



The University of the State of New York

The State Education Department

State Review Officer

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No. 13-014

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, Jessica C. Darpino, Esq., of counsel

Kule-Korgood, Roff, and Associates, PLLC, attorneys for respondent, Andrea M. Santoro, 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 a decision of an impartial hearing officer (IHO) which found that it failed to offer a free appropriate public education (FAPE) to respondents' (the parents') son and ordered it to reimburse the parents for the cost of the student's tuition at the Cooke Center for Learning and Development (Cooke) for the 2012-13 school year. The parents cross-appeal, alleging that the IHO's failed to rule on certain of their claims. The appeal must be dismissed. 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

The student has a history of delayed development and has received diagnoses of autism, pulmonic stenosis, and has a history of "syncopal episodes" (Dist. Exs. 8 at p. 1; 21 at pp. 3-4). The student received early intervention services before attending a public school for kindergarten (Tr. p. 475; Dist. Ex. 21 at p. 3). At the time of the events giving rise to this proceeding, the student was enrolled in a special class at Cooke,¹ where the student has attended since the 2008-09 school

¹ The Commissioner has not approved Cooke as a school with which districts may contract for the instruction of

year (Tr. p 475; Dist. Exs. 20; 21 at p. 3). On April 26, 2012, a CSE convened to conduct the student's annual review and to develop an IEP for the 2012-13 school year (Dist. Ex. 3). Finding that the student remained eligible for special education and related services as a student with autism, the CSE recommended placement in a twelve month program in a 12:1+1 special class in a district specialized school with the related services of speech-language therapy, physical therapy (PT), occupational therapy (OT) and counseling services (id. at pp. 1, 18-20).

By letter dated June 18, 2012, the parents notified the district that they had not received an IEP or "placement recommendation" and would be unilaterally placing the student at Cooke for the 2012-13 school year and seeking tuition reimbursement (Parent Ex. F). On June 21, 2012, the district sent a final notice of recommendation (FNR) to the parents with the placement recommendation and specifying a particular public school site to which the student was assigned (Dist. Ex. 5). After visiting the assigned school, the parents notified the CSE by letter dated July 26, 2012, that the FNR did not specify the classroom in which the district proposed the student to attend and that upon contacting the school, they were informed that the student "would be placed in a 6:1+1 class" and the recommended school "did not have any 12:1+1 classes" (Parent Ex. G at p. 1). Additionally, the parents alleged that the student would not be appropriately grouped at the assigned school, the recommended school could not meet the student's transitional needs, and the physical environment of the school was too large and overwhelming for the student (id. at pp. 1-2). Finally, the parents asserted procedural and substantive inadequacies with the April 2012 IEP and indicated that they would be placing the student at Cooke and seeking tuition reimbursement (id. at p. 2).

A. Due Process Complaint Notice

By amended due process complaint notice dated August 7, 2012, the parents requested an impartial hearing and alleged that the district failed to provide the student with a "procedurally valid, substantively appropriate, and timely IEP and placement recommendation for the 2012-13 school year" (Parent Ex. C at p. 1).² In this regard the parents made a number of allegations, including that they were precluded from fully participating in the April 2012 CSE meeting for a number of reasons, including that certain needs were not discussed at the April 2012 CSE meeting (Parent Ex. C at p. 2) and that they were denied the chance to "meaningfully participate" in the creation of the IEP's transition goals (id. at p. 3). In addition, the parents alleged the April 2012 CSE failed to provide the student's teacher, who participated by telephone, with copies of the evaluations that were considered at the meeting, thereby preventing her from fully participating (id. at pp. 2-3). The parents also contended that the CSE failed to appropriately review the available evaluative data or conduct new assessments in developing the student's IEP (id. at p. 2),

students with disabilities (see 8 NYCRR 200.1(d), 200.7).

² The original due process complaint notice was dated July 2, 2012 (Parent Ex. A). The amended due process complaint notice includes additional claims regarding the assigned school (compare Parent Ex. A, with Parent Ex. C). The hearing record indicates that the district raised concerns with respect to the amended due process complaint during the hearing (Tr. pp. 19-24, 116-17). In their petition, the district continues to argue that the IHO improperly permitted the parents to amend their due process complaint notice subsequent to the commencement of the hearing.

and that subsequent to the April 2012 CSE meeting, the district did not provide the parents with a copy of the IEP for two months (*id.*).

Further, and regarding the April 2012 IEP itself, the parents argued that the IEP failed to accurately describe the student and his needs, and that the annual goals were vague, insufficient, and immeasurable (Parent Ex. C at p. 2). The parents also asserted that the CSE failed to include parent counseling and training on the IEP in derogation of State regulations (*id.*), that the CSE did not provide services to enable the student "to be successfully transitioned from the supportive environment he has historically attended to a large setting" (*id.*), and that the IEP did not provide promotional criteria for the student. Moreover, and concerning postsecondary transition activities, the parents alleged that the April 2012 IEP did not provide an adequate transition plan for the student, that the April 2012 CSE did not have adequate evaluative information regarding the student's transition needs, and that the IEP failed to include any present levels of performance as they related to transition from school to post-secondary activities (*id.* at p. 2-3). Furthermore, the parents argued that the transition plan in the April 2012 IEP failed to include a coordinated set of transition activities or indicate the staff responsible for implementing those services and activities (*id.*).

Finally, the parents raised a number of claims regarding the assigned public school site, including that that it was not appropriate for the student, and that the assigned school would be unable to implement the student's IEP (Parent Ex. C at p. 4). In addition, the parents contended that the assigned school would not meet the student's academic, transitional, or vocational needs (*id.*), and maintained that the student would be inappropriately grouped by virtue of age and academic and social functioning (*id.* at p. 3). For relief, the parents requested reimbursement for their unilateral placement at Cooke (*id.* at p. 4).

B. Impartial Hearing Officer Decision

On July 18, 2012, a hearing was convened and after four days of proceedings, concluded on November 16, 2012 (IHO Decision at p. 3).³ In a decision dated December 26, 2012, an IHO found that the district denied the student a FAPE (IHO Decision at p. 33). In particular, the IHO found that because the student's teacher from Cooke was not present for the entirety of the CSE meeting, the CSE was improperly "formulated" (IHO Decision at pp. 29-30). In addition, the IHO indicated that the CSE failed to conduct new evaluations, did not adequately consider evaluative data it did have available, and that the April 2012 IEP did not accurately reflect the results of evaluations to identify the student's needs (*id.* at pp. 30-31, 34). The IHO also found that the goals contained in the IEP were vague and immeasurable, and were improperly developed after the CSE meeting (*id.* at pp. 32-33). With regard to the failure of the CSE to provide a coordinated set of transition activities, the IHO found that while a transition plan and measureable post-secondary goals should have been developed for the student, this alone did not make the IEP deficient (*id.* at p. 31). However, the IHO noted the lack of a vocational assessment, which "further point[ed] to

³ The first day of the impartial hearing was limited to determining the student's pendency placement (IHO Decision at p. 3). While all parties agreed that the student's pendency placement was Cooke, the district disputed whether the student was entitled to a 12 month program and whether the district's obligations should be limited based on the reduction on reimbursement in the prior decision establishing the student's pendency at Cooke (Tr. pp. 6-15). The district subsequently withdrew its objections (IHO Ex. I) and the IHO memorialized the parties' agreement to the student's pendency placement by order dated July 25, 2012 (IHO Ex. II).

the insufficiency of the IEP," and found that the postsecondary goals contained in the IEP were not measurable (*id.*). The IHO further noted that the IEP incorrectly indicated the student was entering eighth grade rather than ninth grade, and found that it was unclear how the student would have accessed a grade-level curriculum despite having delayed instructional levels in reading and math (*id.* at p. 32). With regard to the assigned school site, the IHO noted that some students did not receive all mandated related services (*id.*).

