



# The University of the State of New York

The State Education Department  
State Review Officer  
[www.sro.nysed.gov](http://www.sro.nysed.gov)

No. 13-230

**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

Advocates for Children of New York, attorneys for respondent, Romi Paek, Esq., and Kim  
Madden, 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 a decision rendered by an impartial hearing officer (IHO) which found that it did not offer a free appropriate public education (FAPE) to respondent's (the parent's) son and ordered it to fund the costs of the student's tuition at the Cooke Center Academy (Cooke) for the 2012-13 school year. The appeal must be sustained.

### II. Overview—Administrative Procedures

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

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

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

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

The student received early intervention and preschool special education, including counseling, speech-language therapy, occupational therapy (OT) and physical therapy (PT) (Parent Ex. B at p. 2). Upon reaching school age, the student attended district public schools from kindergarten through third grade and received special education and related services (*id.*). In April 2002 the parent unilaterally placed the student at Cooke (Tr. p. 298; Parent Ex. B at p. 2).<sup>1</sup> At the time of the March 2012 CSE meeting, the student was attending Cooke and participating in its "SKILLS" program, which is described in the hearing record as a transition program providing a

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

blend of academics, vocational skills, adaptive skills, and leisure skills (Tr. p. 233; Dist. Ex. 3 at p. 1; Parent Ex. L at p. 4).<sup>2</sup>

On March 30, 2012, the CSE convened to conduct the student's annual review and to develop his IEP for the 2012-13 school year (Dist. Ex. 3). Finding the student eligible for special education as a student with autism, the March 2012 CSE recommended a 12-month program in a 12:1+1 special class placement in a specialized school and related services of two 45-minute sessions per week of speech-language therapy in a group (5:1); one 45-minute session per week of individual PT; two 45-minute sessions per week of counseling in a group (5:1); and one 45-minute session per week of individual counseling (id. at pp. 1, 14-16).<sup>3</sup> The IEP also indicated the student would participate in New York State alternate assessments due to his global delays and participate in adapted physical education (id. at p. 18).

On June 20, 2012, the parent signed an enrollment contract for the student's attendance at Cooke for the 2012-13 school year (Parent Ex. F). By letter dated June 21, 2012, the parent advised the district that since she had not received a proposed placement from the district for the student for the 2012-13 school year, she was unilaterally placing the student in a summer program and at Cooke in September 2012, and that she intended to seek public funding for both placements (Parent Ex. N). By letter of the same date, the district sent the parent a final notice of recommendation summarizing the special education and related services recommended in the March 2012 IEP and identifying the particular public school site to which the district assigned the student to attend for the 2012-13 school year (Dist. Ex. 7).

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

By due process complaint notice dated April 29, 2013, the parent requested an impartial hearing and alleged that the district failed to develop an appropriate IEP, provide an appropriate placement, or offer the student a FAPE for the 2012-13 school year (Dist. Ex. 1 at p. 1). Pertaining to the March 2012 CSE, the parent asserted that, "among other improprieties," the CSE did not include "an educational evaluator" (id. at p. 3).

Regarding the development of the March 2012 IEP, the parent alleged that the March 2012 CSE failed to use the student's most recent evaluations, did not conduct evaluations of the student during the "triennial period," relied heavily on informal assessments provided by Cooke to develop the student's March 2012 IEP instead of formal assessments, and failed to utilize information from the private evaluation provided by the parent when developing the student's IEP (Dist. Ex. 1 at pp. 1-2). Further, the parent alleged that the student's IEP failed to reference the student's diagnosis with an intellectual disability (id. at p. 2).<sup>4</sup> Next, the parent contended that the annual goals in the March 2012 IEP were not individualized to the student because the goals did not reference the

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<sup>2</sup> The district funded the student's tuition at Cooke for the 2006-07 school year pursuant to an unappealed 2006 IHO Decision (Parent Ex. M). The hearing record reflects that the district also funded the student's tuition at Cooke for the 2007-08 through 2011-12 school years pursuant to settlement agreements (Tr. pp. 169-170; Dist. Ex. 8 at p. 26).

<sup>3</sup> The student's eligibility for special education programs and related services as a student with autism is not in dispute in this appeal (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

<sup>4</sup> The due process complaint notice uses the term "mental retardation," which is no longer used in State regulations and has been replaced with the term "intellectual disability," which has the same definition (8 NYCRR 200.1[zz][7]).

student's current abilities, were not measurable, and failed to "tie [the student's] progress to any measurable standard" (id.). The parent additionally contended that the transition plan contained in the IEP was inadequate and inappropriate because it failed to include "a statement of the responsibilities of the school district," the needed activities to facilitate the student's movement from school to post-school activities, the student's post-secondary transition needs, or measurable transition goals (id.).

With respect to the recommended placement, the parent alleged that it was "unclear" why the 12:1+1 special class was appropriate for the student, considering that he was progressing in a class with a smaller student-to-teacher ratio in a setting that provided a greater amount of support (Dist. Ex. 1 at p. 2).<sup>5</sup> Relative to the assigned public school site, the parent alleged that she made several attempts to visit the school but she was unable to visit the proposed classroom due to the timing of the "official school tours" (id. at p. 1). However, the parent noted that the district had assigned the student to the same public school site the previous three years and stated her impression, based on past visits, that the assigned public school site was not appropriate for the student because "it was too low functioning" and the student's academic and social/emotional needs could not be met (id.). The parent further contended that based on available information, the school would not be able to meet the student's needs or offer the services recommended in the March 2012 IEP (id.).

The parent invoked the student's right to a pendency placement at Cooke, pursuant to unappealed IHO decisions (Dist. Ex. 1 at p. 3). As relief, the parent sought prospective funding for the costs of the student's tuition at Cooke for the 2012-13 school year and transportation costs(id.).

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

The impartial hearing began on July 22, 2013 and concluded on September 25, 2013, after two days of proceedings (Tr. pp. 1-139, 222-408).<sup>6</sup> The IHO issued a decision dated November 6, 2013 (IHO Decision).<sup>7</sup>

Initially, the IHO found that this was not a unilateral placement case and the Burlington/Carter test for tuition reimbursement did not apply (IHO Decision at p. 5, 29-33). The IHO instead applied a "publicly-provided placement" theory, a "simpler 1-part inquiry into whether the district's effort to change the [student's] placement [was] successful" (id. at p. 5). Applying this theory, the IHO found that the student was placed by the district at Cooke when the district chose not to appeal an IHO Decision from 2006 directing the district to fund the student's placement at Cooke and, since the student remained at Cooke without interruption at district expense based on the unappealed IHO Decision and various settlement agreements, the district

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<sup>5</sup> The due process complaint notice incorrectly states that the March 2012 CSE recommended a 12:1+1 program in a "community" school (compare Dist. Ex. 1 at p. 2, with Dist. Ex. 3 at p. 20).

