



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 13-194

### **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, Lisa R. Khandhar, Esq., of counsel

The Legal Aid Society, attorneys for respondent, Susan J. Horwitz, 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 the district to directly pay the cost of the student's tuition at the Cooke Center Academy (Cooke) for the 2012-13 school year. The parent cross-appeals from the IHO's decision to the extent that it did not award the full relief requested. The appeal must be sustained. The cross-appeal must be dismissed.

#### **II. Overview—Administrative Procedures**

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; *see* 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

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

### **III. Facts and Procedural History**

The student was diagnosed with medulloblastoma—a form of brain tumor—at 11 months old and after undergoing treatment the student received early intervention services (Tr. pp. 262-63; Parent Ex. B at p. 1). The student was unable to attend preschool as a result of medical treatment required to address a recurrence of the tumor (Tr. p. 263; Parent Ex. B at p.1). The student attended a district public school for kindergarten in a general education setting with paraprofessional support and related services including: physical therapy (PT), occupational therapy (OT), speech-language therapy, and hearing education services (Tr. pp. 263-64; Parent Ex. B at p. 1). The student repeated kindergarten and during the school year the student moved into a classroom providing integrated co-teaching (ICT) services, where he remained through first grade (Tr. pp. 264-65; Parent Ex. B at p. 1). The student attended a hospital-based school for second and third grade (Tr. pp. 265-266; Parent Ex. B at p. 1). The student returned to a district community school for fourth through seventh grades, and was placed in a 12:1+1 special class with a 1:1

health paraprofessional and related services (Tr. pp. 267-269; Parent Ex. B at pp. 1-2). During the 2011-12 school year, the parent placed the student at Cooke, where he attended a 12:1+1 classroom with a 1:1 health paraprofessional and related services including PT, OT, speech-language therapy and hearing education services (Tr. p. 212, 215, 274; Dist. Ex. 3 at p. 1).<sup>1</sup>

The CSE convened on January 5, 2012 to develop the student's IEP for the 2012-13 school year (Dist. Ex. 1). The CSE found that the student remained eligible to receive special education and related services as a student with a traumatic brain injury and recommended a 12-month school year program in a 12:1+1 special class in a specialized school for core academic classes, along with a full time 1:1 health paraprofessional and related services, including: two 45-minute sessions per week of speech language therapy in a group, one 45-minute OT session per week in a group, one 45-minute individual OT session per week, one 45-minute individual counseling sessions per week, and two 45-minute individual hearing education services sessions per week (*id.* at pp. 1, 12-14, 17).<sup>2</sup> In addition to the above, the CSE recommended that the student receive an FM unit as an assistive technology device, that the student participate in alternate assessments, and that the student receive special transportation and adapted physical education (*id.* at pp. 14, 16-17). During the meeting, the parent expressed concerns that the student would regress if he returned to public school (*id.* at pp. 1-2).

The district sent a final notice of recommendation (FNR) dated February 10, 2012, advising the parent of the public school site to which the student was assigned for the 2012-13 school year (Dist. Ex. 8).<sup>3</sup> The parent visited the specified public school site in February 2012 (Tr. p. 284). In March 2012, the parent sent a letter to the district notifying the district that the assigned public school was not appropriate for the student for a number of reasons (Parent Ex. C at p. 2). The parent's complaints included: that the school could not identify the specific classroom in which the student would be placed were he to attend the public school; that the classes were grouped by age rather than cognitive ability; that the academic instruction and materials were below the student's level and academic instruction was not based on the students' individual needs; that the students had behavioral issues and would not be appropriate peers for the student; that the school's life skills and travel training programs would not meet the student's needs; and that the school could not meet the student's related services mandates (*id.*). The parent sent another letter to the district in August 2012 notifying the district of the parent's intention to enroll the student at Cooke at public expense for the 2012-13 school year (Parent Ex. D at p. 1).

### **A. Due Process Complaint Notice**

In an amended due process complaint notice dated December 29, 2012, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2012-13 school year (Dist. Ex. 7).<sup>4</sup> The parent objected to the annual goals contained in the January 2012

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<sup>1</sup> The Commissioner of Education has not approved Cooke as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1 [d], 200.7).

<sup>2</sup> The student's eligibility for special education and related services as a student with a traumatic brain injury is not in dispute (Tr. p. 4; *see* 34 CFR 300.8[c][12]; 8 NYCRR 200.1[zz][12]).

<sup>3</sup> As noted by the IHO, both the student and the parent's first names were incorrect on the FNR (Dist. Ex. 8; IHO Decision at p. 20).

<sup>4</sup> The original due process complaint notice was neither offered into evidence at the impartial hearing nor received by the Office of State Review.

IEP as being too general and alleged that they did not reflect the student's unique needs (id. at p. 3). The parent also asserted that the lack of a vocational assessment resulted in "transition goals" that were insufficiently particularized to meet the student's needs (id.). In addition, the parent asserted that a 12:1+1 special class would not have been sufficiently supportive to meet the student's educational needs (id.). The parent further asserted that although the district identified the public school the student would have attended, the district did not identify the particular classroom to which the student would have been assigned, which prevented the parent from determining if it would have been an appropriate classroom for the student (id.). The parent then raised allegations regarding the assigned public school site, alleging that it would not have provided speech-language therapy at a separate location as mandated on the IEP and that the students at the public school would not have provided an appropriate academic, social, and emotional functional grouping for the student (id.).