In addition, and with respect to the parents' unilateral placement, the IHO determined that Cooke addressed the unique needs of the student, including his academic and transitional needs, and that the student was appropriately grouped with students of similar needs (IHO Decision at p. 33-36). The IHO also found that equitable considerations favored the parents' request for tuition reimbursement as the parents cooperated with the CSE, visited the recommended placement, and provided the required notice (*id.* at pp. 36-37). However, the IHO found that the parents had not established their inability to pay the student's tuition at Cooke so as to entitle them to direct funding thereof (*id.* at p. 37). Accordingly, the IHO awarded the parents reimbursement for the full costs of the student's tuition at Cooke for the 12-month 2012-13 school year (*id.* at pp. 37-38).

IV. Appeal for State-Level Review

The district appeals and contends that the IHO erred in determining that it failed to offer the student a FAPE for the 2012-13 school year. Initially, the district alleges that the IHO improperly permitted the parents to amend their due process complaint after the commencement of the impartial hearing. The district also contends that while the April 2012 IEP indicated that the student was entering eighth grade, this was a "clerical error" that did not deny the student a FAPE. With regard to the April 2012 CSE meeting, the district asserts that the absence of the student's Cooke teacher for the latter stages of the meeting did not lead to a denial of a FAPE, and affirmatively alleges that all members of the CSE had the opportunity to participate. In addition, the district argues that the IHO erred in finding that the CSE did not have or consider sufficient evaluative data upon which to recommend an appropriate program for the student. The district also argues that the IHO erred in finding that the student's annual goals were inappropriate to meet the student's needs, and contends that while the CSE failed to complete the "coordinated set of transition activities" section of the April 2012 IEP, such an "oversight" does not amount to a denial of FAPE since other sections of the IEP address the student's needs related to his transition from school to post-school activities. With respect to the assigned public school site, the district contends that the appropriateness of the school was speculative as a matter of law and, in any event, that the school would have implemented the student's IEP had he attended. Finally, the district asserts that equitable considerations do not support the parents' request for relief and that the parents did not establish their entitlement to direct funding of the student's tuition.

The parents answer, denying the substance of the district's allegations and cross-appealing the IHO's failure to reach a determination regarding the appropriateness of a 12:1+1 placement for the student, the availability of a place for the student on the first day of school, and the ability of the recommended placement to meet the needs of the student. The district responds to the cross-appeal by alleging that the parent's failure to raise the issue of the appropriateness of the 12:1+1 placement in the due process complaint notice bars its consideration in this proceeding, and reiterating that claims related to the assigned school are speculative. Nevertheless, the district

asserts that had the student attended the assigned school, it would have had space available for the student on the first day of school and could have met the needs of the student.

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, 180-83 [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]).

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. Preliminary Matters

1. Amended Due Process Complaint Notice

In its petition, the district alleges that the IHO improperly allowed the parents to amend their due process complaint on August 8, 2012, subsequent to the commencement of the impartial hearing. According to the district, the impartial hearing commenced on July 18, 2012, the date of the pendency hearing and thus the parents' request to amend the due process complaint notice on August 7, 2012, was untimely. In opposition, the parents contend that the impartial hearing timeline commenced on August 14, 2014, the first scheduled date for the hearing after the pendency hearing. Thus, the parents argue, they were within the allowable time period for amending the due process complaint.⁴

A party may amend its due process complaint notice "if the impartial hearing officer grants permission, except that the impartial hearing officer may only grant such permission at any time not later than five days before an impartial hearing" (8 NYCRR 200.5[i][7][i][b]). In this case, the hearing record indicates that the sole purpose of the July 18, 2012, hearing was to address the district's concern with the student's educational placement during the pendency of the proceedings. According to the record, the next scheduled date for the hearing was not until August 14, 2012. A pendency hearing commences the impartial hearing timeline if it occurs within 14 days of a waiver by the parties of a resolution meeting or if the 30-day resolution period has expired (8 NYCRR 200.5[j][3][iii][b]). In this case, the pendency hearing was held within the 30-day resolution period following the filing of the original due process complaint notice and there is nothing in the hearing record to suggest if or when the resolution period was waived or that the pendency hearing was held outside of the resolution period. Furthermore, the parents August 7, 2012, request to amend the due process complaint was made at least 5 days prior to the next scheduled hearing date of August 14, 2012. In light of the foregoing, I cannot find that the IHO abused his discretion in allowing the parents to amend their due process complaint.⁵

2. Additional Claim Raised on Appeal

In their cross-appeal, the parents raise as a new issue for consideration, the IHO's failure to determine the appropriateness of a 12:1+1 placement for the student. The district responds and alleges that because this issue was not raised in the amended due process complaint, it is not properly before me now for consideration. It is well settled that a party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (see, e.g., Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). However, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i],

⁴ I note that the district acknowledges in their petition that the first hearing date after the pendency hearing was originally scheduled for August 14, 2012 (Pet. ¶ 3 n.1).

⁵ Even had the IHO abused his discretion in permitting an amendment of the due process complaint notice, it would not affect the outcome of this decision.

300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][i][b]; see N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at *6 [S.D.N.Y. May 14, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *9-*10 [S.D.N.Y. Mar. 28, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 E.D.N.Y. 2012]; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at *8).

Upon review, I find that the parents' amended due process complaint cannot reasonably be read to include allegations regarding the appropriateness of a 12:1+1 special class placement for the student. A careful examination of the amended due process complaint indicates that the parents challenge was to the district's "failure to conduct adequate and sufficient evaluations before changing [the student's] education program recommendation" from a 6:1+1 to a 12:1+1 (Parent Ex. C at p. 2). Consequently, the appropriateness of a 12:1+1 class ratio is outside the scope of my review and, therefore, will not be considered (see N.K., 2013 WL 4436528, at *5-*7; B.M., 2013 WL 1972144, at *6; C.H., 2013 WL 1285387, at *9; B.P., 841 F. Supp. 2d at 611).⁶

B. April 2012 IEP

1. Evaluative Data and Present Levels of Performance

As noted above, the IHO made a number of findings regarding the evaluative data relied upon by the April 2012 CSE. On appeal, the district argues that the IHO erred in determining that the April 2012 CSE did not consider and rely upon sufficient evaluative information to develop the April 2012 IEP. According to the district, the April 2012 CSE had access to and considered the available evaluations and progress reports, obtained information from the parents and the student's teachers and, as a result of this information, was able to accurately describe the student's needs and his present levels of performance.

