



The University of the State of New York

The State Education Department

State Review Officer

www.sro.nysed.gov

No. 13-062

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, Ilana A. Eck, 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 the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) daughter and ordered it to reimburse the parent for his daughter's tuition costs at the Cooke Center for Learning and Development (Cooke) for the 2012-13 school year. The appeal must be sustained in part.

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 parties' familiarity with the detailed facts and procedural history of the case and the IHO's decision is presumed and will not be recited here in great detail. Briefly, the student has received diagnoses of cerebral palsy, seizure disorder, and sleep apnea (see Tr. pp. 137, 353; Dist. Ex. 1 at p. 3). With respect to the student's educational history, the hearing record shows that the

student attended Cooke since kindergarten (*see* Tr. pp. 115-16; Dist. Ex. 1 at p. 1).¹ The CSE convened on March 23, 2012 to conduct the student's annual review and to develop her IEP for the 2012-13 school year (*see* Dist. Ex. 1 at pp. 1, 19).² Finding the student eligible for special education as a student with multiple disabilities, the March 2012 CSE recommended a 12-month school year program in a 12:1+1 special class in a specialized school, along with annual goals, support for management needs, and related services (*id.* at pp. 1, 3-17, 19).³ On June 14, 2012, the parent signed enrollment contracts with Cooke for the student's attendance during the 12-month 2012-13 school year (Parent Exs. J at pp. 1-2; K at pp. 1-2). By letters dated June 18, 2012 and July 24, 2012, the parent informed the district about his disagreement with the recommendations contained in the March 2012 IEP, as well as the particular public school site to which the district assigned the student to attend for the 2012-13 school year and, ultimately, informed the district of his intent to unilaterally place the student at Cooke (*see* Parent Exs. C; D at pp. 1-2).

In a due process complaint notice dated November 2, 2012, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (*see generally* Parent Ex. A).

An impartial hearing convened on December 12, 2012, and concluded on February 4, 2013 after four days of proceedings (*see* Tr. pp. 1-395). In a decision dated March 13, 2013, the IHO determined that the district failed to offer the student a FAPE for the 2012-13 school year, Cooke was an appropriate unilateral placement, and equitable considerations weighed in favor of the parent's request for relief (IHO Decision at pp. 24-32).

IV. Appeal for State-Level Review

The district appeals seeking to overturn the IHO's determinations that the district failed to offer the student a FAPE for the 2012-13 school year and that equitable considerations weighed in favor of the parent's requested relief.⁴ The parties' familiarity with the particular issues for review on appeal in the district's petition for review and the parent's answer thereto is presumed and will not be recited here in detail. Briefly, the district alleges that the IHO erred in determining that: the district denied the parent a meaningful opportunity to participate in the development of the student's IEP; the evaluations of the student before the March 2012 CSE were insufficient; the present levels of performance in the March 2012 IEP were not accurate or sufficient; the annual goals failed to address the student's needs; as a result of the insufficient evaluative information and lack of meaningful parental participation, the 12:1+1 special class placement recommended on the March 2012 IEP was not appropriate; the counseling mandate included on the IEP was inconsistent

¹ The Commissioner of Education has not approved Cooke as a school with which school districts may contract to instruct students with disabilities (*see* Tr. pp. 92-93; *see also* 8 NYCRR 200.1[d], 200.7).

² The student was nineteen at the time of the March 2012 CSE meeting (*see* Dist. Exs. 1 at p. 1; 2 at p. 1).

³ The student's eligibility for special education programs and related services as a student with multiple disabilities is not in dispute (*see* 34 CFR 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

⁴ The district has not appealed the IHO's determination that Cooke was an appropriate unilateral placement. Accordingly, this determination has become final and binding on the parties (34 C.F.R. 300.514[a]; 8 NYCRR 200.5[j][5][v]).

with information available to the CSE; and the transition plan included in the March 2012 IEP was incomplete and inappropriate (see IHO Decision at pp. 24-28). With respect to the assigned public school site, the district asserts that the IHO erred in interpreting certain representations by the district at the impartial hearing as a concession that it failed to offer the student an "appropriate placement" for the 2012-13 school year (see id. at p. 24).

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at

203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "'academic, developmental, and functional needs'" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should

have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

The evidence in the hearing records supports the IHO's ultimate finding in this case that the district failed to offer the student a FAPE for the 2012-13 school year, however, I reach the same conclusion on different grounds than those stated by the IHO.

A. March 2012 CSE

1. Parental Participation and Predetermination

First, contrary to the IHO's finding, the evidence in the hearing record shows that the district afforded the parent a meaningful opportunity to participate in the development of the student's IEP and did not predetermine the student's placement. The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. §1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation"]; Sch. For Language and Comm'n Development v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]; Paolella v. District of Columbia, 2006 WL 3697318, at *1 [D.C. Cir. Dec. 6, 2006]).

A review of the hearing record shows that attendees at the March 2012 annual review CSE consisted of a district school psychologist (who also served as the district representative), a district special education teacher, the student, the parent, an additional parent member, and the Cooke CSE coordinator, as well as the student's Cooke teacher who participated for a portion of the meeting by telephone (Dist. Ex. 1 at p. 23; see Tr. pp. 137-38). The district school psychologist testified, albeit in a general sense, that all members were afforded an opportunity to participate in the CSE meeting (see Tr. p. 44). More specifically, however, she testified that the March 2012 IEP was developed based on information "supplied and dictated" by Cooke, which was support by testimony from the Cooke CSE coordinator (Tr. pp. 45, 48-49, 138-39). The IEP also reflects input from the parent relating to his preference that the student "develop her skills in money" and his concern that the student was "socially apt" but "too trusting" (Dist. Ex. 1 at p. 2; see Tr. pp. 178-79). Further, the hearing record indicates that the parent spoke about the student's experiences helping him in his place of work and the benefit she gained therefrom, as well as his preference

relative to the student's related services mandate (Tr. pp. 143-44, 152-53, 355-56). The hearing record also reflects that the parent and the Cooke CSE coordinator objected to the placement recommendation (Tr. pp. 106, 180). In this regard, the hearing record shows that the parent and Cooke staff participated, in part, by virtue of expressing their disagreement, and the fact that the CSE did not adopt those recommendations does not amount to a denial of meaningful participation (see P.K., 569 F. Supp. 2d at 383; Sch. for Language & Comm'n Dev., 2006 WL 2792754, at *7).

