The University of the State of New York

The State Education Department
State Review Officer
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No. 12-089

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Partnership for Children's Rights, attorneys for petitioner, Charles Gussow, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Lisa R. Khandhar, 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 parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request for the costs of her son's tuition costs at the Cooke Center Academy (Cooke) for the 2011-12 school year. The 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 between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The CSE identified the student's learning deficits in third grade and provided him with an IEP while he attended a parochial school (Tr. pp. 100-01). According to the hearing record, the student attended parochial school programs through eighth grade, and for ninth grade, the student's mother unilaterally placed him at Cooke, where he remained through the 2010-11 school year (Tr. pp. 101-06, 129-30; Dist. Ex. 8 at p. 1).[1]

[1] 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 Tr. p. 202; 8 NYCRR 200.1[d], 200.7).

On June 14, 2011, the CSE convened for the student's annual review and to develop an IEP for the 2011-12 school year (12th grade) (Dist. Ex. 1). The CSE continued the student's classification as a student with a learning disability, and recommended placement in a 15:1 special class in a community school, with counseling and speech-language therapy services (id. at pp. 1, 15).[2]

In a final notice of recommendation (FNR) dated July 14, 2011, the district informed the parent of the 15:1 special class placement and related services the June 2011 CSE had recommended, and the public school site to which the student had been assigned for the 2011-12 school year (Dist. Ex. 3).

In a letter to the district dated August 9, 2011, the parent advised that she was rejecting the recommendations in the student's IEP and unilaterally placing the student at Cooke for the 2011-12 school year (Parent Ex. A at pp. 3-4). The parent further informed the district that she would be seeking an order directing the district to fund the student's tuition at Cooke (id. at p. 4). The parent stated that "in the event that an appropriate placement is offered," she would withdraw the student from Cooke and place him in the district's school (id.).

The student attended Cooke during the 2011-12 school year and received instruction in English language arts (ELA), mathematics, global studies, science, art, language skills, transition skills, and life skills (Parent Exs. C; D at pp. 1-10, 13-14). The student also participated in an internship program, and received counseling and speech-language therapy (Parent Ex. D at p. 1, 11).

In a letter dated September 23, 2011, the parent stated that she had visited the public school site identified for the student in the July 2011 FNR and noted a variety of concerns that she had with the school (Parent Ex. B at pp. 3-4). The parent reiterated that she would be continuing the student's enrollment at Cooke for the 2011-12 school year and seeking the costs of the student's tuition from the district (id. at p. 4).

A. Due Process Complaint Notice and District Response

In her October 18, 2011 due process complaint notice the parent alleged, among other things, that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year (Dist. Ex. 8 at pp. 1-2). The parent contended that no evaluations were conducted prior to the June 2011 CSE meeting and that the student was last evaluated in September 2007, despite a requirement that students be evaluated every three years (id. at p. 1). Accordingly, the parent argued that the June 2011 CSE lacked sufficient information to make a program recommendation for the student (id. at pp. 1-2). The parent also asserted that the 15:1 special class program recommended by the June 2011 CSE would not provide sufficient support for the student because the student required smaller classes where his distraction and disorganization could be addressed (id. at pp. 2-4). The parent further asserted that the recommended 15:1 program would be inadequate to provide the student with the small group instruction he requires, would not be able to address the student's academic management needs, and would place the student with other

[2] The student's eligibility for special education and related services as a student with a learning disability is not in dispute in this proceeding (see Tr. p. 135; Dist. Ex. 1 at p. 1; see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

students who had emotional and behavioral difficulties, which would be inappropriate for the student because of his difficulties in focusing (id. at pp. 3-4).

The parent contended that the assigned public school site was inappropriate, asserting, among other things that when she visited the school she learned that the "core classes" were integrated co-teaching (ICT) classes, rather than classes with a 15:1 student-to-teacher ratio as required by the student's June 2011 IEP and that as such, the school could not implement the student's IEP (id. at p. 4).[3] The parent further alleged that the ICT classes at the district assigned school had a regular education teacher and a "literary specialist" and that the student required a special education teacher (id.). The parent also argued that the assigned public school did not offer, and could not provide, appropriate transition support serves such as life and career training and internships (id. at p. 5).

With regard to the student's unilateral placement at Cooke, the parent asserted that the placement was appropriate because the school provided services specifically designed to meet his individual needs, contained only students with learning disabilities, provided appropriate transition training, and because the student had made progress during his attendance at Cooke and was expected to pass his remaining Regents Competency Tests (RTCs) (Dist. Ex. 8 at pp. 2-3, 5-6). The parent requested that the district fund the student's tuition costs at Cooke for the 2011-12 school year (id. at p. 6).

