The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 13-186

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

Law Offices of Neal H. Rosenberg, attorneys for petitioner, Marc Gottlieb, 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) son and ordered it to reimburse the parent for her son's tuition costs at the Cooke Center (Cooke) for the 2012-13 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; 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], 34 CFR 300.507[a]; 300.508[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

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

III. Facts and Procedural History

On May 17, 2012, a CSE convened to conduct the student's annual review and to develop his IEP for the 2012-13 school year (Dist. Ex. 1). Finding the student eligible for special education and related services as a student with an intellectual disability, the CSE recommended placement in a 12:1+1 special class in a specialized school for 35 periods per week with related services of two 45-minute sessions per week of speech-language therapy in a group of five in a separate location, one 45-minute session per week of individual speech-language therapy in a separate location, and one 45-minute session per week of individual counseling in a separate location, all on a 12-month basis (id. at pp. 1, 12-13, 17-18). Following this meeting, the parent sent a letter to the district dated June 15, 2012 stating that she had "not received a copy of [the] IEP or a placement to consider" and that she had "no choice but to place [her] son at[Cooke]" (Parent Ex. A at p. 1).

In a final notice of recommendation (FNR) dated June 22, 2012, the district summarized the special education and related service recommendations included in the May 2012 IEP and notified the parent of the particular public school site to which the student was assigned for the 2012-13 school year (Dist. Ex. 3). Thereafter, the parent submitted a copy of the student's IEP to the assigned public school site and spoke with the assistant principal at the assigned school (the assistant principal) by telephone on several occasions (Tr. pp. 127-30, 141, 265, 285-87).

By letter to the CSE dated August 15, 2012, the parent indicated that she spoke with the assistant principal and he informed her that the student "would . . . be [placed] at a work site because of his age" (Parent Ex. B at p. 1).[1] The parent stated that the student was "not ready for this type of program" and "need[ed] an academic program and a highly structured, safe, well-supervised classroom" (id.). The parent further stated that the student "could not travel safely or independently in this type of program" (id.). Accordingly, the parent wrote that she had "no choice but to continue [the student's] placement at [Cooke]" and to seek public funding for the costs of the student's tuition (id.).

A. Due Process Complaint Notice

In a due process complaint notice dated October 19, 2012, the parent alleged that the district denied the student a free appropriate public education (FAPE) and requested an impartial hearing (Dist. Ex. 1). Specifically, the parent contended that the May 2012 CSE was improperly composed because it did not contain a regular education teacher (id. at p. 1). Additionally, the parent claimed that the special education teacher member of the May 2012 CSE "would [not] be able to implement the [student]'s proposed program" (id.). The parent further alleged that the CSE did not comply with appropriate procedures and did not review "proper documentation" (id.). According to the parent, the IEP failed to reference testing used to determine the student's academic levels and, moreover, did not indicate that the student had been evaluated within the mandatory three-year period (id.). As a result of these errors, the parent asserted that the IEP did "not accurately reflect th[e student's] learning issues and academic levels" (id.). The parent also contended that the May 2012 IEP contained goals and objectives that were incomplete and did not contain grade level standards (id.). With regard to the assigned public school site, the parent alleged that she was told the student would attend a vocational program and reiterated her concerns as set forth in the August 2012 letter to the district that the student required "an academic program and a highly structured, safe, well-supervised classroom" where he could attend "small class[es] in a small, nurturing environment with similar peers" (Dist. Ex. 9 at p. 2). To remedy these alleged violations, the parent requested public funding for the costs of the student's Cooke tuition, as well as provision of transportation and related services (id.).[2]

---

[1] In their filings and at the impartial hearing, the parties often described the public school site's offsite vocational internship training locations as "work sites." In conformity with the nomenclature used in the IDEA, the Education Law, and State and federal regulations, references in this decision will be to vocational training or vocational programming, which better illuminates the statutory purpose of allowing students to participate in activities at a "work site" (see 20 U.S.C. § 1401[34]; Educ. Law §§ 4401[2][n], 4401[9]; see also 34 CFR 300.39[b][5]; 8 NYCRR 200.1[fff], 200.4[d][2][ix][c]).

[2] At a prehearing conference, counsel for the parent indicated that the only relief sought was for the costs of the student's tuition at Cooke (Tr. pp. 4-5).

B. Impartial Hearing Officer Decision

After a prehearing conference held January 16, 2013, an impartial hearing convened on April 17, 2013 and, following three nonconsecutive days of proceedings, concluded on June 25, 2013 (Tr. pp. 1-316). By decision dated August 23, 2013, the IHO found that the student was not offered a FAPE for the 2012-13 school year and ordered the district to pay the costs of the student's tuition (IHO Decision). Reviewing the evidence, the IHO found that because the student was not in, or considered for, placement in the general education environment, the failure to include a regular education teacher in the CSE was not a violation of State regulations, and further found that the May 2012 CSE was "duly composed under law" (id. at pp. 15, 18). The IHO also found that the district psychologist "dismissed" the opinions of a Cooke employee who attended the CSE meeting due to her belief that the employee "has a 'script' at every IEP meeting" (id.).