Further, there is no support for the IHO's finding that, by drafting portions of the March 2012 IEP after the CSE meeting, the CSE deprived the parent an opportunity to participate in the development of the IEP (see E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at * 8 [S.D.N.Y. Sept. 29, 2012] [recognizing that the IDEA does not require that goals be drafted at the CSE meeting]). Instead, "the relevant inquiry is whether there was a full discussion with the [p]arents regarding the content of the IEP before the IEP was finalized" (R.K. v. New York City Dep't of Educ., 2011 WL 1131492, at *15 [E.D.N.Y. Jan. 21, 2011], adopted at, 2011 WL 1131522 [E.D.N.Y. Mar. 28, 2011], aff'd, R.E., 694 F.3d 167). Thus, although information may have been added to the March 2012 IEP after the CSE meeting, the hearing record shows that the changes were based on a document relating to the student's post-secondary transition related goals, which was read by Cooke staff during the CSE meeting and subsequently provided that document to the district, with some "additions," which according to the Cooke student support services staff member, were discussed at the CSE meeting (Tr. pp. 50, 56-59, 156, 197-98, 201; see Dist. Ex. 3 at pp. 1-5).

With respect to the parties contentions regarding whether or not the CSE had predetermined the student's program and placement recommendations, courts have determined that a key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *10-*11 [E.D.N.Y. Sept. 2, 2011], aff'd 506 Fed.Appx. 80, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [S.D.N.Y. 2009], aff'd, 366 Fed. App'x 239, 2010 WL 565659 [2d Cir. 2010]). Here, the March 2012 IEP indicates that the CSE considered a 15:1 special class in a community school, as well as "other programs" in a specialized school, but determined that such placements would not provide the student "with the level of support she need[ed]" (Dist. Ex. 1 at p. 22; see Tr. pp. 78-79). The district school psychologist testified that "other programs" in a specialized school included 6:1+1, 8:1+1, and 12:1+4 special classes (Tr. p. 100). The district school psychologist testified that, based on the timing of Cooke's provision of information about the student to the district, the district "ha[d] limited information [o]n which to base a recommendation until [they] actually s[a]t down and ha[d] a discussion" (Tr. p. 78). Further, as noted above, the March 2012 CSE discussed the placement recommendation. Thus, there is no basis in the hearing record for a finding that the district predetermined the student's placement recommendation.

Based on the foregoing, while the parent may disagree with the recommendations included in the March 2012 IEP, such disagreement alone does not support a finding that the district deprived the parent an opportunity to meaningfully participate in the development of the student's March 2012 IEP.

2. Sufficiency of Evaluative Information

The district alleges that the March 2012 CSE possessed sufficient evaluative information to develop an appropriate IEP for the student, arguing that it was appropriate for the CSE to rely on information from Cooke. In the alternative, the district asserts that a lack of updated testing did not rise to the level of a denial of a FAPE. The parent asserts that the IHO correctly found that the CSE proceeded on an incorrect assumption that the student's cognitive levels had stabilized and further notes that the district failed to present any evidence of when it last evaluated the student.

Turning first to the issue regarding a triennial reevaluation of the student, 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]).

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]; S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *12 [S.D.N.Y. Nov. 9, 2011]; 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).

Here, the hearing record indicates that the district had not conducted its own evaluation of the student within three years of the March 2012 CSE meeting (see Tr. pp. 102, 353-54). As to the lack of information about the student's cognitive levels, the district school psychologist testified that she had a sense of the student's cognitive functioning level and that new measures of cognition were not necessary in this instance because the student's cognitive levels had stabilized due to her age and that it was more important that the program recommendation be based "on her current level of functioning and her functional academics" (Tr. pp. 107-08); however, the hearing record does not contain evidence of a rationale as to why the district did not seek other types of information about the student, thus the school psychologist's reasoning is only persuasive to a degree. Further, the district offered no evidence as to when, if ever, the district had completed an evaluation of the student in the past. Therefore, the hearing record shows that the district failed to conduct a needed reevaluation as required by federal and State regulations (see 34 CFR 300.303[b][1]-[2]; 8 NYCRR 200.4[b][4]). As a result, the March 2012 CSE did not have before

it certain reports, such as a psychoeducational evaluation, a social history, or a classroom observation (see Tr. pp. 101-03).

Instead, the evidence shows that the information used to develop the student's IEP was provided by Cooke during the CSE meeting and in the March 2012 Cooke progress report (see Tr. pp. 45-46, 48-50, 60-61; see generally Dist. Ex. 2; see also Tr. pp. 138-39, 338-39, 355). The district school psychologist indicated that much of the information included in the IEP was "verbatim" what the Cooke representatives stated during the meeting (Tr. p. 57). The March 2012 Cooke progress report reflected the student's progress and performance in the program at Cooke with regard to academics and vocational, social, and adaptive skills (Dist. Ex. 2 at pp. 2-11). In addition, the hearing record shows that the March 2012 Cooke progress report included a report from the student's speech/language and physical therapy (PT) providers (see id. at pp. 12-14).