In a response dated October 25, 2011, the district listed the reports and evaluations the June 2011 CSE used in making its recommendations for the student's program and placement, the other programs the CSE had considered and rejected, and it asserted that the placement offered was reasonably calculated to enable the student to obtain meaningful educational benefits (Dist. Ex. 9).

B. Impartial Hearing Officer Decision

An impartial hearing convened on December 29, 2011, and concluded on February 28, 2012, after four days of proceedings (Tr. pp. 1, 30, 159, 289).[4] In a decision dated March 15, 2012, the IHO found that the district offered the student a FAPE during the 2011-12 school year and denied the parent's request for tuition at Cooke (IHO Decision at pp. 11-14). Initially, the IHO noted that the parent did not contest the appropriateness of the description of the student's present levels of performance, his academic management needs, or the adequacy of the goals in the June 2011 IEP (id. at p. 12). Rather, the IHO found that the parent argued that the 15:1 special class would not provide the student with a sufficient level of support and that the assigned school site would not have appropriately implemented the IEP or provided the recommended transition

[3] State regulations define an ICT class as "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). Effective July 1, 2008, the "maximum number of students with disabilities receiving integrated co-teaching services in a class . . . shall not exceed 12 students" (8 NYCRR 200.6[g][1]). In addition, State regulations require that an ICT class shall "minimally include a special education teacher and a general education teacher" as staffing (8 NYCRR 200.6[g][2]). In this case, the terms ICT and collaborative team teaching (CTT) are used interchangeably throughout the hearing record (see, e.g., Tr. pp. 77-79). For consistency in this decision, the term ICT will be used.

[4] The hearing record contains a summary of a prehearing conference that was conducted on December 13, 2011 (Tr. p. 3; IHO Ex. I; see 8 NYCRR 200.5[j][3][xi]).

services (id.). The IHO further found that the recommended special education program was consistent with the student's IEP goals, management needs, and transition services (id.). The IHO also found that the IEP could be implemented at the particular school the district identified for the student because the school could provide a 15:1 class for the student and because the other students in that class functioned at a similar level to the student (id. at pp. 12-13). The IHO also determined that the identified district school was capable of meeting the student's transition goals on the IEP and would provide appropriate transition services in that the school offered an internship class taught by a special education teacher and an advisory period that addressed life skills and career counseling (id. at p. 13). Lastly, the IHO determined that any deviation in implementing the IEP at the identified school would not have been substantial (id.).

IV. Appeal for State-Level Review

The parent appeals and argues that the IHO erred in finding that the district offered the student a FAPE. The parent contends that the district failed to conduct a timely evaluation of the student and failed to comply with the "triennial evaluation requirements of the IDEA." The parent contends that the IHO erred in failing to rule that this issue and that the lack of timely evaluations constituted a denial of a FAPE. The parents further allege that there is no support in the hearing record for the testimony offered by the district's school psychologist who attended the June 2011 CSE meeting that a "team" had decided not to conduct an evaluation and that even if such a team existed; the parent's input had not been obtained. Additionally, the parent contends that the student had speech-language needs and therefore required a speech-language therapy evaluation and also required an "age-appropriate transition assessment." The parent further contends that the evaluative information the CSE had before it did not support a recommendation for placement of the student in a 15:1 special class.

The parent next contends that the 15:1 special class recommended by the June 2011 CSE would not provide sufficient support for the student because the student required smaller classes with two teachers where his distraction and disorganization could be addressed. The parent contends that the IHO erred in crediting the "guesses" of the district's witnesses over more credible testimony from the student's current providers at Cooke. The parent asserts that the CSE should have placed the student in a 12:1+1 special class. Next, the parent contends that the IHO erred in finding that the June 2011 IEP could be implemented in the particular school the district identified for the student because the district failed to show that the student would be placed in a 15:1 class for all periods of the school day and given the student's need for small classes, any deviation from the IEP would be material. Further, the parent asserts that the school identified by the district could not implement the IEP's transition services including integrated vocational training or an internship.

The parent also asserts that Cooke was appropriate to meet the student's needs because it provided a classroom consisting of nine or ten students, one teacher, and an assistant teacher that provided sufficient support for the student such that he could focus and progress. Further, the parent asserts that Cooke was appropriate because it provided appropriate transition training, because student made progress there, and he was heading toward passing his RTCs. Lastly, the parent contends that equitable considerations favor a tuition award, and direct payment is appropriate because the parent lacks the resources to pay up front.

In its answer, the district contends that the evaluative material used by the June 2011 CSE was sufficient, that there was no need for a new psychoeducational evaluation, and that the parent agreed with the description of the student in the June 2011 IEP and did not request any additional evaluations. The district further asserts that the CSE relied on the most recent progress report from Cooke dated June 2011 and a 2010 classroom observation, as well as information supplied at the CSE meeting by the parent and two Cooke staff members. The district contends that the decision to place the student in a 15:1 special class in a community school was supported by the evaluative material available to the CSE and that the 15:1 placement and accommodations in the IEP would have adequately addressed student's needs and was the least restrictive environment (LRE) for the student. The district also asserts that the CSE considered other possible programs and services for the student and after consideration, recommended a 15:1 setting for all "academic" periods. The district also asserts that the IHO properly determined that 15:1 classes were available at the school it had identified for the student and that the school offered a variety of transition programs and services such that the student's June 2011 IEP could have been implemented.

Regarding the parent's unilateral placement of the student at Cooke, the district contends that Cooke was too restrictive for the student because it had only students with disabilities in attendance and the hearing record shows that the student was socially adept and had leadership skills. The district further contends that equitable considerations do not favor the parent because she never seriously considered a public placement. Lastly, the district argues that the parent was not legally obligated to pay the student's tuition; therefore, she is not entitled to an award of direct funding for the student's tuition at Cooke.

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. June 2011 IEP

1. Evaluative Information and Present Levels of Performance

Regarding the parent's assertion that the CSE lacked sufficient evaluative information, I note that a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent 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 and 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]).[5] A CSE may

[5] I note that the IHO did not reach this issue in her decision (see IHO Decision). A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[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 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). The parent's due process complaint notice specifically raises the adequacy of the evaluations before the CSE (Dist. Ex. 8 at pp. 1-2, 3). A party appealing must "clearly indicate the reasons for challenging the impartial hearing officer's decision, identifying the findings, conclusions and orders to which exceptions are taken" and this includes clearly identifying which particular issues that the appealing party believes the IHO erroneously failed to decide (see 8 NYCRR 279.4). Here, the parent's petition clearly indicates the claim that the IHO erroneously failed to decide the issue regarding the lack of evaluations conducted by the CSE and I find that there is a sufficient hearing record to decide the issue and in my discretion, I decline to remand the issue to the IHO for a determination (Pet. ¶ 24; see Application of the Dep't of Educ., Appeal No. 12-103; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013]).

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).

Additionally, a CSE is not required to use evaluative information from its own sources only in the preparation of an IEP and is not precluded from relying upon privately obtained evaluative information in lieu of conducting its own evaluation (M.H. v. New York City Dept. of Educ., 2011 WL 609880, at *9 [S.D.N.Y. Feb. 16, 2011]; Mackey v. Board of Educ., 373 F. Supp. 2d 292, 299 [S.D.N.Y. 2005]; Application of the Dep't of Educ., Appeal No. 10-025; Application of a Student with a Disability, Appeal No. 10-004; Application of a Child with a Disability, Appeal No. 02-098; Application of a Child with a Disability, Appeal No. 01-040; Application of a Child with a Disability, Appeal No. 96-87); Application of a Child Suspected of Having a Handicapping Condition, Appeal No. 92-12; see also Application of a Child Suspected of Having a Disability, Appeal No. 98-80).

The district admits that it did not conduct a reevaluation of the student within three years of the June 2011 CSE meeting (Answer ¶¶ 42-43), contending that such failure was not a denial of a FAPE because the CSE relied on sufficient information to formulate the present levels of performance in the student's IEP. The district's failure to conduct a reevaluation of the student constitutes a procedural violation that would lead to a finding that the student did not receive a FAPE in the event that this inadequacy impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or 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]). Under the circumstances of this case and for the reasons detailed below, I do not find that this procedural violation rose to the level of a denial of a FAPE.

The June 2011 CSE consisted of the parent, a district special education teacher who also participated as the district representative, a district school psychologist, and an additional parent member (Tr. pp. 170-71; Dist. Ex. 1 at p. 2). The assistant head of Cooke and the student's math teacher at Cooke participated in the meeting by telephone (Tr. pp. 198, 225-26, 235, 248; Dist. Ex. 1 at p. 2). Prior to the CSE meeting, the CSE reviewed a September 2007 psychoeducational evaluation report, a November 2010 classroom observation report, and a June 2011 Cooke progress report (Tr. p. 180; Dist. Exs. 5-7). The hearing record shows that during the meeting, which lasted

approximately one hour, the CSE reviewed the student's material and discussed his academic and social/emotional needs (Tr. pp. 173-77, 180-81; Dist. Ex. 2).

The description of the student's present levels of academic achievement and functional performance included in the June 2011 IEP indicated that according to his math teacher, the student was doing well in math class working on shopping, personal money management, and budgeting skills (Tr. p. 173; Dist. Ex. 1 at p. 3). The student performed well working with fractions, and maintained a "portfolio of problem solving strategies" (Dist. Ex. 1 at p. 3). According to the IEP, although the student was able to solve problems using all four operations, at times he needed some help with multiplication and division (id.). At the time of IEP development, the student was working on solving double digit division problems and applying his knowledge of money to a variety of real life situations (id.). The IEP indicated that the student had successfully completed the RCT in math (id.). In the area of ELA, the student's teacher reported that the student did best with sentence comprehension and short passage activities, and that he struggled with long passages due to difficulty with syntax (Dist. Ex. 1 at p. 3). The IEP indicated that the student had difficulty making predictions and inferences based on the texts he reads (id.). In writing, the student needed to improve his ability to add details to his writing samples and to use a variety of sources for obtaining information (id.). At the time of the CSE meeting, the student was working on writing multi-paragraph essays on a given topic (id.). The IEP reflected that the student's speech-language therapy focused on improving his pragmatic language skills, and supported the instruction he received in his ELA class (id.).

The June 2011 IEP reflected the results of assessments of the student's reading ability conducted by Cooke in May 2011, and identified in the hearing record as the "QRI" and the "GRADE," indicated that the student's reading comprehension skills were at a fifth grade level and that his vocabulary skills were at a mid-fourth grade level (Dist. Ex. 1 at p. 4). According to the IEP, the student's listening comprehension skills were age appropriate, and his written expression skills were at a fifth grade level (id.). The IEP indicated that the student achieved a May 2011 applied problems subtest grade equivalent score of 4.3 on an administration of an assessment identified in the hearing record as the "GMADE," and that in June 2011, the student's math teacher at Cooke estimated the student's overall math skills to be at a mid-fifth grade level (id.).

The social/emotional present levels of performance included in the June 2011 IEP reflected the math teacher's report that the student had made progress in applying himself, and that he was "moving in the right direction" (Dist. Ex. 1 at p. 5). According to the IEP, the student needed less direction regarding focus, had matured, and was more motivated (id.). Both the student's ELA and math teacher reported that the student could still become distracted by peers (id.). The IEP also indicated that at times the student was "impulsive" and loud, and used inappropriate language (id.). The student was viewed as a leader within his cohort of friends (id.). The June 2011 CSE determined that the student's behavior did not significantly interfere with instruction and could be addressed by a special education teacher (id.). Regarding the student's health and physical development, the IEP indicated that he was in good health, and had a history of cysts requiring that he have access to the bathroom as needed, and that he had a diagnosis of asthma (id. at p. 6). The student's vision and hearing skills were reported to be within normal limits (id.).

The hearing record showed that the Cooke math teacher provided the CSE with the student's annual math goals that were reviewed at the meeting and included in the June 2011 IEP (Tr. pp. 178, 253-54; Dist. Exs. 1 at p. 7; 2 at p. 1). The Cooke assistant head of school provided

the CSE with the student's reading and written expression annual goals (Tr. pp. 179-80; Dist. Ex. 1 at pp. 8-9). Those goals, according to the district's special education teacher who attended the CSE meeting, corresponded to the needs identified in the present levels of performance (Tr. pp. 161, 179-80; Dist. Ex. 1 at pp. 8-9). The IEP included annual goals to improve the student's use of appropriate language in various settings, and his self-awareness, self-advocacy, and interpersonal skills as evidenced by more attention to tasks (Dist. Ex. 1 at p. 10). To improve the student's language skills, the IEP provided an annual goal to increase the student's ability to follow multi-step directions, produce a detailed narrative using appropriate discourse style, engage in active listening and turn taking in small peer groups, and participate in appointment planning (id. at pp. 10-11). Transition annual goals included participating in community experiences to highlight the student's strengths and interests, and identifying future vocational choices (id. at pp. 11-12).

During the impartial hearing, the student's mother testified that she agreed with the present levels of performance and annual goals contained in the June 2011 IEP (Tr. pp. 100, 131-35). The results of the September 2007 psychoeducational evaluation of the student indicated his cognitive functioning was generally in the average range, commensurate with the Cooke assistant head of school's estimate of his then present intellectual ability (Tr. p. 204; Dist. Ex. 6 at p. 6). The IEP reflected the student's current academic performance discussed at the June 2011 CSE meeting, including the results of assessments administered by Cooke, and information contained in the most recent Cooke progress report (compare Dist. Ex. 1 at pp. 3-5, with Dist. Exs. 2; 7 at pp. 2-5). A description of the student's difficulty with attention and need to focus, as set forth in the Cooke progress report, was included in the IEP (Dist. Exs. 1 at pp. 5, 13; 7 at pp. 3, 12, 14). The IEP annual goals developed by Cooke personnel addressed the student's needs identified in the areas of reading, written language, math, language, interpersonal skills, and provided him with goals working toward transition and vocational experiences (Tr. pp. 179-80, 253-54; Dist. Ex. 1 at pp. 7-12).

Regarding the parent's specific assertions on appeal that the student required an "age appropriate transitional assessment" and a speech-language therapy evaluation,[6] I note that the parent does not specify how the evaluative information available to the CSE and the content of the June 2011 IEP do not adequately identify or provide for those needs, and the hearing record does not support a conclusion that the student's speech-language and transition needs would not be met by the programs and services set forth in the June 2011 IEP. Further, I disagree with the parent's assertion that the information before the CSE did not support placing the student in a class with a 15:1 student-to-teacher ratio for the reasons set forth later in this decision.

In light of the above, I find that the information available to the June 2011 CSE was sufficiently comprehensive to identify all of the student's special education and related services needs and that although the district's failure to conduct a reevaluation of the student constitutes a procedural violation, this inadequacy did not impede the student's right to a FAPE, significantly impede the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or cause a deprivation of educational benefits.

[6] A review of the due process complaint notice indicates a general assertion that the district did not conduct evaluations of the student in connection with the June 2011 annual review, and does not specifically identify the lack of transition and speech-language evaluations as problematic.

2. 15:1 Special Class in a Community School Placement

The parent argues on appeal that placement in a 15:1 special class would not provide the student with adequate support, and testimony from the student's providers at Cooke reflected their recommendations that the student be placed in a smaller special class with an additional adult to accommodate his language-based learning disability (Tr. pp. 204, 225-27, 248-49, 284-85). Information considered by the June 2011 CSE showed that during a classroom observation at Cooke, the student was successfully directed to initiate a task following a "look" from the teacher's assistant, participated in class discussions, and volunteered answers in class (Dist. Ex. 5). According to the November 2010 observation report, at that time the student was "typically attentive and compliant," and the report reflected that this was a "typical day" for the student (id.). Information about the student from the Cooke June 2011 progress report indicated that in ELA class, the student was showing improvement completing his homework on time and preparing for class, that he continued to be a "strong voice" during class discussions, and that he was willing to participate and share his opinions in large and small group activities (Dist. Ex. 7 at p. 2). In math, he continued to work towards being a more independent student, and in biology, he had demonstrated growing improvement skills including listening and comprehension, understanding and following multi-step directions, and presenting his work independently (id. at pp. 4, 8-9).

The progress report indicated that in ELA class the student needed prompts to focus on his own responsibilities and to limit his "chattering" with friends during class instruction (Dist. Ex. 7 at p. 3). In the student's career seminar class, "at times" he needed redirection to remain focused and engaged, but the report noted that despite this behavior the student showed interest in the topics discussed and in learning how to search and secure a job independently (id. at pp. 3, 12). During language skills instruction, the progress report indicated that the student contributed valuable information and ideas to classroom discussions; however, required continual redirection to structured tasks as well as to the use of formal language in the classroom (id. at p. 14). The language skills progress report reflected that the student benefited from verbal and visual prompting and provision of examples and reminders about task-completion strategies (id.).