The IHO noted that the May 2012 CSE considered Cooke progress reports, a January 2012 district psychoeducational evaluation, a January 2012 social history update, and a December 2011 classroom observation (id. at pp. 15-18). The IHO additionally noted that the results of a required evaluation were not included in the May 2012 IEP (id. at p. 18). After reviewing the substance of these materials, the IHO found that "the record supports a finding that the student can still learn academically and that he is motivated to do so" (id. at pp. 16-18).

Regarding the assigned public school, the IHO found that the assistant principal informed the parent "that the student had to attend a 'work site' because of his age" (IHO Decision at p. 18). The IHO further found that academic instruction would be provided at the assigned public school site for two hours only per day, and that this amount of instruction was "not enough for the student." (id.) The IHO next found that the student "is capable of learning, is learning[,] and is in many ways thriving at [Cooke]," and that limiting the amount of academic instruction he received to two hours per day would "den[y] the student a meaningful opportunity to achieve academically" (id. at p. 19). Thus, the IHO found that the district's recommended program and placement "denie[d] the student a FAPE" (id.).

Next, the IHO found that Cooke was an appropriate placement for the student (IHO Decision at p. 19). In particular, the IHO reviewed the student's academic and extracurricular program at Cooke, noting that the student's "teachers report . . . progress in all of [the student's] subject areas" (id.). .). Additionally, the IHO noted that the student received a greater amount of direct academic instruction than would have been provided by the public school site, was provided with related services of speech-language therapy and counseling, and received social skills, life skills, and transition classes (id.). The IHO found "ample evidence in the record that the student . . . progressed academically, socially[,] and emotionally at [Cooke]" (id.).

Finally, the IHO found that no equitable circumstances precluded the parent from receiving the relief she requested (IHO Decision at pp. 19-20). The IHO found that the parent participated in the May 2012 CSE meeting and "provided the CSE with access to the student's private school providers and progress reports" (id.) The IHO then ordered the district to pay the costs of the student's tuition "upon reasonably satisfactory proof of services . . . rendered" (id. at p. 20).

IV. Appeal for State-Level Review

The district appeals, asserting that it offered the student a FAPE for the 2012-13 school year. The district initially objects to the IHO's statement that the district school psychologist "conceded" that a required evaluation was not included in the student's IEP. In particular, the district contends that because the IHO made no finding that the district failed to consider appropriate evaluations or that the present levels of performance stated on the IEP were incorrect, and the hearing record reflected that the CSE considered sufficient evaluative data, any alleged deficiencies in the IEP not explicitly referencing evaluations did not rise to the level of a denial of a FAPE. Furthermore, the district asserts that the parent conceded at the impartial hearing that she did not have any particular objection to the description of the student contained in the May 2012 IEP, the goals created to address those needs, or the recommendation for a 12:1+1 special class placement. The district also objects to the IHO's determination that the CSE "dismissed" the opinions of the Cooke representative due to her reliance on a "set script" at each CSE meeting. The district specifically alleges that the CSE was not obligated to adopt the private school's recommendation for placement in a private school. Additionally, to the extent that the IHO made statements regarding the decision by the district school psychologist not to include a regular education teacher in the CSE implying that such a decision was in error, the district asserts such statements should be vacated.

The district also alleges that the IHO erred by considering the appropriateness of the assigned public school site because these issues are speculative as a matter of law where, as here, the student did not attend the public school. Assuming that such claims could be considered, the district argues that the student would not necessarily have been required to attend a vocational program. Even if the student were assigned to a vocational program, the district contends that the assigned public school would have properly implemented the student's IEP and that the student would have been grouped with students of similar academic abilities. Finally, the district argues that the parent rejected the offered placement based on a lack of information that she did not attempt to obtain, as well as misconceptions she did not attempt to correct, when she spoke with the assistant principal at the assigned public school.

The district further appeals the IHO's finding that no equitable circumstances precluded the parent from her sought relief.[3] The district argues that the parent did not seriously consider enrolling her son in a public school. The district also contends that the parent did not provide the district with proper and timely notice of her concerns with the program offered to the student. Finally, the district argues that the parent's signing of an enrollment contract with Cooke in April 2012 and failure to thereafter inform the May 2012 CSE proves that the parent was unwilling to consider placement in a public school.

In an answer, the parent argues that the IHO's decision should be upheld.[4]

---

[3] The district does not appeal the IHO's findings regarding the appropriateness of Cooke.