The parent asserted that the parent's unilateral placement of the student at Cooke for the 2012-13 school year was an appropriate placement for the student and that equitable considerations weighed in favor of her request for relief (Dist. Ex. 7 at pp. 3-4). As relief the parent requested that the district fund the student's attendance at Cooke for the 2012-13 school year, that the district provide a related service authorization (RSA) for a 1:1 health paraprofessional, and that the district conduct a vocational assessment (id. at p. 4).

## **B. Impartial Hearing Officer Decision**

After two prehearing conferences, held November 26, 2012 and January 28, 2013, an impartial hearing convened on March 19, 2013 and concluded on July 17, 2013 after three nonconsecutive hearing dates (Tr. pp. 1-345). In a decision dated September 4, 2013, the IHO determined that the district did not offer the student a FAPE for the 2012-13 school year, that the parent's unilateral placement of the student at Cooke was appropriate, that equitable considerations favored the parent's request for relief, and directed the district to make direct payment to Cooke for the cost of the student's tuition for the 2012-13 school year (IHO Decision).

In finding the January 2012 IEP did not offer the student a FAPE, the IHO determined that the district committed a number of errors in developing the IEP (IHO Decision at pp. 15-20).<sup>5</sup> Regarding the January 2012 CSE meeting, the IHO found that a four-hour delay in holding the meeting foreclosed the participation of the student's hearing services teacher, which was

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<sup>5</sup> The IHO determined that the recommendation in the January 2012 IEP for a 12:1+1 special classroom was for a classroom with 12 students, one teacher, and the student's full time paraprofessional rather than 12 students, one teacher, plus one or more supplementary school personnel (IHO Decision at pp. 16, 19; Dist Ex. 1 at pp. 12-13). However, the January 2012 IEP lists a full time 1:1 health paraprofessional as a related service separately from the 12:1+1 classroom designation and the testimony by the parent and district personnel indicated that they understood the special class placement offered to consist of 12 students, one teacher, plus one or more supplementary school personnel (Tr. pp. 101-02, 285, 313; Dist. Ex. 1 at pp. 12-13; see 8 NYCRR 200.6[h][4][i]). Upon review of the hearing record, I find nothing that supports the IHO's conclusion on this matter (see, e.g., "Continuum of Special Education Services for School-Age Children with Disabilities," Office of Special Educ. Mem. [Nov. 2013], at pp. 16-17, available at <http://www.p12.nysed.gov/specialed/publications/policy/continuum-schoolage-revNov13.pdf>; "Special Education Class Size Variance by Notification for Middle and Secondary Students," VESID Policy No. 01-08 [Oct. 2001], at p. 2, available at <http://www.p12.nysed.gov/specialed/publications/qa/classvariance.pdf>). It is unclear whether the IHO found that the 12:1+1 classroom recommendation itself was inappropriate to meet the student's needs. In addition, the parent clearly testified at the impartial hearing that she agreed with the recommendation that the student attend a 12:1+1 special class in a specialized school (Tr. p. 313).

compounded by the CSE's failure to offer the parent an opportunity to reschedule the meeting (id. at pp. 17, 19). Regarding the evaluative data relied on by the CSE, the IHO found that the CSE failed to conduct standardized testing regarding the student's math skills or cognitive disabilities, failed to review the student's most recent psychoeducational evaluation report, and failed to conduct an observation of the student prior to the CSE meeting (id. at pp. 16-19). The IHO also found that the CSE did not ensure all of the meeting participants were in possession of the evaluative materials reviewed (id. at p. 19). Regarding the goals included in the January 2012 IEP, the IHO found them deficient because they were not based on the recommendations of Cooke personnel and did not address the student's identified weaknesses (id. at pp. 15-16, 19).

The IHO also found a denial of FAPE based on her determination that the proposed public school location would not have been able to implement the student's IEP (IHO Decision at pp. 20-22). The IHO found that the student would have been grouped based on age rather than on functional ability at the public school, that participation in the public school's workplace program would not have been based on the student's vocational preference or ability, and that the public school may not have provided the student with travel training (id. at p. 20). The IHO also found that the district did not establish that the public school would have been a safe environment for the student considering his fragility and the school's enrollment of students with emotional disturbances (id. at p. 21). The IHO further found that the district failed to establish the manner in which the assigned public school would have implemented the accommodations and modifications necessary to meet the student's management needs (id.).

In analyzing the parent's unilateral placement of the student at Cooke for the 2012-13 school year, the IHO found Cooke to be appropriate to address the student's needs (IHO Decision at pp. 22-23). The IHO determined that Cooke provided the student with a small structured program with appropriate peers and that the student made significant progress at Cooke (id. at p. 23). Regarding equitable considerations, the IHO found in favor of the parent, determining that the parent cooperated with the CSE in developing the student's IEP and was willing to consider placing the student in a public school (id. at p. 24). The IHO directed the district to make payment to Cooke for the cost of the student's tuition for the 2012-13 school year (id.).

#### **IV. Appeal for State-Level Review**

The district appeals, seeking a determination that the IHO erred in finding the district did not offer the student a FAPE for the 2012-13 school year, in determining Cooke was an appropriate placement, and in finding equitable considerations favored the parent's request for relief.

The district asserts that the IHO erred in reaching and deciding a number of issues that were not raised in the parent's due process complaint notice. In particular, the district asserts the IHO's findings with respect to CSE composition, the availability of evaluative data to the CSE members, the sufficiency and consideration of evaluative data available to the CSE, and the manner in which the IEP goals were developed were outside the scope of the impartial hearing. As alternative arguments, the district asserts that the CSE was validly composed; that the CSE reviewed sufficient evaluative data in developing the student's IEP; and that the CSE developed the student's goals with input from the student's teachers. Regarding the goals, the district also asserts that the annual goals were sufficient to address the student's identified needs. In addition, the district asserts that the IHO erred in determining that there was a "disconnect" regarding the appropriateness of the recommended student-to-teacher ratio, asserting that the parent understood the 12:1+1 designation in the January 2012 IEP to mean a classroom containing 12 students, one

teacher and one classroom paraprofessional and that she did not disagree with the IEP recommended special class but was dissatisfied with the specific public school assignment. Regarding the student's transition plan, the district argues that the lack of a vocational assessment did not deprive the student of a FAPE because the CSE discussed the student's transition needs and incorporated appropriate transition services and postsecondary goals into the IEP. Regarding the IHO's findings with respect to the implementation of the January 2012 IEP at the assigned public school, the district asserts that IHO erred in reaching any of the parent's implementation claims, alleging that those claims were speculative as the parent rejected the offered placement prior to the time the district became obligated to implement the IEP.

The district also alleges that Cooke was not an appropriate placement for the student for the 2012-13 school year, asserting that while the January 2012 CSE recommended the student for a 12-month school year, the student only attended a 10-month program at Cooke. The district also alleges that equitable considerations weigh in favor of denying the parent's requested relief. In particular, the district asserts that the parent's August, 2012 ten-day notice was insufficient because it raised objections to the student's assigned public school site rather than the student's IEP. In addition, the district asserts that the parent's testimony and actions established that she had no intention of sending the student to a public school.

The parent answers and cross-appeals.<sup>6</sup> While the parent agrees with the IHO's findings that the district failed to offer the student a FAPE, that Cooke was appropriate, and that equitable considerations favor the parent, the parent asserts that in addition to the student's tuition at Cooke, the IHO should have also directed the district to pay the cost of the student's 1:1 health paraprofessional at Cooke or provide a RSA therefor. The parent also asserts as an additional basis for upholding the IHO's decision that the short-term objectives contained in the IEP contained no basis by which to measure the student's progress. The district answers the cross-appeal, asserting that the parent is not entitled to public funding of the student's 1:1 health paraprofessional at Cooke.

## **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

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<sup>6</sup> The parent alleges that the district included multiple allegations in each paragraph of its petition in violation of State regulation (8 NYCRR 279.8[a]); however, she does not request that an SRO take any remedial action on the basis of this purported failure to comply with the regulations governing practice before the Office of State Review. Nonetheless, the parent is correct and I direct the district to comply with standard legal practice and plead discrete allegations in separate paragraphs.

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

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

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at \*6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the

"results of the initial evaluation or most recent evaluation" of the student, as well as the "academic, developmental, and functional needs" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

## **VI. Discussion**

### **A. Scope of Impartial Hearing and Review**

Before reaching the merits in this case, a determination must be made regarding which claims were properly raised by the parent and are properly addressed on appeal. A review of the hearing record reveals that the IHO exceeded her jurisdiction by sua sponte raising and addressing issues that were not raised by the parent in the due process complaint notice, including CSE composition; lack of participation by the student's teachers in the development of the January 2012 IEP; the sufficiency of the evaluative data before the CSE; and the district's ability to implement the educational accommodations and modifications necessary to meet the student's management needs in the assigned public school site (compare IHO Decision at pp. 16-21, with Dist. Ex. 7 at pp. 2-3).

The party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). However, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to

the impartial hearing (20 U.S.C. § 1415[c][2][E][i][III]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]; see N.K. v. New York City Dep't of Educ., 2013 WL 4436528, at \*5-\*7 [S.D.N.Y. Aug. 13, 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at \*8-\*9 [S.D.N.Y. Aug. 5, 2013]; B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at \*5-\*6 & n.2 [S.D.N.Y. May 14, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at \*9 [S.D.N.Y. Mar. 28, 2013]; B.P. v. New York City Dep't of Educ., 2012 WL 33984, at \*4-\*5 [E.D.N.Y. Jan. 6, 2012]; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at \*12-\*13 [S.D.N.Y. Dec. 16, 2011]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at \*12 [Oct. 28, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at \*13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at \*6-\*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at \*8). Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on the issues raised sua sponte (see Dep't of Educ. v. C.B., 2012 WL 220517, at \*7-\*8 [D. Haw., Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

The parents' due process complaint notice cannot reasonably be read to include challenges to the development of the January 2012 IEP regarding the composition of the CSE, the lack of participation by the student's teachers in the development of the January 2012 IEP, the sufficiency of the evaluative data before the CSE, or the district's ability to implement the accommodations and modifications necessary to meet the student's management needs in the assigned public school site (Dist. Ex. 7). The hearing record demonstrates that the issues raised by the parent for resolution before the IHO generally included challenges to the level of support available to the student in a 12:1+1 special class in a specialized school, the sufficiency of the goals included in the January 2012 IEP, the lack of a vocational assessment, the appropriateness of the "transition goals," the district's failure to identify a specific classroom, and challenges to the district's ability to implement the student's January 2012 IEP at the assigned public school site regarding functional grouping and the provision of speech-language therapy (id.).<sup>7, 8</sup>

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<sup>7</sup> Although the parent raised the level of support available in a 12:1+1 classroom as an issue in the due process complaint notice, the parent testified during the hearing that she did not have any objection to the recommendation for a 12:1+1 special class in a specialized school or to the related services offered in the January 2012 IEP (Tr. pp. 313-14). Furthermore, the parent does not raise either issue in her answer and cross-appeal as an alternate basis for upholding the IHO's determination that the district failure to offer the student a FAPE.

<sup>8</sup> The IHO did not address the parent's claim regarding whether the public school site could have implemented speech-language therapy in a separate location as mandated on the student's January 2012 IEP; however, neither the parent nor the district has raised this issue on appeal and I find that the parent has abandoned this claim by failing to identify it before me or make any legal or factual argument as to how it might rise to the level of a denial of a FAPE (Dist. Ex. 7 at p. 3). Therefore, the parent's claim regarding the district's ability to implement the recommended speech-language therapy is not properly before me and I decline to address it herein (34 CFR 300.514[d]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*6-\*7, \*10 [S.D.N.Y. Mar. 21, 2013]). Even had the parents specifically raised an argument regarding the assigned public school site's ability to provide speech-language therapy in a separate location in their answer; as further detailed below, the weight of recent authority supports the conclusion that such claims were speculative and need not be addressed inasmuch as the student never attended the

Moreover, a review of the hearing record shows that the district did not agree to an expansion of the issues in this case, nor did the parents attempt to further amend their due process complaint notice after December 2012 (see Tr. pp. 1-344; Dist. Exs. 1-8; Parent Exs. A-G; I). To the extent that the Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H., 685 F.3d at 250-51; see D.B. v. New York City Dep't of Educ., 2013 WL 4437247, at \*6-\*7 [S.D.N.Y. Aug. 19, 2013]; N.K., 2013 WL 4436528, at \*5-\*7; A.M. v. New York City Dep't of Educ., 2013 WL 4056216, at \*9-\*10 [S.D.N.Y. Aug. 9, 2013]; J.C.S., 2013 WL 3975942, at \*9; B.M., 2013 WL 1972144, at \*5-\*6), the issues raised and addressed sua sponte by the IHO in the decision were initially raised by the IHO during the examination of a district witness or by the parent's attorney during examination of the parent (see, e.g., Tr. pp. 127-32, 136-37, 279-81). Here, the district did not initially elicit testimony regarding these issues, and therefore, I find that the district did not "open the door" to these issues under the holding of M.H.

Where, as here, the parents did not seek the district's agreement to expand the scope of the impartial hearing to include these issues or seek to include these issues in an amended due process complaint notice, I decline to review these issues. To hold otherwise would inhibit the development of the hearing record for the IHO's consideration and render the IDEA's statutory and regulatory provisions meaningless (see 20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]; see also B.P., 2012 WL 33984, at \*4-\*5 [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]"]; M.R., 2011 WL 6307563, at \*13). "By requiring parties to raise all issues at the lowest administrative level, IDEA affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children" (R.B., 2011 WL 4375694, at \*6 [internal quotations omitted]; see C.D., 2011 WL 4914722, at \*13 [holding that a transportation issue was not properly preserved for review by the review officer because it was not raised in the party's due process complaint notice]).

Accordingly, the IHO exceeded her jurisdiction by raising and addressing the issues of CSE composition, participation by the student's private school teachers, and the sufficiency of the evaluative data available to the CSE, and the IHO's findings regarding those issues must be annulled.<sup>9</sup>

## **B. Adequacy of Annual Goals**

The district asserts that the IHO erred in finding that the annual goals included in the January 2012 IEP were not developed properly and further asserts that the annual goals, when read in conjunction with the short-term objectives, addressed the student's needs as identified in the

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public school site pursuant to the January 2012 IEP (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.E., 694 F.3d at 186; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]).

<sup>9</sup> The IHO certainly had the authority to ask the questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record, especially if relevant to the claims asserted by the parent (8 NYCRR 200.5[j][3][vii]), but it was impermissible for the IHO to take the resultant information and formulate new claims against the district on the parent's behalf.

present levels of performance. The parent contends specifically that the reading, writing, and math goals included in the January 2012 IEP were not individualized to meet the student's unique needs. State and federal regulations require that an IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures, and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

According to the district school psychologist who participated in the January 2012 CSE meeting, the CSE discussed the student's present levels of performance and developed the annual goals based on that discussion (Tr. pp. 88-89, 110-11). The school psychologist testified that Cooke representatives orally provided the student's academic goals to the CSE during the meeting and that none of the CSE members objected to the goals, nor did anyone indicate that additional goals were necessary (Tr. pp. 88-91; Dist. Ex. 2 at pp. 2-5).<sup>10</sup> The parent does not dispute that the January 2012 CSE discussed the student's needs and accurately incorporated some of them into the present levels of performance section of the January 2012 IEP. In addition, the student's mother agreed that the CSE reviewed the annual goals with the student's teachers during the CSE meeting and that the CSE read the goals as they typed them; however, she also testified that she would have liked for the goals to more fully reflect the recommendations regarding the goals provided by the student's teachers from Cooke (Tr. pp. 281-83, 313-14).

