fights (Tr. p. 290). Accordingly, I find that the parent's safety concerns regarding the assigned school, had the district been required to implement the student's IEP, are not supported by the hearing record.

## **VII. Conclusion**

Having determined that the IHO erred in determining that the district denied the student a FAPE for the 2010-11 school year, it is not necessary for me to consider the appropriateness of Cooke, or the IHO's determination that the equitable considerations did not support the parent's claim for tuition reimbursement (see MC v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; C.F., 2011 WL 5130101, at \*12; D.D-S., 2011 WL 3919040, at \*13).

I have considered the parties' remaining contentions and find that it is unnecessary to address them in light of my decision.

**THE APPEAL IS SUSTAINED.**

**THE CROSS-APPEAL IS DISMISSED.**

**IT IS ORDERED** that the IHO's decision dated December 6, 2011 is modified by reversing those portions which determined that the district failed to offer the student a FAPE for the 2010-11 school year and awarded the parents partial reimbursement for the cost of the student's tuition at Cooke Center.

**Dated:**            **Albany, New York**  
                         **April 23, 2012**

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