[4] The parent does not cross-appeal any of the IHO's findings. However, to the extent that the parent raises allegations in the answer that argue additional bases on which to premise a denial of FAPE that go beyond the findings made by the IHO, the parent's arguments that: (1) the parent did not receive a copy of the CSE meeting minutes; (2) the IEP was predetermined; (3) the district conducted an invalid vocational assessment; (4) the vocational goal contained in the IEP is invalid; (5) the CSE should have considered a nonpublic school placement;

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., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

---

and (6) the student would not be grouped by academic or functional level at the assigned public school site, cannot reasonably be read as included in the parent's due process complaint notice and there is no evidence that the parent sought to amend her due process complaint or seek agreement from the district to pursue these claims. Accordingly, they cannot be considered (see 20 U.S.C. § 1415[c][2][E][i][II]; 1415[f][3][B]; 34 CFR 300.507[d][3][i], [ii], 300.511[d]; 8 NYCRR 200.5[i][7][b]; [j][1][ii]; see also 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]). Further, none of these claims were raised by the district at the impartial hearing as a defense to claims properly contained in the parent's due process complaint notice so as to "open the door" to the parent to argue them (see M.H. v. New York City Dep't of Educ., 685 F.3d 217, 250-51 [2d Cir. 2012]; see also A.M. v. New York City Dep't of Educ., 2013 WL 4056216, at *10-*11 [S.D.N.Y. Aug. 9, 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *9 [S.D.N.Y. Aug. 5, 2013]; B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at *6 [S.D.N.Y. May 14, 2013]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. 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] [internal quotations omitted]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that

Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. Scope of Review

The parent has not cross-appealed the adverse determination of the IHO that the May 2012 CSE was properly composed (see 8 NYCRR 279.4[b]). An IHO's decision is final and binding upon the parties unless appealed to an SRO (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). The IDEA and State regulations define the scope and procedure of this review process. A party who fails to obtain a favorable ruling with respect to an issue decided by an IHO is bound by that ruling unless a party asserts an appeal or a cross-appeal (see C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *9 [S.D.N.Y. Mar. 28, 2013] [holding that "issues that were decided by the IHO and not appealed or cross-appealed by the party against which they were decided are binding against that party, and on the SRO and this Court, as to that party"]; M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6 [S.D.N.Y. Mar. 21, 2013] [holding that "parties must appeal (or cross-appeal) any adverse findings of the IHO to preserve those arguments"]; J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 [S.D.N.Y. Nov. 27, 2012] [finding that "parties contesting the validity of an IEP may cross-appeal an IHO's adverse particular findings even if they obtained all of their requested relief;" see also Parochial Bus. Sys. v. Bd. of Educ., 60 N.Y.2d 539, 545-47 [1983]).

Based upon the foregoing, as the parent elected not to cross-appeal the adverse finding of the IHO relating to the composition of the CSE, she thereby waived her right to pursue this issue and I lack jurisdiction to review it (see Parochial Bus. Sys., 60 N.Y.2d at 545-47; M.Z., 2013 WL 1314992, at *10; see also 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).[5]

B. May 2012 IEP

Turning to the appropriateness of the district's offer, the district argues that its recommendation was calculated to provide the student with educational benefit, as conceded by

[5] Assuming this argument was properly appealed, it is without merit. The hearing record reflects that the student was not being educated within the general education environment at the time of the CSE meeting. More importantly, neither party argues that a general education environment would be an appropriate setting for the student. Accordingly, for substantially the reasons stated by the IHO in his decision, the absence of a regular education teacher from the CSE did not constitute a procedural violation in this instance, nor does the parent assert that the student suffered any harm as a result. The parent raises no argument regarding the qualifications of the special education teacher member of the CSE.

the parent at the impartial hearing. The parent argues that the IEP did not address certain of the student's deficits and contained improper goals. A review of the hearing record supports the conclusion that the 12:1+1 special class placement, together with related services, offered the student a FAPE.

When the CSE convened on May 17, 2012, the following members were in attendance: the district school psychologist, who also served as the district representative, a special education teacher from the district, an additional parent member, and a representative from Cooke, with the parent and the student's math teacher at Cooke participating via telephone (Dist. Ex. 1 at p. 20; see Tr. pp. 27-29, 260). The Cooke representative "provided draft goals in all . . . areas" and "shared . . . information" from the student's English language arts (ELA) teacher at Cooke (Tr. pp. 29-31).

