



# The University of the State of New York

The State Education Department  
State Review Officer  
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No. 13-211

**Application of the NEW YORK CITY DEPARTMENT OF  
EDUCATION for review of a determination of a hearing officer  
relating to the provision of educational services to a student with  
a disability**

**Appearances:**

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner,  
Jessica C. Darpino, Esq., of counsel

The Law Firm of Tamara Roff, PC, attorneys for respondent, Tuneria R. Taylor, 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 respondent's (the parent's) son an appropriate program for the 2012-13 school year. The appeal must be sustained in part.

### II. Overview—Administrative Procedures

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

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the

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

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

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

On March 28, 2012, the CSE convened to conduct the student's annual review and to develop an IEP for the 2012-13 school year (see Dist. Ex. 3 at pp. 1, 14).<sup>1</sup> Finding that the student remained eligible for special education and related services as a student with an intellectual disability, the March 2012 CSE recommended a 12-month school year program in a 12:1+1 special class placement at a specialized school with related services consisting of two 40-minute sessions per week of individual speech-language therapy, one 40-minute session per week of speech-language therapy in a small group, one 40-minute session per week of individual physical therapy (PT), one 40-minute session per week of individual occupational therapy (OT), one 40-minute

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<sup>1</sup> At the time of the March 2012 CSE meeting, the student had continuously attended the Cooke Center for Learning and Development (Cooke) since September 2007 (see Tr. pp. 352-53). 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).

session per week of OT in a small group, and one 40-minute session per week of counseling in a small group (see id. at pp. 9-11, 14-15).<sup>2</sup> In addition, the March 2012 CSE recommended that the student participate in adapted physical education, and recommended special education transportation services (id. at pp. 13, 15). The March 2012 CSE also developed annual goals to address the student's needs with regard to decoding, reading comprehension and fluency, writing, speech-language development, mathematics, fine and gross motor skills, activities of daily living (ADL), and social/emotional development (id. at pp. 5-9). Additionally, the March 2012 CSE created postsecondary goals, and developed long-term transition goals for the student (id. at pp. 4-5).

In a letter dated June 19, 2012, the parent advised the district that because she had not received a "placement recommendation" for the student for the beginning of the 2012-13 school year in July 2012, she had placed the student at Cooke (Parent Ex. B at p. 1). The parent had, however, received the student's IEP and noted that the "12:1:1 program recommendation" would not provide "sufficient individualized instruction, attention, and support;" "some" of the annual goals were not sufficient to meet the student's needs; and the "long-term goals" were not appropriate for the student because they did not reflect his "interests" and were not discussed at the March 2012 CSE meeting (id.). The parent indicated that she would initiate an impartial due process proceeding to "pursue public funding" for the costs of the student's tuition at Cooke, and she requested that the district arrange for the student's round-trip transportation to Cooke (id.).

On June 20, 2012, the parent received a final notice of recommendation (FNR), dated June 18, 2012 (see Parent Ex. C at p. 1). By letter dated June 25, 2012, the parent advised the district that she could not accept the "proposed school" until she could visit to determine whether it was appropriate for the student (id.). At that time, she requested a "class profile, program description, information regarding the curriculum used, and information regarding the services/supports available" (id.). The parent also repeated the concerns expressed regarding the student's March 2012 IEP in her previous letter, dated June 19, 2012, and her intention to seek public funding for the student's placement at Cooke through an impartial due process proceeding (compare Parent Ex. C at p. 1, with Parent Ex. B at p. 1). According to the hearing record, the parent visited the assigned public school site on June 26, 2012 (see Tr. pp. 362-64).

On July 2, 2012, the student began attending Cooke's 2012 summer program, and continued his enrollment at Cooke for the remainder of the 2012-13 academic school year (see Parent Exs. H at pp. 1-2; I at pp. 1-2; J).<sup>3</sup> According to the hearing record, the parent returned for a second visit to the assigned public school site on July 13, 2012, with a staff member from Cooke (see Tr. pp. 362-64). The parent testified that she signed the Cooke 2012 summer program enrollment contract after her second visit to the assigned public school site on July 13, 2012 (see Tr. pp. 363-72, 379-80).

By letter dated July 23, 2012, the parent notified the district that she had visited the assigned public school site and based upon her observations and conversations with staff, it was not appropriate for the student (see Parent Ex. D at pp. 1-2). The parent indicated that the classroom

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<sup>2</sup> The student's eligibility for special education programs and related services as a student with an intellectual disability is not in dispute (see 34 CFR 300.8[c][6]; 8 NYCRR 200.1[zz][7]).

<sup>3</sup> The hearing record contains two enrollment contracts with Cooke for the student's attendance during the 2012-13 school year, which the parent signed, but did not date (see Parent Exs. H at pp. 1-2; I at pp. 1-2).

size and staff ratio was too large and distracting for the student and did not comply with the recommendation in his March 2012 IEP, and the student would not have "sufficient opportunities to engage with his peers during classroom instruction" (id. at p. 1). The parent also expressed concern about the functional grouping of the students, the token reward system, the level of classroom instruction and supervision the student would receive, whether the student would receive all of his related services as set forth in the March 2012 IEP, and whether the student would have sufficient opportunities to interact with his nondisabled peers (id. at pp. 1-2). Because she did not receive specific information about the student's "proposed class or the program in September," the parent indicated that she would return for another visit to determine whether the assigned public school site would be appropriate for the student (id. at p. 2). The parent also indicated that she had not received any response to her previous letters, dated June 19 and June 25, 2012, and briefly reiterated the concerns expressed in those letters (id.). For these reasons, the parent noted that the student would continue to attend the summer program at Cooke (id.).

According to the hearing record, the parent returned for a third visit to the assigned public school site in September 2012, and she signed the Cooke enrollment contract for the remainder of the 2012-13 school year after the third visit (see Tr. pp. 363-72, 379-80).<sup>4</sup>

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

By due process complaint notice dated January 10, 2013, the parent alleged that the district did not offer the student a free appropriate public education (FAPE) for the 2012-13 school year (see Dist. Ex. 1 at pp. 1-3). Specifically, the parent asserted that the district failed to provide the parent with sufficient notice of the March 2012 CSE because it failed to advise her of the individuals expected to attend the meeting; the district failed to ask the parent what types of evaluations were necessary; the district failed to obtain sufficient evaluative data for the student in all areas of deficit; the district failed to obtain updated evaluative information with respect to the student's PT and OT needs, nor did it procure a classroom observation of the student; the March 2012 IEP contained insufficient present levels of performance because they lacked an adequate baseline from which to gauge the student's progress; the annual goals included in the March 2012 IEP were inappropriate and insufficient to address the student's needs; the district failed to assess the student's transition needs, which resulted in an inappropriate transition plan; the transition plan contained in the March 2012 IEP was developed without the participation of the parent or the student; the March 2012 IEP lacked present levels of performance in relation to the student's transition needs; and the transition plan did not provide for services to support the student in attaining the long-term adult outcomes (id. at pp. 1-2). Moreover, the parent asserted that the student's program recommendation was based on district policy, rather than the student's educational needs (id. at p. 2). She further alleged that the 12:1+1 special class placement recommendation was not appropriate because the student would not receive sufficient individualized attention (id.). Additionally, the parent alleged that the district failed to adequately consider alternative programs for the student (id.).

The parent also raised a number of allegations to support her claim that the assigned public school site was not appropriate for the student: the 12:1+1 special class would not provide the

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<sup>4</sup> By letter dated October 19, 2012, the parent informed the district about her third visit to the assigned school, and included additional reasons regarding why she determined that the assigned public school site was not appropriate for the student (see Parent Ex. F at pp. 1-2).

student with the necessary individualized structure and support; the population of the proposed classroom was too large and did not comport with the program recommendation in the March 2012 IEP; the 12:1+1 special class would not have offered the student an appropriate curriculum or instruction; the assigned public school site would not appropriately supervise the student; the functional grouping within the 12:1+1 special class would not have been appropriate for the student; the assigned public school site would not provide the student with his related services in accordance with March 2012 IEP; and the assigned public school site did not constitute a safe environment for the student because it served students for in-school suspensions (see Dist. Ex. 1 at pp. 2-3). As relief, the parent requested reimbursement of the costs of the student's tuition at Cooke for the 2012-13 school year (see id. at p. 3).

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

The IHO conducted prehearing conferences on March 13, and April 18, 2013, and on May 15, 2013, the parties continued forward with an impartial hearing, which concluded on June 21, 2013, after six days of proceedings (see Tr. pp.1-406). In a decision dated October 4, 2013, the IHO concluded that the district failed to offer the student a FAPE for the 2012-13 school year, Cooke was an appropriate unilateral placement, equitable considerations weighed in favor of the parent's requested relief, and the parent was entitled to direct payment of the costs of the student's tuition at Cooke for the 2012-13 school year (see IHO Decision at pp. 28-40).

Because the IHO found that the student's academic needs were cognitive and academic in nature, he concluded that the 12:1+1 special class placement recommended by the district was not appropriate, as it was "designed to provide intensive behavioral supports to students" (IHO Decision at p. 33). Moreover, the IHO determined that the March 2012 IEP did not address the student's learning deficits that affected his classroom functioning (id. at pp. 33-34). The IHO noted the student's need for instructional support every two minutes in order to function within the classroom setting, and based on the information that was before the March 2012 CSE, he further found that the student required a level of support comparable to the level of support he received at Cooke in order to make progress (id.). Furthermore, the IHO found that the district failed to obtain sufficient evaluative information to develop the student's March 2012 IEP or to support its recommendation of a 12:1+1 special class placement (id. at pp. 34-35). He also concluded that the district increased the student's class size without affording the parent with prior written notice (id.). Next, the IHO noted that the district failed to conduct a classroom observation of the student, which contributed to the failure to obtain sufficient evaluative information about the student and his classroom functioning (id. at p. 36). The IHO also determined that the March 2012 IEP was deficient because the present levels of performance did not sufficiently describe the student in all of his areas of need (id.). Additionally, the IHO found that the district did not incorporate appropriate transition services in the March 2012 IEP to assist the student in meeting his post-secondary goals or appropriate transition goals based on the student's preferences and interests (id. at p. 37). Finally, with regard to the parent's claims about the assigned public school site, the IHO noted that the "district simply chose not" to present evidence to establish that the assigned public school site could implement the student's March 2012 IEP, thereby requiring him to conclude that the district did not demonstrate that it offered the student a FAPE (id. at pp. 37-38).

Turning to the student's unilateral placement at Cooke, the IHO described any argument presented by the district regarding the inappropriateness of Cooke as "disingenuous" because the March 2012 CSE relied extensively on the March 2012 Cooke progress reports to develop the March 2012 IEP (IHO Decision at pp. 38-39). With respect to equitable considerations, the IHO

concluded that the parent cooperated throughout the CSE process, and did not engage in any conduct that prevented the district from developing an IEP (id. at p. 39). Finally, the IHO found that the evidence in the hearing record suggested that the parent lacked the financial ability to cover the cost of the student's tuition at Cooke for the 2012-13 school year (id. at p. 40). Under the circumstances, the IHO determined that the parent was entitled to an award of relief in the form of direct payment of the student's tuition at Cooke for the 2012-13 school year, and ordered the district to directly pay Cooke for the costs of the student's tuition (id.).

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

The district appeals, and asserts that the IHO erred in finding that the district failed to offer the student a FAPE for the 2012-13 school year, that equitable considerations weighed in favor of the parent's request for relief, and that the parent established her entitlement to direct payment of the student's tuition.<sup>5</sup> The district argues that the IHO erred in finding that the March 2012 CSE did not have sufficient evaluative information to develop the present levels of performance in the March 2012 IEP and to support its recommendation of a 12:1+1 special class placement. In addition, while the district asserts that although it did not procure a classroom observation of the student, the failure to obtain a classroom observation did not render the March 2012 IEP inappropriate, particularly in light of the amount of evaluative information available to the March 2012 CSE. Next, the district alleges that the IHO erred in concluding that the 12:1+1 special class placement was not appropriate to address the student's needs. With respect to the IHO's finding that the district did not comply with prior written notice requirements, the district contends that the IHO erred in addressing this issue, because the parent did not raise it in the due process complaint notice. In any event, the district maintains that it complied with the prior written notice requirements through the issuance of the FNR, which provided the parent with timely and appropriate notification of the student's placement in a 12:1+1 special class. Additionally, the district argues that contrary to the IHO's position, it was not required to include transition services in the student's March 2012 IEP because the student had not reached the age, pursuant to State regulation, triggering this requirement, and thus, transition goals were not necessary in order to offer the student a FAPE for the 2012-13 school year. However, the district submits that the March 2012 CSE discussed the student's need for daily living skills and transitions with the parent, and included a single, broad appropriate transition goal to highlight the student's need for support in the future.

Next, with respect to the IHO's findings in relation to the assigned public school site, the district asserts that it was not required to offer evidence to establish whether it could properly implement the student's March 2012 IEP at the impartial hearing because the parent rejected the March 2012 IEP prior to the commencement of the school year and the student never enrolled in the assigned public school site. In any event, the district alleges that the parent's allegations that the assigned public school site could not implement the March 2012 IEP were unfounded and lack support in the hearing record. Finally, the district asserts that the IHO erred in finding that equitable considerations did not preclude an award of tuition reimbursement and that the parent

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<sup>5</sup> The district did not appeal the IHO's finding that Cooke was an appropriate unilateral placement for the student for the 2012-13 school year; as such, the IHO's determination is final and binding and will not be further addressed in this decision (see 34 CFR 300.514[a]; 8 NYCRR 200.5[k]).

was entitled to direct payment of the costs of the student's tuition at Cooke for the 2012-13 school year.

In an answer, the parent seeks, among other things, to uphold the IHO's findings that the district did not offer the student a FAPE for the 2012-13 school year and that equitable considerations weighed in favor of her requested relief. The parent asserts that the IHO correctly found that the district failed to obtain sufficient evaluative information about the student's educational needs to support its recommendation of a 12:1+1 special class placement, and in particular, the district failed to conduct a classroom observation of the student. Next, the parent asserts that the IHO properly concluded that the March 2012 IEP did not contain sufficient present levels of performance in all of the student's areas of need, and alleges that the annual goals did not include a baseline. The parent also argues that the IHO properly found that the March 2012 IEP lacked an appropriate transition plan, post-secondary goals, and transitional services to implement the student's post-secondary goals. Next, the parent argues that the IHO properly found that the district failed to establish that the assigned public school site could implement the March 2012 IEP.

## 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], cert. denied, 133 S. Ct. 2802 [2013]; 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. March 2012 IEP**

#### **1. Evaluative Information and Present Levels of Performance**

Addressing the dispute regarding the sufficiency of the evaluative information available to the March 2012 CSE and the adequacy of the present levels of performance in the March 2012 IEP, a review of the hearing record does not support the IHO's findings.

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at \*12 [S.D.N.Y. Nov. 9, 2011]; Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

Among the other 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]). Furthermore, although federal and State regulations require that an IEP report the student's present levels of academic achievement and functional performance, those regulations do not mandate or specify a particular source from which that information must come, and teacher estimates may be an acceptable method of evaluating a student's academic functioning. When a student has not been attending public school, it is appropriate for the CSE to rely on the assessments, classroom observations, or teacher reports provided by the student's nonpublic school (S.F., 2011 WL 5419847, at \*10).

Participants at the March 2012 CSE meeting included a district school psychologist (who also served as the district representative), an additional parent member, the parent, a Cooke supervisor, and the student's then-current special education teacher at Cooke (via telephone) (Dist. Ex. 3 at p. 17). The district school psychologist (school psychologist) testified that in preparation for the CSE meeting, she reviewed a psychoeducational evaluation, an updated social history, and speech-language evaluation, all from February 2011, as well as a September 2011 health report and a March 2012 progress report from Cooke (Tr. p. 78; see Dist. Exs. 4-7; 9; see also Tr. pp. 103-05). Although the school psychologist could not recall specifically which documents were reviewed during the March 2012 CSE meeting, the parent testified that she did not bring any additional evaluations or reports to the CSE meeting and further, that she did not request any additional evaluations of the student at the CSE meeting, because the March 2012 CSE "had the [evaluations] from 2011" (Tr. pp. 103-05, 377-78). The school psychologist also testified that "hard copies" of the evaluations were present and available at the CSE meeting (Tr. pp. 161-62).

In February 2011, the district conducted a psychoeducational evaluation of the student in order to update his educational plan and determine if his then-current placement was meeting his needs (Dist. Ex. 4 at p. 1). The evaluating psychologist reported that the student was generally cooperative during the evaluation, looked at the examiner while a task was being presented, and responded well to directives (id.). However, according to the psychologist, the student exhibited difficulty articulating words, and his ability to express himself often exceeded his linguistic capabilities, which resulted in echolalia and incomprehensible speech (id.). The psychologist noted that while receptive language appeared to be the student's strength, his ability to understand two-step and three-step directions was limited, and the student required both verbal cues and modeling to aid him with comprehension (id.). The psychologist further indicated that the student was pleasant and generally cooperative, but as the assessment wore on, he appeared restless, had difficulty refocusing his attention, and moved around in his seat (id.). Further, the psychologist described the student as highly responsive to positive reinforcement (id.).

In the February 2011 psychoeducational evaluation, the psychologist assessed the student's cognition, academic achievement, social/emotional development, perceptual motor skills, and adaptive behavior by way of standardized tests, projective drawings, and clinical interview (Dist.

Ex. 4 at p. 2). Administration of the Wechsler Intelligence Scale for Children—Fourth Edition (WISC-4) yielded a full-scale IQ of 44, which placed the student in the "deficient" range for his age group (id. at p. 4). With respect to academic achievement, the psychologist reported that although he attempted to administer the Woodcock-Johnson III Normative Updated Tests of Achievement (WJ III NU), the student performed only the most basic and rudimentary verbal and written tasks (id. at p. 5). The psychologist indicated that the student attained a "Brief Achievement" standard score of 56 (2.3 grade equivalent) on the WJ III NU, which placed his academic skills in the "deficient" range (id. at pp. 5, 9).

To assess the student's adaptive behavior, the psychologist administered the Vineland Adaptive Behavior Scales, Second Edition (Vineland—II) to the parent (Dist. Ex. 4 at p. 2). Completion of the parent or caregiver rating form yielded domain scores for communication, daily living skills, socialization, and motor skills, as well as an adaptive behavior composite (id.). According to the psychologist, the student's adaptive behavior composite score of 78 placed the student's general adaptive functioning in the "moderately low" range (id.). The psychologist described the student's receptive language, domestic skills, and coping skills as relative strengths (id. at pp. 1, 2-3, 7, 11). He also noted the student's elevated score on the maladaptive behavior index, specifically with respect to his tendency to externalize distress (id. at p. 3). The psychologist reported that he attempted to evaluate the student's social/emotional development; however, due to the student's significant cognitive and language limitations (unintelligible speech), the assessment was discontinued (id. at p. 7). Additionally, the psychologist examined the student's perceptual-motor functioning; the student's overall performance on perceptual motor tasks was in the low average range as measured by the Bender Visual-Motor Gestalt Test, Second Edition (Bender Gestalt II) (id. at p. 6).

Ultimately, the evaluating psychologist concluded that the student was a "sweet young boy who present[ed] significant cognitive and academic deficits and [was] at risk for a constellation of learning, academic, and emotional difficulties without intervention and appropriate supports" (Dist. Ex. 4 at p. 8). The psychologist noted, however, that the student was eager to learn and responded well to direct instruction and positive feedback, and characterized these traits as positive indicators that suggested with the appropriate placement and support, the student was likely to make significant progress (id.).

In addition to the February 2011 psychoeducational evaluation, the district completed an updated social history in February 2011 (see Dist. Ex. 5 at pp. 1-3). Based upon parent report, the social history indicated that the student was progressing academically, albeit very slowly (id. at p. 2). The student's speech-language and communication skills were also evaluated in February 2011 through the administration of the Clinical Evaluation of Language Fundamentals—Fourth Edition (CELF-4) (see Dist. Ex. 7 at pp. 1-2). According to the speech-language pathologist, the student attained a core language standard score of 40, which fell in the "severe range" (id.). The speech-language pathologist reported that the student had difficulty with morphological markers and modifiers and explaining the relationship between words (id. at pp. 1-2).

Although it is not clear to what extent the March 2012 CSE reviewed the February 2011 psychoeducational evaluation, the February 2011 speech-language evaluation, or the February 2011 updated social history at the CSE meeting, the results of the standardized testing found in the February 2011 psychoeducational evaluation were reflected in the student's March 2012 IEP, as was a description of the student's health status found in the February 2011 updated social history (compare Dist. Ex. 3 at pp. 1, 3, with Dist. Ex. 4 at pp. 4, 9-12, and Dist. Ex. 5 at p. 2).

However, regardless of the parties' dispute regarding which evaluations were discussed at the March 2012 CSE meeting, the hearing record is unequivocal that the parties relied on and considered the March 2012 Cooke progress report in the development of the student's March 2012 IEP (see Tr. pp. 161-62, 354). The March 2012 Cooke progress report indicated that at Cooke, the student received instruction in reading, writing, mathematics, social studies, science, health, theater, visual arts, and gym (see Dist. Ex. 9 at p. 1). In addition, the report indicated that the student received speech-language therapy, OT, PT, and counseling as related services (*id.*). According to the March 2012 Cooke progress report, the student received classroom instruction within a variety of student-to-teacher staffing ratios, including a 4:1 ratio for reading, an 8:1+1+2 (eight students, one teacher, one assistant teacher, and two paraprofessionals) ratio for writing and mathematics, and a 13:1+1+2 ratio for science (see *id.* at pp. 2, 4, 7, 11). In addition, the student received social studies instruction in a group of eight students with one teacher and three assistant teachers (*id.* at p. 9). The March 2012 Cooke progress report included a five point scale used to describe the student's academic progress, in addition to teacher narratives (*id.* at pp. 2-11).

At the end of the first trimester at Cooke during the 2011-12 school year, the student's teacher reported that he demonstrated relative strengths in social and academic skills (see Dist. Ex. 9 at p. 1). The teacher described the student as friendly, helpful, and caring toward his fellow students (*id.*). The student arrived at school with a positive attitude and was enthusiastic about learning (*id.*). In addition, the student showed responsibility during class participation by consistently sharing his completed assignments, and the student exhibited self-initiating behavior and demonstrated growth in his self-esteem and confidence (*id.*). The teacher indicated that the student's occasional resistance to work served as an obstacle to learning, but required minimal prompting to follow instructions when exhibiting resistance (*id.*). According to the teacher, the student had episodes of being tense and during those episodes, he struggled to follow instructions (*id.*). The teacher also noted that the student's social interactions with peers were more appropriate and that the student was more patient when taking turns (*id.*). The teacher reported use of the following instructional strategies to assist the student: structured directions to help the student limit his thoughts; and the provision of one-on-one instruction, charts, and concrete materials (*id.*).

According to the student's reading instructors, he worked on skills typically associated with a kindergarten level to first grade level (Dist. Ex. 9 at p. 2). The instructors indicated that since the beginning of the year, the student advanced one guided reading level and self-corrected his reading 50 percent of the time, which demonstrated his ability to monitor his comprehension as he read (*id.* at p. 3). According to his instructors, the student's "reading miscues maintained the meaning of the original text," which indicated that the student used letter-sound information when he "reached" an unknown word (*id.*). The instructors noted that the student had a good recall of stories and that he could relate story events; however, the student needed prompting to sequence events correctly and include all story elements (*id.*). The instructors reported that the student struggled with inferential responses, but with teacher support—such as limiting choices and using illustrations—the student arrived at the correct answer (*id.*). Instructor goals included increasing the student's decoding skills through use of word patterns and improving comprehension skills by answering "wh" questions, role-playing, and note-taking during read alouds (*id.*). Overall, the March 2012 Cooke progress report indicated that the student took a subordinate or shared role in completing a task or had a primary role in completing a task for all reading skills (*id.* at p. 2).

In writing, the student was working on skills typically associated with a second grade to third grade level (Dist. Ex. 9 at p. 4). According to the instructors, the student continued to make

progress toward defining a main idea and producing written work that others could follow (*id.*). The instructors identified the student's writing strengths as his ability to generate original ideas when prompted and enthusiastically writing about events that related to his own personal experience (*id.*). The instructors described the student's handwriting as clear and legible (*id.* at pp. 4-5). However, they noted that the student struggled with independently developing and expanding upon his ideas and reported that they employed the following strategies to encourage the student to do so: posing questions to elicit connections and the provision of sentence starters (*id.* at p. 5). The instructors' goals for the student included expanding on his ideas and increasing his ability to independently produce writing with a clear and concise sense of purpose (*id.*). Overall, the progress report indicated that the student took a subordinate or shared role in completing a task or had a primary role in completing a task for all writing skills (*id.* at p. 4).

The student's mathematics instructors at Cooke reported that the student made progress comparing and ordering numbers through 1,000 and demonstrated the ability to add and subtract numbers through the thousands with accuracy (Dist. Ex. 9 at p. 7). According to the March 2012 Cooke progress report, the student continued to work on counting coin combinations and was solving multiplication facts using arrays, repeated addition, and multiplication (*id.*). The instructors noted that the student benefitted from teacher modeling and the use of visuals when problem solving (*id.*). They reported that the student independently identified equivalent combinations to make one dollar (*id.* at p. 6). Additionally, his mathematics instructors noted that the student took a subordinate or shared role in completing a task or had a primary role in completing the remainder of identified mathematics skills (*id.*).

In the student's content areas science (which focused on "kingdoms of life") and social studies (which focused on the "Jazz Age"), the March 2012 Cooke progress report indicated that the student was primarily observing the teacher model a task or taking a subordinate or shared role in completing a task (Dist. Ex. 9 at pp. 8-11).

With respect to the student's speech-language needs, the March 2012 Cooke progress report noted that the student received two therapy sessions per week in a small group and one therapy session per week individually (Dist. Ex. 9 at p. 13). The student's speech-language provider reported that the student demonstrated progress in his ability to retell a story in sequence, to categorize common objects, and to identify cause and effect (*id.*). The provider noted, however, that the student required support in order to clearly state the similarities and differences between two objects (*id.*). In addition, despite the improvement with respect to the student's syntactical skills, the student required support to generalize the skill to conversational speech (*id.*). The student also made progress with regard to labeling feelings in pictures, although he required support to identify his own feelings (*id.*). The speech-language provider further reported improvement in the student's conversational skills, but noted that he continued to require support to understand appropriate topics of conversation for different conversational partners (*id.*). The provider added that the student's speech intelligibility improved with the provision of verbal reminders to slow down (*id.*). According to the provider, the student responded well to verbal prompts and was highly motivated by social interactions, and direct instruction, interactions with peers and "constant" positive reinforcement assisted the student with developing his language skills (*id.*). Overall, the student required models and prompts or fading models and prompts for all speech-language skills (*id.* at p. 12).

With respect to the student's social/emotional needs, the student's counselor reported that the student participated in one 40-minute session of group therapy per week (Dist. Ex. 9 at p. 14).

According to the counselor, the student expressed at least five different personal thoughts or feelings successfully, but required fading prompts or models to demonstrate on-task behavior and to refrain from interrupting others and attend to conversation (*id.*). The counselor noted progress with respect to the student's ability to identify his feelings and express his thoughts and experiences with the counselor (*id.*). She also reported that the student improved his ability to listen to what his friends were saying and, when prompted, the student provided an appropriate response (*id.* at p. 15). In addition, the counselor noted that at times the student had difficulty following directions despite receiving many prompts (*id.*). Moreover, the counselor reported that the student continued to work on turn-taking, and benefitted from peer reminders and being allowed some control over the situation (*id.*). She noted that although the student's functional level remained static in these areas, they comprised skills that required time and a significant amount of practice in order to develop appropriately (*id.*).

According to the March 2012 Cooke progress report, the student also participated in one individual session per week of OT, as well as one group session per week of OT (Dist. Ex. 9 at p. 18). The report indicated that during OT sessions, all skills were worked on with fading models and prompts, including maintaining balance, using scissors, handwriting, tolerating foods, attending to tabletop or floor tasks (sensory), and buttoning small buttons (*id.* at p. 17). In addition to OT, the student participated in one individual session per week of PT and one small group session per week of PT (*id.* at p. 20). The student required models or prompts to demonstrate bilateral integration with a jump rope, motor plan agility activities and drills fluidly, and wheelbarrow walk over a therapy ball (*id.* at 19). In addition, with fading models and prompts, the student demonstrated his ability to balance on one leg while engaged in an upper-body activity, balance on a dome, and exercise without excessive fatigue (*id.*).<sup>6</sup>

In the development of the student's March 2012 IEP, the district school psychologist testified that the reports and evaluations provided sufficient information to make clinical determinations about the student, and further indicated that the student's then-current classroom teacher at Cooke and parent also provided the March 2012 CSE with additional information about the student (Tr. p. 79). In addition, although the March 2012 CSE did not have a classroom observation of the student, the school psychologist explained that she obtained information regarding the student's classroom functioning from the student's then-current classroom teacher at Cooke and that this information was sufficient (Tr. pp. 79-80, 124).<sup>7</sup> According to the school psychologist, the student's then-current teacher at Cooke informed the March 2012 CSE about the student's functional academic levels (Tr. pp. 82-83). The student's then-current teacher at Cooke also provided feedback regarding the student's management needs (Tr. p. 85). While the school psychologist acknowledged that a classroom observation offered different information than that obtained during an individual testing environment, she noted that in terms of the student's classroom functioning, the March 2012 CSE had "a lot of input from [the student's] teacher" (Tr. p. 124). Additionally, the school psychologist testified that a person conducting a classroom

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<sup>6</sup> Although the student's March 2012 Cooke progress report included general curriculum information regarding classes in health, theater, visual arts and gym, no rating scale or narrative specific to the student's participation, activities, or progress appeared on those pages (*see* Dist. Ex. 9 at pp. 16, 21-23, 27-28).

<sup>7</sup> Although the March 2012 CSE was not required to conduct a classroom observation of the student, in this particular instance, a classroom observation may have provided clarity between the results of February 2011 psychoeducational evaluation of the student and the portrayal of the student's special education needs and functional levels as described in the March 2012 Cooke progress report (*compare* Dist. Ex. 4, *with* Dist. Ex. 9).

observation of a student may not necessarily form an "opinion" about the student that would be different from that of the student's actual teacher—and typically, a person conducting a classroom observation of a student would speak with the student's classroom teacher after completing the observation (see Tr. pp. 125-26). The school psychologist indicated she, most likely, made the decision to not conduct a classroom observation of the student, and noted that the district did not conduct a classroom observation for every "annual" review because the CSE received a lot of information from classroom teachers (see Tr. pp. 128-29).<sup>8</sup>

Based on the above, the hearing record shows that the evaluative information considered by the March 2012 CSE, along with input from CSE members, was sufficient to develop an appropriate IEP for the student. Moreover, the hearing record shows that the March 2012 IEP adequately and accurately reflected evaluation results and incorporated information directly from the March 2012 Cooke progress report, as well as the input of CSE participants (see Dist. Ex. 3; compare Dist. Ex. 3, with Dist. Exs. 4; 9). Accordingly, the evaluative information considered by the March 2012 CSE and the input from the CSE participants during the meeting provided the March 2012 CSE with sufficient functional, developmental, and academic information about the student and his individual needs to enable it to develop his IEP (D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at \*8 [S.D.N.Y. Oct. 12, 2011]; Application of a Student with a Disability, Appeal No. 11-041; Application of a Student with a Disability, Appeal No. 10-100; Application of a Student with a Disability, Appeal No. 08-015; Application of the Dep't of Educ., Appeal No. 07-098; Application of a Child with a Disability, Appeal No. 94-2).

## 2. Annual Goals

Although not addressed by the IHO, the parent asserts that the annual goals in the March 2012 IEP were deficient because they lacked a baseline. A review of the hearing record does not support the parent's assertion.

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

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<sup>8</sup> With respect to the parent's assertion that the district failed to obtain updated OT and PT evaluations, the district school psychologist testified that the March 2012 CSE's OT and PT recommendations were based on the student's current progress report and that this report contained information sufficient to determine a recommended level of services for the student (see Tr. pp. 79-80). She confirmed that she did not have an OT evaluation for the meeting, nor did she know when the last OT evaluation of the student was conducted (Tr. p. 141). The district school psychologist testified that she used the progress report from the student's then-current provider (id.). In addition, she did not know when the last physical therapy evaluation of the student was conducted; however, she surmised that an evaluation must have been conducted in order for the student to obtain the service (id.).

300.320[a][3]). Short-term objectives are required for a student who takes New York State alternate assessments (8 NYCRR 200.4[d][2][iv]).<sup>9</sup>

Notably, the applicable State regulations cited above do not require "baseline" functioning levels to be included in annual goals in an IEP (R.B. v. New York City Dep't. of Educ., 2013 WL 5438605, at \*13 [S.D.N.Y. Sept. 27, 2013] [noting that with respect to drafting annual goals "[c]ontrary to Plaintiffs contention . . . , nothing in the state or federal statute requires that an IEP contain 'baseline levels of functioning' from which progress can be measured]). Instead, the annual goals must meet a simpler criterion—which is the annual goal must be "measurable." As discussed more fully below, the annual goals in the March 2012 IEP met the applicable standards and were specifically designed to meet the student's needs that resulted from his disability, enabled him to be involved in and make progress in the general education curriculum, and met the student's other educational needs resulting from her disability. In this case, the March 2013 IEP included approximately 13 annual goals that targeted the student's needs with respect to reading, writing, mathematics, speech-language skills, fine and gross motor development, daily living skills, self-regulation, and social skills (Dist. Ex. 3 at pp. 5-9). Although broad, the majority of the annual goals included a corresponding list of discrete skills to be learned, as well as mastery criteria and a method and schedule for measuring progress (id.).

The district school psychologist who participated at the March 2012 CSE meeting testified that the CSE developed "academic" goals to address the student's areas of deficits discussed at the meeting, including reading, writing, math, speech, OT, PT, and counseling (Tr. p. 87). The March 2012 CSE developed the annual goals at the meeting, generally, based upon a discussion of the student's functioning with the "teacher" and following up with all members at the CSE meeting regarding their "agreement with the goals" (Tr. p. 88; see Tr. p. 154). The school psychologist could not recall anyone objecting to the annual goals at the March 2012 CSE meeting, but testified that if someone objected to an annual goal, it would not be included in the IEP (see Tr. pp. 88-89). When asked if anyone cited the need for additional goals, the school psychologist testified that the parent expressed some concern with "street safety," and consequently, the March 2012 CSE added it to the IEP (id.; see Dist. Ex. 3 at p. 8).

Overall, the hearing record supports a finding that the annual goals included in the March 2012 IEP targeted the student's identified areas of need and provided information sufficient to guide a teacher in instructing the student and measuring his progress (see D.A.B. v. New York City Dep't of Educ., 2013 WL 5178267, at \*11 [S.D.N.Y. Sept. 16, 2013]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at \*18-\*19 [E.D.N.Y. Aug. 19, 2013]; D.B. v. New York City Dep't of Educ., 2013 WL 4437247, at \*13-\*14 [S.D.N.Y. Aug. 19, 2013]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at \*8 [S.D.N.Y. Dec. 8, 2011]; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 288-89 [S.D.N.Y. 2010]; Tarlowe, 2008 WL 2736027, at \*9; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at \*11 [S.D.N.Y. Sept. 29, 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 146-47 [S.D.N.Y. 2006]; Application of the Dep't of Educ.,

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<sup>9</sup> Although the March 2012 CSE recommended that the student participate in alternate assessment, the March 2012 IEP did not contain short-term objectives, in violation of State regulation: an IEP developed for students who participate in the New York State alternate assessment "shall include a description of the short-term instructional objectives and/or benchmarks that are the measurable intermediate steps between the student's present level of performance and the measurable annual goal" (8 NYCRR 200.4[d][2][iv]).



Appeal No. 12-108 [finding annual goals appropriate where the goals addressed the student's areas of need reflected in the present levels of performance]).

### 3. 12:1+1 Special Class Placement

Turning next to an analysis of the parties' claims surrounding the appropriateness of the 12:1+1 special class placement recommended in the March 2012 IEP, State regulations provide that a 12:1+1 special class placement is designed to address students "whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students" (8 NYCRR 200.6[h][4][i]). Management needs for students with disabilities are defined as "the nature of and degree to which environmental modifications and human or material resources are required to enable the student to benefit from instruction" (8 NYCRR 200.1[ww][3][i][d]). A student's management needs shall be determined by factors which relate to the student's (a) academic achievement, functional performance and learning characteristics; (b) social development; and (c) physical development (*id.*). Although the hearing record demonstrated that the March 2012 CSE had sufficient evaluative information, and accurately and adequately reflected that information in the present levels of performance in the March 2012 IEP to identify the student's needs, the evaluative information does not support the March 2012 CSE's decision to recommend a 12:1+1 special class placement. As detailed below, a review of the hearing record weighs against a finding that the 12:1+1 special class placement was reasonably calculated to enable the student to receive educational benefits, and therefore, the IHO properly concluded that the district failed to offer the student a FAPE for the 2012-13 school year on this basis.

In the present case, to address the student's identified needs the March 2012 CSE recommended a 12-month school year program in a 12:1+1 special class within a specialized school setting (Dist. Ex. 3 at pp. 10, 14-15). In addition, to address the student's management needs the CSE recommended the following environmental and human or material resources: repetition, modeling, multi-step directions to be broken down, checking for understanding, provision of clear directions, and visual presentation of material (*id.* at p. 3). With respect to mathematics, the March 2012 IEP included recommendations to use manipulatives, modeling of procedures and skills, in addition to the use of concrete materials (*id.*). In writing, the March 2012 CSE noted in the IEP that the student benefitted from the provision of models, teacher's conferences, graphic organizers, and the use of editing checklists (*id.*). Furthermore, the March 2012 IEP reflected that the student benefitted from small group work, and the provision of verbal prompting to slow down the rate of the student's speech and improve his intelligibility (*id.*). The district school psychologist testified that the March 2012 CSE developed the management needs incorporated into the March 2012 IEP based on feedback from the student's then-current teacher at Cooke (Tr. p. 85). She further explained how each of the management needs in the March 2012 IEP targeted the student's areas of deficit (Tr. p. 86). For example, given the student's difficulty with multistep directions, the March 2012 CSE included the provision of repetition and breaking down materials among the management needs (*id.*; see Dist. Ex. 3 at p. 3). Furthermore, the March 2012 IEP provided for repetition due to the student's receptive language needs (*id.*). The school psychologist further testified that because the student was functioning "at the concrete level," he required visual support, such as models and concrete materials (*id.*). She also described graphic organizers and editing checklists as visuals designed to support the student's comprehension (Tr. pp. 86-87; Dist. Ex. 3 at p. 3). Moreover, the school psychologist noted that the March 2012 IEP incorporated the provision of verbal prompting due to the student's articulation difficulties,

because that helped when the student tended to speak too fast, and the student benefitted from being told and reminded to slow down (Tr. p. 87; Dist. Ex. 3 at p. 3).

Information contained in the hearing record also shows that the March 2012 CSE considered placement of the student in an 8:1+1 special class per the parent's request (Dist. Ex. 3 at p. 16). However, the school psychologist testified that the March 2012 CSE opted against an 8:1+1 special class placement as being "too restrictive" to meet the student's academic and social needs, based on the student's functioning (see Tr. pp. 94-96; Dist. Ex. 3 at p. 16). The school psychologist explained that the student did not need the "level of restrictiveness" in an 8:1+1 special class placement and that the student could work in a small group within the 12:1+1 special class placement (Tr. p. 96).<sup>10</sup>

With respect to the March 2012 CSE's recommendation for a specialized school, the school psychologist testified that the district's specialized schools addressed the needs of students with more significant disabilities, and she characterized them as smaller schools in a more contained setting (Tr. p. 94). The school psychologist further testified that students who exhibited characteristics similar to those of the student in the instant matter were in special classes with a 12:1+1 ratio (Tr. p. 95). She described the student as "relatively independent," and noted that at the time of the March 2012 CSE meeting, the student had developed academic skills (*id.*). She further noted, and the student's March 2012 IEP reflected, that the student was social, worked well in a small group, and responded well to positive reinforcement and redirection (Tr. p. 95; Dist. Ex. 3 at p. 2). According to the school psychologist, the student did not have behavioral needs that would require additional staff (Tr. p. 95; see Dist. Ex. 3 at p. 4).

In this instance, notwithstanding the school psychologist's testimony that a 12:1+1 special class placement was appropriate for the student, the weight of the evidence in the hearing record demonstrates that the student, while at Cooke, required more adult support within the classroom in order to make progress and the March 2012 CSE's recommendation for a 12:1+1 special class failed to provide sufficient support in this regard. As noted above, at Cooke, the student received his primary academic instruction in a 4:1 student-to-teacher ratio or in an 8:1+1+2 student-to-teacher-to-assistant-teacher-to-paraprofessional ratio (see Dist. Ex. 9). However, despite this additional, adult classroom support, the student only made modest progress toward his educational goals and demonstrated few targeted skills independently. For example, in reading in a 4:1 class ratio, the student progressed from observing the teacher model a task to taking a subordinate or shared role in completing a task in three skills: recognizing sight words; making connections to text; and reading with accuracy, appropriate rate, and expression (*id.* at p. 2). Furthermore, according to the March 2012 Cooke progress report, the student's proficiency level remained the same for five additional reading skills, and the student could not complete any of the reading tasks independently on a consistent basis (*id.*). Additionally, in mathematics in an 8:1+1+2 class ratio, the student progressed from observing the teacher model a task to taking a subordinate or shared role in completing a task in three skills: understanding place value, using symbols to compare numbers, and counting or representing dollars and coins using currency symbols (*id.* at p. 6). With respect to identifying equivalent combinations to make one dollar, the student progressed from a shared or subordinate role to having the primary role in completing this task (*id.*). Furthermore,

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<sup>10</sup> The school psychologist further testified that students in a 12:1+1 special class placement were more prepared academically, and were more independent, and she noted that the district wanted to push students to be as independent as possible (see Tr. p. 96).

as described above, the February 2011 psychoeducational evaluation cited the student's need for support within the 1:1 testing environment; in contrast, the school psychologist testified that the 12:1+1 special class placement was for students who were "more prepared academically and are more independent" (Tr. p. 96; Dist. Ex. 4).

Moreover, the student's need for support, particularly with regard to academics and communication, was a consistent theme embedded throughout the March 2012 IEP (Dist. Ex. 3 at pp. 1-2). Additionally, many of the strategies and supports recommended in the student's March 2012 IEP required some level of direct implementation or assistance from classroom staff. Furthermore, given the number and type of management needs recommended for the student in this particular instance, the evidence included in the hearing record does not support a finding that a teacher and a paraprofessional could adequately provide instruction and support to the entire 12:1+1 special class, while also attending to the student's various academic and social/emotional management needs and providing him with the level of individualized support described in the March 2012 IEP. Lastly, given the information presented in the March 2012 Cooke progress report that the student made minimal gains within more intensive classroom ratios, the hearing record further demonstrates that the level of support offered in a 12:1+1 special class placement would not be sufficient to enable this student to receive education benefit. Under the circumstances presented herein, the evidence in the hearing record weighs against a finding that the 12:1+1 special class placement was appropriate to address his unique special education needs and, as a result, denied the student a FAPE.

#### **4. Transition Plan**

Although the evidence fails to support the district's argument that a 12:1+1 special class placement was appropriate to address the student's special education needs, the parties' assertions with respect to the transition plan included in the March 2012 IEP will be addressed.

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]; 8 NYCRR 200.1[fff]). Accordingly, pursuant to federal law and State regulations, an IEP for a student who is at least 16 years of age (15 under State regulations) must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills (20 U.S.C. § 1414[d][1][A][viii]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]). It must also include the transition services needed to assist the student in reaching those goals (id.). As recently noted by one district court, "the failure to provide a transition plan is a procedural flaw" (M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*6, \*9 [S.D.N.Y. Mar. 21, 2013], citing Klein Indep. Sch. Dist. v. Hovem, 690 F.3d 390, 398 [5th Cir. 2012] and Bd. of Educ. v. Ross, 486 F.3d 267, 276 [7th Cir. 2007]).

In this instance, at the time of the March 2012 CSE meeting, the student's age did not require the March 2012 CSE to develop a transition plan or services (Tr. pp. 92, 376; Dist. Ex. 3

at p. 1; see 20 U.S.C. § 1414[d][1][A][viii]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]). Regardless of the student's age, however, the March 2012 IEP included postsecondary goals that pertained to education or training, employment, and independent living skills (Tr. pp. 92-93; Dist. Ex. 3 at pp. 4-5). Specifically, with regard to the student's long-term education goals, the March 2012 IEP revealed that the student would attend a vocational program and in the area of employment, it projected that the student would be employed with moderate to maximum support (Dist. Ex. 3 at p. 4). In the area of independent living skills, the March 2012 IEP provided that the student would live at home or outside the home with moderate to maximum support (*id.* at p. 5). Although the district school psychologist conceded that the district did not conduct a vocational assessment of the student pursuant to State regulation, she explained that she developed the postsecondary goals based on information from the district's February 2011 psychoeducational evaluation and information provided by the student's then-current teacher at Cooke (Tr. pp. 93, 129). Notwithstanding the lack of a vocational assessment in this instance, the school psychologist noted that the purpose of the vocational assessment was "only to give" a baseline for the future as to where the student might go (Tr. p. 94). The school psychologist admitted that while she did not discuss the March 2012 IEP's postsecondary goals with the parent at the time of the March 2012 CSE meeting, their inclusion in the IEP was derived from the parent's concerns regarding street safety to increase the student's independence (Tr. pp. 130-33; see Tr. pp. 356-57). The school psychologist testified that the postsecondary goals in the March 2012 IEP were appropriate for the student because the student exhibited low cognitive abilities and he would need support in the future (Tr. p. 93). While she described the postsecondary goals as "really broad," the school psychologist explained that given the student's age at the time of the March 2012 CSE meeting, it was still very early to plan for the student's future or know exactly what would happen beyond the fact that the student would need support (Tr. pp. 130-32). The school psychologist added that the postsecondary goals were not designed to be implemented by the student's teacher during the upcoming school year; rather, she characterized them as an indication that the student would require support in the future (Tr. p. 163).

More specifically, the school psychologist testified that the following constituted the long-term postsecondary goals in the March 2012 IEP: (1) the student would attend a vocational program; (2) the student would be employed with moderate to maximum support; and (3) the student would live at home or outside the home with moderate to maximum support (Tr. pp. 92-93; see Dist. Ex. 3 at pp. 4-5). The school psychologist described these as "anticipated" long-term goals based on the student's functioning (Tr. pp. 92-93, 129-32). With regard to the formulation of the long-term postsecondary goals, the school psychologist explained that it was possible that she just filled the postsecondary goals out because she fills out a lot of IEPs and she could not recall discussing the postsecondary goals with the parent (Tr. pp. 130-31). Similarly, the parent testified that the postsecondary goals on the March 2012 IEP were not discussed with her (Tr. p. 356). The parent indicated that she would have liked to have been part of the discussion of the postsecondary goals, and also would have liked the student included in the discussion because the goals dealt with the student's future (Tr. pp. 357-58).

Under the circumstances, the hearing record does not support the IHO's finding that the transition services were not appropriate. Moreover, any technical defects in the postsecondary goals included in the March 2012 IEP did not render the transition plan inappropriate for the student and did not rise to a level of a denial of a FAPE (M.Z., 2013 WL 1314992, at \*9; Application of a Student with a Disability, Appeal No. 11-154; Application of the Bd. of Educ., 11-147).

## 5. Prior Written Notice

Finally, while the district correctly argues that the IHO exceeded the scope of the due process complaint notice by reaching the issue of whether the district complied with the provision of prior written notice to the parent, the district is reminded of its obligation to provide prior written notice—in the parent's native language—consistent with State and federal regulations of determinations made, the reasons for the determinations, and the parent's right to request additional assessments (8 NYCRR 200.5[a], [a][4]; see 34 CFR 300.305[c], [d]; see also 34 CFR 300.503; <http://www.p12.nysed.gov/specialed/formsnotices/PWN/home.html>). More specifically, the district must provide the parent with a description of the actions proposed or refused by the district, an explanation of why the district proposed or refused to take the actions, a description of other options that the CSE considered and the reasons why those options were rejected, a description of other factors that were relevant to the CSE's proposal or refusal, a statement that the parent has protection under the procedural safeguards and the means by which the parent can obtain a copy of the procedural safeguards, and sources for the parent to contact to obtain assistance in understanding these (8 NYCRR 200.5[a]; see 34 CFR 300.503[b]; 8 NYCRR 200.1[oo]). In this particular instance, the district's assertion that the June 2012 FNR—which was not submitted as evidence at the impartial hearing—satisfied the regulatory requirements is not substantiated by the hearing record (see Dist. Ex. 3 at p. 16; see also Parent Ex. C). Under the circumstances presented here, had the issue been properly preserved for review on appeal, it is unlikely that the district would have prevailed on this claim.

### B. Challenges to the Assigned Public School Site

Next, with respect to the IHO's findings in relation to the assigned public school site, the district asserts that it was not required to offer evidence to establish whether it could properly implement the student's March 2012 IEP at the impartial hearing because the parent rejected the March 2012 IEP prior to the commencement of the school year and the student never enrolled in the assigned public school site. As a result, the district seeks to reverse the IHO's finding that the district failed to establish that the assigned public school site could not implement the student's IEP.

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. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87, 2013 WL 3814669, at \*6 [2d Cir. July 24, 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at \*7 [S.D.N.Y. Dec. 11, 2012]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom 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., 2013 WL 3814669, at \*6 [rejecting as improper the parents claims related to how the proposed IEP would have been implemented]). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]).

As explained more recently, "[t]he Second Circuit has been clear, however, that where a parent enrolls the child in a private placement before the time that the district would have been obligated to implement the IEP placement, the validity of proposed placement is to be judged on the face of the IEP, rather than from evidence introduced later concerning how the IEP might have been, or allegedly would have been, implemented" (A.M. v. New York City Dep't of Educ., 2013 WL 4056216, at \*13 [S.D.N.Y. Aug. 9, 2013]; see R.B., 2013 WL 5438605, at \*17; E.F., 2013 WL 4495676, at \*26; M.R. v. New York City Dep't of Educ., 2013 WL 4834856, at \*5 [S.D.N.Y. Aug. 14, 2013] [finding that the argument that the assigned school would not have been able to implement the IEP is "entirely speculative"]; see also N.K. v. New York City Dep't of Educ., 2013 WL 4436528, at \*9 [S.D.N.Y. Aug. 13, 2013] [citing R.E. and rejecting challenges to placement in a specific classroom because "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan'"").

In view of the forgoing, the parent cannot prevail on claims that the district would have failed to implement the March 2012 IEP at the assigned public school site because a retrospective analysis of how the district would have executed the student's March 2012 IEP at the assigned

school is not an appropriate inquiry under the circumstances of this case (K.L., 2013 WL 3814669 at \*6; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). In this case, these issues are speculative insofar as the parent did not accept the March 2012 IEP containing the recommendations of the March 2012 CSE or the programs offered by the district and instead chose to enroll the student in a nonpublic school of their choosing (see Parent Exs. H-J). Furthermore, in a case in which a student has been unilaterally placed prior to the implementation of an IEP, it would be inequitable to allow the parent to acquire and rely on information that post-dates the relevant CSE meeting and IEP and then use such information against a district in an impartial hearing while at the same time confining a school district's case to describing a snapshot of the special education services set forth in an IEP (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at \*13 [S.D.N.Y. Dec. 23, 2013] [stating that "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE]).

However, under the facts presented in this case, the district is confined to defending its IEP in view of R.E. and the subsequent district court cases discussed above and it would be inequitable to allow the parent to challenge the March 2012 IEP through information they acquired after the fact. Therefore, the district was not required to demonstrate the proper implementation of services in conformity with the student's March 2012 IEP at the assigned public school site when the parent rejected it and unilaterally placed the student.

### **C. Equitable Considerations**

Having found that the district failed to offer the student a FAPE for the 2012-13 school year, and with no challenge asserted by the district regarding the IHO's conclusion that Cooke was appropriate, the final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194;]; M.C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 362-64 [S.D.N.Y. 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at \*5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at \*4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also 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]; Application of the Dep't of Educ., Appeal No. 07-079; Application of the Dep't of Educ., Appeal No. 07-032).

Contrary to the district's allegation that equitable considerations should preclude relief in this particular instance because the parent had no intention of enrolling the student in a public school, a review of the hearing record reveals otherwise. Initially, there is nothing in

the hearing record to show that the parent engaged in conduct to obstruct the CSE process or its ability to provide the student with a FAPE (see R.B. v. New York City Dep't of Educ., 713 F. Supp. 2d 235, 249 [S.D.N.Y. 2010]). Rather, it is undisputed that the parent asked the district to consider placement of the student in an 8:1+1 special class in a community school, suggesting the parent's willingness to consider a district program for the student (Tr. pp. 96, 358, 379; Dist. Ex. 3 at p. 16). In addition, the hearing record demonstrates that the parent participated in the CSE process and took advantage of the opportunity to visit the assigned public school site. While the hearing record is equivocal regarding the date that the parent executed the enrollment contract with Cooke for the student's attendance for the 2012-13 school year, and when she advised Cooke that she planned to reenroll the student, this does not provide a persuasive reason to deny the parent an award of relief, particularly in light of her participation in the CSE process and three visits to the assigned public school site noted previously (Tr. pp. 379-80, 401; Parent Exs. H- I; Jennifer D. v. New York City Dep't of Educ., 550 F. Supp. 2d 420, 437 [S.D.N.Y. 2008]).<sup>11,12</sup> Under the circumstances, the weight of the evidence supports a finding that equitable considerations favor the parent overall and justify an award of tuition reimbursement under the circumstances of this case (see C.L. v. New York City Dep't of Educ., 2013 WL 93361, at \*8-\*9 [S.D.N.Y. Jan. 3, 2013]; B.R., 910 F. Supp. 2d at 679-80; R.K. v. New York City Dep't of Educ., 2011 WL 1131522, at \*4 [E.D.N.Y. Mar. 28, 2011]).

#### **D. Relief**

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 358-60). 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

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<sup>11</sup> The parent testified that she probably filled out the Cooke enrollment application for the student during the first week of July 2012 (Tr. p. 403).

<sup>12</sup> While I have deep reservations about claims of a denial of a FAPE arising from a parent's visit to an assigned public school site, which the student never attended, the practice of visiting an assigned public school site has value for purposes of equitable considerations, especially if it prompts the parents to exercise their right to request another CSE meeting to make specific modifications to the IEP.



artificially inflated its costs (Mr. and Mrs. A., 769 F. Supp.2d at 430).<sup>13</sup> Since the parent has selected Cooke as the unilateral private 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 the Dep't of Educ., 12-132; 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).

Here, it is undisputed that the parent entered into an enrollment agreement for the Cooke summer 2012 program, as well as the remainder of the 2012-13 school year (Tr. p. 374; Parent Exs. H-I). Under the terms of each enrollment contract and by signing each agreement, the parent acknowledged her financial obligation for payment of the student's tuition (see Parent Exs. H at p. 1; I at p. 1). The parent testified that at the time of the impartial hearing, she had yet to remit payment to Cooke towards the student's tuition for the 2012-13 school year (Tr. p. 374; see Parent Ex. J). She further indicated that in the event that her claim for relief was unsuccessful, she would have to arrange some sort of payment plan with Cooke, and that she had "every intention" of having the student's tuition paid (Tr. pp. 374-75, 400).

Regarding the parent's inability to pay the student's tuition at Cooke, the parent submitted her income tax returns for 2011, which reflected that the parent earned slightly more in 2011 than the total amount of the student's tuition costs at Cooke for the 2012-13 school year (compare Parent Ex. H at p. 1, and Parent Ex. I at p. 1, with Parent Ex. M). The parent testified that she could not afford to pay the tuition at Cooke (Tr. p. 374). Additionally, the parent stated that she did not own a house (Tr. pp. 374-75). With respect to the student's father role, the student's father was not involved in the student's life, and the parent further indicated that he was not in compliance with a child support order that she had obtained (Tr. p. 375; Dist. Ex. 5 at p. 2). Based on the parent's testimony, and undisputed evidence that the parent cannot afford to pay the student's tuition, the hearing record established that the parent satisfied her burden to establish her inability to pay the cost of the student's tuition at Cooke for the 2012-13 school year (Tr. pp. 374-75; Parent Exs. H-I; M). This case is distinguishable from circumstances in which objective information regarding financial resources and a spouse was not presented to the IHO or SRO during the administrative proceedings (see A.R., 2013 WL 5312537, at \*11 [accepting additional evidence at the District Court level and determining that the additional evidence supported parent's assertion regarding a lack financial resources]).

After a review of the hearing record, the evidence sufficiently supports the conclusion that the parent remained "legally obligated" to pay the tuition at Cooke (Mr. and Mrs. A., 769 F. Supp. at 406). Based on the parent's testimony and the 2011 income tax return contained in the hearing record, that the parent established her inability to front the cost of the student's tuition at Cooke (Tr. pp. 374-75; Parent Ex. M). Under the circumstances of this case, equitable considerations do not preclude the parent's claim for direct funding of the student's tuition at Cooke for the 2012-13 school, under the factors described in Mr. and Mrs. A.

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<sup>13</sup> 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 v. T.A., 557 U.S. 230, 244 n.11 [2009]; see 20 U.S.C. § 1415[i][2][C][iii]).

## **VII. Conclusion**

In summary, the hearing record supports the IHO's ultimate conclusion that the district did not offer the student FAPE for the 2012-13 school year; however, his determinations must be reversed to the extent that he concluded that the March 2012 CSE failed to obtain sufficient evaluative information about the student, that the March 2012 IEP failed to adequately describe all of the student's areas of need in the present levels of performance in the March 2012 IEP, and that the lack of an appropriate transition plan contributed to the district's failure to offer the student a FAPE for the 2012-13 school year. The parties' remaining contentions have been considered, and in light of the determinations herein, need not be addressed.

### **THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that the IHO's decision dated October 4, 2013 is modified by reversing those portions which determined that March 2012 CSE failed to obtain sufficient evaluative information about the student, that the March 2012 IEP failed to adequately describe all of the student's areas of need in the present levels of performance in the March 2012 IEP, and that the lack of an appropriate transition plan contributed to the district's failure to offer the student a FAPE for the 2012-13 school year include an appropriate transition plan.

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

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**JUSTYN P. BATES  
STATE REVIEW OFFICER**