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

⁶ Even if this issue had been properly raised in the amended due process complaint notice, there is nothing in the hearing record to indicate that a 12:1+1 class ratio is inappropriate for the student. In fact, the hearing record indicates that there was "consensus" at the April 2012 IEP meeting that the student was ready and "shows a good sense of self, with considerable academic level, and ability to follow teacher directions and increased positive interactions with others" (District Ex. 3 at p. 24). To the extent the parents now argue that the student "requires two teachers" (Answer ¶ 93), I do not find the hearing record supports this contention. Although the assistant head of school at Cooke testified that the student required more support than could be provided by one teacher and one paraprofessional (Tr. pp. 504-05), she provided no explanation or context for this statement, it is not supported by the documentary evidence in the hearing record, and it is unclear why she did not consider paraprofessionals capable of providing the student with similar supports to those afforded the student at Cooke (see 8 NYCRR 80-5.6[a], [b]). Furthermore, the student's mother testified that she did not disagree with the recommendation for a 12:1+1 special class (Tr. p. 565).

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 developing the student's April 2012 IEP, the district psychologist indicated that the April 2012 CSE considered a March 2010 psychoeducational evaluation,⁷ a March 2010 "Vineland

⁷ The IHO, in his decision, suggests that the March 2010 psychoeducational evaluation was insufficient because it was "over two years old." However, and as noted above, a district need only generally conduct a reevaluation once every three years. As there is no indication in the record that the district was required to conduct a reevaluation in this instance, the fact that this evaluation was over two years old at the time of the April 2012 CSE meeting does not, alone, make the CSE's reliance on this evaluation inappropriate. This is especially true since there is no indication in the record (or even an allegation made) that the information contained in this evaluation

Summary," a June 2010 letter from the student's developmental behavioral pediatrician, and a July 2011 psychosocial evaluation (Tr. pp. 136, 139, 141, 143-49, 229-230; see Dist. Exs. 8-10; 21).⁸ In addition to these evaluations, the April 2012 CSE "relied heavily" on the Cooke progress reports which were the main source of information and were "discussed at length and in a lot of detail" in the development of the April 2012 IEP (Tr. pp. 141, 143, 149; see Dist. Ex. 20). Finally, the psychologist indicated that the April 2012 CSE also relied "very much" on the verbal report and information provided by the student's then-current teacher at Cooke (Tr. pp. 135-136).⁹

With respect to the student's cognitive abilities, the March 2010 psychoeducational evaluation contains information regarding the student's intellectual functioning, noting that the student achieved a full scale intelligence quotient (IQ) of 77 (in the borderline delayed range), a nonverbal IQ of 77 (in the borderline delayed range), a verbal IQ of 80 (in the low average range), and an abbreviated IQ of 85 (id. at pp. 2-3). In addition, this evaluation noted that the student's visual-spatial processing skills fell in the average range, and the school psychologist noted this strength may suggest a preferred learning style for the student (Dist. Ex. 9 at p. 3). The March 2010 psychoeducational evaluation also noted the student's relative strength in memory and fluid reasoning – including the student's ability to acquire and store diverse information in short term memory, to transform or sort diverse information and present it in a new format (id.). While the March 2010 psychoeducational evaluation noted the areas above as relative areas of strength, the school psychologist reported the student may find tasks with numbers and numerical problem solving, whether word problems or pictured relationships, to be more challenging (Dist. Ex. 9 at p. 3). The student's weakest performance was in the area related to his accumulated fund of general information (mildly delayed range), which the psychologist reported might signify a significant weakness in the student's ability to provide information about common objects or people (id. at pp. 3-4).

is inaccurate.

⁸ To the extent the parent notes that it is unclear what materials were available to the various members of the CSE, State regulations authorize a parent and district representative of the CSE to agree to use alternative means of CSE meeting participation, such as videoconferences and conference calls (8 NYCRR 200.4[d][4][i][d]). Such regulation, effective December 2005, does not incorporate the requirements for telephonic participation that were set forth in a June 1992 State Education Department field memo entitled, "The Use of Teleconferencing to Ensure Participation in Meetings to Develop the Individualized Education Program (I.E.P.)" which provided, among other things, that individuals who participate by telephone at CSE meetings must have access to the same material as other participants (see Application of a Student with a Disability, Appeal No. 10-002; Application of the Dep't of Educ., Appeal No. 09-078; Application of a Child with a Disability, Appeal No. 05-129). In determining whether there has been a denial of a FAPE due to a procedural violation, every member of a body such as a CSE need not read a document in order for the body to collectively consider the document (T.S. v. Board of Educ., 10 F.3d 87, 89 [2d Cir. 1993]); however, I remind the district that it should ensure that all members of the CSE have access to the documents discussed at a CSE meeting.

⁹ With regard to the IHO's finding that the April 2012 CSE was not properly composed because the student's Cooke teacher was not present for the entirety of the meeting, the district asserts that her absence for a portion of the meeting did not deny the student a FAPE. I agree, noting that the CSE also included a district special education teacher (Dist. Ex. 3 at p. 26) and find that, to the extent the parents wished to include other persons having knowledge of the student (34 CFR 300.321[a][6]; 8 NYCRR 200.3[a][1][ix]), it was not the district's obligation to ensure the attendance of such persons for the entirety of the meeting, especially considering that the hearing record does not reflect that the parent requested that the CSE adjourn until such time as the private school teacher could attend for the duration of a CSE meeting (see, e.g., Tr. pp. 230-31).

In addition, the evaluative data includes significant information about the student's academic ability. The March 2010 psychoeducational evaluation, for example, indicates that, utilizing the Wechsler Individual Achievement Test, Second Edition (WIAT-II), the student achieved a composite standard score for reading of 89 (low average) with standard scores of 102 in word reading, 78 in reading comprehension, and 99 in pseudo word decoding (id. at p. 5). In addition, the March 2010 psychoeducational evaluation included other useful information about the student's academic abilities, including information related to his abilities in reading and in mathematics (id. at pp. 5-6).¹⁰ Likewise, the March 2012 Cooke progress report contains significant information about the student's academic abilities as well, including that the student "made progress" in identifying the focus of a paragraph, made connections to an instructional text when he engaged with the topic, and made progress in his ability to sustain reading for 10 to 20 minutes without becoming distracted (Dist. Ex. 20 at p. 3). The Cooke progress report also noted the student worked toward developing skills to monitor his comprehension of the text by taking notes and asking questions, and slowing down and rereading to self-correct (id. at p. 4). The Cooke progress report also contains information regarding the student's abilities in areas such as writing¹¹ and mathematics,¹² as well as other information that is useful about the student.¹³ Further, and

¹⁰ The March 2010 psychoeducational evaluation also noted additional information about the student related to his academic performance, including that the student displayed minimal eye contact, flat affect, and he demonstrated considerable motor overflow with some facial distortions (id. at pp. 1-2). In addition, the school psychologist reported the student required encouragement and he demonstrated an inconsistent attention span, maintaining attention and motivation for short periods of time (id. at p. 2). The school psychologist also indicated the student's pattern of subtest scores suggested that anxiety and distractibility were factors which may affect his academic performance (id.).

¹¹ For example, the March 2012 Cooke progress report indicates the student "continues to make progress" in editing for punctuation, capitalization, and grammar and he demonstrated a willingness to apply suggestions of others in his writing (Dist. Ex. 20 at p. 5). The Cooke progress report also states the student's strengths in writing included using details, descriptions, and similes more consistently while writing; writing fiction; using graphic organizers; and including a wide range of vocabulary words and adjectives (id.). The Cooke progress report also noted the student had difficulty using writing tools such as checklists and dictionaries independently and the Cooke program encouraged the student to use an online computer-based dictionary and checklists to decrease his frustration level and to encourage independence in editing his work (id. at p. 6).

¹² The Cooke March 2012 progress report showed with respect to mathematics the student demonstrated a strength in basic computations across operations, but procedures for solving double-digit multiplication and division needed reinforcement (Dist. Ex. 20 at p. 8). The Cooke progress report indicated the student made progress counting and manipulating money and identifying and classifying angles and geometric shapes (id.). The progress report from Cooke indicated the student had difficulty with word problems regarding deciding what operation to use and he needed to show flexibility in his thinking (id.). To address these needs Cooke asked the student to solve problems in more than one way with the support of teacher modeling and provided him with guidance on how to break apart word problems (id.). The report noted that the student benefitted from visuals and clear directions during instruction (id.).

¹³ In the March 2012 Cooke progress report, for example, the student's teacher noted the student participated well across school environments including the classroom, small groups and related service sessions, and that the student interacted with others and shared ideas (Dist. Ex. 20 at p. 1). The Cooke teacher noted the student expressed himself well through both oral and written language with a demonstrated strength in learning rule-based information and executing computations (id.). The teacher also indicated the student's obstacles to learning related to his problem solving skills and motivation, noting that although the student remembered specific details he had difficulty "synthesizing these ideas to infer information and solve problems" (id.). The Cooke teacher stated the student struggled with problem solving in his interpersonal relationships because he was less aware of social cues and his tone of voice, as well as his non-verbal communication (id.). The Cooke teacher also noted the student's motivation and frustration tolerance varied especially for less preferred topics or tasks (id.). The Cooke progress report cited the

according to the April 2012 IEP, by oral report from Cooke the student demonstrated strong skills in decoding (Dist. Ex. 3 at p. 1). The April 2012 IEP noted the student worked on expressing main ideas and introducing details while he struggled with basic predications, understanding nuances of the text and making predictions of a "more abstract sense" (id.). The April 2012 IEP also indicated the student's ability to decode was higher than his ability to comprehend text (id.).

Further, the evaluative data before the April 2012 CSE contained information regarding the student's social/emotional functioning. For example, the March 2010 psychoeducational evaluation reported the student came to the evaluation with "disinterest" and showed a preference for easier tasks (Dist. Ex. 9 at p. 4). The school psychologist indicated the student showed an orientation away from responsibility and a preference to be more dependent on others (id.). The school psychologist reported that at times the student's feelings became overly intense and interfered with his decision making ability and the student experienced "negative feelings and heightened anxiety" related to academic performance (id.). The school psychologist further noted the student showed indications of "continuing dependency needs beyond age expectations" which may lead to avoidance of responsibility (id.).

Moreover, and in regard to counseling, the Cooke social worker noted in the first trimester of the 2011-12 school year that the student's "social and relational skills" decreased during the summer months making it necessary to "revert to some skills" worked on during the previous school year as well as to introduce "some more basic skills" (Dist. Ex. 20 at p. 15). During the second trimester the social worker noted the student showed "some improvement" in the maintenance of his personal space, listening skills and use of a positive tone of voice (id. at p. 16). The Cooke progress report also indicated the student demonstrated growth in his ability to be flexible, relating his feelings about personal experiences and identifying his feelings along with accompanying facial expressions (id.). The Cooke progress report also noted the student continued to need to work on self-expression, socialization skills, increasing flexibility, and utilizing coping mechanisms when angry, and stated that "while [the student's] functional level has remained static" in the reported social areas "these are skills that need time and a significant amount of practice in order to develop appropriately" (id.).

The evaluative information before the April 2012 CSE also contained information regarding the student's needs as they relate to daily activities. For example, The March 2010 Vineland Summary¹⁴ provided information on the student related to communication, daily living skills, socialization, and adaptive behavior (Dist. Ex. 10 at p. 1).¹⁵ In addition, the April 2012 CSE

student's "inflexibility" and "difficulty changing course" (id.). To address these concerns the Cooke teacher reported the strategies used at Cooke including: breaking down abstract/social language skills into smaller concrete, rule based segments; graphic organizers to visually organize and simplify information; repetition of information; bringing the student's attention to targeted skills; setting limits and clear expectations; reinforcing self-regulation strategies; and including art components in activities to support focus (id. at pp. 1-2).

¹⁴ This report is assumed to represent the findings of an administration of the Vineland Adaptive Behavior Scales, Second Edition.

¹⁵ Specifically, the district social worker reported that the student achieved a standard score of 69 in the communication domain which included receptive, expressive, and written subdomains (id.). The social worker noted the student demonstrated difficulty telling basic parts of a story, and he did not give simple directions or explain ideas in more than one way (id.). In the area of daily living skills the social worker reported the student achieved a standard score of 66 (id.). The student also achieved a standard score of 66 in the socialization domain

also considered a June 2012 letter from the student's developmental behavioral pediatrician who indicated the student received a diagnosis of autism at two years of age and continued to have delays in language skills, difficulties with age appropriate social interactions, and restricted areas of interest (Tr. p. 149, 161; Dist. Ex. 8).

Further, in July 2011, a comprehensive psychosocial evaluation was completed by a private clinic in order to assess the student's then-current service needs (Dist. Ex. 21 at p. 2). According to the evaluator, while the student would periodically engage in the interview, he appeared to have difficulty maintaining eye contact, and at times, the student "played with his phone" (*id.*). Nonetheless, the evaluator reported the student was able to respond to both multiple-choice and open-ended questions, and his "expressive and receptive skills impressed as good" (*id.*). The July 2011 psychosocial evaluation reported the student indicated his strengths were in self-advocacy and his parent noted his strengths were in organizational skills (*id.* at p. 3). Moreover, in terms of basic daily living skills, the 2011 July psychosocial evaluation report delineated a range of competencies, including the student's ability to complete self-care needs independently, tell time on both digital and analog clocks, "distinguish the letters of his name," and demonstrate "good reading and writing skills" (Dist. Ex. 21 at p. 5). The psychosocial evaluation also highlighted a number of challenges, such as the student's limited understanding of the concept of money and inability to navigate public transportation or use a stove or microwave oven (*id.*). The evaluation report recommended residential habilitation services to increase the student's independence, and "to enhance [the student's] social network," participation in a recreation program for individuals with Asperger's syndrome and "camping services," as well as the continuation of the student's then-current services (*id.*).

In light of the above, I find that the above-described sources of data, when viewed collectively, contain a sufficient amount of information about the student and/or his needs. However, the parents suggest that the evaluative data relied upon by the April 2012 CSE was insufficient because it did not "conduct or rely" on a social history evaluation/update, or obtain updated assessments of the student's needs in the areas of speech, language, visual motor, and sensory regulation.¹⁶ However, the July 2011 psychosocial evaluation report included a brief review of the student's developmental history, noting that at age two, the student received a diagnosis of Asperger's syndrome, at three years old, he developed speech, and at age five, he had mastered toileting (*id.*). Medically, the psychosocial report indicated the student had a history of "pulmonic stenosis" and "syncopal episodes," with an added note that at the time of the evaluation, the student was not "prescribed medication" (Dist. Ex. 21 at p. 4).

In addition, for speech-language services the Cooke report indicated the student made progress in his "ability to predict conclusions to stories, but [the student] continues to require support to identify the main idea of a short story" (Dist. Ex. 20 at p. 14). The speech-language

(*id.* at p. 2). While the district social worker reported the student helped peers and demonstrated friendship-seeking behavior with others, he did not keep a comfortable distance from others, did not talk to others about shared interests, and did not meet with friends regularly (*id.*). The social worker reported that the student's achieved an adaptive behavior composite standard score 65, described as an estimate of the student's level of personal and social sufficiency (*id.*).

¹⁶ The parents also contend that the district failed to conduct an updated vocational assessment of the student, but this issue is addressed separately in the "transition plan" section, below.

progress report also noted the student made progress in being able to discern between grammatically correct and incorrect sentences but noted the student continued to require improvement in the appropriate use of grammar (id.). The speech-language progress report indicated the student asked appropriate questions during conversations when the conversation topic reflected a topic of his choosing but he required verbal prompting to engage with peers regarding a non-preferred topic noting the student did not participate when not motivated by the topic (id.). The speech-language progress report stated that therapy would continue to expand the student's repertoire of preferred conversation topics, through motivating activities, to further elicit expressive language (id.). The speech-language progress report further noted the student required direct instruction, interactions with peers, and constant positive reinforcement to support his development of language skills (id.).

Further, the Cooke progress report included progress from the occupational therapist and physical therapist as it related to the student's motor development (Dist. Ex. 20 at pp. 17-20). The progress report reflected the student's improved upper body and trunk strength and his ability to navigate a floor grid following directional cues (id. at p. 17). The Cooke progress report noted the student followed directions better when they were presented visually as opposed verbal directions (id. at pp. 17-18). The progress report indicated the student participated in supervised trips into the community to address public safety skills (id. at p. 18). The occupational therapist noted in the progress report that the student continued to demonstrate difficulty utilizing sensory strategies but could independently identify his current state of sensory regulation and sensory regulation strategies that could be implemented, but he needed verbal prompts to implement the strategies (id.). With regard to self-help skills the occupational therapist indicated that the student worked on sending e-mails and noted that in addition, emphasis would be placed on trunk and upper body strengthening, as well as the use of sensory strategies within the school environment (id.). The physical therapist indicated the student demonstrated increased interest in physical activity and physical therapy with improvement in endurance and he had begun working on agility skills (id. at p. 20). The Cooke progress report further noted the student demonstrated decreased core strength and mobility (id.). The physical therapist noted the student required prompting and demonstration for core strengthening exercises which were needed to develop strength and endurance for participation in recreational activities and seated classroom activities (id.).

Finally, the IHO found that the April 2012 IEP did not accurately reflect the results of the evaluations before the April 2012 CSE (IHO Decision at p. 33). However, the April 2012 IEP contains the results of the March 2010 psychoeducational evaluation, indicating the student's full scale cognitive ability fell in the borderline range, with his verbal skills falling in the low average range and nonverbal skills falling in the borderline range (Dist. Ex. 3 at p. 1). In addition, the present levels of performance are generally reflective of the information included in the Cooke progress report (compare Dist. Ex. 3 at pp. 1-3, with Dist. Exs. 8-10, and Dist. Exs. 20-21), and correlate closely with the evaluative data available to the CSE (compare Dist. Ex. 3 at pp. 1-3, with Dist. Exs. 8-10, and Dist. Exs. 20-21).¹⁷ In addition, the April 2012 CSE also identified

¹⁷ For example, and with respect the writing, the April 2012 IEP indicated the student followed a very structured outline to write a paragraph, that in narrative writing he had the necessary components of the paragraph and he could follow the writing process, but that he needed to add descriptive language and details with reasoning to support the main idea of his writing, (Dist. Ex. 3 at p. 2). Regarding math, the April 2012 IEP indicated things like Cooke reported that the student functioned at approximately the fourth grade level, and noted that the student could do single digit multiplication but not double digit multiplication and required support to keep the problem

management needs for the student to include teacher modeling, repetition, adult support, repetition of instructions, chunking/clustering of instruction, breaking down directions, and sequential problem solving (Dist. Ex. 3 at p. 3) The management needs also included teacher prompting, teacher questioning, supervision of classroom and homework materials, and use of verbal cues to help the student stay on task and minimize instances of self-talk (Dist. Ex. 3 at p. 4).¹⁸ In light of the forgoing, therefore, I am unable to find that the district had insufficient evaluative data available to it, or that that this data was not accurately reflected on the April 2012 IEP.¹⁹

2. Adequacy of Goals

Relative to the parties' dispute concerning the substantive adequacy of the annual goals and short-term objectives set forth in the April 2011 IEP, the district argues that the IHO improperly determined that the "IEP goals . . . are not appropriate" (IHO Decision at p. 32). Specifically, the IHO held that the goals were "insufficient and vague," not measurable, and did not address the student's unique needs, (id. at pp. 32-33).²⁰ Furthermore, the IHO opined that the goals could not

solving steps in the proper order (id.). The IEP also indicated that the student could count money and identify coins, but he needed reinforcement to understand percentages, percentage of sale and concepts of change in money, and that the student needed help in deciding what math operation to use and help with the explanation of the operation itself (id.). Further, and socially, the April 2012 IEP described the student as friendly, that he shared with others, followed directions from teachers, and was compliant with adults (Dist. Ex. 3 at p. 2). The April 2012 IEP also noted that the student did not have behavioral problems, he was motivated to learn and he participated in school activities (id.). In addition the April 2012 IEP indicated the student "sometimes" got frustrated with peers, he needed support on how to say things properly, and the student required adult prompting to be patient with people as he had difficulty with personal space issues (id.). The April 2012 IEP indicated the student needed to increase his pragmatic awareness in relation to himself with others and his parents indicated a concern with the student's self-talk behavior (id.). Regarding speech-language skills, the April 2012 IEP stated the student worked on improving receptive and expressive language skills as well as his pragmatic language abilities (Dist. Ex. 3 at p. 1), and reflected the student's speech-language abilities as reported in the Cooke progress report (compare Dist. Ex. 20 at p. 14, with Dist. 3 at pp. 1-2). Further, and regarding the student's motor development the April 2012 IEP reflected the information provided by the Cooke progress report (compare Dist. Ex. 20 at pp. 17-20, with Dist. Ex. 3 at pp. 2-3) and noted, among other things, that the student worked on gross motor skills, visual/motor perceptual skills, sensory regulation strategies, self-help skills, balance, endurance, agility, and strength (compare Dist. Ex. 3 at p. 3, with Dist. Ex. 20 at pp. 19-20).

¹⁸ However, as discussed further below the management needs section of the IEP does not address the student's needs, strengths, preferences, and interests as they relate to transition from school to post-school activities.

¹⁹ I do, however, note that the parents argue that the April 2012 IEP incorrectly indicates that the student was entering eight grade and that this would prevent the district from implanting the IEP. However, regarding this incorrect grade designation, there is no evidence in the hearing record to support a finding that this error constituted a denial of a FAPE, and the IHO's finding that "[h]ow instruction on an 8th grade level is to take place is not clearly indicated" (IHO Decision at p. 32) misconstrues a basic principle of special education. As noted by the IHO, the hearing record reflects that the student would have been instructed using a grade-level curriculum, with modifications to address the student's performance deficits (id.; Tr. pp. 237-38). Special education is defined as "specially designed instruction . . . to meet the unique needs of a child with a disability" (20 U.S.C. § 1401[26]; see 8 NYCRR 200.1[ww]) and State regulations define specially designed instruction as "adapting, as appropriate to the needs of an eligible student . . ., the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability; and to ensure access of the student to the general curriculum, so that he or she can meet the educational standards that apply to all students" (8 NYCRR 200.1[vv]). Accordingly, I am unable to find that the district's error had any effect on the substantive adequacy of the IEP.

²⁰ The IHO also noted that the goals "were not written at the [CSE] meeting" (IHO Decision at p. 30), In particular, it appears from the hearing record that while goals may have been discussed as the CSE meeting, they may not

have been explained and accepted by the CSE because the student's teacher was not present during that part of the April 2012 CSE meeting (IHO Decision at pp. 30-33).

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

As previously noted, the April 2012 CSE convened to develop the student's IEP for the 2012-13 school year and with the exception of the student's mathematics teacher, who left after the discussion of the student's present levels of social development, developed the student's goals (Tr. pp. 134-135; Dist. Exs. 3 at p. 23; 4). The district school psychologist explained that when developing IEP goals during the CSE meeting, she would write the goal as a "framework concept" (Tr. p. 168). She noted that while the goals might not be completed during the CSE meeting, "everybody knows the goal" and the concept of each goal was "very clear" (Tr. pp. 168, 173). According to the district school psychologist, the goals were "very clearly explained and accepted by everyone" (Tr. p. 169).

In addition, the April 2012 IEP included approximately 24 annual goals, more than half of which included short term objectives to address the student's needs as described in the present levels of performance in the areas related to social skills, pragmatic skills, reading, writing, mathematics, receptive and expressive language skills, and motor needs (compare Dist. Ex. 3 at pp. 5-18, with Dist. Ex. 3 at pp. 1-3). The present levels of performance indicated that the student required skill development in expressing main ideas, making predictions and comprehending text nuances (Dist. Ex. 3 at p. 1). To address these needs, the April 2012 IEP included a goal regarding participating in group discussion and answering questions related to verbally present text (id. at p. 6). Short term objectives accompanied this goal and included answering questions about events in the story, character analysis, responding to inferential questions and questions related to main ideas and supporting details along with questions related to abstract information, cause and effect, prediction and outcomes (id. at pp. 6-7). The goal included the required measurability criteria (80% accuracy during five activities), method of measuring progress (by the classroom teacher through observation and analysis of the student's work), and a schedule for measurement (every four weeks) (id. at p. 6). Further reading goals included using one sentence to retell the beginning,

have been written in final form until sometime after the CSE meeting had concluded (Tr. pp. 166-190). However, this alone is not a basis to find a denial of FAPE (see, e.g., *E.A.M. v. New York City Dep't of Educ.*, 2012 WL 4571794 at *7-8 [S.D.N.Y. Sept. 29, 2012]). This is especially true since, while the parents did allege in their due process complaint notice that they did not participate in the creation of the IEP's transition goals (which is an issue discussed below), there is no indication (or even an allegation) that the parents were denied the opportunity to participate in the IEP meeting generally, or that they were not consulted regarding the non-transition goals in the IEP.

middle and end of the story and utilizing active reading strategies to increase comprehension (id. at pp. 7-8).

To address the student's needs related to writing, the April 2012 IEP included goals to utilize the writing process by writing in multistep stages using brainstorming, planning, outlining, writing, editing and revising (Dist. Ex. 3 at p. 8). Additionally, the April 2012 IEP targeted the student's writing needs by including goals to write complete paragraphs with at least five complex sentences with a minimum of five to seven words per sentence including content related vocabulary with accurate grammar and punctuation with the assistance of strategies during five activities with 80% accuracy measured every four weeks (id. at p. 9).

With regard to the student's mathematics needs, the April 2012 IEP included goals to address solving problems that contain one or more steps using addition, subtraction, multiplication and division and identified the steps and strategies the student will use to meet the goal (Dist. Ex. 3 at p. 10). The April 2012 IEP also included a goal and short-term objectives related to the student's ability to identify coins and bills by their value and to combine them to make a stated amount (id. at p. 11).

In addition, the April 2012 IEP addressed the student's speech and language needs with three goals including predicting conclusions to stories, describing main ideas in a listening experience at 80% accuracy over three consecutive sessions measured every marking period (Dist. Ex. 3 at p. 12-13). Moreover, the April 2012 IEP included goals regarding the use of grammatically correct sentences and demonstrating appropriate conversational strategies to improve social pragmatic and narrative skills at 80% accuracy over three consecutive sessions measured every 4 weeks (id.).

With regard to the student's social skill needs, the April 2012 IEP included goals for participating in discussions with peers using at least three topics four out of five trials measured four times a quarter, increasing positive and socially correct interactions with peers and adults with 50% accuracy measured twice monthly, using appropriate turn taking skills and increasing the student's ability to solve problems related to conflictive social situations through role playing actives four out of five trials measured four times per quarter (Dist. Ex. 3 at p. 5). Additionally, the April 2012 IEP addressed the parents' concern regarding the student's self-talking by providing a goal to decrease such behavior through exploring instances of self-talk and developing strategies to decrease the self-talk with 60% accuracy measured 2 times per month (id. at p. 6).

Finally, the April 2012 IEP included goals to address the student's visual motor and perceptual areas and balance by navigating floor grids following directional cues charted over three consecutive sessions every four weeks, utilizing three or more sensory regulation strategies at 80% accuracy measured every four weeks to address the sensory area and developed activities of daily living by successfully sending emails with 80% accuracy measured every four weeks (Dist. Ex. 3 at pp. 14-18).

Thus, a review of the April 2012 IEP shows that the annual goals and short-term objectives as they relate to the academic, social, and motor domains included the requisite evaluative criteria, evaluation procedures, and schedules to measure progress (Dist. Ex. 3 at pp. 5-18; see 8 NYCRR 200.4[d][2][iii][b]).

3. Transition Plan

Finally, the parents raised concerns in their due process complaint notice regarding the lack of an "adequate" transition plan for the student (Parent Ex. C at pp. 2-3), and on appeal raise a number of claim related to this issue, including that the April 2012 CSE did not obtain and/or rely on a vocational assessment of the student (Answer ¶¶ 46, 57), that much of the April 2012 IEP meant to address the student's transition was left blank (id. at ¶ 60), and that the post-secondary goals in the April 2012 IEP were insufficient (id. at ¶ 60). On this issue the IHO found that while the lack of a "coordinated set of transition activities" in the April 2012 IEP would not, by itself, indicate a "deficiency in the IEP," the student was "ready to start transitioning right away," and he seemed to indicate that the lack of consideration of a vocational assessment by the April 2012 CSE "further points to the insufficiency of the IEP" (IHO Decision at p. 31). The IHO also found that the April 2012 IEP lacked measurable post-secondary goals. On appeal, the district alleges that the IHO improperly determined that the April 2012 IEP did not include adequate post-secondary goals for the student and contends that while the section of the IEP listing "transitional goals"²¹ was inadvertently left blank, "other sections of the IEP recommend transition services to address [the student's] long term [sic] vocational plans and independent living goals," and therefore the lack of a "coordinated set of transaction activities" section of the April 2012 IEP is harmless error.

Under the IDEA, to the extent appropriate for each individual student, an IEP must focus on providing instruction and experiences that enable the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34]; see Educ. Law § 4401[9]; 34 CFR § 300.43; 8 NYCRR 200.1[fff]). Accordingly, pursuant to federal law and State regulations, an IEP for a student who is at least 16 years of age (15 under State regulations), or younger if determined appropriate by the IEP Team, must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills (20 U.S.C. § 1414[d][1][A][i][VIII]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]).

IEPs must also include the transition services needed to assist the student in reaching those goals (20 U.S.C. § 1414[d][1][A][i][VIII]; 34 CFR 300.320[b]). In this regard, State regulations require that an IEP include a statement of a student's needs as they relate to transition from school to post-school activities (8 NYCRR 200.4[d][2][ix][a]),²² as well as the transition service needs of the student that focuses on the student's course of study, such as participation in advanced placement courses or a vocational education program (8 NYCRR 200.4[d][2][ix][c]). The regulations also require that the student's IEP include needed activities to facilitate the student's movement from school to post-school activities, including instruction, related services, community experiences, the development of employment and other post-school adult living objectives and, when appropriate, acquisition of daily living skills and a functional vocational evaluation (8 NYCRR 200.4[d][2][ix][d]), as well as a statement of responsibilities of the school district (or participating agencies) for the provision of services and activities that "promote movement" from

²¹ Since the April 2012 IEP lists certain post-secondary goals, and further since the district's argument appears to focus on the effect of the lack of a "coordinated set of transition activities" in the April 2012 IEP, I presume the district's reference to "transitional goals" was an error.

²² These are supposed to be listed in the present levels of performance section of a student's IEP (see 8 NYCRR 200.4[d][2][ix][a]).

school to post-school. Here, the hearing record does not support the district's contention that the failure to complete the "coordinated set of transition activities" portion of the April 2012 IEP was a mere administrative oversight; rather, a review of the hearing record indicates that the district neither identified nor addressed the student's needs relating to transition from school to post-school activities.

It is undisputed that the April 2012 IEP lacks a "coordinated set of transition activities" which is a major component of an IEP which relates to post-school activities. However, and as noted above, the district contends that despite this error the IEP as a whole adequately addresses the student's long-term vocational plans and independent living goals. While deficiencies in a transition plan may not amount to a denial of FAPE where an IEP otherwise addresses a student's post-secondary needs (see, e.g., M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *9 [S.D.N.Y. March 21, 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *11 [S.D.N.Y. March 19, 2013]), I am unable to find on the record before me that such was the case here.

Significantly, the district school psychologist acknowledged during testimony that while the student's age at the time of the April 2012 CSE meeting necessitated a transition plan, she was unable to recall if the April 2012 CSE reviewed any vocational assessment or discussed the student's transition to post-secondary activities (Tr. p. 211).²³ Further, the district school psychologist testified that she documented the April 2012 CSE meeting by taking notes which, while not detailed, contain a summary of the meeting which she indicated would have included information about a transition plan if one had been discussed (Tr. pp. 211-213; Dist. Ex. 4). However, these notes do not reflect any discussion by the April 2012 CSE of the student's transition from school to post-secondary activities (Tr. pp. 212-213; Dist. Ex. 4).²⁴

Moreover, I am unable to find that the April CSE took steps to identify the student's post-secondary (including his vocational) needs.²⁵ In fact, a careful review of the hearing record indicates that the April 2012 CSE failed to identify any specific transition needs or provide any information beyond the standard IEP boilerplate language to address the unique post-secondary needs of the student (Dist. Ex. 3 at p. 5). Thus, while the present levels of performance on the April 2012 IEP identify the student's needs relating to the academic, speech-language,

²³ The student turned 15 during the 2012-13 school year.

²⁴ The parent testified that a "transition plan" was not discussed during the April 2012 CSE meeting (Tr. p. 556).

²⁵ While the hearing record indicates that the district conducted a vocational assessment of the student in January 2010, there is nothing to suggest that the April 2012 CSE considered this (or any) vocational information about the student when developing the April 2012 IEP (Tr. pp. 98, 211; 503). Moreover, this vocational assessment was not included in the hearing record and, therefore, cannot be used to assess what the student's vocational needs were. In this regard I note that while the district initially provided this vocational assessment to the IHO for admission into evidence (Tr. p. 98), the hearing record reflects that it was not admitted into evidence, without objection by the district, because it had not been considered by the April 2012 CSE (Tr. pp. 108-109). Additionally, while counsel for the district subsequently sought to use this vocational assessment to refresh the recollection of a witness and argued at that time that the document was relevant to the development of the April 2012 IEP, the district ultimately withdrew its question to that witness, and the document was not admitted into evidence (Tr. pp. 232-35). The district does not now contend that the IHO erred in not allowing this vocational assessment into evidence, nor did it submit this document with its petition and request that I consider it as additional evidence.

social/emotional, sensory, and motor domains, I am unable to determine whether they reflect the student's needs, strengths, and interests as they relate to transition from school to post-school activities (id. at pp. 1-3).²⁶ Likewise, while the annual goals and short-term objectives contained in the April 2012 IEP, such as increasing problem solving related to conflict situations and increasing the student's ability to combine money to make a stated value, may assist the student in post-secondary activities, I am unable to find these goals were developed as a result of discussion of the student's post-secondary needs or were specifically intended to address such (see generally Dist. Ex. 3 at pp. 4-21). In light of the above, therefore, I am unable to find that the April 2012 IEP addressed the student's "long-term vocational plans and independent living goals" as the district suggests.

Further, the Cooke representative stated that the student was "capable of participating in an internship program, a travel training program," and a "very structured daily living skills" program that included activities such as budgeting, cooking for himself, doing his own laundry and "participating in daily living skills in a very structured curriculum" (Tr. p. 501). The Cooke representative also testified that the transition activities for the student needed to "start soon" to address his post-secondary needs so that he could live "as independently as possible when that time comes" (Tr. p. 502). The assistant head of Cooke stated that the student received travel training and transition services at Cooke and participated in the school's Access to Independence program, which she described as a program that provided academic classes as well as language skills classes, a counseling group, a life skills class, travel training, and arts and movement classes (Tr. pp. 394, 481, 484). She further indicated that the student was capable of attending a job site, speaking with supervisors and engaging in work that was "more sophisticated" than that available to students at the assigned public school site (Tr. p. 496). Given the student's abilities as noted above, the hearing record supports a finding that the student had needs relating to daily living skills training, travel training, and career planning in preparation for post-secondary activities and would have benefitted from a transition plan in this regard.

Finally, while the April 2012 IEP does provide some post-secondary goals, since the hearing record does not provide evidence that the student's transition needs were discussed by the April 2012 CSE, I am unable to find the parent was provided with an opportunity to meaningfully participate in the identification of the student's post-secondary needs or the resultant goal development. This is especially true where, as here, the hearing record is unclear as to the extent to which the post-secondary goals were discussed during the April 2012 CSE meeting (see, e.g., Tr. pp. 165-89).

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]). As detailed above, the hearing record is devoid of any evidence to suggest that

²⁶ While a July 2011 psychosocial evaluation included information under the student's functional status that is likely relevant to the student's post-secondary needs, there is nothing in the hearing record to suggest that the April 2012 CSE considered, discussed, or utilized this information in describing the student's post-secondary needs (Tr. pp. 211-213, 565; Dist. Exs. 4; 22 at p. 5).

the April 2012 CSE identified, considered, or discussed the student's transition needs in drafting the April 2012 IEP. As such, this failure significantly impeded the parents from participating in the development of the April 2012 IEP and deprived the student of educational benefits. Accordingly, I find that the aforementioned deficiencies amount to a denial of FAPE.

C. Unilateral Placement and Equitable Considerations

Having reviewed the IHO's decision and determined that the district failed to offer the student a FAPE for the 2012-13 school year, I need not address the parties' remaining contentions related to the provision of a FAPE, including the parents' contentions with respect to the school to which the student was assigned and various issues raised in the parents' due process complaint notice, but which were not addressed by the IHO.²⁷ However, one additional issue must be addressed; namely whether equitable considerations favor the parents in this matter.²⁸

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; M.C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 362-64 [S.D.N.Y. 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-

²⁷ In this regard I note that there a number of issues raised in the parent's due process complaint notice which neither party now clearly raises for review. These issues include (1) the timeliness of the provision of the IEP to the parents, (2) the lack of parent training and counseling in the IEP, and (3) the alleged lack of promotional criteria in the April 2012 IEP. Since it is not an SRO's role to research and construct the parties' arguments or guess what they may have intended (see, e.g., Gross v. Town of Cicero, 619 F.3d 697, 704 [7th Cir. 2010] [finding that an appellate review does not include researching and constructing the parties' arguments]; Fera v. Baldwin Borough, 350 Fed. App'x 749, 752-53, 2009 WL 3634098 [3rd Cir. Nov. 4, 2009] [finding that a party on appeal should at least identify the factual issues in dispute]; Taylor v. American Chemistry Council, 576 F.3d 16, 32 n.16 [1st Cir. 2009]; Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 841 [10th Cir. 2005] [noting that a generalized assertion of error on appeal is not sufficient]; Lance v. Adams, 2011 WL 1813061, at *2 [E.D. Cal. May 6, 2011] [finding that the tribunal need not guess at the parties' intended claims]; Bill Salter Advertising, Inc. v. City of Brewton, 2007 WL 2409819, at *4 n.3 [S.D. Ala. Aug. 23, 2007]), these issues, even if I were to consider issues not addressed by the IHO, would not properly be before me.

²⁸ The district does not appeal the IHO's determination that Cooke is an appropriate placement for the student, so that finding has become final and binding upon the parties and need not be addressed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]; see also IHO Decision at pp. 33-36).

61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]).

The IDEA allows that reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice 10 business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G. v. Bd. of Educ., 459 F.3d 356, 376 [2d Cir. 2006]; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist.; 2007 WL 3085854, at * 13 [E.D. Pa. Oct. 22, 2007]).

The district offers two reasons to reduce or deny the parents' request for reimbursement: (1) the parents never intended to accept a public school placement for the student, as evidenced by their signing a tuition contract with Cooke prior to the April 2012 CSE meeting; and (2) the parents did not provide the district with adequate notice of their intention to placement the student privately at public expense.²⁹ With regard to the first, the Second Circuit has recently explained that, so long as parents cooperate with the CSE, "their pursuit of a private placement [i]s not a basis for denying their [request for] tuition reimbursement, even assuming . . . that the parents never intended to keep [the student] in public school" (C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 840 [2d Cir. 2014]). Here, the hearing record indicates that the student's parent participated in the April 2012 CSE meeting and visited the school specified in the FNR on three separate occasions in an effort to ascertain its appropriateness for the student. Moreover, the parent's testimony at hearing indicates that had an appropriate placement for the student been offered, the student would have attended the district recommended school (Tr. pp. 448; 473).

Further, the hearing record reflects that the parents notified the district, by letters dated June 18, 2012, and July 26, 2012, of their intention to place the student at Cooke for the 2012-13 school year and seek public funding for the placement (Parent Exs. F; G). Although, as the district notes, the first letter did not specify the parents' particular concerns with the IEP, the letter indicated that the parents had not yet received the IEP (Parent Ex. F at p. 1). As noted above, the statutory requirement is that parents notify the district that they are rejecting the recommendation, state their concerns, and indicate their intent to enroll their child in private school at public expense (20 U.S.C. § 1412[a][10][C][iii][I]; 34 CFR 300.148[d][1]). The district does not assert that the parents had previously received a copy of the April 2012 IEP, and the June 2012 letter stated the

²⁹ The district also contends that the parents did not establish an entitlement to direct funding of the student's tuition at Cooke; because the IHO explicitly denied the parents' request for direct funding (IHO Decision at p. 37) and the parents do not now request it, I need not address the district's arguments in this respect.

parents' concerns as of the time it was written. Further, while the district contends that the July 2012 letter (which did raise concerns with the IEP) was untimely because it was sent "days after the start of the school year," I am unable to find that this alone would demand a reduction in reimbursement, especially where the district was aware of the parent's unilateral placement, and it appears that the district did not provide the parents with the student's IEP much before the start of the school year (see Tr. p. 558; Parent Ex. F at p. 1). Accordingly, I decline on these facts to reduce or deny reimbursement to the parents on the grounds that they did not provide the district with timely notice of their intention to unilaterally place the student privately at public expense.

Finally, to the extent the district argues that equitable considerations do not favor the parents because they did not raise any concerns at the time of the CSE meeting, the statute requires that parents state their concerns either at the time of the CSE meeting, or in writing not less than 10 business days before they remove the student from the public schools, not both (20 U.S.C. § 1412[a][10][C][iii][I]; 34 CFR 300.148[d][1]). As such, the evidence in the hearing record weighs in favor of the parents' request for tuition reimbursement for the 2012-13 school year.

VII. Conclusion

In summary, an independent review of the hearing record supports the IHO's ultimate finding that the district denied the student a FAPE for the 2012-13 school year and therefore, the IHO properly ordered the district to reimburse the parents for the costs of the student's tuition at Cooke.

THE APPEAL IS DISMISSED.

THE CROSS APPEAL IS DISMISSED.

**Dated: Albany, New York
October 17, 2014**

**HOWARD BEYER
STATE REVIEW OFFICER**