It should be noted that a district is not required to conduct its own evaluations in developing an IEP and recommending an appropriate program, but may rely on information obtained from the student's private school personnel, including sufficiently comprehensive progress reports, in formulating the IEP (see G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *23 [S.D.N.Y. March 29, 2013], aff'd 554 Fed. App'x 56 [2d Cir. Feb. 11, 2014]; S.F., 2011 WL 5419847, at *10). However, in the present case, the information included in the Cooke progress report was anecdotal and did not offer specific information about the student's functioning, save for a report of the student's progress towards her goals by way of a numbered scale (see Dist. Ex. 2 at pp. 2-14). Although a district's failure "to conduct [a] statutorily-mandated . . . reevaluation of the [s]tudent does not render [an] IEP procedurally defective" if the information before the CSE is sufficient to "directly assist persons in determining the educational needs of the student" (D.B. v. New York City Dep't of Educ., 966 F.Supp.2d 315, 330-31 [S.D.N.Y. 2013]), in this instance, the Cooke report did not offer a sufficient picture of the student's functioning and needs. For example, with respect to "functional literacy," the March 2012 Cooke progress report indicated that the student's proficiency level on her goals (e.g., commenting and making predictions based on illustrations in books) in this area ranged from a "3" (demonstrated skill with a moderate level of prompts/cues) to a "4" (demonstrated skill with a minimum level of prompts/cues) (Dist. Ex. 2 at p. 2). This offers little to no insight as to how this goal should be interpreted in understanding the student's needs. In addition, the report offered a general description of the class's focus on "understanding of environmental print" and noted that the student "demonstrated enthusiasm" with regard to such activities (id. at p. 3).

In view of the forgoing evidence, the district's failure to conduct a triennial reevaluation of the student constitutes a procedural violation. As the hearing record shows that the March 2012 CSE had some information from Cooke to consider in the development of the IEP, in isolation, this violation may not rise to the level of a denial of a FAPE. However, as described below, I find it necessary in this instance to consider the matter further in light of the cumulative effect of the district's failure to conduct a triennial evaluation of the student together with the other deficiencies identified below, in order to determine whether or not the district failed to offer the student a FAPE.

B. March 2012 IEP

1. Present Levels of Performance

The district argues that the IHO erred in finding that the district improperly failed to include the student's diagnoses in the March 2012 IEP or information about the student's program at Cooke, asserting that such information was not required under the IDEA. As to the typographical errors identified by the IHO, largely appearing in the student's present levels of performance, the district argues that such errors did not rise to the level of a denial of a FAPE.

Among the elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental, and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). On the basis of its review, a CSE must "identify what additional data, if any, are needed to determine," among other things, "the present levels of academic achievement" of a student (20 U.S.C. § 1414[c][1][B]). Any additional assessments need only be conducted if found necessary to fill in gaps in the initial review of existing evaluation data (20 U.S.C. § 1414[c][2]; see also D.B., 966 F.Supp.2d at 329-30).

Initially, the hearing record does not support the IHO's conclusion that the March 2012 IEP did not set forth diagnoses received by the student, as it listed a seizure disorder and sleep apnea (Dist. Ex. 3 at p. 3). While, as the IHO noted, the IEP made no mention of diagnoses of cerebral palsy or mental retardation, federal and State regulations do not require the district to set forth students' diagnoses in an IEP; instead, they require the district to conduct an evaluation to "gather functional developmental and academic information" about the student to determine whether the student falls into one of the disability categories under the IDEA and obtain information that will enable the student be "involved in and progress in the general education curriculum" (34 CFR 300.304[b][1]; see 8 NYCRR 200.4[b][1]; see also Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011]; W.W. v. New York City Dep't of Educ., 2014 WL 1330113, at *13 [S.D.N.Y. Mar. 31, 2014] [finding that the "absence of an explicit mention" of a particular diagnosis in a student's annual goals was not fatal to the IEP because the goals were adequately designed to address the student's learning challenges as a whole and related to the particular diagnosis]; D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at *10 [S.D.N.Y. Oct. 12, 2011]).

In addition, as to the typographical errors identified by the IHO as appearing in the present levels of performance and elsewhere in the IEP (see IHO Decision at p. 26), in this particular instance, the errors appear to be typing mistakes that are apparent and easily correctable and thus

did not rise to the level of a denial of a FAPE (see Tr. pp. 116-17).⁵ To find otherwise, would be to "exalt form over substance" (M.H. v. New York City Dep't of Educ., 2011 WL 609880, at *11 [S.D.N.Y. Feb. 16, 2011]).

As to other content in the present levels of performance, review of the March 2012 IEP indicates that it included the student's results on informal assessments performed by Cooke, including the Group Reading Assessment and Diagnostic Evaluation (GRADE), the Group Math Assessment and Diagnostic Evaluation (GMADE), and the STAR Math, as well as the teacher's estimate of the student's grade level functioning and her view that assessment scores did not reflect a reliable indication of the student's performance (Tr. pp. 47-48, 326-27; Dist. Ex. 1 at p. 1).⁶ Specifically, the March 2012 IEP reported that the student performed at a grade equivalent of 2.0 in reading, 2.7 in vocabulary, 1.7 in comprehension, and, in mathematics, 0.2 according to the GMADE and 0.5 according to the STAR Math (Dist. Ex. 1 at p. 1). According to the IEP, the student's teacher estimated the student's skills to be at a second grade level in reading and a kindergarten to first grade level in mathematics (id.).

As the parent argues, the hearing record indicates that the dates reported in the March 2012 IEP for the GRADE and GMADE were inaccurate in that they were conducted in February 2012, rather than September 2011 (Tr. pp. 139-40; Dist. Ex. 1 at p. 1). In addition, the Cooke representatives testified that, although reported by Cooke, the March 2012 IEP failed to report the student's score on the Basic Reading Inventory (BRI) and inaccurately stated the teacher's estimate of the student's grade level functioning (Tr. pp. 140-41, 326; Dist. Ex. 1 at p. 1).⁷

Although the student's the present levels of performance included in the March 2012 IEP are not otherwise inconsistent with the description of the student's then-current performance in the Cooke progress report (compare Dist. Ex. 1 at pp. 1-3, with Dist. Ex. 2 at pp. 1-14), in this instance, this is insufficient to overcome the procedural deficiency resulting from the lack of evaluative information, which is compounded by the questionable accuracy or reliability of the functioning levels reported in the IEP.

⁵ As another example of carelessness, the IHO also noted that the section on the IEP for the student's promotion criteria was left blank (see IHO Decision at p. 26; Dist. Ex. 1 at pp. 20-21). On appeal, the parties continue to argue this point. However, as there is no requirement under the IDEA or State regulation that an IEP contain promotional criteria, the parent has not alleged any harm resulting from their absence, and the evidence in the hearing record shows that the IEP did specify the student's participation in alternate assessments and the CSE discussed the promotion criteria, this alleged deficiency is not a basis for finding that the district failed to offer the student a FAPE (see Tr. pp. 71-72, 99, 182; Dist. Ex. 1 at pp. 18, 21).

⁶ The March 2012 IEP and the hearing record describe the GRADE and the GMADE as "a norm-referenced, group-administered test[s] which assess[] reading readiness, vocabulary and comprehension" and "concepts, computation and process and application," respectively (Tr. pp. 46-47; Dist. Ex. 1 at p. 1). The IEP described the STAR Math as "an individually administered informal reading assessment (Dist. Ex. 1 at p. 1); but the district school psychologist indicated it was a math assessment (Tr. pp. 47-48, 87-88).

⁷ The BRI is described in the hearing record as "an informal reading assessment[,] which provides information on the fluency of an individual reading[,] . . . speak[ing] to the accuracy, rate and prosody, . . . and . . . generat[ing] an independent level of fluency and also a frustration level which provides an instructional level" (Tr. pp. 140-41).

Because of the inaccuracies in the present levels of performance and the failure of the March 2012 CSE to ensure sufficient evaluative information to understand the student's individualized needs, the evidence in the hearing record supports the conclusion that these deficiencies constituted procedural violations of the IDEA.

2. Annual Goals

The district asserts that the annual goals included in the March 2012 IEP were sufficient, addressed multiple areas of need, and were based on information provided by Cooke. The parent asserts the IHO correctly found that the annual goals were not appropriate, emphasizing the IEP's failure to capture the community and/or internship context of the goals and their immeasurability.

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][III]; 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]).

The district school psychologist testified that the annual goals included in the March 2012 IEP were provided by Cooke at the time of the CSE meeting (Tr. p. 66). Review of the evidence in the hearing record shows that the March 2012 IEP included 20 annual goals with corresponding short-term objectives targeted to address the student's needs in the areas of mathematics, reading, writing, speech/language, counseling, PT, occupational therapy (OT), daily living skills, and post-secondary transition (Dist. Ex. 1 at pp. 4-14).

The Cooke CSE coordinator testified the goals provided by Cooke emphasized the student's need for community inclusion and that many of the goals were intended to be implemented with the community as a context (Tr. pp. 153-54). She indicated that this was important for the student because she required "hand-on activities in order to internalize and generalize the skills that she has learned within a classroom context" (Tr. pp. 155-56). She further testified that the March 2012 IEP did not reflect the intended community context (see Tr. pp. 172-77). Contrary to this interpretation, many of the annual goals contemplated implementation in a community or workplace context (see Dist. Ex. 1 at pp. 4-14). For example, testimony at the impartial hearing focused on an annual goal that the student would "develop problem solving skills in the workplace and practice behaviors that affect job retention and advancement" because it omitted language in the proposed goals provided by Cooke that such goal would be accomplished "[t]hrough participation in an individualized internship" (Tr. pp. 172-74; Dist. Exs. 1 at p. 8; 3 at p. 1). However, contrary to this position, while it may have been preferable for the March 2012 IEP to specify whether or not the student should participate in an internship, the language included in the annual goals and short-term objectives, such as "in the workplace" preserves the intent that the goal would be implemented in an internship, job, or an otherwise vocational setting, consistent with the student's needs as emphasized by Cooke (see Dist. Ex. 1 at p. 8). Similarly, to the extent the travel readiness goal included on the March 2012 IEP did not specify that the student would

practice "mass transport in the community," as proposed by Cooke, such a distinction does not result in a finding that the district denied the student a FAPE (Dist. Exs. 1 at p. 6; 3 at p. 3; see Tr. pp. 174-77). In any event, with respect to the foregoing, districts are not required to replicate the identical setting used in private schools (see, e.g., Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at *6 [N.D.N.Y. Jun. 19, 2009]; Watson v. Kingston City Sch. Dist., 325 F.Supp.2d 141, 145 [N.D.N.Y. 2004]). Therefore, notwithstanding the differences in the annual goals included in the March 2012 IEP and those proposed by Cooke, the hearing record supports the finding that the annual goals were aligned with the student's needs to the extent described in the present levels of performance.

Finally, as to the measurability of the annual goals, each goal included evaluative criteria (e.g., 65 or 70 percent accuracy), evaluation procedures (teacher made materials, class activities, portfolios, teacher/provider observations, performance assessment tasks, checklists), and a schedule to be used to measure progress (one time per quarter) (Dist. Ex. 1 at pp. 4-14). Therefore, review of the evidence in the hearing record does not support a finding that the annual goals contained in the March 2012 IEP were so generic, vague, or inaccurate as to constitute the denial of a FAPE (N.S. v. New York City Dep't of Educ., 2014 WL 2722967, at *9 [S.D.N.Y. June 16, 2014]; B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at *12 [E.D.N.Y. Mar. 31, 2014]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013]).

3. 12:1+1 Special Class

The parent argues that the IHO correctly determined that the 12:1+1 special class placement recommendation was not supported by the information available to the March 2012 CSE.