Upon review, the January 2012 IEP contained specific individualized present levels of performance for the student's academic achievement, functional performance, and learning characteristics, his social/emotional development, and his physical development (Dist. Ex. 1 at pp. 1-2). The IEP also indicated that the student benefitted from environmental modifications and human and material resources to address his management needs including repetition and review, preferential seating, graphic organizers, directions read aloud, "small grouping," a 1:1 health paraprofessional, extended time, one on one support, modeling, an FM unit, breaking information into smaller units, discreet sequencing of information, and previewing new skills (id. at pp. 1-3). According to the IEP the student also benefitted from one-to-one instruction, visual cues, visual agendas for transition, and new material/multi-step tasks broken down into chunks or steps (id. at p. 1).

A review of the 13 annual goals and corresponding short-term objectives reveals that they were consistent with the student's identified needs as set forth in the present levels of performance and contained sufficient specificity to guide instruction (id. at pp. 1-2, 4-12). Regarding academics, the January 2012 IEP contained annual goals and short term objectives relating to the student's needs in math, reading, and writing (Dist. Ex. 1 at pp. 10-12).

At the time of the CSE meeting, the student was able to identify the main idea, characters, and setting in written materials and was working on pulling out relevant information from text and decoding complicated vocabulary words (Dist. Ex. 1 at p. 1). The short-term objectives contained

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<sup>10</sup> The school psychologist testified that she made an error in the CSE meeting minutes, which indicated that there was an objection to the goals (Tr. p. 145; Dist. Ex. 2 at p. 6).

in the reading annual goal targeted developing the student's reading skills specific to asking and answering "wh" questions, demonstrating understanding of key details in a text, and learning how to use various text features to locate key facts in text (*id.* at p. 10). While the student's teacher at Cooke for the 2011-12 school year testified that the reading goal was inappropriate because the student had mastered answering "wh" questions and was comfortable reading non-fiction text, this testimony is belied by a March 2013 Cooke progress report, which included goals related to reading non-fiction texts, using various text and organization features to locate key facts in text, and responding using prompts including "wh" questions, indicating that the student continued to work on those skills during the 2012-13 school year (Tr. pp. 223-25; Parent Ex. A at p. 3).

The January 2012 IEP noted that in the area of written language, the student required supports including a graphic organizer, and was working on developing a one paragraph essay with a topic sentence, details, and a conclusion (Dist. Ex. 1 at p. 1). The short-term objectives contained in the student's writing goal addressed the student's need to focus on a topic, respond to questions, introduce a topic the student was writing about, state an opinion and the rationale for the opinion, use linking words, and provide a concluding statement section (*id.* at p. 11). According to the December 2011 and March 2013 Cooke progress reports, the student worked on these skills at Cooke during both the 2011-12 and 2012-13 school years (Dist Ex. 3 at p. 2; Parent Ex. A at p. 3).

In math, the January 2012 IEP indicated that the student completed multi-digit addition and subtraction problems, one-step addition and subtraction word problems, and that the student's multiplication and division skills were in the "developing stage" (Dist. Ex. 1 at p. 1). The short-term objectives contained in the math annual goal targeted strengthening and developing the student's math skills specific to using addition and subtraction within 100 to solve one to two step word problems, fluently adding and subtracting within 20, determining whether a group of objects had an odd or even number of members, telling and writing time by analog or digital clocks, and solving word problems involving money and the applicable monetary symbol (*id.* at pp. 11-12). The district school psychologist testified that the CSE did not include a goal for multiplication and division in the IEP because the student was still working on mastering addition and subtraction up to 20, which was included in the IEP as a short-term objective within the math goal (Tr. pp. 146-47; Dist. Ex. 1 at p. 11). In addition, the March 2013 Cooke progress report indicates that the student was still working on mastering addition and subtraction up to 20 during the 2012-13 school and included no goals for multiplication or division (Parent Ex. A at pp. 5-6). Considering that the student had not mastered adding and subtracting up to 20, prerequisite skills for multiplication and division, the district's decision to omit multiplication and division as a goal was reasonable under the circumstances.

In addition to academics, the January 2012 IEP included annual goals for hearing education relating to auditory comprehension and auditory memory, self-advocacy, the use of a hearing aid and FM system, activities of daily living, visual motor/perceptual and language skills, and counseling (Dist. Ex. 1 at pp. 4-10). The January 2012 IEP included hearing education goals and corresponding short-term objectives to improve the student's auditory comprehension skills by answering "wh" questions, making predictions, connections, and inferences from oral information; and improve auditory memory skills by repeating lists of information and retelling short passages (*id.* at pp. 4-5). Other hearing education goals and short-term objectives were designed to improve the student's ability to use and maintain his FM system and hearing aid; self-advocate as it related to asking for information or directions to be repeated when necessary, and choose preferential seating across settings in order to increase hearing and decrease background noise (*id.* at pp. 4-6,

8). A counseling goal and short-term objective addressed the student's need to use skills learned in school to facilitate socializing within the community by developing self-advocacy skills in unfamiliar settings with unfamiliar people (*id.* at p. 10). A speech-language goal and short-term objectives targeted the student's language comprehension skills related to identifying facts and opinions, comparing and contrasting, and producing descriptive and concise summaries (*id.* at p. 9). An OT goal and short-term objectives were designed to improve the student's activities of daily living skills (ADLs) specific to safe meal and snack planning and preparation, recipe following, making simple purchases, identifying kitchen safety hazards, and wearing and caring for hearing aid and glasses (*id.* at p. 7). Other OT annual goals and short-term objectives addressed the student's need to improve his visual motor/perceptual skills specific to smooth visual tracking for school related activities, his ability to locate and retrieve objects from cluttered environments, locate hidden pictures from incomplete representations, improve color and spatial concepts, and increase his sensory skills by completing challenging activities without emotional outbursts (*id.* at pp. 8-9).

Overall while the annual goals themselves are generally stated, each of the annual goals contains a number of short-term objectives, which when read together were sufficiently detailed to guide a teacher or provider in instructing and assisting the student (Dist. Ex. 1 at pp. 4-12). Under the circumstances of this case, any deficiency due to the general nature of the annual goals does not rise to the level of a denial of a FAPE (R.B. v New York City Dept. of Educ., 2013 WL 5438605, at \*13 [S.D.N.Y. Sept. 27, 2013]; D.A.B. v. New York City Dep't of Educ., 2013 WL 5178267, at \*11 [S.D.N.Y. Sept. 16, 2013]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at \*18-\*19 [E.D.N.Y. Aug. 19, 2013]; D.B., 2013 WL 4437247, at \*13-\*14; *see also* M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*6 [S.D.N.Y. Mar. 21, 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at \*11 [S.D.N.Y. Mar. 19, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at \*13 [S.D.N.Y. Feb. 20, 2013]; C.D., 2011 WL 4914722, at \*8).

### **1. Measurability of Annual Goals**

To the extent that the parent asserts in her answer that the annual goals and short-term objectives are not measurable, this issue was not clearly raised in the parent's due process complaint notice, and was raised for the first time during the impartial hearing by counsel for the parent (Tr. p. 223). In any event, the annual goals and short-term objectives contained in the January 2012 IEP included the requisite evaluative criteria, evaluation procedures, and schedules to measure progress (Dist. Ex. 1 at pp. 3-11; *see* 8 NYCRR 200.4[d][2][iii][b]). The State Education Department's Office of Special Education issued a guidance document in December 2010 which specifies that evaluative criteria refers to "how well and over what period of time a student must perform a behavior in order to consider it met" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," Office of Special Educ. Mem. [Dec. 2010], at p. 32, available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPgguideDec2010.pdf>). A student's performance can be measured in terms of frequency, duration, distance, or accuracy; and period of time can be measured in days, weeks, or occasions (*id.*). Evaluation procedures refers to the method that will be used to measure progress, such as structured observations, student self-monitoring, written tests, recordings, work samples, and behavior charting (*id.* at p. 33). Evaluation schedules refer to the date or intervals of time by which evaluation procedures will be used to measure the student's progress (*id.*). The annual goals and short-term objectives in the January 2012 IEP provided criteria for measurement to determine if a goal had been achieved (i.e., 80 percent accuracy, 60 percent accuracy, 90 percent accuracy), the

method of how progress would be measured (i.e., teacher made materials, performance assessment, portfolio), and a schedule of when progress toward the goals would be measured (i.e., three times during the year, one time per week, one time per quarter) (Dist. Ex. 1 at pp. 3-11). The annual goals, combined with their corresponding short-term objectives, contained "sufficiently detailed information regarding the conditions under which each objective was to be performed and the frequency, duration, and percentage of accuracy required for measurement of progress" (Tarlowe, 2008 WL 2736027, at \*9 [internal quotations omitted]; see R.B., 2013 WL 5438605, at \*13-\*14; D.A.B., 2013 WL 5178267, at \*11; E.F., 2013 WL 4495676, at \*17; see also J.L., 2013 WL 625064, at \*13; P.K. v. New York City Dep't of Educ. (Region 4), 819 F.Supp.2d 90, 109 [E.D.N.Y. 2011] [noting reluctance to find a denial of a FAPE based on failures in IEPs to identify goals or methods of measuring progress]).

## 2. Adequacy of Transition Services and Postsecondary Goals

The parent also contends that the lack of a vocational assessment resulted in "boilerplate" IEP postsecondary goals not reflective of the student's individual needs. State regulations require that students age 12 "shall 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]). Because the student was 15 years old at the time of the January 2012 CSE meeting, the district's apparent failure to have conducted such an assessment at any time amounts to a violation of the district's obligation (Dist. Ex. 1 at p. 1). However, in this instance—because the district had sufficient information relating to the student's transition needs for the development of appropriate transition services and postsecondary goals—the district's failure to comply with its obligations did not impede the student's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process, or cause 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]; see R.B., 2013 WL 5438605, at \*9-\*10; D.B., 2013 WL 4437247, at \*9; see also M.Z., 2013 WL 1314992, at \*6, \*9 [observing that a deficient transition plan is a procedural flaw]).

According to the district school psychologist, the January 2012 CSE reviewed the student's December 2011 Cooke progress report, authored by the student's then-current teachers and related service providers (Tr. pp. 114-15, 128). The Cooke progress report included information that related to the student's travel training, internship, and life skills courses (Dist. Ex. 3 at pp. 12-15). Specifically, the Cooke progress report included travel training goals for increasing the student's awareness in the community in order to navigate safely using public transportation and navigational tools and improving his ability to read signs and identify labels in the community (id. at p. 12). Similarly, the internship section of the Cooke progress report included goals to improve the student's ability to demonstrate responsible behavior, appropriate hygiene, self-advocacy skills, and attention to tasks while at work (id. at p. 14). The life skills section of the student's Cooke progress report included goals for improving the student's self-monitoring and organizational skills, and his ability to follow multi-step written directions and identify resources to support his learning (id. at p. 15).

The school psychologist's testimony indicates that the January 2012 CSE also discussed the student's transition needs and goals within the context of other services such as counseling and OT (Tr. pp. 94, 97). She further testified that a Cooke staff member led the discussion about the student's transition activities, which were included in the transition plan developed as part of the January 2012 IEP (Tr. pp. 107-108, 110-11; Dist. Ex. 1 at p. 15). The IEP also indicated that the

student was currently involved in vocational training and internship programs, where he learned and practiced life skills (Dist. Ex. 1 at pp. 3-4, 15). At the time the CSE developed the student's IEP, he was also involved in travel training (to improve his ability to safely navigate within the community using public transportation and navigational tools) and adaptive living skills programs, and was provided with community inclusion opportunities to improve his ability to read/identify signs and labels and increase personal finance skills (id. at pp. 4, 15). I note that the information about the student's transition (i.e., internship, travel training, and life skills) needs included in the December 2011 Cooke progress report is commensurate with the information in the January 2012 IEP (compare Dist. Ex. 1 at pp. 2-4, 7-8, 10, 15, with Dist. Ex. 3 at pp. 12-15).

The January 2012 IEP also provided postsecondary goals for the student, including that he would continue to work in a supportive learning environment, engage in an internship program, and learn life skills that would prepare him for independence, and that with maximum support and guidance he would seek employment in his area of interest and live independently (Dist. Ex. 1 at p. 3). To achieve these goals, the IEP transition plan recommended continuing the student's counseling services, speech-language therapy, and OT to practice household routines and procedures (id. at p. 15). The plan further recommended that the student continue to practice money management and personal finance skills in the community, and participate in an appropriate internship to develop work skills and job awareness (id. at pp. 3-4, 15).

A review of the information regarding the student's transition needs and the resultant goals and transition plan included in the January 2012 IEP does not support the parent's contention that the lack of a vocational assessment resulted in transition goals that were not individualized to meet the student's needs. Accordingly, although the failure to conduct an assessment of the student's vocational skills, aptitudes, and interests was a procedural violation, in this instance it did not constitute a denial of a FAPE (see R.B., 2013 WL 5438605, at \*9-\*10; D.B., 2013 WL 4437247, at \*9; M.Z., 2013 WL 1314992, at \*9).

### **C. Assigned School**

The district challenges the IHO's findings relating to the implementation of the January 2012 IEP, asserting that the district was not obligated to prove that the assigned public school site would be able to implement the student's January 2012 IEP because the parent's claims regarding implementation were speculative as the parent chose not to enroll the student in the district public school. Initially, challenges to an assigned school are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that 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 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 at 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. July 24, 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at \*7 [S.D.N.Y. Dec. 11, 2012]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise

deficient IEP, it would be inconsistent to require evidence of the actual classroom in which a student would be placed where the parent rejected an IEP before the student's classroom arrangements were even made]; Peter G. v. Chicago Pub. Sch. Dist. No. 299 Bd. of Educ., 2003 WL 121932, at \*19 [N.D. Ill. Jan. 13, 2003] [noting that the court would not speculate regarding the success of the student's services where the parent removed student from the public school before the IEP services were implemented]).

While several district courts have, since R.E. was decided, continued to wrestle with this difficult issue regarding challenges to the implementation of an IEP made before the student begins attending the school and taking services under the IEP (see D.C. v. New York City Dep't of Educ., 2013 WL 1234864, at \*11-\*16 [S.D.N.Y. Mar. 26, 2013] [holding that the district must establish that it can implement the student's IEP at the assigned school at the time the parent is required to determine whether to accept the IEP or unilaterally place the student]; B.R. v. New York City Dep't of Educ., 910 F.Supp.2d 670, 676-78 [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 Dep't of Educ., 2013 WL 2158587, at \*4 [2d Cir. May 21, 2013]), and, even more clearly that "[t]he appropriate inquiry is into the nature of the program actually offered in the written plan, not a retrospective assessment of how that plan would have been executed" (K.L., 2013 WL 3814669, at \*6 [rejecting as improper the parents claims related to how the proposed IEP would have been implemented]). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]).

As explained more recently, "[t]he Second Circuit has been clear, however, that where a parent enrolls the child in a private placement before the time that the district would have been obligated to implement the IEP placement, the validity of proposed placement is to be judged on the face of the IEP, rather than from evidence introduced later concerning how the IEP might have been, or allegedly would have been, implemented" (A.M., 2013 WL 4056216, at \*13 [S.D.N.Y. Aug. 9, 2013]; see R.B., 2013 WL 5438605, at \*17; E.F., 2013 WL 4495676, at \*26; 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 [citing R.E. and rejecting challenges to placement in a specific classroom because "[t]he appropriate inquiry is into the nature of the program actually offered in the written plan"]).

In this instance the parent cannot prevail on her claims that the district would have failed to implement the January 2012 IEP at the public school site because a retrospective analysis of how the district would have executed the student's January 2012 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 F3d at 186; R.C., 906 F. Supp. 2d at 273). The hearing record indicates that the parent rejected the assigned public school site that the student would have attended and chose to enroll the student in a nonpublic school of her choosing (see Tr. pp. 302-03; Parent Exs. C at p. 2; D at p. 1; E at pp. 1-2). The parent reenrolled the student at Cooke in March 2012 for the 2012-13 school year beginning September 2012 (Tr. pp. 302-03; Parent Ex. E at pp. 1-2). The parent also sent a letter to the district in March notifying the district that the assigned public school was not appropriate for the student (Parent Ex. C at p. 2). The parent then followed up the March 2012 letter with another letter in August 2012 notifying the district that the parent intended to enroll the student at Cooke for the 2012-13 school year (Parent Ex. D at p. 1). Although the student's IEP recommended a 12-month school year, which would have begun in July 2012, as set forth above the hearing record indicates that the parent chose not to enroll the student in the recommended public school and instead chose to keep the student at Cooke for the 2012-13 school year (Dist. Ex. 1 at p. 1; Parent Ex. C at p. 2; E at p. 1-2).<sup>11</sup> Accordingly, the IHO erred in finding that the district was obligated to establish that the assigned public school site would implement the student's January 2012 IEP and the IHO's determinations regarding implementation must be reversed (see K.L., 530 Fed. App'x at 87; R.E., 694 F3d at 186; R.C., 906 F. Supp. 2d at 273).<sup>12</sup>

## VII. Conclusion

In summary, although the annual goals were generally stated and the district erred in failing to conduct a vocational assessment of the student, such failures taken as a whole did not result in the denial of FAPE and the hearing record demonstrates that the district sustained its burden to establish that it offered the student a FAPE for the 2012-13 school year (R.B., 2013 WL 5438605, at \*9-\*10, \*13; D.B., 2013 WL 4437247, at \*9; E.F., 2013 WL 4495676, at \*19). The necessary inquiry is at an end and there is no need to reach the issues of whether the student's unilateral placement at Cooke was an appropriate placement or whether equitable considerations support the parent's requested relief (see Burlington, 471 U.S. at 370; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]; C.F., 2011 WL 5130101, at \*12).

Nonetheless, if it has not done so already while these proceedings have been pending, when it next convenes a CSE to determine whether additional evaluative data is necessary to develop an IEP for the student, the district shall consider whether it is necessary to conduct an assessment of the student's transitional and vocational skills, aptitudes, and interests in accordance with the procedures prescribed by federal and State regulations. After due consideration, whether or not

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<sup>11</sup> To the extent that the parent alleges she could not determine if the student would have been appropriately grouped at the assigned public school site because the school did not identify a specific class the student would have been enrolled in, the hearing record indicates that the reason the parent could not observe a potential class was that the possible classes that would have been appropriate for the student were out attending their internship programs during the parent's visit in February, 2012 (Tr. pp. 284, 294-95, 325). In addition, the district was not obligated to afford the parent an opportunity to visit the assigned public school or to identify a specific classroom prior to the start of the school year (see T.Y. v. New York Coty Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009]; S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at \*11-\*12 [S.D.N.Y. Nov. 9, 2011]).

<sup>12</sup> Because the district only challenges the IHO's decision based on legal grounds and does not challenge the IHO's factual findings regarding the implementation of the January 2012 IEP, although I find that the implementation claims do not result in a denial of FAPE as a matter of law, in this instance it would not be appropriate to make alternative findings regarding the appropriateness of the assigned public school site in contravention of factual findings made by the IHO from which the district did not expressly appeal (see 34 CFR 300.514[d]; 8 NYCRR 200.5[j][5][v]).

the district determines such an assessment to be necessary, it shall provide prior written notice of that decision to the parent—on the form prescribed for such use by the Commissioner—including an explanation of why the district chose to evaluate the student's vocational skills and deficits or not and the materials relied on as a basis for such decision (34 CFR 300.503[a], [b]; 8 NYCRR 200.5[a]).

I have considered the parties remaining contentions; however, in light of the above determinations, it is unnecessary to address them.

**THE APPEAL IS SUSTAINED.**

**THE CROSS-APPEAL IS DISMISSED.**

**IT IS ORDERED** that the IHO's decision dated September 6, 2013 is modified, by reversing those portions which found that the district failed to offer the student a FAPE for the 2012-13 school year and which ordered the district to provide direct payment of the costs of the student's tuition to Cooke for the 2012-13 school year; and

**IT IS FURTHER ORDERED** that prior to the next annual review regarding the student's special education programming, the district shall consider whether it is necessary to conduct an assessment of the student's vocational skills, aptitudes, and interests in accordance with the procedures prescribed by federal and State regulations and, thereafter, shall provide the parents with prior written notice consistent with the body of this decision.

**Dated: Albany, New York  
December 26, 2013**

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**JUSTYN P. BATES  
STATE REVIEW OFFICER**