In developing the student's 2012-13 IEP, the CSE considered a December 2011 classroom observation report, a January 2012 psychoeducational evaluation, a January 2012 social history update, and a March 2012 Cooke progress report (Tr. pp. 26-27, 31-3, 63; Dist. Exs. 1; 2 at pp. 1-2, 5; 5; 6; 8).[6] The IEP reported the student's performance on the standardized Group Reading Assessment and Diagnostic Evaluation (GRADE) and Group Math Assessment and Diagnostic Evaluation tests administered during the 2011-12 school year (Dist. Ex. 1 at p. 1).[7] These tests revealed grade equivalencies in various subjects ranging from 1.4 to 3.7, levels that corresponded with a teacher estimate as well as the results of the January 2012 psychoeducational evaluation (Dist. Ex. 1 at pp. 1, 17; Tr. pp. 32, 93-94; compare Dist. Ex. 1 at pp. 1-2, with Dist. Ex. 4 at pp. 2-4).

After reviewing these materials, the CSE detailed the student's levels of academic achievement, functional performance, and learning characteristics (Dist. Ex 1 at pp. 1-2). With respect to math, the IEP indicated that the student was becoming comfortable using all four math operations, performed four-operation single digit computations, solved one step problems, and demonstrated emerging fraction skills (id. at p. 1). Regarding ELA, the IEP noted that the student's comprehension was better at the sentence level than with longer passages and that he needed support such as breaking down passages into chunks to aid with comprehension (id.). The IEP also stated that the student required additional supports to facilitate reading comprehension as well as one-on-one teacher support to, among other things, draw inferences and make predictions (id.). It further described the student as an auditory learner who additionally benefited from visual presentation of materials (id.). The IEP went on to note that the student required pragmatic

[6] To the extent the parent now argues that the results of these evaluations were not fully reflected on the student's IEP, an IEP need not fully state in detail every aspect of a student's abilities or deficits in order to pass muster (P.G. v. New York City Dep't of Educ., 2013 WL 4055697, at *11 [S.D.N.Y. July 22, 2013]). Further, a CSE is not obligated to identify what materials it considered on the face of a student's IEP ("Questions and Answers on Individualized Education Program [IEP] Development, the State's Model IEP Form and Related Requirements," Office of Special Educ. [April 2011], at p. 25, available at http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf ["There is no requirement that the specific names of the individual tests conducted to complete the initial evaluation or reevaluation of the student be indicated in the IEP"]). A prior written notice is designed to inform the parent of the assessments, evaluations, and records that a CSE relied upon when proposing or refusing to take certain actions (34 CFR 300.503; 8 NYCRR 200.5[a]).

[7] These assessments, the validity of which the parent does not dispute, were not introduced as exhibits at the impartial hearing.

language instruction and that he was working on problem solving/making inferences in social situations, maintaining relevant conversations, and using nonverbal cues to enhance communication (id. at pp. 1-2). The student also required, according to the IEP, clear class routines as well as repetition of class work and instructions (id. at p. 2).

With regard to the student's social/emotional needs, the IEP described the student as friendly but slow to initiate conversations in a variety of settings (Dist. Ex. 1 at p. 2). The IEP reported that the student had low self-confidence and that he benefitted from support when interacting with unfamiliar persons (id.). The May 2012 IEP further described the student as a well-liked, athletic, and artistic individual who enjoyed age appropriate leisure activities (id.). The IEP indicated that the student would benefit from continued support increasing his level of self-confidence as well as building his conversational and problem solving skills (id.). Addressing the student's physical development, the IEP indicated that the student was in good health and that the parent and providers had no concerns regarding the student's physical development (id.). The IEP then identified the environmental and human or material resources necessary to address the student's identified management needs; namely, visual and auditory cues, graphic organizers, small group instruction, clear class routines, direct modeling, teacher redirection, individual one-on-one staff instruction and presentation of materials, checklists, scaffolding, manipulatives, extended time to complete assignments, "multisensory [instruction]", clinician made articles, social scripts, verbal repetition of presented materials, and prompts to initiate conversation and express a point of view (id.).

The parent argues on appeal that the lack of information on the student's processing speed and working memory in the IEP denied the student a FAPE.[8] However, a review of the IEP as a whole indicates that the IEP addressed the student's needs in these areas (see Dist. Ex. 1). Specifically, many of the above academic supports and management strategies targeted these deficits (id. at p. 2). For example, visual and auditory cues, clear class routines, and verbal repetition of presented materials would assist the student's working memory deficits (id.). Similarly, teacher redirection, individual one-on-one staff instruction, and extended time to complete assignments would address the student's needs relating to processing speed (id.).

Based on these present levels of performance and management needs, the CSE developed goals and objectives that: (1) targeted the student's reading, writing and math skills; (2) addressed the student's transition to a post-secondary environment; (3) addressed the student's skills for activities of daily living; (4) strengthened the student's ability to understand spoken and written language; (5) encouraged development of spoken and written language skills; (6) bolstered the student's confidence, self-expression, and emotional management skills; and (7) aimed to develop the student's use of social language (Dist. Ex. 1 at pp. 4-12). The goals and objectives, proposed by Cooke and discussed at the CSE meeting, reflected academic, vocational and functionally applied goals (Tr. pp. 30-31, 36-49, 98; Dist. Exs. 1 at pp. 4-12; 2 at pp. 1-5). Additionally, due to the student's participation in alternate state and district-wide assessments, the CSE developed short-term objectives to effectuate these goals (Dist. Ex. 1 at pp. 5-12).

---

[8] Specifically, the parent argues that the January 2012 psychoeducational evaluation contains test results in these two areas and the CSE erred by not including this information in the IEP. For the reasons stated above, this failure alone does not rise to the level of a denial of a FAPE.

On appeal the parent argues that the IEP's goals were idiomatic to small classroom instruction at Cooke and, thus, not susceptible to implementation in a 12:1+1 classroom. This argument is belied by the evidence in the hearing record indicating that all but one of the student's classes at Cooke were in a 12:1+1 configuration at the time of the CSE meeting (Tr. p. 44-45, 183-84). The Assistant Head of School at Cooke explained that Cooke students are grouped into "cohorts" of 12 students for academic instruction (Tr. pp. 183-84). The only exception was math, for which the hearing record indicates the student was in a group of nine students with one teacher and one assistant teacher" (Tr. pp. 157, 162, 184). Therefore, it appears from the hearing record that all but one of the student's academic courses were provided in a 12:1+1 ratio (Tr. pp. 44-45, 183-84). The parent has not elucidated how the May 2012 IEP's goals could be implemented in a 12:1+1 classroom in a private school, but not in a 12:1+1 classroom located within a public school. The parent also argues that the goals were improperly adopted because they were drafted in March 2012, and "one would assume" the student would meet his goals before the conclusion of the 2012-13 school year. As the parent acknowledges, this argument is speculative. Further, there is no evidentiary support for this contention in the hearing record. This argument is also undercut by the parent's testimony that she felt the goals discussed at the CSE meeting were appropriate for the student (see Tr. p. 278; see also Tr. pp. 66-67; Dist. Ex. 2 at pp. 2-3, 5).

After developing goals to target the student's identified areas of need, the May 2012 IEP recommended placement in a 12:1+1 special class in a specialized school for 35 periods per week (Dist. Ex. 1 at p. 12). State regulations provide that a 12:1+1 special class placement is designed to address 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]). These regulations further define management needs for students with disabilities 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]). A student's management needs shall be determined by factors which relate to the student's (a) academic achievement, functional performance and learning characteristics; (b) social development; and (c) physical development (8 NYCRR 200.1[ww][3][i][d]). Given the level of management strategies required to support the student that are included in the IEP, it was reasonable for the CSE to conclude that the student's needs were of such a substantial nature so as to "interfere with the [student's] instructional process" (8 NYCRR 200.6[h][4][i]; see Dist. Ex. 1 at p. 2). Thus, the district's recommended 12:1+1 classroom placement was appropriate under the circumstances (Dist. Ex. 1 at pp. 2, 12).

As noted above, the student received education in a 12:1+1 classroom at the time of the CSE meeting and, according to the evidence in the hearing record, prospered in this setting (Dist. Exs. 5, 7, 8). Cooke progress reports dated June 2011 and March 2012 contain statements reflecting the student's growth and progress (id.). For example, the March 2012 progress report, reviewed at the CSE meeting, indicated that the student "continue[d] to excel" in ELA and grew "as a scientist and a member of [the] classroom community" in science class (Dist. Ex. 8 at pp. 2-3, 7).[9] While the parent expressed interest in math and reading classes smaller than a 12:1+1 ratio

[9] The district psychologist testified that the CSE considered the March 2012 Progress Report and, further, that the handwritten notes on the first page of the Exhibit were hers (Dist. Ex. 8 at p. 1; see Tr. p. 49).

at the May 2012 CSE meeting, there is no evidence in the hearing record indicating that a 12:1+1 classroom would be unable to meet the student's needs (see Dist. Ex. 2 at p. 5).

In addition to the 12:1+1 special class placement, the CSE recommended related services (Dist. Ex. 1 at pp. 12-13). The CSE recommended two 45-minute sessions per week of group speech-language therapy, one 45-minute per week session of individual speech-language therapy, and one 45-minute session per week of individual counseling (id.).

The parent also contends that the vocational assessment contained in the psychoeducational evaluation was inconsistent with the postsecondary goals contained in the IEP. However, the district school psychologist testified that the information contained in the postsecondary goals, transition goals, and the coordinated set of transition activities section of the IEP was derived largely from information provided by Cooke and was discussed at the CSE meeting (Tr. pp. 37-39, 48-51, 66; see Dist. Exs. 1 at pp. 3-4, 10-11, 14-15; 8 at p. 1). Furthermore, the parent asserts no reason why it was improper for the district to rely on information provided by the parent and Cooke staff in developing postsecondary goals and transition services for the student's IEP, and the hearing record contains no indication that the CSE had reason to doubt that the parent and Cooke staff were aware of the student's interests and desires regarding his postsecondary goals.

The hearing record also reflects that, at the time of the May 2012 CSE meeting, the student enjoyed healthy social functioning in a 12:1+1 environment (see Dist. Ex. 5). A social history interview with the parent conducted by the district on January 10, 2012 reported that the student was "a peer leader at school", a participant on the school basketball team, and "a very loving teenager [whom] people are drawn to" (id. at p. 2). Given the student's positive social development, the hearing record reveals that the district's recommended placement, consisting of a 12:1+1 classroom along with the related services of speech and counseling, goals designed to address the student's identified needs, and significant strategies to address his management needs, was reasonably calculated to enable the student to receive educational benefits for the 2012-13 school year in the LRE (see M.W. v. New York City Dep't of Educ., 725 F.3d 131, 143-45 (2d Cir. 2013).

C. Challenges to the Public School Site

The IHO based his decision in large part on the parent's allegations regarding the particular public school site to which the district assigned the student to attend during the 2012-13 school year. Specifically, the IHO credited the parent's recollection that the Assistant Principal at the assigned school told her that the student would have to attend a vocational program (IHO Decision at p. 18). The IHO further found that the assigned public school would only provide the student with approximately two hours of academic instruction each day, which he found insufficient to meet the student's needs (id.). On appeal, the district contends that the IHO erred in reaching the parent's contentions about the assigned school since the student did not attend the assigned school, and alternatively, even if the IHO properly addressed these issues, the hearing record does not support his findings. As set forth in greater detail below, neither the law nor the facts of this case support the IHO's conclusions.

The IDEA and State regulations require that a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; Tarlowe, 2008 WL 2736027, at *6).

The IDEA and State regulations also provide parents with the opportunity to offer input in the development of a student's IEP, but they do not permit parents to direct through veto a district's efforts to implement each student's IEP (see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419-20 [2d Cir. 2009]). 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). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if the district deviates from substantial or significant provisions of the student's IEP in a material way (A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]).

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 a parent's "[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 N.K. v. New York City Dep't of Educ., 2013 WL 4436528, at *9-*13 [S.D.N.Y. Aug. 13, 2013]; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *14-*16 [S.D.N.Y. Oct. 16, 2012]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012] [finding the parents' pre-implementation arguments that the district would fail to adhere to the IEP were speculative and therefore misplaced], adopted, 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87; 2013 WL 3814669 [2d Cir. 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *7 [S.D.N.Y. Dec. 11, 2012]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom in which a student would be placed where the parent rejected an IEP before the student's classroom arrangements were even made"]; Peter G. v. Chicago Pub. Sch. Dist. No. 299 Bd. of Educ., 2003 WL 121932, at *19 [N.D. Ill. Jan. 13, 2003] [noting that the court would not speculate regarding the success of the student's services where the parent removed student from the public school before the IEP services were implemented]).

While several district courts have, since R.E. was decided, continued to wrestle with this difficult issue regarding challenges to the implementation of an IEP made before the student begins attending the school and taking services under the IEP (see D.C. v. New York City Dep't of Educ., 2013 WL 1234864, at *11-*16 [S.D.N.Y. Mar. 26, 2013] [holding that the district must establish that it can implement the student's IEP at the assigned school at the time the parent is required to determine whether to accept the IEP or unilaterally place the student]; B.R. v. New York City Dep't of Educ., 910 F. Supp. 2d 670, 677-78 [S.D.N.Y. 2012] [same]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012] [holding that parents may prospectively challenge the adequacy of a "placement classroom" when a child has not enrolled in the school because districts are not permitted to assign a child to a public school that cannot satisfy the requirements of an IEP]), I now find it necessary to depart from those cases. Since these prospective implementation cases were decided in the district courts, the Second Circuit has also

clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v New York City Dept. of Educ., 526 Fed. App'x 135, 141; 2013 WL 2158587 [2d Cir. 2013]) and, even more clearly, that "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 2013 WL 3814669, at *6 [rejecting as improper the parents' claims related to how the proposed IEP would have been implemented], quoting R.E., 694 F.3d at 187). 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]).[10]

As explained more recently, "[t]he Second Circuit has been clear, however, that where a parent enrolls the child in a private placement before the time that the district would have been obligated to implement the IEP placement, the validity of [the] proposed placement is to be judged on the face of the IEP, rather than from evidence introduced later concerning how the IEP might have been, or allegedly would have been, implemented (A.M. v. New York City Dep't of Educ., 2013 WL 4056216, at *13 [S.D.N.Y. Aug. 9, 2013]; see 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 Dept. of Educ., 2013 WL 4495676, at *26 [E.D.N.Y. Aug. 19, 2013]; M.R. v New York City Bd. of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013] [finding that the argument that the assigned school would not have been able to implement the IEP is "entirely speculative"]; N.K., 2013 WL 4436528, at *9 [rejecting challenges to placement in a specific classroom because the "appropriate inquiry is into the nature of the program actually offered in the written plan"]).

In view of the forgoing and under the circumstances of this case, I find that the IHO erred in determining that the May 2012 IEP was inappropriate for the student, in part, based upon a retrospective analysis of how the district would have executed the student's May 2012 IEP at the assigned public school site, which was not an appropriate inquiry under the circumstances of this case (K.L., 2013 WL 3814669 at *6; R.E., 694 F3d at 186; R.C., 906 F. Supp. 2d at 273). In this case, these issues are speculative insofar as the parent did not accept the May 2012 IEP containing the recommendations of the CSE by the district and instead chose to maintain the student's enrollment at Cooke (see Parent Ex. B at p. 1).

In any event, the evidence in the hearing record does not support the conclusion that the student would be required to attend a vocational program at the public school site. The assistant

---

[10] The Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular school site or classroom location on a student's IEP, the district is not permitted to choose any school and provide services that deviate from the provisions set forth in the IEP (see T.Y., 584 F.3d at 420 [noting that the district does not have carte blanche to provide services to a child at a school that cannot satisfy the IEP's requirements]; N.K. v. New York City Dep't of Educ., 2013 WL 4436528, at *11 [S.D.N.Y. Aug. 13, 2013] ["The [district] may place a student at any school site it chooses, so long as the school can satisfy the requirements of the IEP"]). 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.

principal testified that he informed the parent that vocational programming was an "option", and that she "had a choice" as to whether the student would receive all-day academic instruction at the assigned school's main site, or a combined academic/vocational program (Tr. pp. 128-31). This testimony is supported by the testimony of a Cooke teacher, who attended two tours of the public school site in spring and fall 2012 led by the same assistant principal (Tr. pp. 179-81, 198-99). During one of these tours, the assistant principal indicated that "at a certain age[,] [students] are based primarily" in off-site vocational programs (Tr. p. 181 [emphasis added]). The assistant principal indicated that he offered to provide the parent with additional information about the public school site's vocational program and asked her to inform him of her preference (Tr. p. 129). However, the parent never contacted the assistant principal to follow up (id.).

The parent recalled, on the other hand, that the assistant principal told her that the student, due to his age, would receive between one and one-and-one-half hours of academic instruction in the morning and would report to an "internship" for the remainder of the school day (Tr. pp. 267-69). The parent also testified that the assistant principal did not provide her with the promised information regarding the assigned public school site's vocational program (Tr. p. 267). The parent further testified that she made an appointment to visit the public school sometime in August (Tr. p. 288). There is no indication in the hearing record that the parent attended this appointment.

Thus, although the assistant principal's testimony on this point conflicts with the parent's, the assistant principal's testimony is entitled to greater weight because it was independently corroborated by the teacher at Cooke. The teacher at Cooke did not have a motive for testifying in favor of the district and, in fact, opined that the vocational program offered by the district was inappropriate for the student (Tr. p. 182). This version of the events is further supported by the parent's admission that she did not ask the assistant principal whether the student could receive all-day academic instruction at the main site (Tr. p. 292). Therefore, the IHO's determination on this point was not supported by the weight of the totality of the evidence in the hearing record.

Assuming for purposes of argument that considerations regarding the assigned public school site were legally permissible and that the student was, in fact, required to attend a vocational program, it appears from the hearing record that the district was capable of implementing the student's IEP. As a preliminary matter, the student's IEP contemplated participation in a vocational program (Dist. Ex. 1 at pp. 11-12, 14; see Tr. p. 39). The IEP's coordinated set of transition activities identify, in two locations, "participation in a work study program" as an instructional activity necessary to facilitate the student's movement from school to post-school activities (Dist. Ex. 1 at p. 14). Similarly, several of the student's goals and short-term objectives are consistent with participation in a vocational program such as: requesting and completing an application or resume, practicing interviewing techniques, experience real work environment job skills, and developing travel training skills to and from internship placements to support success in vocational or work study programs (Dist. Ex. 1 at pp. 10-11).

The assistant principal at the assigned public school testified that the school's work-study program consisted of vocational opportunities at 17 locations in addition to the school's main site (Tr. pp. 122-23). Students were allowed to choose which vocational site they were interested in at a "college fair" style event held toward the beginning of the school year (Tr. pp. 137-38). Students spent between one and three-quarters to two hours in the morning receiving academic instruction and then spent the rest of the school day at their chosen vocational program (Tr. p. 122, 133). Most students traveled independently to their vocational programs; however, public

transportation and travel training services were available for students who could not travel independently (Tr. pp. 131-33). Students were not bound by their initial choice of vocational program and were allowed to switch programs during the school year (Tr. p. 138).

On appeal, the parent argues that the IEP guaranteed the student 35 periods per week of academic instruction and that the vocational program at the assigned public school would not meet this mandate. Critically, and contrary to the parent's argument, the May 2012 IEP does not require 35 hours of "academic" instruction. Instead, it offers special class instruction for 35 periods per week (Dist. Ex. 1 at p. 12). Thus, nothing in the IEP precluded the student from receiving a portion of these 35 periods of instruction in a vocational environment (id.). While the parent's concern that the student would not have received sufficient academic instruction is understandable, the hearing record reflects that, in one of the assigned school's vocational programs, the student would have received eight hours and forty-five minutes to ten hours of classroom academic instruction per week. (Tr. p. 133) While this may not be as much as the parent desired, the CSE's decision to provide the student with a combination of vocational and academic instruction was not unreasonable given his age, abilities, and needs (see Tr. pp. 44-45). Further, the IDEA requires school districts to "facilitate . . . student[s'] movement from school to post-school activities" beginning at the age of 15, a transition that can include vocational training (8 NYCRR 200.1[fff]; see 200.4[d][2][ix]).[11]

The IEP as designed reflected academic and functional goals that could be achieved in either a classroom or a vocational environment. This provided the assigned public school with flexibility in determining how to address the student's need for academic and vocational instruction. Such flexibility is permissible and appropriate and allows districts to design and operate programs that best meet students' individual needs, without providing unnecessary constraints on the educators responsible for implementation of a student's IEP.

Thus, for all of the foregoing reasons, the evidence in the hearing record indicates that the assigned public school was capable of implementing the student's IEP in a program containing both academic and vocational instruction. While the parent's concern that the student would not receive the instruction mandated by his IEP if he was placed in the public school is understandable, the district cannot escape its obligation to put the IEP into effect and such concerns are not automatically transformed into viable claims simply as a result of conclusions drawn solely from parental tours with assigned public school personnel.[12] Accordingly, the parent's claims regarding the assigned public school site were speculative and the IHO's findings relying on evidence relating to potential events at the assigned public school site must be reversed.[13]

---

[11] In her answer, the parent argues that the assigned school could not provide the related services mandated by the May 2012 IEP. Although this is speculative for the reasons stated above, the evidence in the hearing record indicates that the assigned school could have provided the student's related services either at the main location or at an off-site vocational program (Tr. p. 126).

[12] This is precisely why the IDEA emphasizes the development of a written plan in the form of and IEP by a team of experts—so that special education services are not chosen on the imprecise events surrounding a public school tour. That said, I do not suggest that the district stop offering tours, as they are useful in helping parents formulate additional questions and identify concerns regarding the written IEP.

[13] On appeal, the parent complains of her inability to contact the assigned public school site, as well as "errors and subsequent delay[s]" attributable to the assigned public school. While public schools should strive to facilitate

VII. Conclusion

Upon review of the evidence in the hearing record, the district designed a program reasonably calculated to provide the student with educational benefits for the 2012-13 school year. The May 2012 CSE designed a flexible educational program that included academic and vocational elements. While the parent expressed concerns regarding the assigned public school's inability to implement the student's IEP, these concerns were speculative insofar as the parent never enrolled the student in the school. Moreover, there is no evidence in the hearing record indicating that the assigned public school was incapable of implementing the IEP. Having reached this determination, it is unnecessary to consider the appropriateness of the unilateral placement or whether equitable factors favor an award of tuition reimbursement (M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]; C.F., 2011 WL 5130101, at *12; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]).

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the decision of the impartial hearing officer dated August 23, 2013 is modified, by reversing those portions which found that the district failed to offer the student a FAPE and directed it to fund the costs of the student's attendance at Cooke for the 2012-13 school year.

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

JUSTYN P. BATES
STATE REVIEW OFFICER

---

timely and effective communication between parents and school personnel, the assignment of a particular school is an administrative decision, provided it is made in conformance with the CSE's educational placement recommendation (see R.E., 694 F.3d at 191-92; K.L.A. v. Windham Southeast Supervisory Union, 2010 WL 1193082, at *2 [2d Cir. March 30, 2010]; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419-20 [2d Cir. 2009]; White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 [5th Cir. 2003]; see Veazey v. Ascension Parish Sch. Bd., 2005 WL 19496 [5th Cir. Jan. 5, 2005]; A.W. v. Fairfax Co. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]; Tarlowe, 2008 WL 2736027, at *6.