The University of the State of New York

The State Education Department
State Review Officer
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No. 12-216

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

Appearances:
Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Cynthia Sheps, Esq., of counsel

The Law Offices of Lauren A. Baum, attorneys for respondents, Richard A. Liese, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for the costs of the student's tuition at the Cooke Center for Learning and Development (Cooke) for the 2010-11 school year. The parents cross-appeal the IHO's failure to address certain issues asserted in the due process complaint notice. The appeal must be sustained. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

On April 29, 2010, the CSE convened for the student's "turning five" conference to develop an IEP for the 2010-11 school year (kindergarten) (Tr. p. 95; Dist. Ex. 4 at p. 1). Finding the student eligible for special education and related services as a student with a speech or language impairment, the April 2010 CSE recommended a 12:1+1 special class placement at a community school with the following related services: one 30-minute session per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a small group,

two 30-minute sessions per week of occupational therapy (OT) in a small group, and one 30-minute session per week of individual counseling (Dist. Ex. 4 at pp. 1-2, 16).[1]

By final notice of recommendation (FNR) dated June 15, 2010, the district summarized the special education and related services recommended in the April 2010 IEP, and identified the particular public school site to which the district assigned the student to attend for the 2010-11 school year (see Dist. Ex. 6).

On June 28, 2010, the parent visited the assigned public school site and met with the guidance counselor; however, the proposed class was under construction and the parent could not view it (Parent Ex. F at p. 1; see Parent Ex. C at p. 1).

On June 29, 2010, the parent executed an enrollment agreement with Cooke for the student's attendance during the 2010-11 school year (see Parent Ex. M at p. 2).[2]

In a letter dated June 30, 2010, the parent indicated that she attempted to visit the proposed classroom at the assigned public school site (Parent Exs. C-D). The parent inquired about the age range of the students in the proposed class, the academic and instructional methodologies used, the students' classifications and their verbal and behavioral functioning (Parent Ex. C at p. 1). In addition, the parent asked if the assigned public school site was staffed with a speech-language pathologist, occupational therapist and counselor, and whether students' related services mandates could be implemented at the site (id.). The parent also indicated that she would visit the class in September 2010 (id.).

In a letter dated August 8, 2010, the parent notified the district of her concerns that the student would not receive a sufficient level of support in a 12:1+1 special class placement, and therefore, in June 2010, she privately obtained an evaluation of the student (Parent Ex. F at p. 1). The parent enclosed a copy of the June 2010 evaluation report and indicated that she "would really appreciate if [the district] could schedule an opportunity for the team to consider [the evaluator's] findings and recommendations" (id.). Finally, the parent advised that until she had an opportunity to visit the assigned public school site and have the CSE consider the June 2010 evaluation report, she planned to enroll the student in Cooke for the 2010-11 school year, and request an award of tuition reimbursement (id.).

In a letter also dated August 8, 2010, the parent advised the head of the NEST program that she was "not comfortable keeping [the student] in a pre-K program this year in the hope that he will progress enough for the NEST program, as that [did] not seem a surety" (Parent Ex. E at p. 1).

In September 2010, the student attended Cooke for the 2010-11 school year (Tr. p. 603; Parent Exs. L; Q).

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[1] The student's eligibility for special education programs and related services as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

[2] The Commissioner of Education has not approved Cooke as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

On September 14, 2010, the parent visited the assigned public school site (Parent Ex. G at p. 1). In a letter dated September 20, 2010, the parent advised the district that she found the proposed classroom and assigned public school site to be inappropriate for the student, and that she planned to enroll him in Cooke and request an award of tuition reimbursement for the 2010-11 school year (Parent Ex. G at p. 2). The parent noted her concerns with regard to the functional grouping of the 12:1+1 special class (see id at p. 1). In addition, the parent raised concerns that the size of the assigned public would heighten the student's anxiety, exacerbate his behavioral "issues," and potentially create safety concerns (see id. at pp. 1-2). Similarly, the parent noted that the student would experience anxiety eating lunch with 50 students in the cafeteria, and while she agreed that the student needed opportunities for social interaction, he could not function in that setting (see id. at p. 2). Finally, the parent noted the assigned school's lack of a "fully equipped sensory gym" (id.). According to the parent, if the student could not appropriately address his sensory needs, he could not regulate himself, which would result in an increase in his behaviors and a decrease in his focus on academic exercises (id.).

In a letter dated November 23, 2010, the parents informed the district that they would continue to send the student to Cooke for the 2010-11 school year, and would request an award of payment of the student's tuition to be provided at public expense (Parent Ex. H at p. 2).

A. Due Process Complaint Notice

By due process complaint notice dated August 8, 2011, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2010-11 school year (Parent Ex. A at p. 1). Specifically, the parents claimed that the April 2010 CSE was improperly composed (id.). The parents further alleged that the April 2010 CSE did not base the resultant IEP on sufficient evaluative information, and as a result, the April 2010 IEP did not adequately describe the student's deficits (id. at pp. 1-2).[3] In addition, the parent argued that the annual goals included in the April 2010 IEP were not appropriate to address the student's needs and she further described them as "vague and generic" (id. at p. 3). The parents also contended that placement of the student in a 12:1+1 was not appropriate for the student, because it would not provide him with the requisite level of individual attention and support to enable the student to make educational gains and avoid regression (id. at p. 2). Additionally, the parents claimed that the assigned public school site was not appropriate for the student for the following reasons: (1) the student would not have been appropriately grouped in the proposed 12:1+1 special class; (2) the proposed special classroom constituted an overly restrictive setting for the student; (3) the assigned public school site lacked a sensory gym; (4) the large student body would overwhelm the student; (4) the assigned public school site did not offer the student opportunities for interactions with typically developing peers (id. at pp. 3-4). The parents maintained that Cooke constituted an appropriate unilateral placement and that equitable considerations favored their request for relief (id. at p. 7).

[3] Although the due process complaint notice included claims that pertained to the November 2010 IEP, in an interim decision dated December 11, 2011, the IHO ruled that the district could defend the April 2010 IEP (IHO Ex. II at p. 4). Subsequently, both parties limited the evidence to the case to the April 2010 IEP (IHO Ex. IV at p. 3).

B. Impartial Hearing Officer Decision

On November 23, 2011, the parties proceeded to an impartial hearing, which concluded on August 3, 2012 after nine days of proceedings (see Tr. pp. 1-628). In a decision dated October 10, 2012, the IHO concluded that the district failed to offer the student a FAPE for the 2010-11 school year, that Cooke was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parent's request for relief (IHO Decision at pp. 17-18).

More specifically, the IHO found that the April 2010 CSE failed to base the IEP on sufficient, appropriate and timely evaluative data, which rendered the April 2010 IEP inadequate (IHO Decision at p. 17). Specifically, the IHO determined that the lack of sufficient evaluative data resulted in an inadequate description of the student's needs related to his anxiety and social functioning (id.). The IHO also found that the April 2010 CSE did not properly develop the IEP's annual goals, particularly those related to the student's speech-language needs, because the student's progress in this area of need should have been formally evaluated and not primarily based on input from the parent (id.). He further concluded that the April 2010 IEP's annual goals, particularly the annual goals that pertained to the student's speech-language needs, did not adequately address the student's needs (id.). Finally, the IHO found that placement of the student in a 12:1+1 special class was not sufficiently supportive to meet the student's needs and that it would have been too large for the student (id.). Accordingly, the IHO directed the district to fund the costs of the student's tuition at Cooke for the 2010-11 school year (id. at p. 18).

IV. Appeal for State-Level Review

The district appeals, and asserts that the IHO erred in finding that it failed to offer the student a FAPE for the 2010-11 school year, that Cooke was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parents' request for relief in this instance. Alternatively, the district maintains that there was no showing in the hearing record to demonstrate that the parents are entitled to an award of direct tuition funding. The district maintains that the April 2010 CSE relied on appropriate evaluative data and that the April 2010 IEP adequately described the student's needs, particularly his sensory and social-emotional needs. In addition, the district asserts that the April 2010 IEP's annual goals were appropriate. More specifically, the district alleges that the April 2010 CSE developed the speech-language goals based on sufficient available documentation and on input from the parent. The district further submits that placement of the student in a 12:1+1 special class was appropriate. Finally, with respect to the parents' allegations surrounding the assigned public school site, notwithstanding the speculative nature of their claims, the district maintains that the assigned public school site would have appropriately implemented the student's IEP.

Next, the district argues that there was insufficient evidence to show that Cooke was an appropriate unilateral placement for the student, given that it did not afford the student access to typically developing peers. The district also submits that equitable considerations should preclude an award of relief in this instance, due to the parents' failure to comply with the IDEA's notice provisions. Additionally, the district maintains that the parents are not entitled to an award of direct funding of the student's tuition for Cooke, because there is an insufficient showing in the hearing record that they are financially unable to front the cost of the student's tuition.

In an answer, the parents respond to the district's allegations and seek to uphold the IHO's decision. The parents cross-appeal the IHO's decision to the extent that he failed to address certain claims raised in the due process complaint notice. Specifically, they argue that the absence of a special education teacher from the April 2010 CSE who would implement the April 2010 rendered it improperly constituted. The parents further allege that the IHO failed to consider their remaining claims pertaining to the April 2010 IEP's annual goals. In particular, they argue that the April 2010 IEP's academic goals were inappropriate, because the student had already met them, and that the lack of annual goals designed to address the student's anxiety further rendered the April 2010 IEP inappropriate. The parents also assert that the IHO erred to the extent that he did not consider their claims with respect to the appropriateness of the assigned public school site, and further maintain that it was not appropriate to meet the student's needs. In an answer to the parents' cross-appeal, the district generally denies the parents' allegations.

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. CSE Process

1. April 2010 CSE Composition

The parents allege that the lack of a special education teacher at the April 2010 CSE meeting who would have been responsible for implementing the student's IEP rendered the CSE improperly constituted. As more fully explained below, while the absence of a special education teacher from the April 2010 CSE who would have taught the student arguably resulted in a procedural violation, such a procedural violation did not rise to the level of a denial of a FAPE in this instance.

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

Meeting participants at the April 2010 CSE meeting included the following individuals: the parent and her friend; a district representative who also served as a regular education teacher; a district school psychologist; and a district special education teacher (Dist. Ex. 4 at p. 2). The hearing record suggests that the special education teacher in attendance at the April 2010 CSE did not know the student personally (see Tr. pp. 100-01; Dist. Ex. 4 at p. 2). Nor is there any indication in the hearing record that the special education teacher in attendance would have been responsible for implementing the April 2010 IEP (see Tr. pp. 136-38). The evidence in the hearing record, however, does not suggest that the absence of a special education teacher of the student inhibited the parents' ability to meaningfully participate in the development of the student's IEP, thereby resulting in a denial of a FAPE. Initially, the hearing record reflects that the April 2010 CSE attempted to contact the student's preschool teacher during the April 2010 CSE meeting (Tr. pp. 105, 145; Dist. Ex.2 at p. 3).[4] The district school psychologist further indicated that the student's

[4] According to the district school psychologist, had the student's preschool teacher participated in the April 2010 CSE meeting, it should have been recorded on the April 2010 IEP (Tr. p. 145; see Dist. Ex. 4 at p. 2).

preschool teachers did not complete paperwork regarding the student pursuant to her request (Tr. pp. 169, 186; see Dist. Ex. 12 at p. 2). Moreover, the hearing record suggests that the April 2010 CSE solicited the parent's input in developing the April 2010 IEP, particularly with respect to appropriateness of the annual goals (see Tr. pp. 110, 168-70, 177-78; Dist. Ex. 2 at pp. 3-4). In addition, the April 2010 CSE reviewed the student's IEP from the previous school year (Tr. pp. 118-23, 148) and, as discussed further below, comprehensive current evaluative data concerning the child's needs, strengths, weaknesses and overall academic and developmental functioning. Moreover, the district special education teacher present at the meeting would be knowledgeable about the special education services offered by the district.

Accordingly, although I find that the April 2010 CSE lacked a certified special education teacher who taught the student or could have personally implemented his IEP had the student attended the district's proposed program, even assuming without deciding that this constituted a procedural error, I am not persuaded by the evidence that it impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process, or caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; see 34 CFR 300.513; 8 NYCRR 200.5[j][4]).

2. Evaluative Information and Present Levels of Performance

Turning next to the parties' contentions surrounding the adequacy of the evaluative information available to the April 2010 CSE, as more fully described below, a review of the evidence contained in the hearing record reflects the April 2010 CSE had before it sufficient, appropriate and timely evaluative data, which resulted in an accurate description of the student's needs in the resultant IEP.

In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). However, neither the IDEA nor State law requires a CSE to "'consider all potentially relevant evaluations'" of a student in the development of an IEP or to consider "'every single item of data available'" about the student in the development of an IEP (T.G. v. New York City Dep't of Educ., 2013 WL 5178300, at * 18-*19 [S.D.N.Y. Sept. 16, 2013], citing M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *8 [S.D.N.Y. Mar. 21, 2013]; see F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 578-82 [S.D.N.Y. 2013]). In addition, while the CSE is required to consider recent evaluative data in developing an IEP, so long as the IEP accurately reflects the student's needs the IDEA does not require the CSE to exhaustively describe the student's needs by incorporating into the IEP every detail of the evaluative information available to it (20 U.S.C. § 1414[d][3][A]; see M.Z., 2013 WL 1314992, at *9; D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at *7-*9 [S.D.N.Y. Oct. 12, 2011]).

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]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

In this case, the April 2010 CSE utilized a January 13, 2010 Parent Survey, a March 10, 2010 OT school function evaluation, an April 21, 2010 classroom observation of the student in his then-current preschool classroom, which also included a post-observation conference with the student's teacher, an April 22, 2010 updated physical examination report from the student's physician, and the summary assessment results of the student's Child Outcomes Summary Form (Tr. pp. 104-10; Dist. Exs. 7-13). Additionally, the district school psychologist attempted to attain information regarding the student's functioning from the student's preschool teacher; however, the district school psychologist never received the completed teacher report that she sought from the student's preschool teacher (Tr. pp. 101-02; see Dist. Ex. 12 at p. 2). However, information from the student's teacher was reflected in several other documents that were available to the April 2010 CSE, as was information provided by the parent (Dist. Ex. 9 at pp. 2-5; 11 at pp. 2-3; 12 at pp. 1-2).

The January 13, 2010 parent survey reflected that the student's services at that time had helped him increase his language abilities including his ability to express himself, and also helped the student in the areas of concentration, attention span and dealing with his sensitivity (Dist. Ex. 10). The survey further reflected that the student loved to learn and followed and reinforced rules (id.). It also noted that he lost focus easily, was easily distracted, and paid attention to other stimuli instead of staying on task (id.). With regard to social relationships, the survey indicated that the student loved to play with his younger sibling in a physical way (i.e., chasing, hide and seek), loved and remembered people, and wanted to gain the attention of adults in order that they play with him (id.). The survey also reflected that the student participated in gymnastics and was interested in listening to classical music, playing outside on the playground, dancing, spelling, words and numbers (id.).

The March 10, 2010 OT school function evaluation included a parent interview, a teacher interview, and a classroom observation of the student by the occupational therapist (Dist. Ex. 9 at pp. 2-5). The OT Parent Checklist of School Functioning reflected the parent's concerns regarding the student's performance in the areas of attention, sensation, frustration tolerance, slow working

pace, and social skills (id. at p. 2). As per the teacher checklist, the student experienced difficulties in the areas of attention/on task behavior, social participation, dressing, frustration tolerance, and self-regulation, while his strengths included following classroom routines and choosing play activities independently (id. at pp. 2-3).

Similarly, the occupational therapist observed difficulties in the area of attention and behavior that affected the student's ability to participate independently in the classroom (Dist. Ex. 9 at p. 3). She noted during her observation of the student that he benefited from verbal cues and/or physical prompts in order to follow directions in the classroom and verbal redirection to shift his attention from gazing out the window to table top activities, and that he required individual assistance to choose "work" activities (id.). The occupational therapist indicated that the student was not able to initiate and complete tasks independently and required verbal cues to participate in "work" activities (id.). However, the student could transition in a line with his peers to the playroom (id.). With regard to regulation, the student demonstrated difficulty maintaining an appropriate level of arousal to participate in activities, as he worked too quickly and also demonstrated difficulty screening out auditory and visual distractions in the classroom (id.). The report also reflected the student's sensory difficulties such as mouthing his shirt or hands, poor attention to personal boundaries, bumping into peers and furniture, squinting one or both eyes, closing his eyes and/or gazing intensely at various objects in the room, an averse response to music, seeking out crashing activities in the playroom, and as per parent report, distress during grooming activities (id.).

With regard to social/emotional development, the occupational therapist noted that the student played alone, did not engage in cooperative play and did not interact with peers in his class (Dist. Ex. 9 at p. 4). According to the March 2010 report, the student did not seek out adult help, although when offered, he accepted it, made inconsistent eye contact, and was observed twice to knock into children and continue moving (id.). With regard to self-care skills, per teacher report, the occupational therapist indicated that the student required assistance with snaps and buttons and was independently toileting at school, although he benefited from verbal cues to move throughout the sequence of steps in order (id.).

With regard to fine motor skills, the student's teachers reported that pre-writing skills were not part of the pre-school curriculum at the Montessori school; however, the student used writing tools in the classroom with which to scribble (Dist. Ex. 9 at p. 4). His teachers reported that he used two hands to complete activities and carry objects and that he did not appear to have established hand dominance (id.). Neither the student's teacher nor the parent reported concerns in the area of gross motor skills, consistent with the occupational therapist's observation that the student demonstrated strengths in gross motor skills (id. at p. 5).

Ultimately, the occupational therapist recommended the provision of OT comprised of two 30-minute sessions per week in a group of two (Dist. Ex. 9 at p. 5). The occupational therapist further suggested that the student's OT sessions will address "self-regulation strategies and classroom strategies for improved attention in the classroom, difficulties in the areas of fine motor skills and social participation" (id.). The report also included a list of suggestions for home and in the classroom related to using scissors, maintaining attention, pre-writing/fine motor/visual motor skills, and social participation (id. at pp. 5-6).

The April 21, 2010 classroom observation of the student completed by the district school psychologist reflected that the observation lasted for 50 minutes, and began in the playroom, where there were two teachers and nine students (Dist. Ex. 11 at p. 1). While in the playroom, the school psychologist found the student exhibited a high level of activity and movement, including running around the room, bumping into other students, jumping into the air and spinning, and riding a bicycle (id.). She also observed the student repeatedly putting his fingers into his mouth as well as sucking on his shirt (id. at pp. 1-2). In addition, the district school psychologist found that the student required redirection to return to the line when the class transitioned from the playroom to the classroom (id. at p. 2). During a small group activity, the district school psychologist reported that the student required redirection for not following directions, and also during a large group activity on the carpet, again for not following teacher directions (id.).

The April 2010 classroom observation report also included a post-observation conference with the student's teacher, which reflected that the student had been receiving OT and speech-language therapy since the beginning of the school year (Dist. Ex. 11 at pp. 2-3). His teacher reported that the student continued to have difficulty concentrating on his work and when off task, he would sit in the circle, bite his clothing and take his shoes off and on (id.). She further indicated that the student often attempted to get someone to help him put his shoes on, preferred to ride his bicycle instead of playing with peers and did not usually participate in birthday parties, as he did not want to see the other parents (id. at p. 3). The teacher indicated that the student's behavior during the observation was typical of his day-to-day functioning (id.). The April 21, 2010 post-observation teacher interview form reflected information consistent with that reflected in the post observation conference report (compare Dist. Ex. 11, with Dist. Ex. 12). The hearing record reflects that the district school psychologist completed this form in part, based on her interview with the student's teacher, because the teacher did not complete and return the form (see Tr. pp. 146-47; see also Dist. Ex. 12 at pp. 1-2).[5]

The April 22, 2010 physical examination report reflected that the student currently exhibited a "speech problem" and "autism," and further reflected a diagnosis of a "developmental delay" (Dist. Ex. 13 at pp. 1, 2).[6]

In addition to the above-referenced information, the April 2010 CSE reviewed the student's

[5] Consistent with the district school psychologist's testimony, a notation on the form reflected that the student's teacher was given the report form to fill out and return, that the teacher needed permission from the director of the Montessori program to do so, and that the report was not returned (Tr. pp. 101-02; Dist. Ex. 12 at p. 2).

[6] The physical examination report did not include any details related to the presence of a speech problem or autism, rather it merely noted by check mark that the student "had (or now has)" these conditions (Dist. Ex. 13 at p. 1). The developmental delay was noted under the "Diagnosis" section of the physical form although the form did not reflect the DSM diagnosis of a global developmental delay 315.8 (id. at pp. 1-2).

previous IEP (Tr. pp. 118-20, 121-23, 128, 134, 147-48; Dist. Ex. 4 at pp. 3, 5, 7, 9, 10, 13).[7] The April 2010 CSE carried over the student's scores on previously administered tests from his August 2009 IEP to the April 2010 IEP, including his full scale composite score on the Stanford-Binet Intelligence Scale, Fifth Edition (SB-5) in the low average range of functioning, an adaptive behavior composite score in the moderately low level on the Vineland Adaptive Behavior Scale, Second Edition (Vineland-II), a score of "below age expectancy" on the Beery Visual-Motor Integration Test (VMI), and a score in the clinical range on the Pervasive Developmental Problems Scale of the Child Behavior Checklist (CBCL) (Tr. pp. 121-23; Dist. Ex. 4 at p. 3).[8]

Contrary to the IHO's finding that the district failed to fully evaluate the student, particularly in light of evidence that suggested the student had an autism spectrum disorder, the April 2010 CSE was aware that the student demonstrated behaviors that were characteristic of an autism spectrum disorder and included them in the description of the student in the April 2010 IEP. For example, the present levels of social/emotional performance in the April 2010 IEP reflected information carried over from the previous IEP that the student had received a score in the clinical range on the Pervasive Developmental Problems scale of the CBCL (Dist. Ex. 4 at p. 5).[9] The April 2010 IEP also identified the student's social difficulties related to interpersonal relations, play and leisure skills, including that he did not yet imitate complex actions several hours after watching someone else perform them, demonstrate friendship-seeking behavior with others of the same age, have a best friend or show preference for certain friends, choose to play with other children, play cooperatively with one or more children for up to five minutes, or play simple make-believe games with others (id.).

Although the April 2010 CSE did not have access to a current speech-language report, information regarding the student's speech-language functioning was available to the CSE and

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[7] While the IHO believed that the district school psychologist should not have relied on summaries of evaluations that were completed almost two years earlier, State regulations do not require a district to reevaluate a student each year but rather dictate that a student be evaluated at least every three years (IHO Decision at p. 16). Moreover, while the IHO noted that "children change rapidly," there is nothing in the hearing record to support that the student in the instant case changed rapidly (IHO Decision at p. 16; Tr. pp. 201-02). On the contrary, as noted below, the hearing record reflects that the CSE confirmed that much of the description of the student set forth in his previous August 2009 IEP continued to be accurate at the time of the April 2010 CSE meeting (Tr. pp. 152-53, 162-63, 181, 203-04).

[8] According to the district school psychologist, the parent completed a Childhood Autism Rating Scale (CARS) of the student, however, the school psychologist indicated that the parent's responses, which rated the student's behaviors below the "mild-moderate autistic range," indicated the student's behaviors were less severe than those the school psychologist had observed and as such, she did not feel it was an accurate depiction of the student's functioning (see Tr. pp. 111-13). According to the April 2010 CSE meeting minutes, the parent did not complete two of the items on the CARS, which further rendered the score not reliable (Dist. Ex. 2 at pp. 3-4). The hearing record does not contain the results of this evaluation (Tr. pp. 114-15). As a result, the district school psychologist referred the parent to the NEST program for further autism diagnostic testing using the Autism Diagnostic Observation Scale, (ADOS) (Tr. pp. 113-14).

[9] The district school psychologist explained that the information in the present level of social/emotional performance page of the April 2010 IEP initially came from the August 4, 2009 IEP and to make that known, the page was dated August 4, 2009 followed by a comma and the April 2010 CSE added the current CSE date (Tr. p. 152; Dist. Ex. 4 at p. 5). She testified that she knew the information was still current at the time of the April 2010 CSE meeting because she had seen some of the same type of behaviors when she observed the student (Tr. p. 153).

reflected in the April 2010 IEP, particularly within the context of the student's identified weaknesses in pragmatic language, social interaction, and engagement skills (see Dist. Ex. 4 at p. 5). For example, the parent's responses on the Vineland II that were included in the April 2010 IEP reflected that the student did not yet answer when a familiar adult made small talk, repeat phrases heard previously from an adult, or use words to express emotions (id.). In accordance with the January 2010 parent survey, the April 2010 IEP indicated that the student played with his brother in a physical way (running after him, playing hide and seek), rather than utilizing verbal interaction (id. at p. 4). The district school psychologist further explained that at the time of the April 2010 CSE meeting, the parent indicated that the student's speech-language goals were still appropriate for the student due to continued need (Tr. pp. 168-70; Dist. Ex. 4 at p. 9). Finally, two of the student's annual goals focused on improving the student's interaction skills including improvement of his ability to follow two-step verbal directions and improvement of his responses to yes/no and where questions, and an additional goal addressed pragmatics including increasing the student's ability to participate during group play/work to share group roles, take turns, use eye contact and perform as an active member of a group (Dist. Ex. 4 at pp. 10, 12).

The April 2010 IEP also identified the student's sensory and self-regulation needs, including his attentional needs. For example, the present levels of academic performance and learning characteristics section of the April 2010 IEP incorporated information that was reflected in the classroom observation and reported by the student's teacher in the post observation conference, and which is also reflected in the parent survey and the OT report, that described the student's difficulty with focusing on tasks (compare Dist. Ex. 4 at p. 3, with Dist. Ex. 9 at pp. 2-3, and, Dist. Ex. 10, and Dist Ex. 11 at pp. 1-3, and Dist. Ex. 12 at pp. 1-2; see also Tr. pp. 146-47). Consistent with the March 2010 OT school function evaluation, the April 2010 IEP noted that the student required additional adult support in the classroom setting to remain on task, complete assignments, and to improve his attention span (Dist. Ex. 4 at pp. 3-4, 6; see Dist. Ex. 9). Also in accordance with the March 2010 OT evaluation, the April 2010 IEP provided for the use of teacher cueing and a timer to assist with task completion (compare Dist. Ex. 4 at p. 12, with Dist. Ex. 9 at p. 6). The April 2010 CSE also described the student's sensory difficulties in the present level of health and physical development section of the IEP, including his tendency to crave movement and to mouth objects, and his need for movement breaks throughout the day, all of which was information gleaned from the March 2010 OT evaluation report, the April 2010 classroom observation, and the post observation conference (Dist. Exs. 4 at pp. 6, 7; 9 at pp. 3, 6; 11 at pp. 1-3).[10] Finally, the April 2010 CSE listed the student's "sensory issues," as one reason why the student could not be considered for a "'general education only'" program (Dist. Ex. 4 at p. 15). Additonally, the April 2010 IEP reflected the student's deficits related to activities of daily living (ADL) skills, with his adaptive behavior composite score in the moderately low level on the Vineland Adaptive Behavior Scale, Second Edition (Vineland-II) as well as by information provided in the teacher's report that the student required additional assistance when putting on his shoes (see Tr. pp. 146-47; Dist. Exs. 4 at p. 3; 12 at p. 2).

[10]The district school psychologist also indicated that the information in the present level of health and physical development was carried over from the August 2009 IEP because she knew it was still accurate as she had seen these behaviors during her classroom observation of the student and because the April 2010 CSE went through every page of the IEP with the parent, who confirmed it (Tr. pp. 163, 181, 204).

Based upon the foregoing, the evidence in the hearing record indicates that in developing the student's April 2010 IEP, the April 2010 CSE considered and relied upon the results of the student's most recent evaluation (a March 2010 OT school function evaluation), a parent survey, and a classroom observation report, from which it gleaned information regarding the student's strengths; the parent's concerns; and the academic, developmental and functional needs of the student—as described in the evaluative information available to the April 2010 CSE—consistent with regulations. In addition, the evidence in the hearing record demonstrates that the April 2010 IEP accurately and sufficiently described the student's needs consistent with the evaluative information available to the CSE.

B. April 2010 IEP

1. Annual Goals

Turning next to the parents' contention that while the IHO properly determined that the annual goals related to speech-language contained in the April 2010 IEP were not appropriate, the IHO erred in failing to address their remaining claims pertaining to the annual goals, namely, that the April 2010 IEP's academic goals were inappropriate because the student had achieved them and that lack of social/emotional goals rendered the IEP inappropriate. Conversely, the district alleges that the April 2010 IEP's annual goals were appropriate, including the annual goals directed at the student's speech-language needs. As expressed more fully below, the hearing record supports the district's contention.

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

A review of the April 2010 IEP reveals that it included ten annual goals with 18 short-term objectives in the student's areas of identified need (Dist. Ex. 4 at pp. 9-13). Specifically, with regard to the speech-language domain, the April 2010 IEP contained four annual goals with three corresponding short-term objectives for each of these goals, that addressed the student's needs related to vocabulary development, appropriate sentence structure, auditory processing skills (retaining and following two-step verbal directions), and responding appropriately to questions (Dist. Ex. 4 at pp. 9-10). To address the student's fine motor deficits, the April 2010 IEP included one annual goal that focused on increasing the student's prewriting and handwriting skills and one annual goal to address the student's ADL skills (id. at pp. 11). To address the student's emerging academic skills, the April 2010 IEP included one annual goal to increase the student's cognitive skills with three corresponding short-term objectives that focused on the student's ability to identify shapes, understand positional concepts (i.e., on top of, under), and recognize letters and numbers (id. at p. 13). To address the student's attending deficits, another annual goal addressed increasing his ability to remain on tabletop tasks or lessons for extended periods of time (id. at p. 12).

To support their claim that the April 2010 IEP's academic goals were not appropriate because the student had already achieved them, the parents rely on testimony from the student's Cooke teacher for the 2010-11 school year, information that was not before the April 2010 CSE (Tr. pp. 255-56). The teacher's testimony indicated that the student had met the academic goals by the time he came into her classroom, which was not until September 2010 (Tr. pp. 255-56: Parent Ex. L). In any event, the district school psychologist knew that the academic goals were still appropriate for the student because she asked the student's mother at the CSE meeting, who indicated that they remained appropriate, and there is no indication in the hearing record that the student had met the academic goals on the IEP at the time of the April 2010 CSE meeting (Tr. pp. 169-70). Moreover, the district school psychologist testified that parental input was necessary for the development of the annual goals, and that the parent and the teacher were the best indicators of whether or not the goals had been achieved (Tr. p. 186).

Notwithstanding the parents' contention that the absence of annual goals designed to address the student's anxiety contributed to a denial of a FAPE to the student, the student did not demonstrate anxiety at the time of the April 2010 CSE meeting and accordingly, no goals addressing anxiety were included or required to be included in the IEP (see Tr. pp. 573-74; Dist. Exs. 2, 9; 11; 12; Parent Ex. I). With regard to the student's deficits in the social/emotional domain, the April 2010 IEP included two annual goals, the first which addressed increasing the student's ability to participate during group play/work including sharing group roles, taking turns, using eye contact and performing as an active member of a group while maintaining personal boundaries, which would also address the student's social skills and the second which addressed increasing the student's social skills including decreasing his mouthing of objects, attending to tasks on initial directive and engaging in group play (Dist. Ex. 4 at pp. 12-13).

Based upon the foregoing, a review of the evidence in the hearing record demonstrates that the annual goals included in the April 2010 IEP were sufficiently linked to the student's needs as identified in the present levels of performance section of the April 2010 IEP (compare Dist. Ex. 4 at pp. 3-5, 7, with Dist. Ex. 4 at pp. 1-3). Thus, overall, the evidence in the hearing record supports a finding that the annual goals in the April 2010 IEP targeted the student's identified areas of need, appropriately addressed the student's needs, and were sufficiently specific and measurable to guide instruction and to evaluate the student's progress over the course of the school year (see D.A.B. v. New York City Dep't of Educ., 973 F. Supp. 2d 344, 359-61 [S.D.N.Y. 2013]; E.F. v. New York City Dept. of Educ., 2013 WL 4495676, at *18-*19 [E.D.N.Y. Aug. 19, 2013]; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 334-35 [S.D.N.Y. 2013]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *8 [S.D.N.Y. Dec. 8, 2011]; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 288-89 [S.D.N.Y. 2010]; Tarlowe, 2008 WL 2736027, at *9; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *11 [S.D.N.Y. Sept. 29, 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 146-47 [S.D.N.Y. 2006]; Application of the Dep't of Educ., Appeal No. 12-108 [finding annual goals appropriate where the goals addressed the student's areas of need reflected in the present levels of performance]).

2. 12:1+1 Special Class Placement

Turning next to the parties' contentions pertaining to the appropriateness of the 12:1+1 special class placement, as explained more fully below, the IHO's finding that proposed 12:1+1 special class placement was too large and not sufficiently intensive to meet the student's needs must be reversed.

According to State regulation, a 12:1+1 special class placement is designed for those students whose "management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students" (8 NYCRR 200.6[h][4][i]). In reaching its decision to recommend a 12:1+1 special class placement, the April 2010 CSE considered but rejected other placement options, including "general education only," but rejected this option because the student was exhibiting difficulties in multiple areas including speech-language development, fine motor, sensory, and socialization (Dist. Ex. 4 at p. 15). The April 2010 IEP also indicated that a general education placement was not appropriate for the student due to his difficulties focusing on tasks presented and completing tasks independently (id. at p. 14). The April 2010 CSE also considered the provision of special education teacher support services (SETSS) and a collaborative team teaching (CTT) placement for the student; however, the April 2010 CSE rejected these placements because the student's needs could best be addressed by placement in a class with a small student-to-teacher ratio on a full-time basis (Dist. Ex. 4 at p. 15; see also Tr. p. 612).[11]

Consistent with this, information before the CSE at the time of the April 2010 meeting indicated that the student presented with difficulties in the areas of attention/on task behavior, social participation, fine motor, self-care skills, frustration tolerance and self-regulation in his small, general education preschool setting, which was comprised of two "teachers" and nine students (Dist. Exs. 9 at pp. 2-5; 11 at pp. 1-3). Accordingly, the district school psychologist indicated that the April 2010 CSE did not believe the general education class with 25 to 30 students would be appropriate to meet the student's needs, nor would the ICT class because, although the ICT class would include both a regular education and special education teacher, the class size of approximately 25 students would be too large to provide the level of support the student required (Tr. p. 125).

At the impartial hearing, the district psychologist's testimony reflected that the CSE recommended a 12:1+1 class with 12 students, one teacher, and one paraprofessional so that the student could receive the additional support during the school day, in a smaller class setting (Tr. p. 125). She explained that the student required a smaller class where he would have more opportunities to interact with the teacher and where "the teacher and the para could have kept an eye on him and gotten him into more of the activities, kept him on task more of the time, and helped him" (id.). Although the IHO and the parents maintained that the 12:1+1 was still too large to meet the student's needs, at the time of the April 2010 CSE, information reflected in the April 2010 classroom observation supported the program recommendation, including his ability to follow routines in the classroom and his ability to independently choose activities with which to play (Dist. Ex. 9 at p. 3). While the student was also described as requiring more assistance to participate in table top tasks than his general education peers in preschool, he was able to benefit from verbal cues and verbal redirection and also demonstrated ability to transition with his peers in line, for example, to the playroom (Dist. Ex. 9 at p. 3). Additionally, the district psychologist testified that the April 2010 CSE considered the student's low average IQ, and believed he was too high functioning for a 6:1+1 class (Tr. pp. 126, 202). According to the district school psychologist, placement in a 12:1+1 special class would provide the student with the support he needed to perform better academically (Tr. p. 126). She added that placement in a 12:1+1 special class met

[11] CTT refers to the integrated co-teaching (ICT) placement included in State regulations and SETSS refers to the resource room programs described in State regulations (8 NYCRR 200.6[f],[g]).

the student's needs, because he would be with students who also needed additional support in the classroom (Tr. p. 202). The district school psychologist further explained that the student would also be in a special education class in a general education building, so he would still be able to interact with general education students for activities such as lunch, library, and assemblies (id.).

In addition to its recommendation for the small, structured setting that a 12:1+1 placement provides, the April 2010 CSE also recommended strategies to address the student's academic, social/emotional, and physical management needs (Dist. Ex. 4 at pp. 3-6). Specifically, the April 2010 IEP noted that the student required additional adult support to remain on task, complete assignments and increase his attention span and indicated that his teachers and related service providers would be responsible for additional behavioral support if necessary (id. at p. 4). The April 2010 IEP also provided for preferential seating as needed to address the student's attention difficulties and in order for the student to receive more support and assistance from the teacher during the school day (id at pp. 3, 6). Additionally, the April 2010 IEP provided for movement breaks throughout the day (id. at p. 6). Finally, the April 2010 IEP provided that the student would have questions, directions and instructions repeated (id.at p. 3). Furthermore, several of the student's annual goals incorporated additional strategies including the provision of opportunities for frequent practice, visual models, and a multi-sensory approach as well as previews, teacher cueing (i.e., timer), social role play, and peer models (id. at pp. 11-12). Finally, to effectuate the annual goals, the April 2010 also recommended the student receive related services of individual and group speech-language therapy, counseling and OT (id. at pp. 1, 4, 16).

Based on the foregoing, the evidence in the hearing record demonstrates that, in light of the student's academic, language, social/emotional, fine motor, attentional, and sensory regulation needs, the April 2010 CSE's decision to recommend a 12:1+1 special class placement in a community school, together with the strategies to address the student's management needs and the recommended related services, was reasonably calculated to enable the student to receive educational benefits for the 2010-11 school year.

C. Challenges to the Assigned Public School Site

Finally, the parents assert, among other things, that the district failed to demonstrate that the student would have been functionally grouped at the assigned public school site. The district argues that it had no legal obligation to establish that the assigned public school site could implement the April 2010 IEP, and alternatively, the evidence in the hearing record demonstrates that the student would have been appropriately grouped at the assigned public school site. As explained more fully below, the parents' assertions and that portion of their cross-appeal which address this issue must be dismissed.

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., 553 Fed. App'x 2, 9 [2d Cir. Jan. 8, 2014]; see also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. July 24, 2013]; 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"]).

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 Dep't of Educ., 526 Fed. App'x 135, 141 [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, quoting R.E., 694 F.3d at 187; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. Mar. 4, 2013]). 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]).[12] When the Second Circuit spoke 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., 553 Fed. App'x at 9, quoting R.E., 694 F.3d at 187 n.3).

In view of the foregoing, the parent cannot prevail on claims regarding implementation of the April 2010 IEP because a retrospective analysis of how the district would have implemented the student's April 2010 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.

[12] While the IDEA and State regulations provide parents with the opportunity to offer input in the development of a student's IEP, the assignment of a particular school is an administrative decision that must be made in conformance with the CSE's educational placement recommendation (T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009]; see K.L.A. v. Windham Southeast Supervisory Union, 371 Fed. App'x 151, 154 [2d Cir. Mar. 30, 2010]). A school district "may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement" (Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]). Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). The Second Circuit recently reiterated that while parents are entitled to participate in the determination of the type of placement their child will attend, the IDEA confers no rights on parents with regard to school site selection (C.F., 746 F.3d at 79). However, the Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular public 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 R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 420 [the 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.

Supp. 2d at 273). Here, it is undisputed that the parents rejected the assigned public school site that the student would have attended and instead chose to enroll the student in a nonpublic school of his choosing prior to the time the district became obligated to implement the April 2010 IEP (see Parent Exs. F; M). 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. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [stating that in addition to districts not being permitted to rehabilitate a defective IEP through retrospective testimony, "[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 claims that the assigned public school site would not have properly implemented the May 2011 IEP.[13]

However, even assuming for the sake of argument that the parents could make such speculative claims or that the student had attended the district's recommended program at the assigned public school site, the evidence in the hearing record does not support the conclusion that the district would have violated the FAPE legal standard related to IEP implementation—that is, that the district would have deviated from the student's IEP in a material or substantial way (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205, 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]; see D. D-S. v. Southold Union Free Sch. Dist., 2011

[13] While some district courts have found that parents have a right to assess the adequacy of a particular school site to meet their children's needs, the weight of the relevant authority supports the approach taken here (see B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at *20-*22 [E.D.N.Y. Mar. 31, 2014]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957 [S.D.N.Y. Mar. 31, 2014]; M.O. v. New York City Dept. of Educ., 2014 WL 1257924, at *2 [S.D.N.Y. Mar. 27, 2014]; E.H. v. New York City Dep't of Educ., 2014 WL 1224417, at *7 [S.D.N.Y. Mar. 21, 2014]; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *26 [E.D.N.Y. Aug. 19, 2013]; M.R. v New York City Bd. of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013]; A.M, 964 F. Supp. 2d at 286; N.K., 961 F. Supp. 2d 577, 588-90 [S.D.N.Y. 2013]; Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at *5 [E.D.N.Y. Mar. 21, 2013], aff'd, 556 Fed. App'x 1 [2d Cir Dec. 23, 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *13 [S.D.N.Y. Mar. 19, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *10 [S.D.N.Y. Feb. 20, 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *7 [S.D.N.Y. Dec. 11, 2012]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012], adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at *12-*14 [S.D.N.Y. June 16, 2014] [holding that "[a]bsent non-speculative evidence to the contrary, it is presumed that the placement school will fulfill its obligations under the IEP"]; but see V.S. v. New York City Dep't of Educ., 2014 WL 2600313, at *4 [E.D.N.Y. June 10, 2014]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16 [S.D.N.Y. May 27, 2014]; Scott v. New York City Dep't of Educ., 2014 WL 1225529, at *19 [S.D.N.Y. Mar. 25, 2014]; D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13 [S.D.N.Y. 2013]; B.R. v. New York City Dep't of Educ., 910 F.Supp.2d 670, 676-78 [S.D.N.Y. 2012]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012]).

WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 495, 502-03 [S.D.N.Y. 2011]).

VII. Conclusion

In summary, having determined that the evidence in the hearing record demonstrates that the district sustained its burden to establish that it offered the student a FAPE in the LRE for the 2010-11 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether the student's unilateral placement at Cooke was an appropriate placement or whether equitable considerations supported the parents' requested relief (see Burlington, 471 U.S. at 370; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that, the IHO's decision, dated October 10, 2012, is modified to the extent that it directed the district to directly fund payment of the student's tuition for the 2010-11 school year to Cooke.

Dated: **Albany, New York**
December 19, 2014

CAROL H. HAUGE
STATE REVIEW OFFICER