The district school psychologist testified that, based on the student's global delays, the CSE determined that the student required a "small structured environment" would help the student "develop the skills that she need[ed] to transition into adulthood" (Tr. pp. 64-65). She testified that such an environment would be routine, . . . predictable," and offered the student "supports that she need[ed] in order to transition from [one] skill set to another" (Tr. pp. 97-98). She further indicated, that based on the fact that the student was functioning "well below grade level" and based on the parent's concerns about the student's "naivety" and the desire that she "learn basic functional skills," the CSE determined the student's placement (Tr. p. 77). She elaborated that, given the foregoing, as well as the student's "many management needs," and the "profile of students in that type of program" the 12-month program in a 12:1+1 special class placement was appropriate (Tr. p. 77).

Notwithstanding this testimony, according to the information available to the CSE, and given the supports and strategies that the CSE determined the student required, the hearing record indicates that the student exhibited management needs requiring supports beyond those available in a 12:1+1 special class (see Dist. Ex. 1 at pp. 1-3). State regulations provide that a 12:1+1 special class placement is designed for students "whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students" (8 NYCRR 200.6 [h][4][i]). In contrast, State regulations contemplate an 8:1+1 or a 6:1+1 special class for students whose management needs are determined to be intensive or highly intensive, respectively (8 NYCRR 200.6[h][4][i]-[ii]). State

regulations define management needs as "the nature of and degree to which environmental modifications and human or material resources are required to enable the student to benefit from instruction" (8 NYCRR 200.1[ww][3][i][d]).

The March 2012 IEP listed multiple supports and strategies to address the student's management needs, including directions reread aloud, scaffolded examples of new problem solving, use of graphic organizers with instruction for use, repetition of instruction using multiple modalities, chunking for sufficient time for practice and learning before moving on to new concepts and materials, frequent modeling and guidance, opportunities to form connections between materials and personal interest, verbal prompting and modeling to structure written expression, visual cues, graphic organizers to enable comprehension strategies, vocabulary instruction that incorporates a multisensory approach, guidance to select appropriate books, concise and direct instructions, frequent review of instructions and expectations for assignment, rereading aspects of a text to facilitate comprehension, frequent teacher conferences to check for understanding, enlarged text, tracking devices or methods for reading, structured class routines, and frequent positive reinforcement for on task behaviors (Dist. Ex. 3 at p. 3).

The Cooke CSE coordinator testified that she informed the March 2012 CSE "that [the student] require[d] a small structured setting in order to make educational gains" and emphasized to the CSE the ratio of the student's 9:1+1 mathematics and English language arts (ELA) classes at Cooke and the fact that the district members of the CSE had not observed the student at Cooke (Tr. pp. 180-82). When asked what ratio would be appropriate for the student, the Cooke CSE coordinator responded that the student would benefit from "a program [that] enabled her to work [in] smaller groups than 12," and that such class size should be capable of breaking down into even smaller groups "because [the student] required individualized support" (Tr. p. 187). The student's Cooke teacher, who attended the March 2012 CSE meeting, also emphasized the student's need for small groups, and the parent indicated that the student required a smaller class (see Tr. pp. 329-33, 357).

Absent more information about the student's needs, which the district failed to obtain, and based on the foregoing, the hearing record does not support the conclusion that the March 2013 CSE's recommendation for a 12:1+1 special class was sufficiently supportive for the student.

4. Related Services

The district asserts that the IHO erred in finding that the counseling mandate included in the March 2012 IEP was inappropriate because the parent failed to raise such an issue in the due process complaint notice. In the alternative, the district asserts that the March 2012 IEP included related services appropriate for the student.

Here, it does not appear that the parent raised a claim relating to the related services recommended in the March 2012 IEP in his due process complaint notice (20 U.S.C. § 1415[c][2][E][i], [f][3][B]; 34 CFR 300.508[d][3]; 8 NYCRR 200.5[i][7][i], [j][1][ii]; see R.E., 694 F.3d at 187 n.4 ["The parents must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function."]). However, in this instance, it appears that the district opened the door to the issue with the objective of defeating the parent's claim that the district failed to offer the student a FAPE when it elicited testimony from the district

school psychologist regarding the CSE's rationale underlying the recommended related services (Tr. pp. 76-77; see M.H., 685 F.3d at 250-51; see also C.F. v. New York City Dep't of Educ., 746 F.3d 68, 78 [2d Cir. 2014] [holding "that the waiver rule is not to be mechanically applied"]; B.M. v. New York City Dep't of Educ., 2013 WL 1972144 [S.D.N.Y. May 14, 2013]). Thus it was permissible for the IHO to reach this issue, but the IHO should have explained in the decision why an issue outside the due process complaint notice was ruled upon.

The district school psychologist testified that the CSE continued the student's related services mandate from the year prior (Tr. p. 76). The Cooke CSE coordinator testified that Cooke recommended that the student receive her counseling mandate in a group setting, as opposed to an individual session (Tr. p. 151). She further specified that the CSE discussed the student's "need for appropriate social instruction in order to foster her social interaction" and, as such, a group setting was needed in order to provide the student this opportunity (Tr. pp. 151-52). Indeed, the March 2012 IEP indicates that the student "continue[d] to require[] counseling to address appropriate social skills" (Dist. Ex. 1 at p. 2). Thus, the hearing record supports the parent's contention that the IEP should have included a counseling mandate in a small group.

5. Transition Plan

The district argues that to the extent the transition goals appeared vague, did not identify implementation in the community, or did not specify the student's interests, they were nevertheless sufficient to enable the student to receive educational benefit. In an answer, the parent argues that, despite the fact that the student was nineteen at the time of the CSE meeting and, therefore, transitioning to post-school activities soon thereafter, the district failed to conduct an assessment to determine the student's needs in this respect. The parent argues that the transition plan included in the March 2012 IEP was generic and boilerplate and did not address the student's needs or preferences. Further, the parent notes that the goal of a two-year college or vocational school was unrealistic given the student's functioning.

The IDEA—to the extent appropriate for each individual student—requires that an IEP must focus on providing instruction and experiences that enables the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34][A]; 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) 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][viii]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]). It must also include the transition services needed to assist the student in reaching those goals (*id.*). Transition services must be "based on the individual child's needs, taking into account the child's strengths, preferences, and interests" and must include "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 functional vocational evaluation" (20 U.S.C. § 1401[34][B]-[C]; 8 NYCRR 200.1[fff]). As recently noted by one district court, "the failure to provide a transition plan is a procedural flaw" (M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6, *9 [S.D.N.Y. Mar. 21, 2013], citing Klein Indep. Sch. Dist. v. Hovem, 690 F.3d 390, 398 [5th Cir. 2012] and Bd. of Educ. v. Ross, 486 F.3d 267, 276 [7th Cir. 2007]).

The district school psychologist testified that the district did not conduct a vocational assessment of the student because they "relied on books, vocational information, [and] assessment of the student," which she indicated was reflected in the transition goals included in the IEP (Tr. pp. 80-81).⁸ The hearing record shows that Cooke discussed at the March 2012 CSE and subsequently provided a document setting forth various annual goals relating to the student's transition needs (Tr. pp. 50, 56-59, 156, 197-98, 201; see Dist. Ex. 3 at pp. 1-5). While the district school psychologist indicated that the student's preferences were discussed at the March 2012 CSE meeting, she admitted that these preferences were not reflected in the IEP (Tr. p. 96). Indeed, the hearing record indicates that the CSE discussed the student's experience working in retail and her preference to continue doing so (Tr. pp. 143-44).

The March 2012 IEP did include postsecondary goals for the student (Dist. Ex. 1 at p. 4). Specific to education/training, the March 2012 IEP stated that the student would "attend a community college or a vocational school and gain a qualification in the career of her choice" (id.). With respect to employment, the March 2012 IEP specified that the student "w[ould] gain experience in a part-time job related to the career of her choice" (id.). Finally, with respect to independent living skills, the March 2012 IEP stated that, "[w]ithin one year of graduating from high school," the student would "access[] relevant services from the Developmental Disabilities Program and maintain contact with her case worker" (id.). The Cooke CSE coordinator testified that the long term goal relative to the student's attendance at a community college or vocational school was not discussed at the CSE meeting and would not be appropriate for the student because it was "akin to a higher functioning project" (Tr. pp. 144-45). She further testified that this and the remainder of the long term goals were vague and generic (Tr. pp. 145-47). In addition to the foregoing, as noted above, the annual goals in the March 2012 IEP also targeted many of the student's transition needs (see Dist. Ex. 1 at pp. 4-14).

Review of the evidence in the hearing record shows that the March 2012 IEP did not describe the student's transition needs to aid her in reaching the goals set forth in the March 2012 IEP, which the Cooke CSE coordinator described as including information about what the student "require[d] as an individual to develop her independence" (Tr. p. 147; Dist. Ex. 1 at p. 4; see 20 U.S.C. § 1414[d][1][A][viii]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]).

With respect to activities or services to facilitate the student's movement from school to post-school activities, the May 2012 IEP set forth transition services, which included relative to instruction that the student would participate in "person-center planning," "a work study program," as well as instruction in "adaptive daily skills" and "travel readiness development skills" (Dist. Ex. 1 at p. 17). As to related services, the transition plan stated that the student would participate in counseling, speech-language therapy, OT, and PT, which additional detail to describe the student's transition needs in these areas (id.). For community experiences, the IEP indicated the student would practice "money handling [and] budgeting instruction," "personal financial skills," and "travel readiness development skills" (id.). Relative to employment or post-school adult living objectives, the transition plan recommended that the student participate in "small group vocational activities" and "a work student to develop on-the-job work skills" (id.). Finally, the March 2012

⁸ In addition, State regulations require the district to ensure that students who are 12 years old receive an assessment that includes a review of school records and teacher assessments, and parent and student interviews to determine vocational skills, aptitudes, and interests (8 NYCRR 200.4[b][6][viii]).

IEP indicated that the student would participate "in community projects with sequence in [a]daptive [d]aily [l]iving skills (e.g., planning [and] budgeting a community activity)" (id.). However, as the parent notes, the transition plan did not designate the parties responsible for implementing each transition service (id.; see 8 NYCRR 200.4[d][2][ix][e]).

Review of the foregoing shows that the transition plan contains some deficiencies, which, by themselves, constitute technical defects that would not render the March 2012 IEP, as a whole, inappropriate. To the extent such deficiencies might contribute to a finding that the district failed to offer the student a FAPE, that question will be addressed further below.

C. Assigned Public School Site

The district asserts that the IHO erred in finding that it conceded that it failed to offer the student an appropriate school placement. On the contrary, the district argues that its position at the impartial hearing was that the parent's claims relating to the assigned public school site were speculative, since the student never attended the public school, and that, therefore, it was not required to demonstrate the ability of the assigned public school site to implement the IEP. As the district argues, the hearing record reflect that the district did not make a concession at the impartial hearing (see Tr. pp. 14-15). Further, the district correctly argued that it was not required to establish the appropriateness of the assigned public school site.

Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9, 2014 WL 53264 [2d Cir. Jan. 8, 2014]; see also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL 3814669 [2d Cir. July 24, 2013]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom a student would be placed in where the parent rejected an IEP before the student's classroom arrangements were even made"]).

The Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141, 2013 WL 2158587 [2d Cir. May 21, 2013]) and, even more clearly, that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 530 Fed. App'x at 87, quoting R.E., 694 F.3d at 187; see C.F., 746 F.3d at 79). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see

also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]).⁹ When the Second Circuit spoke recently with regard to the topic of assessing the district's offer of an IEP versus later acquired school site information obtained and rejected by the parent as inappropriate, the Court disallowed a challenge to a recommended public school site, reasoning that "the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'" (F.L., 553 Fed. App'x at 9, quoting R.E., 694 F.3d at 187 n.3).

In view of the foregoing, the parent cannot prevail on claims regarding implementation of the March 2012 IEP because a retrospective analysis of how the district would have implemented the student's IEP at the assigned public school site is not an appropriate inquiry under the circumstances of this case (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Here, it is undisputed that the parent rejected the assigned public school site that the student would have attended and instead chose to enroll the student in a nonpublic school of his choosing prior to the time the district became obligated to implement the March 2012 IEP (see generally Parent Exs. D; J; K). Therefore, the district is correct that the issues raised and the arguments asserted by the parent with respect to the assigned public school site are speculative. Furthermore, in a case in which a student has been unilaterally placed prior to the implementation of an IEP, it would be inequitable to allow a parent to acquire and rely on information that post-dates the relevant CSE meeting and IEP and then use such information against a district in an impartial hearing while at the same time confining a school district's case to describing a snapshot of the special education services set forth in an IEP (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [stating that in addition to districts not being permitted to rehabilitate a defective IEP through retrospective testimony, "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information

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

available to the CSE"). Based on the foregoing, the district was not obligated to present retrospective evidence at the impartial hearing regarding the execution of the student's program or to refute the parents' claims (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Accordingly, the parents cannot prevail on claims that the assigned public school site would not have properly implemented the March 2012 IEP.¹⁰

D. Cumulative Impact

To the extent the district's violations described above constitute procedural violations, a finding that the district denied the student a FAPE is appropriate 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]). Under the circumstances of this case, I find it appropriate to consider the cumulative impact of the identified deficiencies in order to determine whether or not the district offered the student a FAPE (T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170 [2d Cir. 2014]; R.E., 694 F.3d at 191 [noting that "even minor violations may cumulatively result in a denial of a FAPE"]; see also M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *10 [S.D.N.Y. Mar. 31, 2014]; R.B. v. New York City Dep't of Educ., 2014 WL 1618383, at *10 [S.D.N.Y. Mar. 26, 2014]).

Here, as set forth above, the evidence in the hearing record shows that the district: failed to conduct a timely triennial evaluation of the student; included present levels of performance in the March 2012 IEP that were questionable in terms of accuracy and completeness; recommended a 12:1+1 special class that, based on the limited information available appeared insufficiently supportive to address the student's needs; recommended an inappropriate counseling mandate; and failed to develop a transition plan consistent with regulations in all respects. Under the unique circumstances of this case, these individual violations may or may not have resulted in a finding

¹⁰ While some district courts have found that parents have a right to assess the adequacy of a particular school site to meet their children's needs, the weight of the relevant authority supports the approach taken here (see E.E. v. New York City Dep't of Educ., 2014 WL 4332092, at *10 [S.D.N.Y. Aug. 21, 2014]; B.K., 2014 WL 1330891, at *20-*22; M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *12 [S.D.N.Y. Mar. 31, 2014]; M.O. v. New York City Dep't. of Educ., 996 F.Supp.2d 269, 271-72 [S.D.N.Y. 2014]; E.H. v. New York City Dep't of Educ., 2014 WL 1224417, at *7 [S.D.N.Y. Mar. 21, 2014]; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *26 [E.D.N.Y. Aug. 19, 2013]; M.R. v. New York City Bd. of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 286 [S.D.N.Y. 2013]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 588-90 [S.D.N.Y. 2013]; Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at *5 [E.D.N.Y. Mar. 21, 2013], aff'd, 556 Fed. App'x 1 [2d Cir Dec. 23, 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *13 [S.D.N.Y. Mar. 19, 2013]; J.L., 2013 WL 625064, at *10; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *7 [S.D.N.Y. Dec. 11, 2012], rev'd on other grounds, 760 F.3d 211 [2d Cir. 2014]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012], adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also N.S., 2014 WL 2722967, at *12-*14 [holding that "[a]bsent non-speculative evidence to the contrary, it is presumed that the placement school will fulfill its obligations under the IEP"]; but see V.S. v. New York City Dep't of Educ., 2014 WL 2600313, at *4 [E.D.N.Y. June 10, 2014]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16 [S.D.N.Y. May 27, 2014]; Scott v. New York City Dep't of Educ., 6 F. Supp. 3d 424, 444-47 [S.D.N.Y. 2014]; D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13 [S.D.N.Y. 2013]; B.R. v. New York City Dep't of Educ., 910 F. Supp.2d 670, 676-78 [S.D.N.Y. 2012]; E.A.M., 2012 WL 4571794, at *11).

of a denial of a FAPE, but the district's failure to complete a triennial evaluation of the student resulted in a questionable IEP and further exacerbated the other violations in this case because, as a result of the lack of evaluative information, it is difficult to clearly gauge whether or not the recommendations in the March 2012 IEP were appropriate for the student. This, in turn, supports a finding that the cumulative effect of the violations tilted the calculus in favor of the parent insofar as the IEP, viewed as a whole, was not reasonably calculated to enable the student to receive educational benefits and resulted in a denial of a FAPE to the student for the 2012-13 school year (Rowley, 458 U.S. at 206-07; R.E., 694 F.3d at 190-91; M.H., 685 F.3d at 245; Cerra, 427 F.3d at 192).

E. Equitable Considerations

Having determined that the district failed to offer the student a FAPE for the 2012-13 school year, and given that the district did not appeal the IHO's finding that Cooke was an appropriate unilateral placement, 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; R.E., 694 F.3d at 185, 194; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826 [2d Cir., 2014]; M.C. v. Voluntown Bd. of Educ., 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"]). The IDEA also provides that reimbursement may be reduced or denied when parents fail to challenge 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]; 34 CFR 300.148[d]; 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, 192 Fed. App'x 62, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at 69 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 ten 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 March 2012 CSE meeting; and (2) the parent did not provide the district with adequate notice of his intention to placement the student privately at public expense. 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., 744 F.3d at 840). Here, the hearing record indicates that the parent participated in the March 2012 CSE meeting and visited the school specified in the final notice of recommendation (FNR) in an effort to ascertain its appropriateness for the student. Moreover, the parent's testimony at the impartial hearing indicates that, had an appropriate placement for the student been offered, the student would have attended the district recommended school (Tr. p. 392).

Further, the hearing record reflects that the parent notified the district, by letters dated June 18, 2012, and July 24, 2012, of his intention to place the student at Cooke for the 2012-13 school year and seek public funding for the placement (Parent Exs. C; D). Although, as the district notes, the parent testified that the first letter was not intended as a rejection of the March 2012 IEP (see Tr. p. 388; Parent Ex. C), 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 June 2012 letter stated the parent's concerns as of the time it was written and indicates that the student would continue at Cooke unless the district's program could provide the student an appropriate education (Parent Ex. C). Thus, this letter offered sufficient information to put the district on notice about the parent's concerns regarding the March 2012 IEP and give it an opportunity to cure any deficiencies, which is the intent underlying the 10-day notice requirement (Greenland Sch. Dist., 358 F.3d at 160).

Further, while the district contends that the July 2012 letter was untimely because it was sent 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 communicate with parent regarding the concerns raised in the June 2012 letter (see Tr. p. 372; Parent Exs. C; D). Accordingly, I decline on these facts to reduce or deny an award of tuition on the grounds that the parent did not provide the district with timely notice of his intention to unilaterally place the student privately at public expense.

F. Relief

The district asserts that the parent is not entitled to the direct payment of the student's tuition. With regard to fashioning equitable relief, one court has addressed whether it is appropriate under the IDEA to order a school district to make retroactive tuition payment directly to a private school where: (1) a student with disabilities has been denied a FAPE; (2) the student has been enrolled in an appropriate private school; and (3) the equities favor an award of the costs

of private school tuition; but (4) the parents, due to a lack of financial resources, have not made tuition payments but are legally obligated to do so (Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 406 [S.D.N.Y. 2011]). The court held that "[w]here . . . parents lack the financial resources to 'front' the costs of private school tuition, and in the rare instance where a private school is willing to enroll the student and take the risk that the parents will not be able to pay tuition costs—or will take years to do so—parents who satisfy the Burlington factors have a right to retroactive direct tuition payment relief" (Mr. and Mrs. A., 769 F. Supp. 2d at 428; see also A.R. v. New York City Dep't of Educ., 2013 WL 5312537, at *11 [S.D.N.Y. Sept. 23, 2013]). The Mr. and Mrs. A. Court relied in part on dicta from earlier cases in which similar claims seeking direct retroactive payment to a private non-approved school were asserted (see Connors v. Mills, 34 F. Supp. 2d 795, 805-06 [N.D.N.Y. 1998] [opining that such financial disputes should be resolved within the administrative hearing process]; see also S.W., 646 F. Supp. 2d at 360). The Mr. and Mrs. A. Court held that, in fashioning such relief, administrative hearing officers retain the discretion to reduce or deny tuition funding or payment requests where there is collusion between parents and private schools or where there is evidence that the private school has artificially inflated its costs (Mr. and Mrs. A., 769 F. Supp.2d at 430). Since the parent selected Cooke as the unilateral placement, and his financial status is at issue, it is the parent's burden of production and persuasion with respect to whether he has the financial resources to "front" the costs of Cooke and whether he is legally obligated for the student's tuition payments (Application of a Student with a Disability, Appeal No. 12-036; Application of a Student with a Disability, Appeal No. 12-004; Application of the Dep't of Educ., Appeal No. 11-130; Application of the Dep't of Educ., Appeal No. 11-106; Application of a Student with a Disability, Appeal No. 11-041).

In this case, it is undisputed that the parent entered into an enrollment agreement with Cooke for the student's attendance during the 2012-13 school year (see Parent Exs. J; K). Under the terms of the enrollment contract and by signing the agreement, the parent acknowledged his financial obligation for payment of the student's tuition (see Tr. pp. 376-77; Parent Ex. J at pp. 1-2; K at pp. 1-2). In addition, the parent testified that he would be responsible for the tuition in the event he was unsuccessful at the impartial hearing (Tr. pp. 376-77). Based upon the foregoing, the evidence sufficiently supports the conclusion that the parent was "legally obligated" to pay the student's tuition at Cooke (Mr. and Mrs. A., 769 F. Supp. at 406).

Next, with respect to the parent's inability to pay the costs of the student's education, the parent's federal tax return indicated that the parent's household income for 2011 totaled \$29,120, which the parent testified was similar to his earnings during 2012 (Tr. pp. 377; Parent Ex. L at pp. 1-2). The parent further testified that this figure reflected his sole source of income available to support himself and two dependents as their sole provider (Tr. p. 377-78). Based upon this testimony and evidence, the hearing record shows that the parent offered sufficient evidence of his inability to pay the costs of the student's education at Cooke for the 2012-13 school year.

VII. Conclusion

Base on the above, the evidence in the hearing record shows that the district failed to offer the student a FAPE for the 2012-13 school year but on grounds different than those identified by the IHO. In addition, the evidence in the hearing record supports the IHO's finding that equitable considerations weigh in favor of the parent's request for relief.

I have considered the parties' remaining contentions and find that I need not address them.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that that the IHO's decision dated March 13, 2013 is modified to the extent indicated in the body of this decision and otherwise affirmed.

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

JUSTYN P. BATES
STATE REVIEW OFFICER