<sup>6</sup> On August 29, 2013, the parties held a conference to clarify the issues and schedule a hearing date (Tr. pp. 140-221).

<sup>7</sup> Although the IHO subsequently issued an "amended" decision dated November 13, 2013, containing additional analysis, I remind the IHO that his decisions, once issued, are final unless timely appealed to an SRO and that he may not amend them thereafter (20 U.S.C. § 1415[i][1][A]; 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

did not change the student's placement away from Cooke and therefore Cooke was the student's publicly-provided placement "at the time the dispute about the district's 2012-13 recommendation arose" (*id.* at pp. 5-8, 11). Accordingly, the IHO found that the district was responsible for the costs of the student's tuition from the period between the beginning of the 2012-13 school year until the filing of the parent's due process complaint notice (*id.* at pp. 6-7, 11-29, 43). The IHO also ordered the district, if it had not already done so, to pay Cooke directly for the costs of the student's tuition for the period from the filing of the due process complaint notice until June 30, 2013, pursuant to pendency (*id.* at pp. 44-45).<sup>8</sup> The IHO also made equitable determinations, including that the district failed to provide the parent with reasonable notice of the proposed placement for the 2012-13 school year and that the parent provided timely notice of her intent to continue the student's placement at Cooke (*id.* at pp. 33-38).

Finally, the IHO made brief alternative findings regarding the merits of the case, determining that district failed to offer the student a FAPE because it did not evaluate the student as required by law, which lead to "confusion" about the student's needs (IHO Decision at pp. 39, 41-43).

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

The district appeals, contending that the IHO exceeded the scope of his jurisdiction by sua sponte raising and addressing the issue of whether Cooke was the student's "publically provided placement." The district further contends that the IHO relied upon an incorrect legal standard in determining that the district was obligated to directly fund the student's tuition at Cooke from the beginning of the 2012-13 school year until the filing of the due process complaint notice.

The district also asserts that the IHO erred in finding that the district denied the student a FAPE by not evaluating the student and taking all available evaluative data into account because the March 2012 CSE considered sufficient evaluative materials, including evaluations, progress reports, and information from the parent, and the student's teachers. Additionally, the district asserts that the IHO improperly determined that there was confusion as to the student's classification because no one at the March 2012 CSE meeting disagreed with the student's autism classification and the IEP reflected the student's intellectual, academic, and social deficits. The district also contends that the IHO erred in finding that the district failed to provide the parent with reasonable notice of the student's placement because it informed the parent of the public school site to which it was assigning the student on June 21, 2012 which was in conformity with State and federal regulations.

Although not addressed by the IHO, the district contends that it did not deny the student a FAPE for reasons stated in the parent's due process complaint notice. In particular, the district asserts that the March 2012 IEP included sufficient goals and transition services for the student. The district further contends that the 12:1+1 special class program addressed the student's needs. With respect to the assigned public school site, the district argues that since the parent rejected the assigned public school site, and the student never attended the school, the parent's claims are

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<sup>8</sup> Neither party has appealed the IHO's finding that the district is responsible to pay Cooke directly for the costs of the student's tuition for this period pursuant to pendency. Accordingly, these determinations have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*6-\*7, \*10 [S.D.N.Y. Mar. 21, 2013]).

speculative. In addition, the district contends that Cooke was not an appropriate unilateral placement and that equitable considerations do not favor the parent's request for relief because the parent did not inform the district about any perceived deficiencies with the March 2012 IEP when she informed the district that she was unilaterally placing the student at Cooke.

In an answer, the parent argues that the IHO correctly found that the district should pay for the student's tuition at Cooke from the beginning of the 2012-13 school year until the filing of the due process complaint notice because Cooke was the student's "current educational placement" for the 2012-13 school year. Since the parent and the district have agreed upon a district public school placement for the 2013-14 school year, the parent argues that this case is now "moot"; however, the parent alternatively asserts she is entitled to relief because the district failed to provide a FAPE for the student for the reasons stated in her due process complaint notice, Cooke was an appropriate placement for the student, and equitable considerations favor her request for relief. The parent also request that an SRO consider additional documentary evidence. In a reply, the district objects to the parent's request to submit additional documentary evidence for consideration by an SRO.

## **V. Applicable Standards**

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

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

WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at \*7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at \*15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in 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, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by

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

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

## **VI. Discussion**

### **A. Preliminary Matters**

#### **1. Scope of Review**

Before reaching the merits in this case, a determination must be made regarding which claims are properly addressed on appeal. The parent now raises as a basis upon which to conclude that the district failed to offer the student a FAPE for the 2012-13 school year that the March 2012 CSE was not duly constituted because (1) it did not invite a representative of a relevant agency pertaining to transition planning; and (2) the special education teacher who participated in the March 2012 CSE meeting was not qualified.

A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][i][b]; J.C.S. v Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at \*8-\*9 [S.D.N.Y. Aug. 5;]; S.M. v. Taconic Hills Cent. Sch. Dist., 2013 WL 773098, at \*4 [N.D.N.Y. Feb. 28, 2013], aff'd, 2014 WL 322294 [2d Cir. Jan. 30, 2014]; DiRocco v. Bd. of Educ., 2013 WL 25959, at \*23 [S.D.N.Y. Jan. 2, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012]; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at \*12-\*13 [S.D.N.Y. Dec. 16, 2011]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at \*12 [S.D.N.Y. Oct. 28, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at \*13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at \*6-\*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at \*8; see K.L. v. New York City Dep't of Educ., 2013 WL 3814669, at \*3, \*6 [2d Cir. July 24, 2013]).

Upon review, I find that the parent's due process complaint notice cannot reasonably be read to include challenges to the composition of the March 2012 CSE for the failure to invite a representative of a relevant agency pertaining to transition planning or the qualifications of the special education teacher who participated in the CSE meeting (see Dist. Ex. 1). A further review

of the hearing record shows that the district did not agree to an expansion of the issues in this case, nor did the parent attempt to amend the due process complaint notice to include these issues. Accordingly, the allegations in the parent's answer are outside the scope of review and will not be considered (see, e.g., M.P.G., 2010 WL 3398256, at \*8).<sup>9</sup>

## 2. Additional Evidence

As noted above, the parent requests that an SRO consider additional documentary evidence annexed to her answer. Specifically, the parent requests the consideration of notes prepared by a Cooke representative relating her impressions of her visit to the assigned public school site in December 2012. Generally, documentary evidence not presented at a hearing may be considered in an appeal from an IHO's decision if such additional evidence could not have been offered at the time of the hearing and the evidence is necessary to enable the SRO to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; see also L.K. v. Northeast Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [noting that an SRO is only required to admit additional evidence if necessary to render a decision]).

In the instant case, the Cooke representative who participated at the March 2012 CSE meeting prepared notes based on her observations of the assigned public school site (Ans. Ex. O). During the impartial hearing, the Cooke representative referred to her notes which were used by both attorneys when questioning the Cooke representative; however, the notes were never introduced into evidence by the parent (Tr. pp. 364-368). As this additional evidence was available at the time of the impartial hearing and not timely offered into evidence, I decline to accept the notes as additional documentary evidence. Additionally, as the notes were not based on the parent's observations of the school; but instead were based on the observations of a Cooke representative who visited the school for purposes unrelated to the student, it is not necessary in order to render a decision herein. In any event, the additional evidence is retrospective in that it post-dates the relevant CSE meeting and as such, the parent's request is denied.

## 3. Pendency/Applicable Legal Standard

The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4], 4410[7][c]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; 8 NYCRR 200.16[h][3][i]; see Student X v. New York City Dep't of Educ., 2008 WL 4890440, at \*20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie

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<sup>9</sup> To the extent that the Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H., 685 F.3d at 250-51; see D.B. v. New York City Dep't of Educ., 2013 WL 4437247, at \*6-\*7 [S.D.N.Y. Aug. 19, 2013]; N.K., 2013 WL 4436528, at \*5-\*7; A.M. v. New York City Dep't of Educ., 2013 WL 4056216, at \*9-\*10 [S.D.N.Y. Aug. 9, 2013]; J.C.S., 2013 WL 3975942, at \*9; B.M. v. New York City Dep't of Educ., 2013 WL 1972144, at \*5-\*6 [S.D.N.Y. May 14, 2013]), the additional issues raised in the petition were not initially elicited by the district at the impartial hearing and, therefore, the district did not "open the door" to this issue under the holding of M.H. (see A.M., 2013 WL 4056216, at \*10-\*11; c.f., Y.S. v. New York City Dep't of Educ., 2013 WL 5722793, at \*6 [S.D.N.Y. Sept. 24, 2013]; P.G. v. New York City Dep't of Educ., 2013 WL 4055697, at \*14 [S.D.N.Y. July 22, 2013]).

City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. Jan. 18, 2005]). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief (Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; see Wagner v. Bd. of Educ., 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996]; Bd. of Educ. v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]).

Under the IDEA, the pendency inquiry focuses on identifying the student's then current educational placement (Mackey v. Bd. of Educ., 386 F.3d 158, 163 [2d Cir. 2004]; Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean the last agreed upon placement at the moment when the due process proceeding is commenced (Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 86 F. Supp. 2d 354, 359 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2d Cir. 2002]). The United States Department of Education has opined that a student's then current placement would "generally be taken to mean current special education and related services provided in accordance with a child's most recent [IEP]" (Letter to Baugh, 211 IDELR 481 [OSEP 1987]; see Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]). However, if there is an agreement between the parties on placement during the proceedings, it need not be reduced to a new IEP and can supersede the prior unchallenged IEP as the then current placement (Evans, 921 F. Supp. at 1189 n.3; see Bd. of Educ. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; Murphy, 86 F. Supp. 2d at 366; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Moreover, a prior unappealed IHO's decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440 at \*23; Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Furthermore, if a "private school placement funded by the school district is the pendency placement, then the school district must continue to pay for that placement for the duration of the proceedings regardless of the final outcome of the dispute" (T.M. v. Cornwall Cent. Sch. Dist., 2012 WL 4069299, at \*4 [S.D.N.Y. Aug. 7, 2012]; see Zvi D., 694 F.2d at 906, 908; Vander Malle v. Ambach, 673 F.2d 49, 52 [2d Cir. 1982]; New York City Dep't of Educ. v. S.S., 2010 WL 983719, at \*1, \*6, \*8-\*9 [S.D.N.Y. Mar. 17, 2010]; Ambach, 612 F. Supp. at 233-34).

At the outset of this discussion, there is no dispute amongst the parties that the district has been required to fund the student's placement at Cooke since the filing of the parent's due process complaint notice as a result of its obligation to provide the student with his pendency (stay-put) placement (20 U.S.C. § 1415[j]; Educ. Law § 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Weaver v. Millbrook Cent. Sch. Dist., 812 F. Supp. 2d 514, 526-27 [S.D.N.Y. 2011]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 643 [S.D.N.Y. 2011]; Child's Status During Proceedings, 47 Fed. Reg. 46710). The crux of the parties' dispute in this matter is which party is responsible for the cost of the student's tuition at Cooke from the beginning of the 2012-13 school year until the filing of the parent's due process complaint notice. The IHO concluded that the district was responsible for such costs, based on a "publicly-provided placement" theory (IHO Decision at pp. 11-29). The IHO opined that if a parent rejects the district's recommendation, continues their child's enrollment in a "publicly-funded non-public school," and notifies the district of their intention to challenge the district's recommendation, "the district is responsible for continuing that non-public school placement until pendency vests" (id. at p. 6). The IHO explained that Cooke became the student's "publicly-provided placement" by virtue of an unappealed 2006

IHO Decision which ordered the district to pay the student's tuition at Cooke (id. at p. 20). The IHO further indicated that since the parent rejected the district's recommendation and sought to continue the student in the "publicly-provided placement" (Cooke), the district was responsible for the cost of the student's tuition at Cooke for the entirety of the 2012-13 school year, not just from the date of the filing of the due process complaint forward during the pendency of the proceedings (id. at p. 6). The IHO explained, "placement pre-exists the pendency determination," and pendency is derived from a determination of a student's then-current placement (id. at p. 24). The IHO found that since the student remained at Cooke from the 2006-07 school year through the start of the 2012-13 school year, the student's placement could not be changed away from Cooke without a determination that the district had offered the student an appropriate program and placement, and therefore the district was responsible for the student's tuition at Cooke as the student's "publicly-provided placement" for the period at issue (id. at pp. 20-29).

After reviewing the IHO's analysis, I concur with the district's contention that the IHO erred in determining that the district was responsible for the cost of the student's attendance at Cooke for the period from the beginning of the 2012-13 school year until the filing of the due process complaint notice. To the extent that the IHO was relied on pendency principles to decide that the district was responsible for the student's "publicly-provided placement" for that period, the law is clear that pendency does not apply upon an expression of disagreement by a parent but is triggered only upon the filing of the due process complaint (T.M., 2012 WL 4069299, at \*4 [the district is required to implement pendency "for the duration of the proceedings"]; Weaver, 812 F. Supp. 2d at 526-27 [finding that the "plain language of the statute . . . suggests that the provision only applies 'during the pendency of any proceedings,' and not . . . before such a proceeding has begun"]; Child's Status During Proceedings, 47 Fed. Reg. 46710 ["a child's right to remain in the current educational placement attaches when a due process complaint is filed"]). Moreover, as a student's pendency placement and an appropriate placement are two separate concepts, the IHO should have applied a Burlington/Carter tuition reimbursement analysis in determining which party was responsible for the cost of the student's tuition at Cooke for the period at issue (Mackey, 386 F.3d at 160 ["A claim for tuition reimbursement pursuant to the stay-put provision is evaluated independently from the evaluation of a claim for tuition reimbursement pursuant to the inadequacy of an IEP"]; see O'Shea, 353 F. Supp. 2d at 459 [finding that "pendency placement and appropriate placement are separate and distinct concepts"]; Student X, 2008 WL 4890440, at \*20). Although the IHO set forth the applicable legal authority for the Burlington/Carter tuition reimbursement analysis, he determined that the instant matter was not a unilateral placement case because the student was not "unilaterally moved" by the parent into Cooke, and therefore the appropriateness of Cooke need not be determined for the 2012-13 school year (IHO Decision at pp. 31-34). The IHO is mistaken in his analysis, and it was improper to find that a change in the student's then-current placement for purposes of pendency constituted a perpetual obligation of the district placement on a going forward basis regardless of whether an impartial hearing was requested (see Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 414-15 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. Aug. 9, 2006] [holding that parents must "put FAPE at issue" in each school year for which they seek tuition reimbursement by giving notice to the district]; Wood v. Kingston City Sch. Dist., 2010 WL 3907829 at \*7 [N.D.N.Y. Sept. 19, 2010] [noting that reenrollment at a private school versus initial unilateral placement does not extinguish analysis of the elements such as the notice requirement applicable in a Burlington/Carter case]; S.W. v. New York City Dep't of Educ., 646 F.Supp.2d 346, 366 [S.D.N.Y.2009]). The student was originally unilaterally placed at Cooke in April 2002 by the parent, who continued the student's unilateral placement by signing an enrollment contract for the student's attendance at Cooke for the 2012-13 school year, providing

notice to the district that she was placing the student at Cooke, and indicating her intention to seek public funding therefor (Parent Exs. F; N). The hearing record contains no indication that the district ever agreed to fund the student's unilateral placement other than for purposes of pendency or limited stipulations of settlement.

That there may have been several other due process proceedings regarding the student that have been commenced and then concluded through settlement and withdrawal since the 2006 unappealed IHO decision is of no moment. As stated by the Ninth Circuit, "[the stay-put provision] does not guarantee a child the right to remain in any particular institution once proceedings have concluded. Thus, the fact that dismissing an appeal as moot would remove a child from the protection of the stay-put provision cannot in and of itself create a live controversy, as the stay-put order will lapse however the litigation concludes *Marcus I. v. Dep't of Educ.*, 434 Fed.Appx. 600, 602 [9th Cir. 2011][emphasis added]). Thus, the parent was required to commence file a due process complaint before the student was enrolled at Cooke for in September 2012 school year if they wished to take advantage of a pendency entitlement from September 2012 to April 2013, and neither the IHO nor the parent can rely on 20 U.S.C. 1415(j) to recover tuition costs at Cooke at a time when there was no pending proceeding. Accordingly, the IHO erred by not applying the elements of a traditional Burlington/Carter analysis to the merits of the parent's due process complaint notice (see Burlington, 471 U.S. at 370; Carter, 510 U.S. at 15-16; see also Gagliardo, 489 F.3d at 111-12; Frank G. v. Bd. of Educ., 459 F.3d 356, 363-64 [2d Cir. 2006]); Cerra, 427 F.3d at 192; M.C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; 20 U.S.C. 1412 § [a][10][C][ii]).

## **B. March 2012 IEP**

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

Turning to the merits of the appeal, the first issue to address is the parent's allegation that the district failed to conduct sufficient evaluations and adequately consider private evaluations. A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district 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]). 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]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR

300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

Among the elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).<sup>10</sup> However, neither the IDEA nor State law requires a CSE to "consider all potentially relevant evaluations" of a student in the development of an IEP or to consider "every single item of data available" about the student in the development of an IEP (T.G. v. New York City Dep't of Educ., 2013 WL 5178300, at \* 18-19 [S.D.N.Y. Sept. 16, 2013], citing M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*8 [S.D.N.Y. Mar. 21, 2013]; see F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 582 [S.D.N.Y. 2013]). In addition, while the CSE is required to consider recent evaluative data in developing an IEP, so long as the IEP accurately reflects the student's needs the IDEA does not require the CSE to exhaustively describe the student's needs by incorporating into the IEP every detail of the evaluative information available to it (20 U.S.C. § 1414[d][3][A]; see M.Z., 2013 WL 1314992, at \*9; D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at \*8 [S.D.N.Y. Oct. 12, 2011]).

The district special education teacher testified that according to the student's file, the last evaluation for the student conducted by the district occurred in 2005 (Tr. p. 72). Although the parent is correct that the district failed to follow the proper procedures to reevaluate the student under the IDEA and State regulations, the hearing record does not support the conclusion that the district's failure in this regard constituted the denial of a FAPE to the student. For an IHO or SRO to find that the district's failure to comply with its procedural obligations under the IDEA constituted the denial of a FAPE, the procedural misstep must either have (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]). To the extent that the lack of formal testing constituted a procedural violation of the IDEA, in this instance—because the district had other current evaluative data available to adequately assess the student as described below—the district's failure to comply with its obligations under the IDEA did not impede the student's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process, or cause a deprivation of educational benefits (id.).

The hearing record demonstrates that the participants of the March 2012 CSE meeting included the parent, a district special education teacher, a school psychologist, who also served as the district representative, an additional parent member, a Cooke representative/consulting teacher, and the student's math teacher at Cooke (Dist. Ex. 3 at p. 22). Next, the hearing record

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<sup>10</sup> 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 (see 34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

demonstrates that the March 2012 CSE relied upon multiple sources of evaluative information to develop the student's March 2012 IEP, including a March 2012 progress report prepared by the student's teachers at Cooke as well as input from the Cooke staff participating at the CSE meeting (Tr. pp. 17-19, 33-35, 39, 106; Parent Ex. H). The CSE also reviewed the student's IEP for the 2011-12 school year, which the district special education teacher testified documented the student's disability classification and provided information regarding the student's social, intellectual, and academic deficits, as well as goals that reflected his instructional needs (Tr. pp. 29-31).<sup>11</sup> Additionally, the district special education teacher, who participated in the March 2012 CSE meeting, testified that much of the information regarding the student's daily functioning was supplied by the student's teachers at Cooke, emphasizing, "what better information resources can we ask? These are the people that work with this child every day" (Tr. p. 32).

With respect to the parent's contention that the March 2012 CSE failed to consider private evaluations provided by the parent, a CSE must consider privately-obtained evaluations, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, "consideration" does not require substantive discussion, that every member of the CSE read the document, or that the CSE accord the private evaluation any particular weight (*T.S. v. Bd. of Educ.*, 10 F.3d 87, 89-90 [2d Cir. 1993]; *G.D. v. Westmoreland Sch. Dist.*, 930 F.2d 942, 947 [1st Cir. 1991]; see *Michael P. v. Dep't of Educ.*, 656 F.3d 1057, 1066 n.9 [9th Cir. 2011]; *K.E. v. Indep. Sch. Dist. No. 15*, 647 F.3d 795, 805-06 [8th Cir. 2011]; *Evans v. Dist. No. 17*, 841 F.2d 824, 830 [8th Cir. 1988]; *James D. v. Bd. of Educ.*, 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]). Moreover, the IDEA "does not require an IEP to adopt the particular recommendation of an expert; it only requires that recommendation be considered in developing the IEP" (*J.C.S. v. Blind Brook-Rye Union Free Sch. Dist.*, 2013 WL 3975942, at \*11 [E.D.N.Y. Aug. 5, 2013]; *Watson v. Kingston City Sch. Dist.*, 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [holding that a CSE's recommendation is not necessarily rendered inappropriate by "[t]he mere fact that a separately hired expert has recommended different programming"], *aff'd*, 142 Fed. App'x 9, 2005 WL 1791553 [2d Cir. July 25, 2005]; see *T.G. v. New York City Dep't of Educ.*, 2013 WL 5178300, at \*18 [S.D.N.Y. Sept. 16, 2013]; *E.S. v. Katonah-Lewisboro Sch. Dist.*, 742 F. Supp. 2d 417, 436 [S.D.N.Y. 2010]). In the instant case, the parent testified that she shared the private evaluations for the student with the CSE during the March 2012 CSE meeting (Tr. pg. 278). Although the district special education teacher could not verify that the privately-obtained evaluations were reviewed during the CSE meeting, she explained that per standard procedures, had they been provided to the district, she and other district staff would have reviewed and discussed them during the meeting (Tr. pp. 23-28; Parent Exs. A; B; C). Furthermore, the record shows that aspects of the information presented in the privately-obtained January 2010 psychosocial, October 2010 neuropsychological, and February 2010 psychological evaluation reports were reflected in the March 2012 IEP (Dist. Ex. 3 at pp. 1-3; Parent Exs. A at pp. 2-3; B at pp. 2, 8-9, 11).<sup>12</sup> Under these circumstances, the district considered the parent's private evaluation reports to the extent required by law, although perhaps not to the extent that the parents would have preferred (see *CLK v. Arlington Sch. Dist.*, 2013 WL 6818376, at \*10 [S.D.N.Y. Dec. 23, 2013] [a CSE is not required to follow all of the

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<sup>11</sup> The 2011-12 IEP was not included in the hearing record.

<sup>12</sup> It is not possible to ascertain whether the private evaluations served as the primary source of information for the IEP. Nonetheless, entries in the IEP that are consistent with the findings of the private evaluators are highlighted as such.

recommendations contained in a private evaluation]; T.G., 2013 WL 5178300, at \*18-\*19 [CSE considered privately obtained evaluative report even though it was not discussed at CSE meeting]).

In addition, a review of the hearing record reveals that based upon the evaluative information available to the March 2012 CSE, the present levels of performance included results of the student's performance on standardized achievement tests, descriptions of the student's motivation for learning, as well as his daily work habits and management needs (Dist. Exs. 3 at pp. 1-3; Parent Ex. J). The March 2012 IEP also provided information regarding the student's peer interactions and his ability to advocate for himself when presented with tasks he perceived as too easy or too difficult (Dist. Ex. 3 at pp. 1-2; Parent Ex. J at p. 1). The March 2012 IEP indicated the student was better able to function independently "within routines," which the author of the October 2010 neuropsychological evaluation report recommended and which was also noted in a document prepared by Cooke for purpose of facilitating the CSE's discussion (Dist. Ex. 3 at p. 1; Parent Exs. B at p. 12; J at p. 1).

The March 2012 IEP delineated the student's performance on a variety of Cooke administered individual and group standardized assessments (Dist. Exs. 3 at p. 1; 4 at pp. 1-2; Parent Exs. J at p. 1; L at p. 1). Specifically, the IEP indicated that in February 2012, the student had earned a total grade equivalent score (GE) of 2.8 (i.e., eighth month of second grade) on a group-administered reading assessment, with a 2.4 GE on tasks assessing vocabulary, and a 3.0 GE in the area of comprehension (Dist. Exs. 3 at p. 1; 4 at p. 2; Parent Ex. L at p. 1). The present levels of performance also reported that the student's performance on a reading inventory administered in September 2011, indicated he was able to read text written at the late second/early third grade independently and that his "instructional level" appeared to be at the fourth grade level and his "frustration level" at the fifth grade level (Dist. Ex. 3 at p. 1; Parent Ex. L at p. 1).

Consistent with the evaluative information before the March 2012 CSE, the IEP also included a description of the student's daily interactions with and around text, such as his willingness "to adjust his thinking following questions and verbal prompting," and how he benefited from the use "graphic organizers and modeling to support higher thinking" (Dist. Exs. 3 at p. 1; 4 at p. 2). The March 2012 IEP noted the student's preference for reading nonfiction text about music and sports, and indicated that although the student was able to use the library as a resource, he still required assistance in choosing books with manageable text difficulty (Tr. pp. 125-26; Dist. Exs. 3 at p. 1; 4 at p. 2; 5 at p. 3; Parent Ex. L at p. 1).

In addition, consistent with the evaluative information before the March 2012 CSE, when describing the student's writing skills, the IEP included an explanation of his need for specific supports and strategies, such as use of the "writing process" to help him organize his ideas (Dist. Exs. 3 at p. 2; 4 at p. 2; 5 at p. 4). The student's pragmatic language skill development was described in terms of daily functioning, including the student's continued challenges to maintain eye contact and interactions with others, and his need to build his use and interpretation of nonverbal cues (Dist. Exs. 3 at p. 2; 4 at p. 4; Parent Ex. L at p. 2).

The student's performance on a two math assessments administered three months apart was also reported; in November 2011, he earned a 2.0 GE on an individually administered math

assessment (Dist. Exs. 3 at p. 1; 4 at p. 1; Parent Exs. J at p. 1; L at p. 1).<sup>13</sup> The March 2012 IEP also denoted the student's performance on a group-administered math assessment completed in February 2012, on which the student earned a 2.8 GE (*id.*). The present levels of performance provided a brief description of the student's math skills to complement the grade equivalent scores mentioned previously, including his ability to solve addition and subtraction problems and his emerging understanding of division and tell time on an analog clock with support (Dist. Exs. 3 at p. 1; 4 at p. 1; Parent Exs. B at p. 10; J at p. 1; L at p. 1). The March 2012 IEP also described the student's challenges related to "real world" application of math skills, such as identifying coins and making change (Dist. Exs. at p. 2; 4 at p. 1; 5 at p. 5; Parent Exs. B at p. 10; J at p. 2).

Within the social development portion of the present levels of performance, the student was described as being friendly, happy to help his peers, and "able to advocate for himself in the classroom" (Dist. Exs. 3 at p. 2; 4 at p. 1; 5 at pp. 9, 12; Parent Ex. J at p. 1). It was also noted that on occasion, the student experienced "difficulty understanding and reflecting on another's feelings," an observation that mirrored a depiction in the neuropsychological evaluation report (Dist. Exs. 3 at p. 2; 4 at p. 4; Parent Ex. B at p. 8).

The student's physical development was described in the March 2012 IEP, as well as a variety of motor skills upon which he was currently working to strengthen and improve, some of which were referenced in the psychosocial and neuropsychological evaluation reports (Dist. Ex. 3 at p. 2; Parent Exs. A at pp. 2-3; B at p. 2). That is, among others, the IEP denoted the student's challenges with balance and hand coordination/fine-motor skills, as described by the authors of the psychosocial and neuropsychological evaluation reports (Dist. Ex. 3 at p. 2; Parent Exs. A at p. 3; B at pp. 5, 11). Based upon the student's physical development, the March 2012 IEP indicated the student required the continuation of physical therapy services (Dist. Exs. 3 at p. 3; 4 at p. 5; Parent Ex. L at p. 3).

The student's management needs, as outlined in the March 2012 IEP, include instructional strategies to enhance student functioning, such as the provision of instruction in "multiple modalities," modified materials, and verbal and visual prompts (Dist. Exs. 3 at pp. 2-3, 9; 4 at pp. 1, 3-4; 5 at p. 7; Parent Exs. B at p. 12; J at p. 2). The IEP also documented that the student's needs necessitated a small, structured classroom environment (Dist. Exs. 3 at pp. 3, 10, 18; 5 at p. 11; Parent Ex. B at p. 11).

Based on the foregoing, the hearing record shows that the March 2012 CSE had before it sufficient evaluative information to develop an appropriate IEP for the student. Although the district did not comply with the procedural requirements for conducting a triennial evaluation, the evidence above supports the conclusion that such a procedural violation did not result in a denial of a FAPE to the student (see R.B., 2013 WL 5438605, at \*9-\*10). It should also be noted that a district is not required to conduct its own evaluations in developing an IEP and recommending an appropriate program, but may rely on appropriate privately obtained evaluations (M.H. v. The New York City Dept of Educ., 2011 WL 609880 at \*9-10 [S.D.N.Y. Feb. 16, 2011]). The district may also rely on information obtained from the student's private school personnel, including sufficiently comprehensive progress reports, in formulating the IEP (see G.W. v. Rye City Sch.

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<sup>13</sup> The IEP indicates the score on the individual assessment was earned on a Math test, but described it as an "informal reading assessment," which appears to be a clerical error as the results of the informal reading assessment were reported earlier in the same section (Dist. Ex. 3 at p. 1).

Dist., 2013 WL 1286154, at \*23 [S.D.N.Y. March 29, 2013]; S.F., 2011 WL 5419847, at \*10). The March 2012 IEP reflected information drawn from the student's progress report from Cooke, which described the student's level of independence when engaging in a variety of endeavors across time and setting (Tr. pp. 18-19, 239; Dist. Exs. 3 at pp. 1-3; 5 at pp. 3-5, 11-13, 15). In addition, a review of the hearing record shows that the March 2012 IEP included the results of the student's performance on multiple standardized measures of achievement (Tr. pp. 250, 263-64; Dist. Exs. 3 at p. 1; 4 at pp. 1-2; Parent Exs. J at p. 1; L at p. 1). Lastly, as indicated above, despite the district special education teacher's inability to verify that the CSE had reviewed the parent-obtained evaluations during the March 2012 CSE meeting, the resultant IEP included information presented in the neuropsychological evaluation and elsewhere in the hearing record (Tr. pp. 24-29; Dist. Exs. 3 at p. 2, 4; 4 at p. 1; 5 at p. 5; Parent Exs. B at p. 10; J at p. 1).

Finally, regarding the parent's assertion that the March 2012 IEP failed to indicate that the student had received a diagnosis of an intellectual disability, I note that federal and State regulations do not require the district to set forth the student's diagnoses in an IEP; instead, they require the district to conduct an evaluation to "gather functional developmental and academic information" about the student to determine whether the student falls into one of the disability categories under the IDEA and information that will enable the student be "involved in and progress in the general education curriculum" (34 CFR 300.304[b][1]; see 8 NYCRR 200.4[b][1]; see also Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011]; Application of a Student with a Disability, Appeal No. 09-126 ["a student's special education programming, services and placement must be based upon a student's unique special education needs and not upon the student's disability classification"]). As described above, the March 2012 IEP addressed the student's needs related to significant delays in the areas of academic, functional performance, learning characteristics, and social development as well as his considerable management needs, which were sufficient to address the student's deficits related to his intellectual disability diagnosis, as reflected in the minutes of the CSE meeting, private evaluations, and testimony provided by individuals with firsthand knowledge of the student (Dist. Ex. 3 at pp. 1-3; see Tr. pp. 19-20; 29; Dist. Exs. 4; 5; Parent Exs. A; B; C; J; L).

## **2. Annual Goals**

Next, turning to the parent's contention that the annual goals in the March 2012 IEP were not measurable or sufficiently individualized to meet the student's needs, an IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]). Short-term objectives are also required for a student who takes New York State alternate assessments (8 NYCRR 200.4[d][2][iv]). Under the IDEA and State and federal regulations, a determination of the appropriateness of a particular set of annual goals and short-term objectives for a student turns not upon their suitability within a particular classroom setting or student-teacher ratio, but rather whether the goals and objectives

are consistent with and relate to the needs and abilities of the student (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]).

In this case, the March 2012 IEP contained approximately sixteen annual goals and seventy-two short-term objectives intended to target the student's needs with respect to math, English language arts, speech-language skills, counseling, physical therapy, and transition (Dist. Ex. 3 at pp. 4-14). Although written in broad language, each of the annual goals included a corresponding list of discrete skills, methods and criteria by which to measure progress and a schedule for monitoring this progress (id.).

With regard to the parent's argument that the goals were not sufficiently individualized to the student's specific needs, the goals were consistent with the Cooke progress report as well as with the information presented in the neuropsychological evaluation report (Tr. pp. 18, 34; Dist. Ex. 3 at pp. 3-14; Parent Ex. B at pp. 8-11). For example, the March 2012 IEP included a goal focused on improving the student's ability to solve addition and subtraction word problems, a need recorded in the present levels of performance (Dist. Ex. 3 at pp. 2, 5). The importance of building this skill was highlighted in the neuropsychological evaluation report as well as in the student's progress report from Cooke (Dist. Ex. 5 at p. 5; Parent Ex. B at pp. 8, 10). In another example, the IEP included a goal regarding the effective use of communicating within social situations, an area of need noted in the present levels of performance and delineated in the neuropsychological evaluation and the Cooke progress report (Dist. Exs. 3 at p. 2, 9; 5 at p. 12; Parent Ex. B at p. 11).

Additionally, the district special education teacher, who participated in the March 2012 meeting, testified that the CSE discussed each goal, including those related to transition, and had there been any disagreement among the meeting participants, she "would type a new goal" (Tr. pp. 34-35). Moreover, meeting notes, independently recorded by both the Cooke representative and the district special education teacher, document the discussion, but neither set forth minutes indicated any disagreement regarding the appropriateness of the goals (Tr. pp. 18, 34; Dist. Exs. 3 at pp. 3-14; 4; Parent Ex. L at p. 3).

In conclusion, I find that overall, the annual goals and short-term objectives in the March 2012 IEP appropriately targeted the student's areas of need, contained sufficient specificity by which to direct instruction and intervention, and contained sufficient specificity by which to evaluate the student's progress or gauge the need for continuation or revision.

### **3. Transition Plan**

Although the IHO failed to reach a determination regarding the parent's assertion that the March 2012 IEP transition plan was "inadequate and inappropriate", the parent also asserts that the district failed to identify the school district or agency responsible for providing the transition activities in the IEP. 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]).

The district special education teacher testified that the transition plan was developed by Cooke staff because, "it's part of their curriculum . . . they talk to the child and they find out what the child wants to do, his goals" (Tr. p. 40). The district special education teacher further testified that the Cooke staff members spoke with the parent and the district about transition goals, which the CSE then incorporated into the IEP's transition plan (Tr. pp. 40-42; Dist. Ex. 3 at p. 17). While the March 2012 meeting notes prepared by the Cooke representative indicated that post-secondary goals were not discussed at the meeting, her notes indicated that the Cooke representative "read through" the student's "transition needs" and "transition activities" from a document that she had sent to the district via email (Parent Ex. L at p. 3). In addition, the meeting summary notes prepared by the district special education teacher indicated that the CSE had discussed transition goals, and at least some of this information was reflected in the transition plan activities (Dist. Exs. 3 at p. 17; 4 at pp. 2, 5).

Upon review of the March 2012 IEP coordinated set of transition activities, the transition plan incorporated the required areas of instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and the acquisition of daily living skills (Dist. Ex. 3 at p. 17). Within area of instruction, the transition plan listed four services/activities designed to enhance the student's post-secondary learning (*id.*). The transition plan also recommended two specific activities each for counseling, speech-language therapy, and OT, and one activity for PT (*id.*). Within the domain of community experiences, the transition plan included two activities related to money management (Tr. pp. 42, 243, 249; Dist. Ex. 3 at p. 17; Parent Exs. B at p. 10; C at p. 4). With regard to the development of employment and other post-secondary adult living objectives, the transition plan recommended two vocational skill building activities (Dist. Ex. 3 at p. 17). Finally, in the field of daily living skills, the transition plan recommended participation in community projects with "sequences of life skills activities" (*id.*).

Additionally, the recommended services/activities listed within each category of the transition plan showed they were consistent with the student's documented needs and were designed to support continued post-secondary progress in addressing these needs (Dist. Ex. 3 at p. 17). For example, within the area of instruction, the recommended services/activity target "life skills activities in the community" and "travel related instruction," which were consistent with concerns or areas of need noted in the neuropsychological and psychosocial evaluation reports, and by the testimony of Cooke staff (Tr. pp. 31, 41-42, 110, 114, 243; Dist. Exs. 3 at p. 17; 5 at p.

7, 10; Parent Exs. A at p. 2; B at p. 2, 11; C at p. 4).<sup>14</sup> In a second example, the transition activities included speech-language therapy "to develop and practice social interactions with unfamiliar adults," a need that was echoed in the neuropsychological evaluation and the Cooke progress report, as well as in the parent's testimony (Tr. p. 242, 274; Dist. Exs. 3 at p. 17; 4 at p. 4; 5 at pp. 8, 12-14; Parent Ex. B at p. 11). Overall, the service/activities proposed in the areas of community experiences and development of employment and other post-school adult living objectives are similarly aligned with information presented in the neuropsychological evaluation and the progress report authored by Cooke staff (Tr. pp. 40-41).

Under the circumstances, the hearing record does not support the parent's contention that the transition services were not appropriate. However, the parent is correct that the March 2012 IEP failed to identify the school district or agency responsible for providing the services recommended (Dist. Ex. 3 at p. 17; see 8 NYCRR 200.4[d][2][ix][e]). While, under the circumstances of this case, this deficiency in the transition plan does not rise to the level of a denial of a FAPE, the district is hereby reminded of its obligation to conform to the requirements of the statute and regulations (see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \* 9 [Mar. 21, 2013] [observing that a deficient transition plan is a procedural flaw]; see also K.C. v. Nazareth Area Sch. Dist., 806 F. Supp. 2d 806, 822-26 [E.D. Pa. 2011]).

#### **4. 12:1+1 Special Class Placement**

Turning next to an analysis of the parent's claim 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.).

The parent asserts that the 12:1+1 special class placement would not be appropriate because it would not provide enough support for the student. The hearing record reflects that at the time of the impartial hearing, the student was attending Cooke where he was enrolled in math and English language arts classes with a 10:1+1 ratio (Dist. Ex. 3 at p. 1). While the March 2012 CSE meeting minutes as recorded by both the district special education teacher and the consulting teacher from Cooke reflect a general consensus regarding the student's annual goals and present levels of performance, including his management needs, the notes prepared by the Cooke teacher reflect her "concern" regarding a perceived "lack of support" in a 12:1+1 setting (Dist. Ex. 4; Parent Ex. L at p. 4). However, the student did not present with management needs that were so unusual or exceptional that they could not be met in a 12:1+1 special class (Dist. Ex. 3 at p. 3). For

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<sup>14</sup> In testimony, the district special education teacher defined "life skills" as relating to "banking, how to go to the supermarket, how to make change, basic life skills so he can be independent" (Tr. p. 31). The district special education teacher also indicated the skills were "part of our daily living" (Tr. pp. 48-49). The staff at Cooke use a slightly different set of terms, but Cooke and district staff expressed the same basic tenet that the importance of building skills in this domain was to foster independence (Tr. pp. 42, 45, 243, 256, 345).

example, the student's management needs, as delineated in the March 2012 IEP, included instruction in multiple modalities, directions read to the student, redirection and modeling, the use of verbal and visual prompts, teacher check-ins, and the use of graphic organizers, all of which fall easily within the notion of "specially designed instruction" (Dist. Ex. 3 at p. 3).

While the parent and consulting teacher from Cooke would have optimally preferred the slightly smaller ratio offered at Cooke for the student, the hearing record does not reflect that the district's proposed 12:1+1 classroom placement was incapable of providing the small structured setting or appropriate opportunities for individualized support in a special education environment and therefore it was reasonable for the CSE to conclude that the student was likely to make progress in that setting. "The education provided need only be appropriate,—likely to produce progress, not regression—and not one that provides everything that might be thought desirable by loving parents" (D.D-S. v Southold Union Free Sch. Dist., 2011 WL 3919040, at \*11 [E.D.N.Y. Sept. 2, 2011] [internal quotations omitted], aff'd, 2012 WL 6684585 [2d Cir. Dec. 26, 2012]; Walczak, 142 F.3d at 132; Watson, 325 F. Supp. 2d at 144 ["While the IDEA requires districts to provide appropriate education to disabled students, this is not necessarily synonymous with offering disabled students the best educational opportunities available."]). Based on the foregoing, the March 2012 CSE's recommendation of a 12:1+1 special class in a special school, together with appropriate related services, was reasonably calculated to address the student's needs.

### **C. Challenges to the Assigned Public School Site**

Finally, the district argues that any inquiry into the appropriateness of the assigned public school site is speculative because the parent unilaterally enrolled the student at Cooke prior to the beginning of the 2012-13 school year. Challenges to an assigned public school site are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at \*14-\*16 [S.D.N.Y. Oct. 16, 2012]; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at \*15 [W.D.N.Y. Sept. 26, 2012] [finding the parents' pre-implementation arguments that the district would fail to adhere to the IEP were speculative and therefore misplaced], adopted at 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also K.L., 530 Fed. App'x at 87, 2013 WL 3814669; 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., 2013 WL 4436528, at \*9 [citing R.E. and rejecting challenges to placement in a specific classroom because "'[t]he appropriate inquiry is into the nature of the program actually offered in the written plan'"]). Most recently, the Second Circuit rejected a challenge to a recommended public school site, reasoning that "'[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement,' and '[a] suggestion that some students are underserved' at a particular placement 'cannot overcome the particularly important deference that we afford the SRO's assessment of the plan's substantive adequacy.'" (F.L. v. New York City Dep't of Educ., 2014 WL 53264, at \*6 [2d Cir. Jan. 8, 2014], quoting R.E., 694 F.3d at 195). The court went on to say that "[r]ather, the appropriate forum for such a claim is 'a later proceeding' to show that the child was denied a free and appropriate public education 'because necessary services included in the IEP were not provided in practice'" (id., quoting R.E., 694 F.3d at 187 n.3).

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 public school site because a retrospective analysis of how the district would have executed the student's March 2012 IEP at the public 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 (see Parent. Ex. N). 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 light of R.E. and the subsequent district court cases discussed above, and it would be inequitable to allow the parents 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, or that the student would have been appropriately grouped, at the public school site when the parents rejected the March 2012 IEP.

## **VII. Conclusion**

Having found that the claims that the district failed to offer the student a FAPE for the 2012-13 school year are without merit, the necessary inquiry is at an end and there is no need to reach the issues of whether the student's unilateral placement at Cooke was appropriate or whether equitable considerations support an award of tuition reimbursement (Burlington, 471 U.S. at 370; Voluntown, 226 F.3d at 66).

### **THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the impartial hearing officer's decision dated November 13, 2013 is modified, by reversing those portions which determined that the district failed to offer the student a FAPE for the 2012-13 school year and ordered the district to pay Cooke directly for the costs of the student's tuition for the period from September 1, 2012 until April 28, 2013.

**Dated:**            **Albany, New York**  
                         **February 21, 2014**

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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**