For the 2011-12 school year, the June 2011 CSE recommended that the student be placed in a 15:1 special class for academic instruction (Dist. Ex. 1 at p. 13). State regulations provide that the "maximum class size for those students whose special education needs consist primarily of the need for specialized instruction which can best be accomplished in a self-contained setting shall not exceed 15 students" (8 NYCRR 200.6[h][4]). The district's special education teacher who attended the June 2011 CSE meeting testified that after considering a 12:1+1 special class placement, the CSE recommended placement in a 15:1 special class because the student "require[d] the support of a small class ratio with a special ed[ucation] teacher," with peers that were academically functioning on a similar level to him, which the 15:1 class provided (Tr. p. 184; see Dist Exs. 1 at p. 14; 2 at p. 2). The district's special education teacher also testified that the CSE decided against a 12:1+1 placement in a special school because such a placement would be

too restrictive for the student (Tr. pp. 185; Dist. Exs. 1 at p. 14; 2 at p. 2).[7] The CSE also recommended that the student receive one session of group counseling and two sessions of group speech-language therapy per week, which would support the special education teacher's efforts to improve the student's academic and social/emotional skills in the classroom (Tr. pp. 184-85; Dist. Ex. 1 at p. 15). The CSE's recommendations for the type and frequency of counseling and speech-language therapy were consistent with what the student was receiving at Cooke (compare Dist. Ex. 1 at p. 15, with Dist. Ex. 7 at p. 1).

Within the 15:1 special class, the June 2011 IEP identified the student's management needs as small group instruction opportunities, directions repeated and rephrased as needed, graphic organizers/charts/graph paper, visual and auditory cues, teacher redirection and modeling, scaffolding, a multisensory approach, tasks broken down into small manageable pieces, and positive reinforcement for on-task behavior (Dist. Ex. 1 at pp. 4-5). Both the student's math and English/social studies teachers at Cooke testified that the student benefited from the use of these supports and management strategies (Tr. pp. 235-37, 277-80; see Dist. Ex. 7 at pp. 2, 8, 14). The hearing record shows that the CSE reviewed and discussed the student's management needs and supports that he would need in the classroom, that these were the same supports that were recommended by Cooke personnel, and that the parent did not disagree with the inclusion of these supports in the IEP (Tr. pp. 177, 131-33, 254; Dist. Ex. 1 at pp. 4-5).[8]

A careful review of the hearing record does not support the parent's assertion that the student would not receive adequate support in a 15:1 special class (see Tr. p. 249). At the impartial hearing, a district's special education teacher of a 15:1 special class reviewed the student's June 2011 IEP academic present levels of performance and testified that the student exhibited similar academic and social/emotional needs to other students placed in 15:1 special classes (Tr. pp. 41-42, 48-50, 54). The special education teacher described how the management needs recommended in the June 2011 IEP, such as small group instruction, could be provided in a 15:1 environment (Tr. pp. 50-57). While it is understandable that the parent would prefer the student remain in an educational setting replicating his placement at Cooke, I agree with the IHO's finding that the recommended special education program and 15:1 special class placement was consistent with the student's IEP goals and management needs (IHO Decision at p. 12).

B. Assigned School

With regard to the assigned school, the parent asserts that the IEP could not be implemented in the particular school the district identified for the student because the district failed to show that the student would be placed in 15:1 class for all periods of the school day and because the school

[7] This witness also testified that the students placed in 12:1+1 special classes in special schools were "generally functioning on a 3rd grade level or below and so academically [the student] is too high functioning for a [12:1+1] program" (Tr. p. 185). I am not persuaded by the parent's contention that this testimony shows that the CSE was "administratively constrained" to select a 15:1 placement, because the testimony could be understood to reflect the witness' concern that the student be placed in a setting where an appropriate functional peer grouping would exist, and because the hearing record leads to the conclusion, on balance, that the CSE decided against a 12:1+1 placement at a special school based upon appropriate LRE considerations.

[8] Additionally, the June 2011 IEP provided the testing accommodations of extended time with breaks as needed, directions read and reread aloud, questions read aloud that do not measure reading comprehension, and use of a calculator except when measuring computation skills (Dist. Ex. 1 at p. 15).

could not implement the IEP's transition services, including integrated vocational training or an internship. In this case, analysis of the parent's claims with regard to the assigned school would require me to determine what might have happened had the district been required to implement the student's IEP. By letter dated August 9, 2011, the parent informed the district that she had concerns about the recommendations in the June 2011 IEP and had not been able to visit the assigned school yet, therefore, the student would begin the 2011-12 school year at Cooke and that she would be requesting an impartial hearing to seek district funding of the unilateral placement (Parent Ex. A at pp. 3-4). I find that this constitutes a rejection of the June 2011 IEP prior to the time that the district became obligated to implement the student's IEP.

Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L. v. New York City Dep't of Educ., 2014 WL 53264, at *6 [2d Cir. Jan. 8, 2014]; B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at *20-*22 [E.D.N.Y. Mar. 31, 2014]; E.H. v. New York City Dep't of Educ., 2014 WL 1224417, at *7 [S.D.N.Y. Mar. 21, 2014]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012] [finding the parents' pre-implementation arguments that the district would fail to adhere to the IEP were speculative and therefore misplaced], adopted at 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL 3814669 [2d Cir. July 24, 2013]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *12 [S.D.N.Y. Mar. 31, 2014]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *7 [S.D.N.Y. Dec. 11, 2012]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom a student would be placed in where the parent rejected an IEP before the student's classroom arrangements were even made"]; Peter G. v. Chicago Pub. Sch. Dist. No. 299 Bd. of Educ., 2003 WL 121932, at *19 [N.D. Ill. Jan. 13, 2003] [noting that the court would not speculate regarding the success of the student's services where the parent removed student from the public school before the IEP services were implemented]).

Several district courts have, since R.E. was decided, continued to wrestle with this difficult issue regarding challenges to the implementation of an IEP made before the student begins attending the school and taking services under the IEP (see Scott v. New York City Dep't of Educ., 2014 WL 1225529, at *19 [S.D.N.Y. Mar. 25, 2014] [finding that "[t]he proper inquiry . . . is whether the alleged defects of the placement were reasonably apparent" to the parent or the district when the parent rejected the assigned public school site]; D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13 [S.D.N.Y. 2013] [holding that the district must establish that it can implement the student's IEP at the assigned school at the time the parent is required to determine whether to accept the IEP or unilaterally place the student]; B.R. v. New York City Dep't of Educ., 910 F. Supp. 2d 670, 676-78 [S.D.N.Y. 2012] [same]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012] [holding that parents may prospectively challenge the adequacy of a "placement classroom" when a child has not enrolled in the school because districts are not permitted to assign a child to a public school that cannot satisfy the requirements of an IEP]). However, I continue to find it necessary to depart from those cases.

However, the Second Circuit has clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v. New York City Dep't of Educ. (Region 4), 526 Fed. App'x 135, 141, 2013 WL 2158587 [2d Cir. May 21, 2013]) and, even more clearly, that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 530 Fed. App'x at 87 [rejecting as improper the parents claims related to how the proposed IEP would have been implemented]). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]).

As explained recently, "[i]t would be inconsistent with R.E. to require the [district] to proffer 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 (M.O. v. New York City Dept. of Educ., 2014 WL 1257924, at *2 [S.D.N.Y. Mar. 27, 2014]). Instead, "[t]he Second Circuit has been clear . . . that where a parent enrolls the child in a private placement before the time that the district would have been obligated to implement the IEP placement, the validity of proposed placement is to be judged on the face of the IEP, rather than from evidence introduced later concerning how the IEP might have been, or allegedly would have been, implemented" (A.M., 964 F. Supp. 2d at 286; see R.B., 2013 WL 5438605, at *17; 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] [finding that the argument that the assigned school would not have been able to implement the IEP was "entirely speculative"]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 588-89 [S.D.N.Y. 2013] [citing R.E. and rejecting challenges to placement in a specific classroom because "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan'"]). When the Second Circuit spoke most recently with regard to the topic of assessing the district's offer of an IEP versus later acquired school site information obtained and rejected by the parent as inappropriate, the Court disallowed a challenge to a recommended public school site, reasoning that "the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'" (F.L., 2014 WL 53264, at *6, quoting R.E., 694 F.3d at 187 n.3).

In view of the foregoing, I find that the parent cannot prevail on her claim that the district would have failed to implement the June 2011 IEP at the assigned public school site because a retrospective analysis of how the district would have executed the student's June 2011 IEP at the assigned public school site is not an appropriate inquiry under the circumstances of this case (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Here, it is undisputed that the parent rejected the assigned public school site that the student would have attended and instead chose to enroll the student in a nonpublic school of her choosing (see Parent Exs. A, B; Dist. Ex. 8). Therefore, the district is correct that the issues raised and the arguments asserted by the parent with respect to the assigned public school site are speculative. Furthermore, in a case in which a student has been unilaterally placed prior to the implementation of an IEP, it would be inequitable to allow the parent to acquire and rely on information that post-dates the relevant CSE

meeting and IEP and then use such information against a district in an impartial hearing while at the same time confining a school district's case to describing a snapshot of the special education services set forth in an IEP (C.L.K., 2013 WL 6818376, at *13 [stating that "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]). Based on the foregoing, the district was not obligated to present retrospective evidence at the impartial hearing regarding the execution of the student's program or to refute the parent's claims (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Accordingly, the parent cannot prevail on her claim that the assigned public school site would not have properly implemented the June 2011 IEP.

As set forth below, even assuming for the sake of argument that the student had attended the district's recommended program, there is no evidence in the hearing record to support the conclusion that the district would have deviated from student's IEP in a material or substantial way (see A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D.D.C. 2007]).

1. 15:1 Special Classes

Regarding the parent's assertion that the assigned school could not place the student in a 15:1 special class for "all" his classes, I note that the June 2011 IEP indicated that the student would receive instruction in a 15:1 special class during "academic periods – 5 periods per day" (Dist. Ex. 1 at p. 13). A special education teacher at the assigned school testified that she provided math, English, and science instruction in a 15:1 special class consisting of 11th and 12th grade students, and another special education teacher provided instruction to the 11th/12th grade social studies 15:1 special class (Tr. pp. 40-41, 43-44, 79-80, 292-93; see Dist. Ex. 3). During the remaining periods of the school day, the student would eat lunch, attend a student advisory period, and participate in elective courses such as art and music (Tr. pp. 82-86).[9] Although the parent alleged that the district failed to show the student would receive instruction in only 15:1 special class settings, the hearing record does not suggest that the student required 15:1 special classes for non-academic courses (Dist. Ex. 1 at p. 13; see, e.g., Tr. pp. 206-07, 229-32, 245, 277).

2. Transition Services

Regarding the parent's assertion that the assigned school could not implement the transition services recommended in the June 2011 IEP, I note that the IEP indicated the student participated in a community service internship in an office, completed work on a computer, and processed mail (Dist. Ex. 1 at p. 5). The IEP further indicated that the student enjoyed cooking, would like to be a chef, and traveled independently (id.).[10] Annual goals contained in the IEP related to transition skills included using appropriate discourse style during interviews; scheduling, confirming, and attending appointments; participating in community experiences to facilitate independence; and

[9] The special education teacher testified that during the student's non-academic class periods, he would be in classes of 20 students or less, with one to two teachers (Tr. pp. 82-86).

[10] The indication on the June 2011 IEP that the student was able to travel independently is consistent with the parent's testimony (Tr. p. 117; Dist. Ex. 1 at p. 5).

identifying future vocational choices and learning about the job search process (id. at pp. 11-12). The IEP transition plan identified long-term adult outcomes including that the student would integrate into the community with supports, attend a post-secondary educational program, live independently with supports, and become employed in an area of interest (id. at p. 16). Instructional activities identified to progress toward the outcomes included that the student would participate in a transition program that integrated academics with vocational training, in that he would receive academic instruction to support vocational and personal goals (id.). The transition plan indicated that the student would volunteer within the community to gain understanding of agency functions, and participate in school internships to learn skills necessary for the workplace (id.). After graduation from high school, according to the transition plan, the student would participate in a post-secondary vocational training program (id.). For independent living, the student would learn personal money management, budget, travel training, and household maintenance skills (id. at p. 17).

The hearing record shows that a special education teacher at the assigned school provided instruction to students to develop resume writing and interview skills, and to identify appropriate internship sites based upon their interests and needs (Tr. pp. 86-87, 92, 95, 303-04). The special education teacher at the assigned school stated that she worked on transition goals "a lot," and an IEP coordinator at the assigned school referred and assisted students in coordinating post-secondary services with "VES[I]D" (Tr. pp. 65-66).[11] The assigned school provided volunteer opportunities to students via the "New York Cares" after-school program (Tr. pp. 68-70). In the assigned school's 15:1 math special class, students received instruction in money management skills and the assigned school offered opportunities to take economics and an entrepreneurship class, which was taught by a special education teacher (Tr. pp. 70, 84, 87, 308). During advisory period at the assigned school, students discussed college and/or employment goals with a special education teacher and another licensed teacher (Tr. pp. 65, 82-83, 85-86). The principal of the assigned school testified that the school also had an internship class available in which the teacher provided a individualized internship opportunity for students based on their interests, and that a variety of internships had been provided for students in the past (Tr. pp. 292, 302-05). For these reasons, I find the parents' assertions to be without merit.

VII. Conclusion

Having determined that there is no reason to disturb the IHO's finding that the district offered the student a FAPE for the 2011-12 school year, it is not necessary for me to consider the appropriateness of Cooke or consider whether equitable factors favor an award of tuition reimbursement (see M.C. 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).

[11] The portion of the State Education Department office that addressed post-secondary services formerly known as the Office of Vocational and Educational Services for Individuals with Disabilities (VESID) is now referred to as Adult Career and Continuing Education Services (ACCES).

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

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
June 24, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER