The University of the State of New York

The State Education Department
State Review Officer
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No. 12-118

Application of a STUDENT WITH A DISABILITY, by her 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, Todd Silverblatt, Esq. of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorney for respondent, Alexander M. Fong, 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 to be reimbursed for her daughter's tuition costs at the Cooke Center Academy (Cooke) for the 2011-12 school year. Respondent (the district) cross-appeals from the impartial hearing officer's determination that it failed to demonstrate that it had offered to provide an appropriate educational program to the student for that year. The appeal must be dismissed. The cross-appeal must be sustained.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law. § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C.

§§ 1221e-3, 1415[e]-[f]; 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 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

In the present case, the student demonstrates delays in the areas of cognition, academics, attention, language processing, and social/emotional functioning (Tr. pp. 17, 21-26, 147-49, 211-215, 301, 357; Parent Exs. I; J). Within a neuropsychological report, the evaluating psychologist indicated his diagnostic impressions of the student, which included an attention deficit hyperactivity disorder (ADHD) and a learning disability, not otherwise specified (NOS) (Parent Ex. M at p. 6).

During her second grade year, the student first exhibited difficulties in the areas of academics (Tr. p. 240), and began to receive special education services during her third grade year (Tr. p. 241). The student currently attends the Cooke Center Academy (Cooke)[1] where she began in September 2005 at the Cooke Center for Learning and Development (Tr. p. 240; Parent Ex. B at p. 1).[2] On March 21, 2011, the parent executed an enrollment contract for the student's attendance at Cooke for the 2011-12 school year (Parent Ex. R at p. 1-2).[3]

On March 24, 2011, the Committee on Special Education (CSE) convened for the student's annual review and to develop her individualized education program (IEP) for the 2011-12 school year (Tr. pp. 15, 242; Parent Ex. C). The CSE determined that the student continued to be eligible for special education and related services as a student with a learning disability (Parent Exs. C at p. 1; D at p. 1).[4] To address the student's academic and social/emotional needs, the CSE recommended placing the student in a 12-month 12:1+1 special class in a specialized school in conjunction with related services of two 45-minute sessions of speech-language therapy per week in a group of five, one 45-minute session of individual speech-language therapy per week, one 45-minute session of individual counseling per week, and one 45-minute session of counseling per week in a group of three (Parent Ex. C at p. 14). The CSE developed a transition plan for the student describing the student's transition needs and related post-secondary goals (Parent Ex. C at pp. 15-16).

By final notice of recommendation (FNR) dated June 8, 2011, the district notified the parent of the school to which the student was assigned and at which her IEP would be implemented for the 2011-12 school year (Parent Ex. G). By letter dated June 24, 2011, the parent, in response to the FNR, informed the district that she visited the assigned school and that it would not offer the student adequate support in light of her severe learning disabilities (Tr. p. 250 Parent Ex. P at pp. 1-2). The parent indicated that during her visit to the assigned school she found that it was too large, lacked appropriate transitional supports, lacked a social skills program, and only offered pull-out related services (Tr. pp. 254-55; Parent Ex. P at pp. 1-2). The parent also indicated that there was a shortage of speech-language providers and the students exhibited maladaptive behaviors at the assigned school (Tr. pp. 254-55; Parent Ex. P at pp. 1-2). The parent indicated that she would be seeking tuition reimbursement for the student's attendance at Cooke for the 2011-12 school year (Parent Ex. P at pp. 1-2).

A. Due Process Complaint Notice

By due process complaint notice dated January 23, 2012, the parent requested an impartial hearing (Parent Ex. B). The parent alleged that the district failed to offer the student a free

[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 8 NYCRR 200.1[d], 200.7).

[2] The district funded the student's tuition at Cooke for the 2005-06 and 2010-11 school years pursuant to IHO Decisions (Parent Ex. B at p. 2). The district also funded the student's tuition at Cooke for the 2006-07, 2007-08, 2008-09, and 2009-10 school years pursuant to settlement agreements (Parent Ex. B at p. 2).

[3] The student was reportedly absent 20 days and late 24 days from September 2011 through December 2011 (Tr. p. 405; Parent Ex. L at p. 1).

[4] 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 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

appropriate public education (FAPE) for the 2011-12 school year (id.) Specifically, the parent asserted that the recommended program in the March 24, 2011 IEP, which included a 12-month 12:1+1 special class in a specialized school, could not meet the student's needs (id. at 4). The parent further disagreed with the assigned classroom at the public school site identified by the school in the FNR (id. at 4). The parent sought an order of pendency directing the district to pay the student's tuition at Cooke for the period of time from the due process complaint until final determination of the matter (id.). As relief, the parent sought the costs of the student's tuition at Cooke at district expense for the 2011-12 school year (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened on March 19, 2012 and concluded on March 28, 2012 after two days of testimony (Tr. pp. 1-409). In a decision dated April 24, 2012, the IHO found that the district failed to offer the student a FAPE for the 2011-12 school year (IHO Decision at p. 6). In support of his finding, the IHO indicated that the 12:1+1 special class placement as recommended in the IEP would not meet the student's need for one-to-one assistance and would not sufficiently target the student's inability to stay focused (IHO Decision at p. 6). The IHO declined to address the claims regarding the appropriateness of the public school site to which the district assigned the student (id. at p. 5).

The IHO next found that the parent's unilateral placement, the classes of which included eight to twelve students with two teachers, did not provide special education services adequate to meet the student's needs and did not offer an appropriate twelve-month program (id. at p. 7). Therefore, the IHO denied the parent's request for seeking the costs of the student's tuition at Cooke (id.).

Addressing the parent's request for a pendency order, the IHO stated only that the parent never made the request for pendency to the New York City Impartial Hearing Office (id. at p. 2).

IV. Appeal for State-Level Review

The parent appeals the IHO's failure to address the appropriateness of the school assigned by the district for the student and asserts that the academic, social and emotional needs of the student would not have been addressed at the assigned school.

In addition, the parent asserts that the IHO erred in concluding that Cooke was inappropriate for the student. The parent alleges that Cook appropriately addressed the student's attention deficits, asserting that there was no evidence in the hearing record showing that the student's tendency to be distracted was so severe to require one-on-one support. According to the parent, the evidence established that the student required a structured environment that balanced small group instruction with targeted one-on-one interventions. Furthermore, the parent argues that she should have no burden to prove the adequacy of the summer program because it was not at issue: the parent did not seek payment for the summer program in her due process complaint; and, in any event, the student was physically unable to attend the 2011 summer program while she was recovering from surgery. In the alternative, the parent asserts that the evidence produced at the hearing was sufficient to demonstrate that Cooke could have provided the student with an appropriate twelve-month program.

The parent further alleges that equitiable considerations support the parent's tuition claim, contending that the parent cooperated with the CSE and considered the recommended program and assigned class. The parent emphasizes that the contract with Cooke for the 2011-12 school year allowed the parent to withdraw the student without financial penalty if the district offered an appropriate placement.

Finally, the parent claims error in the IHO's failure to issue a pendency order, which was properly raised in the parent's due process complaint, directing the district to pay the student's tuition from the date of the parent's due process complaint notice through the pendency of this appeal.

In an answer and cross-appeal dated June 22, 2012, the district cross-appeals from the IHO's finding that the district failed to offer the student a FAPE, asserting that the recommended twelve-month placement in a 12:1+1 special class in a specialized school with related services of counseling and speech and language therapy was reasonably calculated to provide meaningful benefits to the student.[5] The district emphasizes that the 12:1+1 student-to-staff ratio is appropriate for the student when combined with a multi-disciplinary team and a small class environment and that the student would have received such benefits.

With respect to the assigned public school site, the district asserts that: the IHO was correct not to address the issue, as any discussion would be speculative; and, in any event, the public school was appropriate and offered the student a class in which ten of the eleven students were classified as learning disabled, with the student's level of functioning falling in the middle of the range. The district points out that the parent's assumption that the behaviors of the other students at the school would have adversely affected the student was speculative.

The district further asserts that the IHO correctly found that Cooke was not appropriate for the student, pointing to Cooke's lack of a summer program for the student, and contends that even if the student opted out of the summer program in order to recover from her surgery, there was no evidence that Cooke offered home instruction or make-up services for the missed summer classes. The district also alleges that the functional grouping of the student's classes at Cooke was too disparate, with the grade levels of the students' in the classes ranging from the third to the seventh. Finally, the district argues that the student has made little academic progress at Cooke.

Turning to the equitable considerations, the district asserts that: the parent did not seriously intend to enroll the student in public school, noting that: the student was enrolled in private school since 2005; the parent signed the contract with Cooke for the 2011-12 school year on March 21, 2011, four days before the CSE meeting; and the parent, upon her visit to the public school, did not seek information about the academic program offered there.

With respect to the parent's challenge to the IHO's failure to issue a pendency order, the district contends that it has agreed to issue pendency payments to Cooke for a portion of the

[5] The district notes that it is disingenuous for the parent to argue that the Cooke staffing ratio is appropriate for the student but that the staffing ratio offered in the student's March 2011 IEP is not, since they both consisted of the 12:1+1 ratio. The district asserts that "+1" assistant teacher at Cooke provides the student the same support as the classroom paraprofessional at the public school. The parent asserts in her answer to the cross-appeal that the student required two teachers in the class.

student's tuition for the 2011-12 school year, commencing on January 23, 2012, the date of the parent's due process complaint notice, and continuing during the pendency of this appeal.

In an answer to the cross-appeal, the parent reiterates her position with respect to the district's failure to offer the student a FAPE and an appropriate school placement and counters the district's allegations about equitable considerations.

V. Applicable Standards

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

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that

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

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. 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 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. Pendency (Stay Put)

Regarding pendency, it appears that the district concurs with the parent that the student's pendency placement is Cooke, the school attended by the student for the 2010-11 school year, and further represents that the district has agreed to issue pendency payments (Answer at ¶ 16; p. 5, n. 3). The parents filed no answer or reply controverting the district's assertion in its answer and cross-appeal that it has agreed to make "pendency payments". Therefore, it appears that there is agreement between the parties as to the student's current educational placement and the district's corresponding obligations. Under these circumstances, unless the parties otherwise agree or other exceptions to the pendency requirements apply, the student's pendency placement will remain her current educational placement as identified by the parties. [6]

Although pendency does not appear to be an issue in this matter, a brief discussion of the IHO's decision is warranted. The IHO addressed the parent's requested for pendency only briefly, stating: "[a]lthough the parent in her complaint indicates a request for a pendency order, the parent through their attorney never made that request to the New York City Impartial Hearing Office" (IHO Decision at p. 2). The parent is correct in her assertion that pendency was properly raised.

It is well-established that a student must remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4], 4410[7][c]; 34 C.F.R. § 300.518[a]; 8 NYCRR 200.5[m]; and that, moreover, pendency has the effect of an automatic injunction (see Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; Wagner v. Bd. of Educ., 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). While the IDEA does not preclude a parent from addressing pendency in a due process complaint notice in addition to the merits of the underlying claim, the IDEA does not require a parent to set forth an anticipated dispute with regard to pendency in a due process complaint notice (see 20 U.S.C. § 1415[b][7][A][ii]; 34 C.F.R. § 300.508[b]; 8 NYCRR 200.5[i][1]). The filing of a due process complaint notice gives rise to a student's right to a pendency placement (see 20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4], 4410[7][c]; 34 C.F.R. § 300.518[a]; 8 NYCRR 200.5[m]; see also (34 C.F.R. Parts 300 and 301, Analysis of Comments and Changes, 71 Fed. Reg. 46710 [2006]) ("a

[6] I also note that the available evidence in the hearing record confirms that Cooke should be the student's pendency placement. A prior unappealed IHO's decision may establish a student's current educational placement for purposes of pendency (Student X v. New York City Dep't of Educ., 2008 WL 4890440 at *23 [E.D.N.Y. Oct. 30, 2008]; Letter to Hampden, 49 IDELR 197 [OSEP 2007]; Application of a Student with a Disability, Appeal No. 08-107; Application of a Student with a Disability, Appeal No. 08-050; Application of the Dep't of Educ., Appeal No. 08-009; Application of the Dep't of Educ., Appeal No. 07-140; Application of the Dep't of Educ., Appeal No. 07-134). Here, An IHO's prior, unappealed May 9, 2011 decision in favor of the parent, which directed the district to pay the student's tuition at Cooke for the 2010-11 school year, as implemented, should have been the student's current educational placement for pendency purposes in this proceeding (Parent Ex. A at p. 10).

child's right to remain in the current educational placement attaches when a due process complaint is filed"); Bd. of Educ. v. Schutz, 290 F.3d 476, 481-82, 484-85 [2d Cir. 2002]; Student X, 2008 WL 4890440 at *20; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. Jan. 18, 2005]; Letter to Goldstein, ___IDELR __, 112 LRP 54441 [OSEP 2012]; Letter to Winston, 213 IDELR 102 [OSEP 1987]. Notwithstanding the fact that a parent need not set forth anticipated pendency dispute in a due process complaint, upon review of the parent's January 2012 due process complaint notice in this case, I find that the parent went well beyond the requirements and clearly identified that they were seeking pendency at Cooke, thus further notifying the IHO that the parent had concerns about the issue (see Parent Ex. B at p. 4).

B. Recommended 12:1+1 Special Class Placement

The district asserts that the IHO erred in finding that a 12:1+1 special class was not appropriate for the student. The IHO concluded that the district did not address the student's needs in the area of attention and failed to provide her with one-to-one assistance (IHO Decision at p. 6). Upon review, and as more fully described below, I find that the March 2011 IEP accurately reflected the student's needs, and that the March 2011 CSE developed an appropriate placement with related services for the student for the 2011-12 school year based on the student's needs in the areas of cognition, academics, attention, language processing, and social/emotional functioning.

The evidence shows that on March 24, 2011, the CSE convened for the student's annual review and to develop her IEP for the 2011-2012 school year (Parent Ex. C at p. 1). The CSE determined that the student continued to be eligible for special education and related services as a student with a learning disability (Parent Ex. C at p. 1). To address the student's language and social/emotional needs, the CSE recommended that the student receive a 12-month placement in a 12:1+1 special class with related services of speech-language therapy and counseling (Parent Ex. C at pp. 1, 14).

In developing its placement recommendation, the March 24, 2011 CSE considered recent documents including an October 2010 classroom observation and a January 2011 psychoeducational evaluation as well as the student's 2010-11 IEP and input from the parent and the student's Cooke providers (Tr. pp. 15-17, 19, 26; Parent Exs. D; I; J).[7] On October 12, 2010, the district special education teacher conducted a classroom observation of the student during an English language arts (ELA) lesson at Cooke (Parent Ex. J). The class consisted of seven students who were seated at individual desks facing the front of the room towards the Smart board while the teacher reviewed a homework assignment regarding sentences (Parent Ex. J). The observation report indicated that the student sat quietly at her desk but was inattentive as indicated by her reading a novel unrelated to the teacher's current lesson (Parent Ex. J). The observation report also indicated that the student followed the teacher's directive to put the book away (Parent Ex. J). The observation report reflected that the student engaged in the lesson when the assistant teacher sat behind the student to assist her to maintain attention (Parent Ex. J). The student then began to engage in the lesson, including responding to the homework questions with occasional prompts from the teacher (Parent Ex. J). The teacher reported that the student's behavior during the

[7] The hearing record indicates that the March 2011 CSE reviewed Parent Ex. L; however, Parent Ex. L is dated December 2011 which is after the March 2011 CSE indicating the CSE could not have reviewed that particular document (see Tr. p. 19).

observation was typical and that the student performed best when the assistant teacher was in close proximity to the student (Parent Ex. J).

Before making a placement recommendation in the IEP, the CSE also considered the student's psychoeducational evaluation report. On January 13, 2011 a licensed psychologist conducted a psychoeducational evaluation of the student to assess her cognitive, academic, and social/emotional functioning (Parent Ex. I at p. 1). Behaviorally, the psychologist noted that the student exhibited average attention and concentration during the evaluation (Parent Ex. I at p. 1). Administration of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) to the student yielded standard scores (percentile rank) of 87 (19) in verbal comprehension, 90 (25) in perceptual reasoning, 52 (.1) in working memory, 78 (7) in processing speed, and a full scale IQ of 73 (4) (Parent Ex. I at p. 2). The evaluation report indicated that the student's abilities related to attention, concentration, and mental control were relative weaknesses compared to her nonverbal and verbal reasoning abilities (Parent Ex. I at p. 3). The report also indicated that within the processing speed domain, the student's performance on tasks related to attention to detail and mental control were better developed compared to her performance on tasks related to fine motor skills, short-term memory, and learning (Parent Ex. I at p. 3).

With respect to academic achievement, administration of the Woodcock-Johnson Tests of Academic Achievement (WJ-III ACH) to the student yielded standard scores (percentile rank) of 49 (<1) in letter-word identification, 52 (<1) in calculation, 70 (2) in spelling, 76 (5) in passage comprehension, 70 (2) in applied problems, and 86 (17) in writing samples (Parent Ex. I at p. 4). The evaluating psychologist indicated that the student demonstrated severe academic delays (Parent Ex. I at p. 4). With respect to reading, the student demonstrated significant delays in decoding skills and word identification (Parent Ex. I at p. 4). Additionally, the student exhibited mildly delayed skills on tasks related to syntactic and semantic cues in comprehending written discourse read aloud (Parent Ex. I at p. 4). In the area of math, the student computed single digit addition and subtraction facts as well as added two/three digit numbers but had yet to master multiplication and division (Parent Ex. I at p. 4). The evaluation report indicated that the student was moderately delayed in math reasoning abilities including identification and analysis of procedures to solve math problems (Parent Ex .I at p. 4). With regard to written expression, the student demonstrated mild delays in the area of written language including spelling (Parent Ex. I at p. 4).

With respect to social/emotional functioning, projective measures and a clinical interview indicated that the student exhibited "a number of depressive symptoms" and her "sense of self is fragile and easily threatened" (Parent Ex. I at p. 5). The student expressed that she found it difficult to establish friendships, felt "socially isolated," and school was anxiety provoking (Parent Ex. I at p. 5).

The student's 2011-12 IEP reflected that the student exhibited deficits in the areas of cognition, academics, attention, language processing, and social/emotional functioning (Parent Exs. C at pp. 3-8). I note that the student's needs and abilities described in the student's January 2011 psychoeducational report and the October 2010 observation were consistent with those reflected in the student's March 2011 IEP and are also consistent with the recommendation for a 12:1+1 special class (compare Parent Exs. I; J, with Parent Ex. C).

After considering the documentary information described above and the input from the participants at the CSE meeting, the March 2011 CSE recommended a 12:1+1 special class for the student to provide her with a small class to address her reading and math skills as well as her difficulties with attention (Tr. pp. 27-28). The March 2011 CSE believed that the student required a classroom paraprofessional to assist the student with her difficulties with attention and distractibility (Tr. p. 27). The IEP also shows that CSE considered the placement option of a 15:1 special class in a community school which was rejected as not adequately supportive (Parent Ex. C at p. 13). The CSE also considered placing the student in a specialized school in either a 12:1+4, 6:1+1, and an 8:1+1 special class but decided the class functional grouping would likely not be appropriate for the student (Tr. pp. 27-28; Parent Ex. C at p. 13).

The March 2011 CSE recommended counseling for the student to address her needs related to social/emotional functioning, self-advocacy, and attention (Tr. pp. 24-25, 40; Parent Ex. C at pp. 11, 14). In addition, the March 2011 CSE recommended speech-language therapy to address the student's needs in receptive and expressive language, including following directions, responding to questions, and communication with peers (Tr. p. 26; Parent Ex. C at pp. 10, 14).

According to the special education teacher, the March 2011 CSE discussed the student's academic and social/emotional needs (Tr. pp. 21-26, 42). The special education teacher testified that the student demonstrated third grade skills in reading and math and fifth grade skills in writing (Tr. pp. 21-22). The CSE discussed the student's social/emotional functioning including her needs related to communication, self-advocacy, attention, and distractibility (Tr. pp. 22-24).

Although, the parent testified that the student's annual goals and placement were discussed during the CSE meeting (Tr. p. 243), she also testified that the March 2011 CSE did not make any changes from the 2010-11 IEP to the 2011-12 IEP (Tr. p. 242). The parent testified that she did not disagree with the March 2011 CSE recommendations regarding the 12:1+1 special class placement and the related services for the student (Tr. pp. 243-44, 277). According to the special education teacher, the parent was provided with opportunities to participate during the March 2011 CSE meeting, indicated by the parent asking questions, expressing concerns, and providing information (Tr. pp. 28-29). The special education teacher testified that the March 2011 CSE recommended a 12:1+1 special class for the student based on input from all members and the evaluative data (Tr. p. 38). The parent and staff at Cooke provided input into the development of the student's IEP, including her annual goals (Tr. pp. 24-26, 29, 32-33). The March 2011 CSE developed the IEP, including student's instructional levels, from information provided by the student's teachers at Cooke and the 2011 psychoeducational evaluation (Tr. pp. 29, 31). According to the special education teacher, the March 2011 CSE was flexible and listened to all input on which the CSE based their recommendations (Tr. pp. 34-35).

The IHO concluded that the district failed to address the student's need for one-to-one assistance and address the student's needs in the area of attention; however, there is nothing in the hearing record to suggest that the student would not be adequately supported within a 12:1+1 special class setting, regarding the student's difficulties with academics, attention, and distractibility (see Parent Exs. I; J). For example, although at times the student was inattentive, the hearing record also reveals that she could remain focused when provided with check-ins and prompts (Parent Exs. I at p. 1; J). Furthermore, the special education teacher, who conducted a classroom observation of the student, testified that the student required redirection but when redirected the student participated in the lesson (Tr. pp. 17, 37-38; Parent Ex. J).

In addition, the March 2011 CSE recommended the provision of the following supports to address the student's needs related to academics and attention: (1) small group instruction; (2) direct teacher modeling; (3) use of manipulatives; (4) multisensory approach; (5) preview/review of materials; (6) preferential seating; (7) clear and simple directions repeated and rephrased; (8) scaffolding; (9) use of graphic organizers/graphs/charts/checklists; (10) use of drawing to process thoughts; (11) auditory/visual cues; (12) positive reinforcement; (13) use of artistic strength to assist with educational process and self-esteem; and (14) redirection (Parent Ex. C at pp. 4, 6).

In support of the CSE's placement recommendation, at the time of the impartial hearing, the student's class at Cooke consisted of twelve students, one teacher, and one assistant teacher akin to the March 2011 CSE recommendation of a 12:1+1 special class (Tr. p. 286). The testimony of the Cooke head teacher reflected that the 12:1+1 setting addressed the student's needs (Tr. pp. 323-24). Within a 12:1+1 setting, the student exhibited academic and social/emotional progress at Cooke (Tr. pp. 299, 301-04, 327). The Cooke student services staff member stated that the student required a small structured program such as a 12:1+1 setting (Tr. pp. 203-04). Further, testimony reflects that the function of the assistant teacher at Cooke would be fulfilled by the classroom paraprofessional within the district's 12:1+1 program (see Tr. pp. 17, 27-28, 36-37, 297-98, 308, 310-11, 313, 334; see Parent Ex. J). Furthermore, the head teacher at Cooke also testified that the student's 2011-12 IEP accurately represented the student's academic performance (Tr. p. 321).

In summary, the evidence in the hearing record supports the conclusion that the student would have been provided adequate support within a 12:1+1 special class to address her needs related to academics, social/emotional functioning, and attention (Parent Exs. I at p.1; J). Accordingly, I find that the CSE's recommendation of a 12:1+1 special class in conjunction with the recommended related services and the program accommodations and strategies described above was designed to provide the student with sufficient individualized support such that her IEP was reasonably calculated to enable the student to receive educational benefits for the 2011-12 school year.

C. Challenges to the Public School Site/Assigned Classroom

Turning next to the parent's allegations in this case regarding the appropriateness of the assigned public school site identified in the June 2011 FNR, I find no reason to disturb the IHO's decision not to address these claims. Initially, challenges to an assigned school are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *14-*16 [S.D.N.Y. Oct. 16, 2012]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012] [finding the parents' pre-implementation arguments that the district would fail to adhere to the IEP were speculative and therefore misplaced], adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also K.L. v. New York City Dep't of Educ., 2013 WL 3814669, at *6 [2d Cir. July 24, 2013]; Reyes 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 in which a student would be placed 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]).

While several district courts have, since R.E. was decided, continued to wrestle with this difficult issue regarding challenges to the implementation of an IEP made before the student begins attending the school and taking services under the IEP (see D.C. v. New York City Dep't of Educ., 2013 WL 1234864, at *11-*16 [S.D.N.Y. Mar. 26, 2013] [holding that the district must establish that it can implement the student's IEP at the assigned school at the time the parent is required to determine whether to accept the IEP or unilaterally place the student]; B.R. v. New York City Dep't of Educ., 2012 WL 6691046, at *5-*7 [S.D.N.Y. Dec. 26, 2012] [same]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [holding that parents may prospectively challenge the adequacy of a "placement classroom" when a child has not enrolled in the school because districts are not permitted to assign a child to a public school that cannot satisfy the requirements of an IEP]), I now find it necessary to depart from those cases. Since these prospective implementation cases were decided in the district courts, the Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v New York City Dept. of Educ., (Region 4), 2013 WL 2158587, at *4 [2d Cir. May 21, 2013]), and, even more clearly that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 2013 WL 3814669, at *6 [rejecting as improper the parents claims related to how the proposed IEP would have been implemented]). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]).[8]

As explained more recently, "[t]he Second Circuit has been clear, however, that where a parent enrolls the child in a private placement before the time that the district would have been obligated to implement the IEP placement, the validity of proposed placement is to be judged on the face of the IEP, rather than from evidence introduced later concerning how the IEP might have been, or allegedly would have been, implemented (A.M. v. New York City Dep't of Educ., 2013 WL 4056216, at *13 [S.D.N.Y. Aug. 9, 2013]; see N.K. and L.W. v. New York City Dep't of Educ.,

[8] The Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular school site or classroom location on a student's IEP, the district is not permitted to choose any school and provide services that deviate from the provisions set forth in the IEP (see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [district does not have carte blanche to provide services to a child at a school that cannot satisfy the IEP's requirements]). The district has no option but to implement the written IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan.

12-cv-05038, slip opn. at *17 [S.D.N.Y. Aug. 13, 2013] [citing R.E. and rejecting challenges to placement in a specific classroom because '[t]he appropriate inquiry is into the nature of the program actually offered in the written plan']). In view of the forgoing and under the circumstances of this case, I find that the parents cannot prevail on their claims that the district would have failed to implement the IEP at the public school site because a retrospective analysis of how the district would have executed the student's May 2011 IEP at the assigned school is not an appropriate inquiry under the circumstances of this case (R.E., 694 F3d at 186 [2d Cir. 2012]; K.L., 2013 WL 3814669 at *6; R.C., 906 F. Supp. 2d at 273) . In this case, the district developed the student's 2011-12 IEP and offered the student a timely placement.

In this case, the parents rejected the IEP and unilaterally placed the student prior to the time that the district became obligated to implement the student's IEP. Consequently, the district correctly argues that because the parents rejected the proposed IEP, and removed the student from the public school before the IEP was executed, district was not required to establish that the student's IEP was implemented in the proposed classroom.

However, I have reviewed the evidence in the hearing record in order to discuss what alternative findings could be made, assuming for the sake of argument that the student had attended the district's recommended program at the assigned public school site. As further explained below, the evidence in the hearing record would not support the conclusion that the district would have violated the FAPE legal standard related to IEP implementation. As further described below, the evidence would nevertheless show that the 12:1+1 special class at the assigned district school was capable of providing the student with a suitable classroom environment, appropriate grouping, methods, and supports, 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; Van Duyn, 502 F.3d at 822; see D. D-S v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011], aff'd, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 502 [S.D.N.Y. 2011]; Savoy v. District of Columbia, 844 F. Supp. 2d 23, 31 [D.D.C. 2012]; Wilson v. District of Columbia, 770 F. Supp. 2d 270, 274 [D.D.C. 2011] [focusing on the "proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld"]; Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D.D.C. 2007]; see also L.J. v. School Bd. of Broward County, 850 F. Supp. 2d 1315, 1319 [S.D.Fla. 2012] [explaining that a different standard of review is used to address implementation claims which is materially distinct from the standard used to measure the adequacy of an IEP]).

1. Assigned Class—Grouping

Assuming for the sake of argument that the student had attended the public school site, the parent's assertion in her petition that the student's academic needs would not have been addressed within the assigned 12:1+1 special class would be unavailing. 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 the Dep't of Educ., Appeal No. 11-113; 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 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]).

The hearing record indicates that the student exhibited delays in academics, attention, language processing, working memory, and processing speed (Tr. pp. 17, 21-26, 147-49, 211-215, 301, 357). The ELA and math special education teachers at the assigned school taught eleventh grade 12:1+1 special classes during the 2011-12 school year (Tr. pp. 50, 82, 114). There were 11 students in the ELA class and 8 students in the math class as of September 2011 (Tr. pp. 54, 139). Within the ELA and math classes, the students were provided instruction through the use of whole group instruction, use of computers, individual assistance, and small group work (Tr. pp. 56-57, 60, 90, 92, 120). The classroom paraprofessionals in the special classes provided students with 1:1 assistance and support during group work (Tr. pp. 60, 94, 121). Assessments in the areas of reading and math were used to develop individualized lessons for the students (Tr. pp. 60-61, 117).

Testimony of both the ELA and math teachers reflected that within the assigned classes, the student would have been appropriately grouped for academic instruction (Tr. pp. 63-64). The student's skills, as compare to the instructional levels of the other students in the assigned classes, were in the mid-range for reading and math and at the high end of the range for writing (Tr. pp. 63-63, 123). The ELA and math teachers provided differentiated instruction to the students based on their instructional levels and interests (Tr. pp. 83, 116, 119).

2. Instructional Methods and Supports

The parent also asserts that the assigned classroom would have been too reliant on computers and independent work for the student to function in light of her delays in academics and attention. At the outset, I note that although an IEP must provide for specialized instruction in a student's areas of need, generally, a CSE is not required to specify methodology on an IEP, and the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher (Rowley, 458 U.S. at 204; M.M. v. Sch. Bd. of Miami-Dade County, 437 F.3d 1085, 1102 [11th Cir. 2006]; Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 [7th Cir. 1988]; A.S. v New York City Dep't of Educ., 10-CV-00009 [E.D.N.Y. May 26, 2011] [noting the "broad methodological latitude" conferred by the IDEA]; L.K. v. Department of Educ. of the City of New York, 2011 WL 127063, at *11 [E.D.N.Y. Jan. 13, 2011]; Application of a Student with a Disability, Appeal No. 12-050; Application of a Student with a Disability, Appeal No. 12-017; Application of the Dep't of Educ., Appeal No. 11-133; Application of a Student with a Disability, Appeal No. 11-089; Application of the Bd. of Educ., Appeal No. 11-058; Application of the Bd. of Educ., Appeal No. 11-007; Application of a Student with a Disability, Appeal No. 10-056; Application of a Student with a Disability, Appeal No. 09-092; Application of the Dep't of Educ., Appeal No. 08-075; Application of a Child with a Disability, Appeal No. 07-065; Application of

a Child with a Disability, Appeal No. 07-054; Application of a Child with a Disability, Appeal No. 07-052; Application of a Child with a Disability, Appeal No. 06-022; Application of a Child with a Disability, Appeal No. 05-053; Application of a Child with a Disability, Appeal No. 94-26; Application of a Child with a Disability, Appeal No. 93-46).

Again, assuming for the sake of argument that the student had attended and remained in the particular classroom to which the district assigned the student, the hearing records shows that the students in the particular 12:1+1 special class at the assigned school received instruction through a variety of teaching methods and strategies (Tr. pp. 86-87, 89, 97, 99-102, 106, 111, 127).

The ELA teacher implemented the universal design for learning (UDL) methodology in which he modified one text in multiple ways to provide all students with access to the text (Tr. pp. 86-87). The ELA teacher provided individualized instruction to the students based on their needs (Tr. p. 89). The ELA teacher also provided students with verbal reminders and visual cues to address needs in attention as well as academic and social/emotional strategies such as redirection, use of graphic organizers, and behavioral intervention plans, including a token economy (Tr. p. 99). Within the ELA class, the students received instruction regarding phonemics, decoding, and reading comprehension during five 50-minute sessions per week (Tr. pp. 97, 106). To monitor student understanding during whole group ELA instruction a four-card system was used whereby the students placed a specific card on their desk indicating their level of understanding (Tr. p. 100). The four-card system was useful for students with low self-esteem because it facilitated the process of monitoring student understanding of the material (Tr. p. 111). The teacher previewed lessons and provided transition planning for the students (Tr. pp. 100-01). There were weekly staff meeting for the teachers and related service providers to discuss transition needs, worksite needs, and the academic needs of the students (Tr. pp. 102, 127).

The parent also asserts in her petition that the students academic management needs, namely her IEP accommodations and strategies, would not have been provided to the student on a consistent basis at the assigned school (see Parent Ex. C at pp. 3-8). As stated above, the ELA teacher provided the students with verbal reminders and visual cues to address attention as well as academic and social/emotional strategies such as behavioral intervention plans, redirection, and graphic organizers (Tr. p. 99). The ELA teacher provided assistance to students based on their individual needs (Tr. p. 89). Based on the foregoing, I find no reason why the student's accommodations and strategies in her IEP would not have been implemented within the assigned class (see Parent Ex. C at pp. 3-8).

I find based on the evidence in the hearing record that the assigned class would have addressed the student's needs in the areas of academics and attention (see Parent Exs. I; J). Moreover, the student demonstrated skills showing that she would have been able to function within the assigned class with support from the special education teacher and classroom paraprofessional (see Parent Exs. I; J). For example, while at Cooke in a class of seven students, the student engaged in the ELA lesson with prompts from the teacher/assistant teacher (Parent Ex. J). Further, the student followed the teacher's directives during the ELA class at Cooke (Parent Ex. J). During the psychoeducational evaluation, the student exhibited average attention and concentration (Parent Ex. I at p. 1). Further, the head teacher at Cooke testified that the student was capable of self-advocacy (Tr. pp. 299-300, 319, 331-32).

3. School Site Environment and Social/Emotional Supports

The parent also asserts in her petition that the student's social/emotional needs would not have been addressed at the assigned school. The parent further expressed concern that the student would have lacked the needed support during transitions between classrooms, in light of the incidents of acting-out behaviors of other students observed by the parent during her visit to the school.

The hearing record reflects the student demonstrated delays in social/emotional functioning including difficulties with self-esteem (Tr. pp. 148-49, 211). Within the assigned building there were 600 students attending one of three programs (Tr. pp. 66, 73). The assigned school implemented a school-wide positive behavior intervention system to assist students regarding behavior and school rules (Tr. pp. 55, 99). There were also six deans to support the students (Tr. pp. 66, 73). Additionally, the classroom paraprofessional accompanied the students during transitions between classes (Tr. pp. 72-73).

Within the assigned school, during advisory class, the students were provided with explicit social skills training (Tr. pp. 61-62, 101-04). In addition, the counselor provided the students with a whole group counseling instruction one session per week regarding emotional literacy and classroom expectations (Tr. p. 58). The speech-language pathologist also worked with the student regarding related social goals (Tr. p. 59). A counselor was assigned to the class to provide overall support for the students (Tr. p. 102). During ELA instruction, the students were provided with opportunities to interact with peers (Tr. p. 104). The ELA teacher testified that the crisis team did not need to intervene during his class so far that school year (Tr. p. 109). As state above, to address the student's needs related to social/emotional functioning, the student would have received related services of one 45-minute session of individual counseling per week and one 45-minute session of counseling per week in a group of three (Parent Ex. C at p. 14).

Based on the above, I do not find evidence sufficient to support the conclusion that, had the student enrolled in the public school, that the district would have failed to implement the student's IEP by deviating from it in a material or substantial way regarding the environment of the assigned school and the ability of the school to support the student's social/emotional needs.

In sum, assuming that the district had been required to implement the student's IEP and upon consideration of the totality of the evidence contained in the hearing record, I find the parent's concerns regarding the assigned 12:1+1 special class, the appropriateness of teaching methodologies and academic supports, the school environment and appropriateness of social/emotional supports are not supported by the preponderance of the evidence contained in the hearing record (see generally, M.H. v. New York City Dep't of Educ., 2011 WL 609880 [S.D.N.Y. Feb. 16, 2011], citing Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004]; see also Karl v. Bd. of Educ., 736 F.2d 873, 877 [2d Cir. 1984] [finding that although a single component of an IEP may be so deficient as to deny a FAPE, the educational benefits flowing from an IEP must be determined from the combination of offerings rather than the single components viewed apart from the whole]). The evidence does not support the conclusion that upon implementation the district would have deviated from the student's IEP in a material or substantial way (A.P., 2010 WL 1049297, at *2; Van Duyn, 502 F.3d at 822; V.M. v. N. Colonie Cent. Sch. Dist., 2013 WL 3187069 [N.D.N.Y. June 20, 2013]; R.C., 906 F Supp 2d at 273; D. D-S, 2011 WL 3919040, at *13; A.L., 812 F. Supp. 2d at 502).

VII. Conclusion

In summary, I find that the IHO's determination that the district failed to offer the student a FAPE for the 2010-11 school year must be reversed. As described above, the hearing record contains evidence showing that the March 2011 IEP recommending placement of the student in a twelve month 12:1+1 special class in a specialized school with the services of speech-language therapy and counseling services was reasonably calculated to enable the student to receive educational benefits, and thus, the district offered the student a FAPE for the 2011-12 school year (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). Having reached this determination, it is not necessary to reach the issue of whether Cooke was appropriate for the student or whether equitable considerations support the parents' claim and the necessary inquiry is at an end (M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *12 [S.D.N.Y. Oct. 28, 2011]; D. D-S., 2011 WL 3919040, at *13; Application of a Child with a Disability, Appeal No. 08-158; Application of a Child with a Disability, Appeal No. 05-038).

I have considered the parties' remaining contentions and find that the contentions are either without merit or that I need not consider them in light of my determinations herein.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated April 24, 2012 is modified by reversing those portions which determined that the district failed to offer the student a FAPE for the 2011-12 school year.

Dated: **Albany, New York**
August 20, 2013

JUSTYN P. BATES
STATE REVIEW OFFICER