The University of the State of New York

The State Education Department
State Review Officer
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No. 13-205

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, attorney for petitioner, Cynthia Sheps, Esq., of counsel

Advocates for Children of New York, attorneys for respondent, Michera Brooks, Esq., and Rebecca C. Shore, Esq., of counsel

Greenberg Traurig, LLP, attorneys for respondent, Caroline J. Heller, 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 Academy School (Cooke) for the 2012-13 school year. The parent cross-appeals from the IHO's reduction of the amount of the tuition awarded. The appeal must be dismissed. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

On April 18, 2012, the parent signed an enrollment contract with Cooke for the student's attendance during the 2012-13 school year (see Dist. Ex. 6).[1]

On June 15, 2012, the CSE convened to develop the student's IEP for the 2012-13 school year (Dist. Ex. 18 at pp. 1, 17). Attendees included a district school psychologist (who also served

[1] The hearing record shows that the student began attending Cooke in 2010 (see Tr. pp. 134; Dist. Ex. 8 at p. 2; see also Tr. p. 197). 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).

as a district representative), a district special education teacher, a private social worker, and an additional parent member (Dist. Exs. 16 at p. 1; 18 at p. 20). From Cooke, the student's mathematics teacher and a consulting teacher participated in the meeting by telephone (id.). Finding the student eligible for special education as a student with a speech or language impairment, the June 2012 CSE recommended a 15:1 special class placement for mathematics, English language arts (ELA), social studies, and science (Dist. Ex. 18 at p. 13).[2] The June 2012 CSE also recommended that the student receive two sessions per week of group (5:1) speech-language therapy and one session per week of individual counseling (id. at p. 13).

By final notice of recommendation (FNR) dated August 2, 2012, the district summarized the 15:1 special class, speech-language therapy, and counseling recommended by the June 15, 2012 CSE and identified the particular public school site to which the district assigned the student to attend for the 2012-13 school year (Dist. Ex. 19).

In a letter dated August 24, 2012, the parent notified the district of her concerns regarding the appropriateness of the assigned public school site, noting the assigned school's designation as a "school in need of improvement" by the New York State Education Department, as well as its chronic and well documented discipline issues (Parent Ex. G). The parent also notified the district that, "unless upon visiting the placement" the parent found it appropriate for the student and notified the district of such "in writing," the parent intended to place the student at Cooke for the 2012-13 school year and to seek public funding for the costs of the student's tuition, as well as the provision of transportation services (id.).

A. Due Process Complaint Notice

In an amended due process complaint notice dated April 9, 2013, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (Parent Ex. F at p. 1).[3] First, the parent asserted that the June 2012 CSE lacked sufficient and updated evaluative information with which to formulate an appropriate IEP (id. at pp. 1-2). Specifically, the parent asserted that the district ignored the student's diagnoses, failed to conduct appropriate new evaluations based on those diagnoses, ignored a district-generated psychoeducational evaluation, and improperly relied on Cooke progress reports (id.). With respect to the June 2012 IEP, the parent asserted that, given the student's staggering academic deficits, functional delays, and need to develop activities of daily living (ADLs), the CSE inappropriately recommended that the student be subject to the same promotional and graduation criterion as general education students (id. at p. 2). The parent also asserted that the annual goals listed on the June 2012 IEP did not address the student's present levels of educational performance and lacked a sufficient method to measure progress (id.). The parent asserted that the June 2012 CSE failed to recommend an appropriate transition plan to facilitate the student's movement from school to post-school activities, including transition services, a statement of post-secondary transition needs, and measurable post transition goals (id. at pp. 2-3). With respect to the June 2012 CSE's

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

[3] The original due process complaint notice was filed on December 12, 2012 (see Dist. Ex. 1). During an April 4, 2012 pre-hearing conference, the IHO took full use of the opportunity to clarify the issues and noted that the parent's December 2012 due process complaint notice did not raise any concerns about the appropriateness of the June 2012 IEP and, instead, focused on the assigned public school site (Tr. pp. 3-6). As a result, with district consent, the parent amended her due process complaint (see Parent Ex. F; see also Tr. pp. 6-7).

recommendation for a 15:1 special class placement in a community school, the parent asserted that the class size was too large given the student's needs and he would not be afforded the level of individualized support he required (id. at p. 2).

With respect to the assigned public school site, the parent asserted that the school campus was inappropriate for the student because it: (1) was too large and crowded; (2) had multiple schools that all used a common entrance and lunchroom; (3) had well documented discipline issues; and (4) was designated as a "school in need of improvement" by the New York State Education Department (Parent Ex. F at p. 3). Furthermore, the parent asserted that the proposed 15:1 classroom was at capacity, the other students in the class exhibited negative behaviors, and the student would not have been functionally grouped with the other students in the class (id.).

In addition, the parent alleged that the student made "marked progress" at Cooke during the 2011-12 school year (Parent Ex. F at p. 3). As relief, the parent requested that the district pay the costs of the student's tuition and related services at Cooke for the 2012-13 school year and provide transportation to and from Cooke (id.).

B. Impartial Hearing Officer Decision

On April 4, 2013, the IHO conducted a prehearing conference and, on June 26, 2013, the parties proceeded to an impartial hearing, which concluded on July 19, 2013, after two days of proceedings (see Tr. pp. 1-261). In a decision dated September 23, 2012, the IHO determined that the district failed to offer the student a FAPE, that Cooke was an appropriate unilateral placement for the student, and that equitable considerations precluded an award in the parent's favor (IHO Decision at pp. 10--15).

Specifically, the IHO found that the June 2012 CSE lacked sufficient evaluative information about the student to formulate an appropriate IEP for the 2012-13 school year (IHO Decision at pp. 10-11). The IHO noted that the district requested and obtained the parent's consent to conduct further evaluations of the student in preparation for the June 2012 CSE meeting, but that no such evaluations took place (id.). The IHO also noted that the August 2010 psychoeducational evaluation utilized by the June 2012 CSE did not mention that the student had received diagnoses of autism or an attention deficit hyperactivity disorder (ADHD) but that the IEP mentioned both (id. at p. 10). The IHO also found that the student's present levels of educational performance set forth in the June 2012 IEP were inappropriate as they were not based on current information (id. at p. 11). The IHO further found that, since the present levels of educational performance set forth in the June 2012 IEP failed to accurately describe the student's needs, the annual goals and recommended program which flowed from the present levels of educational performance were also inappropriate (id.). The IHO also surmised that, because the June 2012 IEP specified that the student would receive his core academic instruction in a special class but was silent as to his non-core instruction, the CSE recommended that the student attend a general education classroom for "the remaining portion of his school day" (id.). Based on this conclusion, the IHO held that the absence of a regular education teacher at the June 2012 CSE meeting constituted a procedural error and that the error also resulted in a denial of a FAPE (id.).

The IHO also determined that the parent satisfied her burden to establish that Cooke was an appropriate unilateral placement for the 2012-13 school year, citing: Cooke's small structured class setting, staffing ratios, small group instruction based on student needs, life skills classes,

which were always co-taught by an occupational therapist, and the school's use of technology, as well as testimony about the student's progress at Cooke (IHO Decision at pp. 12-13).

With respect to equitable considerations, the IHO noted that the parent did not attend the June 2012 CSE meeting and, instead, allowed a proxy (a social worker) to attend, who, in turn, offered nothing to the development of the student's June 2012 IEP (IHO Decision at p. 13). The IHO also noted that parent "vacillated" during testimony as to why she did not attend the CSE meeting (differing medical reasons) but that the district school psychologist was told that the parent was shopping with the student, as it was the student's birthday (id.). The IHO further noted that the parent testified that she visited the assigned public school site months before it was actually offered to the student and found it inappropriate but also testified that she did not know if the assigned school was "good or bad" (id. at p. 14). The IHO found that, after observing the parent during the hearing and reviewing her testimony, she offered very little, if any, input into the student's educational programs or placement (id.).

The IHO also found that, given the parent's fixed income derived from social security, Cooke knew that the parent "did not possess the wherewithal to enter such a [c]ontract, or even consider such a [c]ontract as binding (IHO Decision at p. 14). Given these circumstances, the IHO determined that the contract between the parent and Cooke was non-binding and that Cooke was "the sole entity interested in the outcome" of the impartial hearing (id.). Based on the above, the IHO determined that equitable considerations precluded an award of the costs of tuition at Cooke (id. at p. 15). However, the IHO also determined that it was equally inequitable not to reimburse Cooke for the expenses it incurred providing the student with an appropriate educational program and, as such, ordered the district to reimburse Cooke the sum of $24,000, which constituted a portion of the cost of the student's attendance at Cooke for the 2012-13 school year (id.).

IV. Appeal for State-Level Review

The district appeals, seeking to overturn the IHO's determination that the district failed to offer the student a FAPE for the 2012-13 school year and order that the district pay Cooke a portion of the costs of the student's tuition. The district does not appeal the IHO's determination that Cooke was an appropriate placement for the student for the 2012-13 school year.[4]

Specifically, the district asserts that, contrary to the IHO's determination, the June 2012 CSE relied on sufficient evaluative information, including an April 2010 psychoeducational evaluation, Cooke progress reports, a classroom observation report, and information provided by Cooke staff who attended the CSE meeting. The district also asserts that, after the parent signed a consent form to allow the student to be evaluated, it conducted a classroom observation of the student and did not deem other evaluations necessary.

With respect to the IHO's determination that the lack of a general education teacher deprived the student of a FAPE, the district asserts that the issue was not raised in the parent's due process complaint notice, it did not agree to expand the scope of the impartial hearing, and, as such, the IHO exceeded his jurisdiction by deciding the issue. In the alternative, the district asserts that the lack of a regular education teacher at the June 2012 CSE meeting did not deprive the student of a FAPE because the student was not considered for a general education placement, the

[4] 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]).

June 2012 CSE recommended that the student attend his core classes in a special education setting, and the student's then-current mathematics teacher, as well as a district special education teacher, attended the June 2012 CSE meeting.

The district also asserts that the parent's allegations, which were set forth in the due process complaint notice but not addressed by the IHO, lacked merit (e.g., sufficiency of evaluations given the student's diagnoses, appropriateness and sufficiency of the annual goals and the transition plan set forth in the June 2012 IEP, and appropriateness of the assigned public school site).

Turning to the IHO's determination with respect to equitable considerations, the district asserts that the IHO conflated the equitable question of the parties conduct with an analysis of available equitable remedies. As for equitable considerations, the district asserts that the parent never intended to accept a public school placement, did not even give the appearance of cooperation, failed to attend the June 2012 CSE meeting, never visited the assigned public school site, and provided the district with an inadequate and boilerplate 10-day notice of unilateral placement. Next, the district asserts that the IHO erred in fashioning relief in the form of direct payment of tuition to Cooke, noting that the parent was not liable for any payments by way of the contract and produced no evidence of a lack of financial ability to pay. Furthermore, the district asserts that the IHO's award of tuition was "wholly inappropriate" and "intended to mollify Cooke . . . , a non-party to this action."

In an answer and cross-appeal, the parent restates many of the assertions found in her due process complaint notice, including that: the district failed to perform evaluations of the student despite the parent's consent; the June 2012 CSE lacked up-to-date evaluative information; the student's present levels of educational performance set forth in the June 2012 IEP failed to accurately or fully describe the student; the June 2012 IEP did not set forth any of the student's diagnoses; the 15:1 special class placement recommended by the June 2012 CSE was not appropriate; the transition plan included in the June 2012 IEP was inadequate; and the assigned public school site and proposed classroom were not appropriate for the student. The parent also asserts for the first time on appeal that: (a) the district did not translate the June 2012 IEP into the parent's native language; (b) no regular education teacher attended the June 2012 CSE meeting; and (c) the Cooke staff who participated at the June 2012 CSE meeting were ignored, thus precluding the parent from an opportunity to meaningfully participate in the development of the student's IEP.

The parent asserts that the IHO erred in finding that equitable considerations did not weigh in favor of an award of tuition. In response to the district's claims regarding her motive for not attending the June 2012 CSE meeting, the parent asserts she was unable to attend due to a medical issue, so her social worker attended in her place. Finally, the parent asserts that she established at the impartial hearing that she could not afford the tuition payments at Cooke but remained legally obligated to do so. Consequently, the parent seeks an order reversing that portion of the IHO's decision that reduced the amount of tuition awarded for the student's attendance at Cooke for the 2012-13 school year.

In an answer to the parent's cross-appeal, the district reiterates the arguments contained in the petition and asserts that the parent's contentions and allegations contained within her answer and cross-appeal have no merit.

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 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]).

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. June 2012 IEP

1. Evaluative Information and Present Levels of Performance

The district asserts that the IHO erred in finding that the June 2012 IEP lacked current information and that the district's failure to obtain additional assessments rendered the IEP inappropriate to the degree that it failed to offer the student a FAPE (IHO Decision at p. 11). However, a review of the hearing record shows that the CSE had available and relied upon a substantial amount of information about the student's then-current skills and needs, which were reflected in the June 2012 IEP.

An evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things, the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]), and evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018). A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district agree otherwise (34 CFR 300.303[b][1]; 8 NYCRR 200.4[b][4]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). No single measure or assessment should be used as the sole criterion for determining an appropriate educational program for a student (8 NYCRR 200.4[b][6][v]).

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

to fill in gaps in the initial review of existing evaluation data (20 U.S.C. § 1414[c][2]; see also D.B. v. New York City Dep't of Educ., 2013 WL 4437247, at *9 [S.D.N.Y. Aug. 19, 2013]).

According to the district school psychologist, the June 2012 CSE reviewed the student's August 2010 district psychoeducational evaluation report, the November 2011 classroom observation of the student at Cooke, the June 2012 Cooke progress report, an undated set of transition goals developed by Cooke, and the student's IEP for the 2011-12 school year (Tr. pp. 56-58, 62, 75-77, 95; see Dist. Ex. 4; 8; 9; 15).[5] Additionally, the Cooke consulting teacher, who participated during the entirety of the two hour long meeting, verbally presented to the June 2012 CSE information about the student's ELA, speech-language, counseling, and transition needs and abilities (Tr. pp. 74, 76-77, 131, 137, 163-66; see Dist. Exs. 10; 12; 13; 14). The student's Cooke mathematics teacher also participated during the June 2012 CSE meeting and verbally provided information about the student's mathematics skills (Tr. pp. 61, 164; see Dist. Ex. 11).

The hearing record shows that the June 2012 CSE developed the IEP present levels of performance and management needs from information Cooke provided and the discussion held during the CSE meeting (Tr. pp. 65-76; Dist. Exs. 16 at pp. 1-6; 17 at pp. 1-2; 18 at pp. 1-3). A careful comparison between the June 2012 Cooke progress report, the June 2012 Cooke IEP annual review discussion documents, the CSE meeting minutes prepared by both the district school psychologist and the Cooke consulting teacher, and the June 2012 IEP present levels of performance shows a high degree of correlation (compare Dist. Exs. 10-15; 16; 17, with Dist. Ex. 18 at pp. 1-3).

The June 2012 IEP contains the results of the May 2012 reading assessments Cooke conducted that were discussed during the CSE meeting (Dist. Exs. 10 at p. 1; 16 at p. 1; 17 at p. 1; 18 at p. 1). The June 2012 IEP indicated that the student's performance on measures of reading generally fell between a sixth to seventh grade level and that his reading comprehension skills were at an eighth grade level (Dist. Ex. 18 at p. 1; see Dist. Exs. 10 at p. 1; 16 at p. 1; 17 at p. 1). According to the June 2012 IEP, the student received ELA instruction in a 12:1+1 class ratio and worked in small groups of four students (id.). The June 2012 IEP indicated that the student's sentence comprehension was a relative strength and that he was developing an awareness of comprehension strategies, summarizing key details independently, and developing strategies to read with increased fluency (Dist. Ex. 18 at p. 1; see Dist. Exs. 10 at p. 1; 16 at pp. 1-2; 17 at p. 1). In writing, the June 2012 IEP stated that the student was working on the writing process with a variety of genres (Dist. Ex. 18 at p. 1; see Dist. Exs. 10 at p. 1; 16 at p. 2). Using graphic organizers and checklists for editing, the June 2012 IEP indicated that the student could write two clear, cohesive, sequenced paragraphs, and was working on writing research articles and synthesizing information from two or more sources into his own words (id.). The IEP also noted that the student needed support identifying fact versus opinion and organizing new material (id.). Additionally, the June 2012 IEP indicated that the student benefitted from multisensory methods, the opportunity for repetition, and modeling of expected behavior and outcomes (id.). According to the June 2012 IEP, the student needed redirection and prompting in group settings but did well with small guided lessons when the teacher modeled the expected outcome and behavior and when the student was provided with time for guided and independent practice (id.). The June 2012 IEP

[5] The student's IEP for the 2011-12 school year was not included in the hearing record.

indicated that the student required checklists and graphic organizers to remain on topic when participating in group discussions and activities (id.).

The hearing record shows that the June 2012 CSE discussed the results of the May 2012 mathematics assessment Cooke administered to the student (Dist. Exs. 16 at p. 3; 17 at p. 1; see Dist. Ex. 11 at p. 1).[6] In the area of mathematics, the June 2012 IEP indicated that the student enjoyed math, participated, and did his "best work" (Dist. Ex. 18 at p. 1; see Dist. Exs. 11 at p. 1; 16 at p. 3; 17 at p. 1). Although the IEP indicated that the student demonstrated a desire to socialize and had developed positive relationships with his classmates, he struggled socially with many of his peers and with using appropriate and relevant conversation starters (Dist. Ex. 18 at p. 1; see Dist. Exs. 11 at p. 1; 16 at p. 3). The June 2012 IEP stated that "computationally," the student was able to complete the work, he was "procedural" in his understanding of math concepts, and he had exhibited progress with division facts and understanding how math concepts relate to the real world (id.). According to the June 2012 IEP, given his computation skills and strong vocabulary, the student's challenge was to understand that numbers and words were related (Dist. Ex. 18 at p. 2; see Dist. Ex. 11 at p. 1). The June 2012 IEP indicated that the student demonstrated awareness of how to answer direct questions pertaining to operations and that he should continue to develop his math vocabulary repertoire (Dist. Ex. 18 at p. 2; see Dist. Ex. 11 at pp. 1-2). Although the June 2012 IEP stated that the student understood math concepts, it also described his conceptual understanding of math concepts as "scattered," indicating that he only retained them "for the short term" and struggled to recall previous concepts once a new topic was introduced (Dist. Ex. 18 at p. 1; see Dist. Exs. 11 at p. 1; 16 at p. 3). According to the June 2012 IEP, in mathematics, the student repeatedly asked questions until he was asked to stop, and asked unrelated, off-topic questions (id.). The June 2012 IEP indicated that the student often understood new concepts presented verbally in a whole group setting and that he required reteaching of materials to be able to work independently (Dist. Ex. 18 at p. 1; see Dist. Exs. 11 at p. 1; 16 at p. 4). The June 2012 IEP stated that the student learned best and was most successful when provided the opportunity to talk through steps with a teacher with fading prompts (id.).

The June 2012 IEP reflected the results of a 2010 social language assessment, which yielded a standard score of 66 (1st percentile), and a March 2012 conversation rubric that indicated the student achieved 8 out of 15 items (Dist. Ex. 18 at p. 2; see Dist. Exs. 12 at p. 1; 14 at pp. 1-2; 16 at p. 5). According to the June 2012 IEP, the student initiated conversation with peers, asked relevant questions and made relevant comments to maintain the conversation (Dist. Ex. 18 at p. 2; see Dist. Ex. 12 at p. 1). The June 2012 IEP described the student's specific interests, noting that he enjoyed projects involving some degree of socialization (Dist. Ex. 18; see Dist. Ex. 11 at p. 1). Information included in the June 2012 IEP indicated that the student responded to "wh" questions posed by peers, asked "topical" questions during conversations, and labeled emotions (Dist. Ex. 18 at p. 2; see Dist. Ex. 12 at p. 1). The June 2012 IEP reflected that the student continued to work on appropriately terminating a conversation, exhibiting nonverbal cues to indicate interest in others, identifying nonverbal cues, using social language, expressing his opinions, describing his experiences, and using nonverbal cues to make logical inferences (id.). According to the June 2012 IEP the student's ability to summarize and make inferences using prior knowledge had improved, and his inferences contained references to relevant facial expressions, body language,

[6] The May 2012 administration of a test identified in the hearing record as the "GMADE" yielded a grade equivalent of 4.8 (Dist. Exs. 11 at p. 1; 16 at p. 3; 17 at p. 1). The June 2012 IEP indicated that, in May 2012, the student achieved a grade equivalent of 3.8 on the GMADE, which appears to be a typographical error (see Dist. Ex. 18 at p. 1).

and environmental cues (Dist. Ex. 18 at p. 2; see Dist. Exs. 12 at p. 1; 16 at p. 5). According to the counselor report reflected in the June 2012 IEP, the student was very outgoing, had several friends at school, and was working on the depths and quality of his friendships, and also friendships outside of school (Dist. Ex. 18 at p. 2; see Dist. Exs. 13 at p. 1; 16 at p. 5). The June 2012 IEP noted that, at times, the student struggled to interact with peers and adults at school and in the community (id.). The June 2012 IEP indicated that the student often asked inappropriate questions, required consistent redirection, and could become distracted by social interactions and engage in attention seeking behavior (id.). Strengths identified in the June 2012 IEP included that the student was friendly, generally got along with others, was motivated, and wanted to do well and please others (Dist. Ex. 18 at p. 2; see Dist. Ex. 13 at p. 1). The June 2012 IEP reported parental concern that the student needed to increase self-awareness and social skills for interacting with peers and adults (Dist. Ex. 18 at p. 2; see Dist. Exs. 13 at p. 1; 16 at p. 5).

The hearing record reflects that the Cooke consulting teacher provided the June 2012 CSE with information related to the student's needs addressed by occupational therapy (OT) (Tr. pp. 74, 80-81, 139; Dist. Ex. 15 at p. 1). The June 2012 IEP indicated that the student had achieved all of his developmental milestones and goals and that his OT services at Cooke had been terminated (Dist. Ex. 18 at p. 2; see Dist. Ex. 15 at p. 1). As reflected in the June 2012 IEP, the occupational therapist recommended that the student be seen on an "at risk basis" for life skills (Dist. Ex. 18 at p. 2; see Dist. Ex. 16 at p. 5). According to the June 2012 IEP, the student was in good health, wore glasses, and had received diagnoses including ADHD and "mild" autism (Dist. Ex. 18 at p. 2; see Dist. Exs. 16 at p. 5; 17 at p. 2). The June 2012 IEP noted that the student was not administered medication "for ADHD-Inattentive type" but was under the weekly care of a therapist to address his attention deficits (Dist. Ex. 18 at p. 2; see Dist. Exs. 16 at pp. 5-6; 17 at p. 2). The June 2012 IEP indicated that the parent did not have any concerns about the student's physical development at that time (Dist. Ex. 18 at p. 3; see Dist. Ex. 17 at p. 2).

The June 2012 CSE discussed and included the following management needs in the student's IEP: repetition and review, direct teacher modeling, scaffolding support, directions read and reread, small group instruction, graphic organizers and checklists, teacher redirection, extended time for all assignments, collaboration with the speech-language therapist to target language skills, limited amount of questions not related to topic, individualized attention, occasional calculator use, consistent opportunities for generalization, visual cues to promote socially appropriate nonverbal language, and social scripts (Tr. p. 74; Dist. Ex. 18 at pp. 2-3; see Dist. Ex. 16 at p. 4). Additionally, the June 2012 IEP indicated that the student benefitted from one-to-one redirection and reteaching in each newly-presented context (Dist. Ex. 18 at p. 2). The June 2012 IEP reflected that the student "continued to require a small class setting to address his academic needs (id. at p. 3).

Contrary to the IHO's finding that the June 2012 IEP lacked current information regarding the student, as described above, the June 2012 CSE had ample information about the student's then-current skills and needs and, following discussion at the CSE meeting, incorporated that information into the IEP (compare Dist. Exs. 10-14; 16-17; with Dist. Ex. 18 at pp. 1-4). The IHO's finding that the June 2012 CSE lacked current information about the student appears predicated on the district's October 2011 request for the parent's consent to conduct additional assessments, which the IHO determined were not done (IHO Decision at pp. 10-11; see Dist. Ex. 3). The October 2011 request for consent form indicated that the "assessment process may include a psycho-educational evaluation, a classroom observation, and other appropriate assessments or evaluations as necessary to determine your child's educational needs" (Dist. Ex. 3). Subsequent to

the receipt of the parent's consent, on November 1, 2011, the district conducted a classroom observation of the student at Cooke, and the hearing record shows that the district had conducted a psychoeducational evaluation of the student in August 2010 (see Dist. Exs. 4; 8).[7] The school psychologist testified that the June 2012 CSE identified the student's areas of strengths and weaknesses and present levels of performance and concluded that it did not require any additional evaluations to complete the IEP (Tr. pp. 86-87). She further testified that at no time after the CSE meeting did she receive any requests from the parent asking for additional evaluations of the student (Tr. p. 87). Given that the district conducted a psychoeducational evaluation within three years of the June 2012 CSE meeting and a classroom observation of the student during the school year in which the CSE convened, in addition to the extensive information provided to the CSE by Cooke, the hearing record supports a finding that the evaluative information available to the CSE was adequate.

To the extent that the parent asserts that the district failed to conduct evaluations to "address" the student's diagnoses of an ADHD and an autism spectrum disorder, federal and State regulations do not require the district to offer the student a "diagnosis;" instead, they require the district to conduct an evaluation to "gather relevant functional developmental and academic information" about the student to determine whether the student falls into one of the disability categories under the IDEA and information that will enable the student be "involved in and progress in the general education curriculum" (34 CFR § 300.304[b][1]; see 8 NYCRR 200.4[b][1]).[8] Courts have given considerably less weight to the identification of the underlying theory or root causes of a student's educational deficits and have instead focused on ensuring the parent's equal participation in the process of identifying the academic skill deficits to be addressed though special education and through the formulation of the student's IEP (see Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011] [noting the IDEA's strong preference for identifying the student's specific needs and addressing those needs and that a student's "particular disability diagnosis" in an IEP "will, in many cases, be substantively immaterial" because the IEP is tailored to the student's individual needs]; Draper v. Atlanta Indep. Sch. Sys., 480 F. Supp. 2d 1331, 1342 [N.D. Ga. 2007]; see also Application of the Dep't of Educ., Appeal No. 12-013; Application of a Student with a Disability, Appeal No. 09-126 [noting that "a student's special education programming, services and placement must be based upon a student's unique special education needs and not upon the student's disability classification"]). As detailed above, the June 2012 IEP described the student's difficulty with attention, social skills and pragmatic language skills, and recommended supports within the management needs section of the IEP, counseling, and speech-language therapy to address the student's deficits and needs (Dist. Ex. 18 at pp. 1-3; 13).

The parent further asserts that the June 2012 CSE failed to rely on, and the June 2012 IEP failed to include, information from the August 2010 district psychoeducational evaluation report. A review of the August 2010 psychoeducational evaluation report indicated that the student's

[7] In the November 2011 classroom observation report, the school psychologist indicated that the student participated in class, was very verbal, appeared to be motivated during the lesson, maintained good effort, and required little prompting to stay on task in a classroom of 12 students, one teacher, and one teacher assistant (Dist. Ex. 4).

[8] The district school psychologist testified that the CSE knew of the student's autism based on the prior year's IEP (Tr. p. 98). The June 2012 IEP attributed information about the diagnosis to the parent (Dist. Ex. 18 at p. 2). The hearing record itself is devoid of information regarding whether the student has received an actual clinical diagnosis of either autism or ADHD.

verbal, performance, and full scale IQ were in the borderline range of cognitive functioning (Dist. Ex. 8 at p. 8). Academically, the report indicated that the student's overall reading and writing abilities were in the borderline range and his mathematics skills were in the extremely low range (id. at pp. 3-4). The evaluator reported that the student did not distinguish his interest level among the careers surveyed on a career inventory; rather that he indicated a strong interest in all areas (id. at p. 5). The student's communication skills were marked by a "great deal of spontaneous conversation," but with many tangential comments noted (id.). According to the report the student spoke in a "monotone and mechanical manner," and projective measures yielded results suggestive of dependency, defensive attitudes, and evasiveness (id.). Although distractible, according to the evaluator, the student was easily redirected to tasks (id.). While the parent is correct that the June 2012 IEP does not reflect information from the psychoeducational evaluation report regarding the student's cognitive functioning, both the evaluation report and the IEP describe the student's below average reading, writing, and mathematics skills and difficulty with social communication and attention, such that this deficiency fails to rise to the level of a denial of a FAPE (compare Dist. Ex. 8, with Dist. Ex. 18 at pp. 1-3).

In summary, the evidence in the hearing record demonstrates that the June 2012 CSE adequately considered and reviewed a variety of sources to ascertain information about the student's abilities and needs and developed the student's June 2012 IEP based on this information. Based on the foregoing, the parent's assertions regarding the sufficiency of the evaluative data and its consideration by the June 2012 CSE are not supported by the hearing record and must be dismissed (see J.C.S. v Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *10 [S.D.N.Y. Aug. 5, 2013]; D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at *8 [S.D.N.Y. Oct. 12, 2011]; see also Application of a Student with a Disability, Appeal No. 11-041).

2. Annual Goals

With respect to the annual goals developed by June 2012 CSE, the IHO found that the IEP's annual goals were "infected" with what he perceived to be a lack of current information about the student (IHO Decision at p. 11). The district alleges that the IHO did not address the issue of the appropriateness of the annual goals, but, nonetheless, asserts that the June 2012 IEP included appropriate annual goals. 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 CSE (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

The hearing record shows that the June 2012 CSE discussed the annual goals that the Cooke representatives presented during the meeting (Tr. pp. 78-80; Dist. Ex. 17 at p. 3; see Dist. Ex. 18 at pp. 4-12). The June 2012 IEP included 24 annual goals developed to address the student's needs, as described in the student's present levels of performance, in the areas of transition and work preparedness, personal management, written language, reading, mathematics, social skills, and expressive, receptive, and pragmatic language(Dist. Ex. 18 at pp. 1-12, 15-16). A review of the IEP shows that the CSE developed the annual goals directly from information contained in the June 2012 Cooke progress report and the Cooke IEP transition and annual review discussion

documents, which the Cooke consulting teacher and mathematics teacher discussed with the June 2012 CSE (compare Dist. Ex. 18 at pp. 4-12, with Dist. Exs. 9-13; 15 at pp. 4, 19; see Dist. Ex. 17 at p. 3). In this case, a review of the annual goals included in the June 2012 IEP demonstrates that they addressed the student's deficits as identified in the present levels of performance contained in the IEP, as described above.

3. Transition Plan

Although the IHO failed to reach a determination regarding the parent's assertion that the June 2012 IEP transition plan was inadequate, the parent asserts that the statement of transition activities to facilitate the student's movement from school to post-secondary activities was "vague" and that the June 2012 IEP failed to include the name of the school district or agency responsible for the provision of transition services. The IDEA—to the extent appropriate for each individual student—requires that an IEP must focus on providing instruction and experiences that enables the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34][A]; see Educ. Law § 4401[9]; 34 CFR 300.43; 8 NYCRR 200.1[fff]). Transition services must be "based on the individual child's needs, taking into account the child's strengths, preferences, and interests" and must include "instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation" (20 U.S.C. § 1401[34][B]-[C]; 34 CFR 300.43[a][2]; 8 NYCRR 200.1[fff]).

As noted previously, the June 2012 CSE discussed the student's transition needs and activities, as described in the Cooke IEP transition document and by the Cooke consulting teacher (Tr. pp. 76-77; Dist. Ex. 9; see Dist. Ex. 16 at p. 6). The June 2012 IEP included a coordinated set of transition activities to address the student's needs with respect to instruction, related services, community experiences, development of employment and other post-school adult living objectives, and acquisition of daily living skills—information that came directly from the Cooke IEP transition document (compare Dist. Ex. 18 at pp. 15-16, with Dist. Ex. 9 at p. 3). Specifically, in the area of instruction, the June 2012 IEP indicated that the student would participate in work study and receive instruction in life skills, community travel, and budgeting/money management activities (Dist. Ex. 18 at p. 15; see Tr. pp. 77-78; Dist. Ex. 9 at p. 3). In related service areas, the June 2012 IEP identified counseling and speech-language therapy as needed services and indicated that the student would participate in small group activities to develop awareness of common job areas, self-awareness, and social interaction skills with unfamiliar adults (Dist. Ex. 18 at p. 15; see Dist. Ex. 9 at p. 3). The June 2012 CSE also recommended activities targeted to address the student's community experiences, including that the student would practice handling money and budgeting, develop personal finance skills, use the public library, and receive instruction in travel readiness (Dist. Ex. 18 at pp. 15-16; see Dist. Ex. 9 at p. 3). To develop employment and post-school adult living objectives, the June 2012 IEP indicated that the student would participate in small group vocational activities and work study (Dist. Ex. 18 at p. 16; see Dist. Ex. 9 at p. 3). Additionally, the June 2012 IEP indicated that the student needed to practice and/or participate in daily living skills, such as using household utilities and routines, money-handling, and budgeting (id.). Based on the foregoing, the coordinated set of transition activities set forth in the June 2012 IEP cannot be described as "vague."

Finally, with respect to the transition plan, the parent is correct that the June 2012 IEP failed to identify the school district or agency responsible for providing the services recommended (Dist. Ex. 18 at pp. 16-17; see 8 NYCRR 200.4[d][2][ix][e]). While, under the circumstances of

this case, this deficiency in the transition plan does not rise to the level of a denial of a FAPE, the district is hereby reminded of its obligation to conform to the requirements of the statute (see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at * 9 [Mar. 21, 2013] [observing that a deficient transition plan is a procedural flaw]; see also K.C. v. Nazareth Area Sch. Dist., 806 F. Supp. 2d 806, 822-26 [E.D. Pa. 2011]).

4. 15:1 Special Class Placement

The district asserts that the June 2012 CSE's recommendations for a 15:1 special class placement for the student's "core academic subjects," in conjunction with other supports included in the June 2012 IEP, were appropriate and constituted the student's LRE. On a different basis than articulated by the IHO, a review of the hearing record supports the conclusion that the 15:1 special class recommendation was not reasonably calculated to enable the student to receive educational benefits.

The IHO concluded that, since the June 2012 IEP recommended that the student receive his core academic instruction in a special class but was silent as to the non-core instruction, the CSE recommended that the student receive the remainder of his instruction in a general education classroom (IHO Decision at p. 11). Thus, as no regular education teacher participated in the formulation of the student's IEP, the IHO concluded that the district failed to offer the student a FAPE (id.). The district asserts that the IHO lacked jurisdiction to make this finding, as the issue was not raised in the parent's due process complaint notice. The IDEA provides that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in the 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][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][i][b]; 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., 2013 WL 3975942, at *8-*9; B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at *6 [S.D.N.Y. May 14, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *9 [S.D.N.Y. Mar. 28, 2013]; S.M. v. Taconic Hills Cent. Sch. Dist., 2013 WL 773098, at *4 [N.D.N.Y. Feb. 28, 2013]; DiRocco v. Bd. of Educ., 2013 WL 25959, at *23 [S.D.N.Y. Jan. 2, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012]; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *12 [S.D.N.Y. 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; see K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL 3814669 [2d Cir. July 24, 2013]). 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 those issues (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]). In this case, the parent's due process complaint notice cannot be reasonably read to assert that the lack of a regular education teacher at the June 2012 CSE deprived the student of a FAPE for the 2012-13 school year (see Parent Ex. F). Moreover, a further review of the hearing record shows that the parent did not further amend her due process complaint notice to include this issue. In fact, although the district objected to the parent's line of questioning regarding this issue, rather than rule on the objection, the IHO elicited further testimony on the issue (see Tr. pp. 140-142). Accordingly, the IHO exceeded his

jurisdiction by addressing this issue and finding that the lack of a general education teacher at the June 2012 CSE deprived the student of a FAPE.

The district also appeals the IHO's finding that, given the lack of evaluative information, the June 2012 CSE's recommendation for a 15:1 special class in a community school was not appropriate for the student.[9] As noted above, the June 2012 CSE had sufficient information with which to formulate the student's IEP. Nonetheless, a review of the hearing record reveals that the 15:1 special class recommendation was not reasonably calculated to enable the student to receive educational benefits.

As stated previously, the June 2012 CSE recommended placement of the student in a 15:1 special class for five periods per week each of mathematics, ELA, social studies, and science instruction (Dist. Ex. 18 at p. 13). State regulations provide that a 15:1 special class placement is designed to address students "whose special education needs consist primarily of the need for specialized instruction which can best be accomplished in a self-contained setting" (8 NYCRR 200.6[h][4]). The school psychologist stated that a 15:1 placement was a "small structured class" in which the student could receive small group instruction (Tr. pp. 81-82).

The hearing record shows that the June 2012 CSE was aware that at Cooke the student received ELA and math instruction in a 12:1+1 and 7:1+1 setting, respectively (Dist. Ex. 16 at pp. 1, 3). When asked why the June 2012 CSE recommended the "less restrictive" 15:1 setting for academic instruction, the school psychologist testified that the CSE's recommendation was based on the results of the student's standardized mathematics and reading tests and his then-current levels of performance as shared by the Cooke teacher (Tr. pp. 107-08). The school psychologist further testified that she and the special education teacher recommended the 15:1 special class because the student's reading comprehension skills were at an eighth grade level and because of the "profile" of other students in 15:1 special class placements (Tr. p. 83).

However, even if the student's reading and math performance levels were consistent with other students typically placed in 15:1 special classes, according to the information available to the CSE and included in the June 2012 IEP, the student exhibited management needs requiring supports beyond those available in a 15:1 special class (see Dist. Exs. 10-14). As indicated above, a 15:1 special class is designed for students whose special education needs "consist primarily of the need for specialized instruction" and is not specifically intended for students with significant management needs (see 8 NYCRR 200.6[h][4]).[10] The June 2012 IEP present levels of performance indicated that the student required supports such as repetition and review, direct teacher modeling, scaffolding support, directions read and reread, small group instruction, graphic organizers and checklists, teacher redirection, extended time for all assignments, collaboration

[9] On appeal, the parent asserts that the June 2012 CSE did not consider placing the student in a 12:1+1 special class in a community school (Pet. ¶ 73). While with the hearing shows that the CSE may not have considered other placement options for the student (Tr. p. 110; Dist. Ex. 18 at pp. 17, 19), the issue is raised by the parent for the first time on appeal and therefore exceeds the scope of my review.

[10] In contrast, state regulations contemplate a 12:1+1 special class for those students whose management needs interfere with the instructional process, an 8:1+1 special class for students whose management needs are determined to be intensive, and a 6:1+1 for student whose management needs are determined to be highly intensive (8 NYCRR 200.6[h][4][i]-[ii]). State regulations define management needs as "the nature of and degree to which environmental modifications and human or material resources are required to enable the student to benefit from instruction" (8 NYCRR 200.1[ww][3][i][d]).

with the speech-language therapist to target language skills, limited amount of questions not related to topic, individualized attention, occasional calculator use, consistent opportunities for generalization, visual cues to promote socially appropriate nonverbal language, and social scripts (Tr. p. 74; Dist. Ex. 18 at pp. 2, 3; see Dist. Ex. 16 at p. 4). Additionally, the June 2012 IEP indicated that the student benefitted from one-to-one redirection and reteaching in each newly presented context (Dist. Ex. 18 at p. 2).

Further, the school psychologist testified that the June 2012 CSE recommended the 15:1 special class for the student, in part, because his social skills were "well developed," in that he related well with teachers and peers, and that, in her opinion, the student's social skills were a "relative strength" (Tr. p. 81). However, according to information provided by the student's Cooke ELA and mathematics teachers and included in the June 2012 IEP, the student needed redirection and prompting in group settings, and checklists and graphic organizers to remain on topic when participating in group discussions and activities (Dist. Exs. 10 at p. 1; 18 at p. 1). Additionally, in mathematics, the student struggled socially with many other peers and when initiating conversation and, at times, asked unrelated questions or repeatedly asked questions until asked to stop (Dist. Exs. 11 at p. 1; 18 at p. 1). The June 2012 IEP present levels of social performance, as described in greater detail above, indicated that the student at times engaged in attention-seeking behavior, became distracted by social interactions, and exhibited deficits in conversation skills and in producing/identifying nonverbal cues (Dist. Ex. 18 at p. 2).

Therefore, a review of the hearing record supports the conclusion that the student's management needs—exhibited in his academic classes at Cooke despite student-to-teacher ratios that provided additional adult assistance—required a level of support not inherently available in a 15:1 special class.

Also problematic is the lack of an indication in the June 2012 IEP of what, if any, special education services the student would receive during the remaining instructional periods of the school day.[11] According to the school psychologist, the school week consisted of approximately 35 instructional periods, 20 of which were accounted for by the 15:1 special class recommendation for the student's academic courses (Tr. p. 111; Dist. Ex. 18 at p. 13). The school psychologist acknowledged that the June 2012 IEP did not reflect the type of setting contemplated for the remaining 15 instructional periods per week, which included "elective" courses (Tr. pp. 111-12). She further testified that she could not guarantee that the student would be in a 15:1 special class setting for the entire school day and that an "administrator" would make the decision whether or not the student's electives would be provided in a small classroom setting (Tr. p. 112). Nothing in the hearing record is contrary to the IHO's conclusion that the student "would be placed in a [g]eneral [e]ducation class for the remainder of the day," and the hearing record does not support a finding that placement in a general education setting was appropriate for the student (IHO Decision at p. 11; see Dist. Exs. 4; 8-15).

Based on all of the foregoing, the evidence contained in the hearing record fails to establish that the district's recommended educational program, consisting of a 15:1 special class in core academic subjects, was reasonably calculated to enable the student to receive educational benefits for the 2012-13 school year.

[11] The hearing record is unclear whether the three sessions per week of the student's related service sessions are included as "instructional periods" (see Tr. pp. 111-12; Dist. Ex. 18 at p. 13).

B. Challenges to the Assigned Public School Site

Although the IHO did not address the issue, the parent asserts the claims from her due process complaint notice that the district could not properly implement the student's June 2012 IEP at the assigned public school site.

Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L. v. New York City Dep't of Educ., 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., 530 Fed. App'x at 87; 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 a student would be placed in 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 Dep't of Educ. (Region 4), 526 Fed. App'x 135, 141, 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., 530 Fed. App'x at 87 [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 (see C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13

[S.D.N.Y. Dec. 23, 2013] [holding that "a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]). 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. 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 was "entirely speculative"]; N.K., 2013 WL 4436528, at *9 [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 view of the foregoing, the parent, in this instance, cannot prevail on the claims that the district would have failed to implement the June 15, 2012 IEP at the assigned school because a retrospective analysis of how the district would have executed the student's June 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 F.3d at 186; C.L.K., 2013 WL 6818376, at *13; R.C., 906 F. Supp. 2d at 273). In this case, these issues are speculative insofar as the parent did not accept the June 2012 IEP containing the recommendations of the CSE or the programs offered by the district and instead chose to enroll the student in a private school of her choosing (Parent Ex. G). Therefore, in these circumstances, the district was not required to demonstrate that the services were in fact delivered to the student in conformity with his IEP at the public school site when the parent rejected it and unilaterally placed her son at Cooke before the IEP went into effect.

Having found that the district's recommended 15:1 special class placement in a community school for the 2012-13 school year was not appropriate and, since the district did not appeal the IHO's determination that Cooke was an appropriate unilateral placement for the student, the next issue to consider is whether equitable considerations weigh in favor of the parent's request for the costs of the student's tuition.

C. Equitable Considerations

With respect to the IHO's determination that equitable considerations did not favor an award of tuition reimbursement, the district asserts that the parent did not truly consider a public school placement and did not cooperate with the district, as evidenced by: (a) her failure to attend the June 2012 CSE; (b) her failure to visit the assigned public school site; (c) her failure to make the CSE aware of any health concerns that would have precluded her attendance at the CSE; and, (d) her lack of contribution to the development of the student's educational program or placement. The district also asserts for the first time that the parent's notice of unilateral placement was

insufficient as a matter of law to allow for any reimbursement, as it did not state any specific concerns about the June 2012 IEP. The parent asserts that, due to her need for extensive medical and management supports, she was not physically able to attended meetings but maintains that she still actively participated in the IEP development process by proxy, by virtue of the attendance of the social worker (see Tr. pp. 161, 190). The parent also asserts that she promptly sent notice to the district requesting an on-site visit of the school but that the school could not accommodate a visit prior to the start of the school year.

The final criterion for a reimbursement award is that the parent's claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). The IDEA also provides that reimbursement may be reduced or denied when parents fail to challenge the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412 [a][10][C][iii]; 34 CFR 300.148[d]; see T.M. v. Kingston City Sch. Dist., 891 F. Supp. 2d 289, 295 [N.D.N.Y. 2012]; J.P. v. New York City Dep't of Educ., 2012 WL 359977, at *13-*14 [E.D.N.Y. Feb 2, 2012]; W.M. v. Lakeland Cent. Sch. Dist., 783 F. Supp. 2d 497, 504-06 [S.D.N.Y. 2011]; G.B., 751 F. Supp. 2d at 586-88; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, at *10 [S.D.N.Y. Mar. 18, 2010]; S.W. v. New York City Dep't of Educ., 646 F.Supp.2d 346, 362-64 [S.D.N.Y. 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; see also Frank G.v. Bd. of Educ., 459 F.3d 356, 363-64 [2d Cir. 2006]; M.C., 226 F.3d at 69 n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]).

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

In this case, the hearing record shows that the parent signed the re-enrollment contract at Cooke in April 2012, prior to the June 2012 CSE meeting (see Dist. Ex. 6). The hearing record also shows that the parent did not attend the June 2012 CSE, and instead, a social worker who worked in the parent's residence appeared on her behalf (Tr. pp. 59, 200; Dist. Ex. 18 at p. 20; see

Tr. pp. 161, 190). According to the parent, she could not attend the CSE meeting due to health reasons, first indicating that she could not walk because of difficulties with her hip and later indicating that she was in the hospital (Tr. pp. 200-01, 216). However, according to the district school psychologist, the parent's social worker informed the CSE that the parent did not attend because she was shopping with the student in celebration of his birthday (Tr. pp. 59, 125). The parent's testimony with regard to her visit to the assigned public school site was also unclear. The parent testified that she visited the assigned public school site in appropriately May 2012, prior to the June 2012 CSE meeting (Tr. pp. 205-06). Although the parent's August 24, 2012 letter to the district stated that the parent was "actively seeking information about the placement and [would] visit once the school open[ed] in September," nothing in the hearing record indicates that the parent further investigated the assigned public school site (see Parent Ex. G). In fact, the parent testified that she did not know if the assigned school "was good or bad" (Tr. p. 212). Finally, although the parent testified that, had the district offered the student an appropriate placement, she would have enrolled the student in a "school where [she] wouldn't have to pay", the hearing record shows that the student has not attended a district public school since age eight (Tr. pp. 134, 197, 213; Dist. Ex. 8 at pp. 1-2). While the foregoing considerations do not preclude an award of the costs of the student's tuition at Cooke, they do support a reduction in the amount awarded.

With respect to the district's allegations about the adequacy of the parent's 10-day notice, the hearing record also shows that the parent timely notified the district of her unilateral placement of the student at Cooke (see Parent Ex. G). However, while the parent's notice to district did provide the district with a reasonable understanding of the parent's concerns about the assigned public school site, it did not set forth the parent's specific disagreements with the June 2012 IEP (see id.; see also 20 U.S.C. § 1412[a][10][C][iii]). Furthermore, the parent did not provide the district with any clarification as to her concerns regarding the June 2012 IEP until after the IHO inquired at the pre-hearing conference and the district agreed to allow the parent to amend her due process complaint notice (Tr. pp. 3-7). Notwithstanding the foregoing, the district did not make any inquiries upon receipt of the parent's 10-day notice of the parent to try to get a better understanding of the nature of the complaint, let alone to cure any defect in the program or placement (L.K. v. New York City Dep't of Educ., 2011 WL 127063, at *12 [E.D.N.Y. 2011] [noting that the purpose of the 10-day notice was to allow the district a chance to cure whatever defects the parent may find in the public placement and provide a FAPE prior to unilateral placement]). Given this failure and the fact that the district consented to the parent's amendment of the due process complaint notice nearly seven months later, it is not equitable for the district to now raise, for the first time on appeal, that the 10-day notice was insufficient. At this point it is now raised as an afterthought by the district and inconsistent with its conduct at the impartial hearing.

Based upon the foregoing equitable considerations, the evidence in the hearing record supports the IHO's reduction in the tuition award, albeit, in part, and on different grounds. As such, the parent is entitled to an award of approximately 50 percent ($24,000, as awarded by the IHO) of the tuition for the student's enrollment at Cooke for the 2012-13 school year.

D. Relief

The IHO found that, while equitable considerations did not favor an award of tuition reimbursement, it was equally inequitable to deny Cooke any recovery for the expenses incurred in providing the student with his educational program for the 2012-13 school year, and awarded

roughly 50 percent tuition reimbursement. The hearing record supports the IHO's reduced tuition award, but for different reasons.

With regard to fashioning equitable relief, one court has addressed whether it is appropriate under the IDEA to order a school district to make retroactive tuition payment directly to a private school where: (1) a student with disabilities has been denied a FAPE; (2) the student has been enrolled in an appropriate private school; and (3) the equities favor an award of the costs of private school tuition; but (4) the parents, due to a lack of financial resources, have not made tuition payments but are legally obligated to do so (Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 406 [S.D.N.Y. 2011]). The court held that "[w]here . . . parents lack the financial resources to 'front' the costs of private school tuition, and in the rare instance where a private school is willing to enroll the student and take the risk that the parents will not be able to pay tuition costs—or will take years to do so—parents who satisfy the Burlington factors have a right to retroactive direct tuition payment relief" (Mr. and Mrs. A., 769 F. Supp. 2d at 428; see also A.R. v. New York City Dep't of Educ., 2013 WL 5312537, at *11 [S.D.N.Y. Sept. 23, 2013]). The Mr. and Mrs. A. Court relied in part on dicta from earlier cases in which similar claims seeking direct retroactive payment to a private non-approved school were asserted (see Connors v. Mills, 34 F. Supp. 2d 795, 805-06 [N.D.N.Y. 1998] [opining that such financial disputes should be resolved within the administrative hearing process]; see also S.W., 646 F. Supp. 2d at 360). The Mr. and Mrs. A. Court held that in fashioning such relief, administrative hearing officers retain the discretion to reduce or deny tuition funding or payment requests where there is collusion between parents and private schools or where there is evidence that the private school has artificially inflated its costs (Mr. and Mrs. A., 769 F. Supp.2d at 430).[12] Since the parent selected Cooke as the unilateral placement, and her financial status is at issue, I assign to the parent the burden of production and persuasion with respect to whether she has the financial resources to "front" the costs of Cooke and whether she is legally obligated for the student's tuition payments (Application of a Student with a Disability, 12-036; Application of a Student with a Disability, 12-004; Application of the Dep't of Educ., 11-130; Application of the Dep't of Educ., Appeal No. 11-106; Application of a Student with a Disability, Appeal No. 11-041).

In the present case, the hearing record shows that the parent was obligated to pay the full amount of the student's tuition for attendance at Cooke for the 2012-13 school year on or before September 30, 2012, unless she availed herself of her right to seek direct/prospective tuition reimbursement from the district, in which case, Cooke would delay the payments (Dist. Ex. 6 at p. 2). Further review of the contract demonstrates that, if the parent was unsuccessful in her attempt to secure prospective funding, she would be liable for the full amount of tuition within 60 days (id.). Thus, although the parent's testimony about the enrollment contract indicated a lack of full awareness regarding her legal obligations to pay, the terms of the contract reveal that the parent was, in fact, actually liable for the costs of the tuition (see Tr. p. 211; Dist. Ex. 6 at pp. 1-2).

Regarding the parent's proof of inability to pay the student's tuition to Cooke, the hearing record contains a letter from the Social Security Administration that states that, as of March 21, 2012, the parent received a supplemental security income (SSI) payment in the amount of $721.00 per month (Parent Ex. C). While there is little other evidence regarding the parent's financial situation, and, in particular, no further elaboration as to other sources of income, if any, or the

[12] The Court in Forest Grove noted that the remedial powers set forth in the statute are also applicable to administrative hearing officers in fashioning Burlington/Carter relief (Forest Grove, 557 U.S. at 244 n.11; see 20 U.S.C. § 1415[i][2][C][iii]).

parent's actual assets, liabilities, or expenses during any period of the time, the parent testified that she was unemployed, living in "supportive housing," a single mother of two children, and had minimal resources beyond the SSI payments (Tr. pp. 189, 191-93). The parent testified that she lacked the means to front the cost of tuition at Cooke (Tr. pp. 210-11). She indicated that she wanted the student "to work, so that way he [could] pay back all the debt" (Tr. p. 222). Based on the parent's testimony and because of the significant shortfall between the parent's income and the cost of the tuition at Cooke, the parent has met her burden of demonstrating an inability to pay the cost of the student's tuition at Cooke for the 2012-13 school year (see Tr. pp. 189, 191-93, 210-11, 222; Parent Ex. C). The parent's testimony is consistent with the documented determination by the Social Security Administration received in evidence showing that the parent was eligible for SSI, which is program under federal law designed for disabled adults and children having limited income and financial resources.

Thus, a review of the evidence in the hearing record reveals that the parent remained "legally obligated" to pay the tuition at Cooke and lacking the financial resources to front the cost of the student's tuition. Therefore, under the circumstances of this case, the parent is entitled to direct funding of a reduced amount of student's tuition at Cooke for 2012-13 school year under the factors described in Mr. and Mrs. A. (see 769 F. Supp. 2d at 406).

VII. Conclusion

Based on the foregoing, I find that the district failed to offer the student a FAPE for the 2012-13 school year and that equitable considerations support payment of a portion of the tuition costs for the student's 2012-13 school year at Cooke, in the sum of $24,000, as was awarded by the IHO.

I have considered the parties remaining contentions and find it is unnecessary to address them in light of my determinations herein.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
January 16, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER