



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 14-025

### **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, Cynthia Sheps, Esq., of counsel

Law Offices of Lauren A. Baum, PC, attorneys for respondents, Scott M. Cohen, Esq., of counsel

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') daughter and ordered it to reimburse the parents for the costs of the student's tuition at the Cooke Center Academy High School (Cooke) for the 2011-12 school year. The parents cross-appeal from the IHO's decision to the extent that it did not address issues raised in the due process complaint notice. The appeal must be sustained in part. The cross-appeal must be dismissed.

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

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

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

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

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

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

When then student first arrived in the United States in September 2003, she attended English as a Second Language (ESL) classes in a district public school (Tr. pp. 565-66; Dist. Ex. 7 at p. 3). The student started receiving special education services in 2004 after a CSE found her eligible for special education as a student with a learning disability (Dist. Exs. 7 at pp. 1, 3; 8 at pp. 3, 9). The hearing record shows that the student attended an approved nonpublic school for two years and had been attending Cooke since approximately 2006 (Tr. pp. 566-67; Dist. Ex. 7 at

p. 3).<sup>1</sup> On April 26, 2011, the parents signed an enrollment contract with Cooke for the student's attendance during the 2011-12 school year (Parent Ex. K at pp. 1-2).

On June 3, 2011, the CSE convened to conduct the student's annual review and to develop an IEP for the 2011-12 school year (see Dist. Ex. 3 at pp. 1-2). The attendees at the June 2011 CSE meeting included a district special education teacher (who also acted as the district representative), a district school psychologist, an additional parent member, the parent, a friend of the parent, a Cooke consulting teacher, and, by telephone from Cooke, the student's then-current English language arts (ELA) and mathematics teachers and speech-language provider (id. at p. 2). The hearing record shows that the June 2011 CSE requested the services of an interpreter to translate for the parent at the meeting but could not secure those services in time (Tr. p. 157).

Finding the student eligible for special education as a student with an intellectual disability, the June 2011 CSE recommended a 12-month school year program in a 12:1+1 special class placement in a specialized school (Dist. Ex. 3 at pp. 1, 11).<sup>2</sup> In addition, the June 2011 CSE recommended related services of two 45-minute sessions per week of speech-language therapy in a small group (3:1), one 45-minute session per week of individual speech-language therapy, and three 45-minute sessions per week of counseling in a small group (5:1) (id. at p. 13). The June 2011 CSE also recommended support for management needs, as well as a transition plan, and annual goals (id. at pp. 3, 5, 7-10, 14-15).

In a final notice of recommendation (FNR) dated June 15, 2011, the district summarized the 12:1+1 special class and related services recommended in the June 2011 IEP and identified the particular public school site to which the district assigned the student to attend for the 2011-12 school year (Parent Ex. R).

In an August 4, 2011 letter to the district, the parents indicated that, in response to receiving the FNR, they visited the assigned public school site on July 20, 2011 and observed three classrooms (Parent Ex. D at p. 1). The parents indicated that the assigned public school site "could not confirm" to which class the student would be assigned and that none of the observed classrooms were appropriate for the student because they were intended for ESL students whose primary language was Spanish, younger students, and lower functioning students, respectively (id.). The parents also indicated the student "need[ed] to be in a program with similarly functioning peers and appropriate peer models" in order to "continue to make academic and social progress to prepare for an independent life" (id.). The parents stated that the assigned public school site could not provide the student with "the level of individual attention and support" or the transition services or inclusion opportunities that she required (id.). The parents requested that the district provide a class profile of the student's assigned classroom and indicated their willingness to reconsider the assigned public school site, provided it was appropriate for the student (id.). Finally, the parents notified the district that, unless the district offered an "appropriate program/site/class," they

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

<sup>2</sup> The student's eligibility for special education 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]).

intended to unilaterally place the student at Cooke for the 2011-12 school year at public expense (id.).

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

In a second amended due process complaint notice dated April 13, 2013, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2011-12 school year (see Parent Ex. A at p. 1).

With respect to the June 2011 CSE meeting, the parents asserted that: (1) the June 2011 CSE was not properly composed; (2) the district failed to provide an interpreter at the June 2011 CSE meeting to translate for the parent; (3) the June 2011 CSE failed to adequately involve the parents, Cooke staff, and the parent's representative during the development of the student's IEP and failed to ensure that all of the CSE members had access to the evaluative information considered; and (4) the district did not fully evaluate the student (Parent Ex. A at pp. 1-2).

With respect to the June 2011 IEP, the parents asserted that: (1) the CSE did not consider sufficient or current evaluative and documentary material that would justify its recommendations and did not properly identify the student's present levels of educational performance; (2) the June 2011 CSE did not adequately identify the student's management needs; (3) the June 2011 IEP included an insufficient number of annual goals and short-term objectives and the annual goals listed in the IEP were not appropriate for the student, constituted the same annual goals as those listed in the student's IEP from the year prior, and were not objectively quantifiable; (3) the June 2011 CSE ignored concerns "that the recommended staffing ratio . . . would not have been sufficient to meet [the student's] needs"; (4) the June 2011 IEP included an insufficient level of related services to address the student's needs and the CSE discontinued the student's occupational therapy (OT) "without sufficient justification or supporting material"; (5) the June 2011 IEP did not contain any promotion criteria; (6) the transition plan included in the June 2011 was vague, generic, and insufficient to meet the student's post-secondary transition and vocational needs; and (7) the June 2011 IEP lacked any "transitional support services to help [the student] successfully transition into the larger setting" (Parent Ex. A at p. 3).

Next, the parents asserted that, as the student was recommended for a 12-month program, the district violated its own standard operating procedures by failing to timely provide the FNR before June 15 (Parent Ex. A at p. 3). With respect to the assigned public school site, the parents asserted that the three observed classrooms were not appropriate for the student because they were intended for ESL students whose primary language was Spanish, younger students, or lower functioning students, respectively (id. at p. 4). The parents also asserted that: (1) the student would not have been functionally grouped with the other students at the assigned public school site; (2) the assigned school utilized teaching methodologies that would not have been appropriate for the student; (3) the student would not have received sufficient individual support or attention or academic instruction; (4) the assigned school would not have been able to implement the student's June 2011 IEP; (5) the assigned school did not offer appropriate training to assist the student transition to adult life, life skills and activities of daily living (ADL) instruction, an available travel training program, a social skills program, integrated related services, or transitional support services; (6) the school was part of a shared campus and presented a safety issue; and (7) the

assigned school was listed as "below average in academic expectations and engagement" for the 2011-12 school year (id. at pp. 4-5).

In addition, the parents alleged that the student's unilateral placement at Cooke was appropriate and that equitable considerations weighed in favor of their request for relief (Parent Ex. A at p. 5). As relief, the parents requested that the IHO order the district to award them the costs of the student's tuition at Cooke, related services, and transportation for the 2011-12 school year (id. at pp. 5-6).

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

An impartial hearing convened on April 1, 2013 and concluded on October 22, 2013 after seven days of proceedings (Tr. pp. 1-601). In a decision dated January 7, 2014, the IHO determined that the district failed to offer the student a FAPE for the 2011-12 school year, that Cooke was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parents' request for relief (IHO Decision at pp. 11-15). Specifically, the IHO determined that, given evidence that the parent "understood only about half of the spoken content" of the June 2011 CSE meeting, the district's failure to ensure the presence of an interpreter at the meeting constituted a "material procedural violation" that "significantly impeded the parents opportunity to participate in the decision-making process regarding the provision of a FAPE to [the student]" (id. at pp. 11-12). The IHO also noted that the district failed to provide the parents with a copy of their due process rights in their native language (id. at p. 5).

The IHO also determined that the parents satisfied their burden to establish that Cooke was an appropriate unilateral placement for the 2011-12 school year, finding that the student's teacher was a licensed special education teacher who differentiated instruction for the student as needed using multi-sensory techniques (IHO Decision at p. 14). In addition, the IHO determined that the educational program at Cooke was tailored to meet the student's needs "through small-group instruction, social-emotional support, and effective travel training," as well as through the related services of OT, speech-language therapy, and counseling (id.). The IHO also found that the student demonstrated progress at Cooke during the 2011-12 school year (id.). Lastly, the IHO determined that equitable considerations weighed in favor of the parents' request for relief because the hearing record indicated that the parents' execution of the enrollment contract with Cooke in April 2011 demonstrated their intent to secure an appropriate placement for the student should the district fail to offer the student a FAPE (id. at p. 15). Furthermore, the IHO determined that the parents fully cooperated, visited the assigned public school site, and provided timely notice of their intent to unilaterally place the student (id.). Consequently, the IHO ordered the district to reimburse the parents for the costs of the student's tuition at Cooke for the 2011-12 school year (id. at pp. 15-16). The IHO further ordered the district to provide the parents with any future evaluations, IEPs, and written notices in their native language and to provide an interpreter for the parents at "all meetings and discussions regarding [the student's] education program for the duration of her IDEA eligibility" (id. at pp. 13, 16).

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

The district appeals, seeking to overturn the IHO's determinations that the district failed to offer the student a FAPE for the 2011-12 school year and that equitable considerations weighed in

favor of the parents' request for relief.<sup>3</sup> Specifically, the district asserts that, although it is undisputed that the district did not provide a translator at the June 2011 CSE meeting, the absence did not constitute a procedural violation because the parent did not request postponement of the June 2011 CSE meeting, the parents' friend attended the meeting and stated her willingness to provide translation assistance to the parent, the parent possessed some ability to understand English without an interpreter, and the evidence in the hearing record showed that the parent, in fact, understood the discussions at the CSE meeting. The district also alleges that the lack of an interpreter did not constitute a denial of a FAPE because the absence did not impede the student's right to a FAPE, impede the parents' opportunity to participate in the decision-making process, or cause a deprivation of educational benefits.

With regard to matters not address by the IHO, the district asserts that the June 2011 CSE was properly composed; the June 2011 CSE solicited input from the parents and the Cooke representatives who attended the CSE meeting; the June 2011 CSE considered appropriate and current evaluative data and accurately stated the student's present levels of educational performance in the IEP; the annual goals and short-term objectives included in the June 2011 IEP were measurable, appropriate, and created with the input of Cooke staff; and the educational program recommended in the June 2011 IEP, consisting of a 12-month program in a 12:1+1 special class placement with related services of speech-language therapy and counseling, was appropriate for the student. The district also asserts that the parents' claims relative to the assigned public school site were speculative as a matter of law and that, in any event, the assigned school would have been able to implement the student's June 2011 IEP.

Next, the district asserts that the IHO erred in ordering relief relating to the translation of documents and provision of interpreters at future meetings because the parents did not request such relief in their due process complaint notice. Furthermore, the district asserts that the relief ordered exceeded the duration of the school year at issue. Alternatively, the district argues that IHO's order was overly broad and without a basis in the law, in that neither the IDEA nor State law requires translation of IEPs and evaluations or provision of an interpreter at "all meetings and discussions" concerning the student.

In an answer and cross-appeal, the parents respond to the district's petition by denying the allegations raised and asserting that the IHO correctly determined that the district failed to offer the student a FAPE for the 2011-12 school year and that equitable considerations weighed in favor of awarding the parents the costs of the student's tuition. Initially, the parents assert that the district failed to provide them with a translated version of the petition which deprived them of their due process rights and resulted in an untimely, invalid service, and, therefore, the petition should be dismissed. The parents also assert that the IHO correctly determined that the district's failure to ensure the presence of a translator at the June 2011 CSE meeting resulted in a denial of a FAPE and additionally asserts that the district also failed to prove that it provided the parents with translated versions of the June 2011 IEP, a procedural safeguards notice, and prior written notice.

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<sup>3</sup> The district has not appealed the IHO's determination that Cooke was an appropriate unilateral placement. Accordingly, this determination has become final and binding on the parties (34 C.F.R. 300.514[a]; 8 NYCRR 200.5[j][5][v]).

As to their cross-appeal, the parents assert the IHO erred in failing to address the remaining procedural and substantive claims raised in their due process complaint notice, including that: the June 2011 CSE did not afford the parents or Cooke staff the opportunity to meaningfully participate in the development of the student's IEP; the June 2011 CSE failed to either conduct, discuss, or review required evaluations, progress reports or prior IEPs; the June 2011 IEP failed to accurately reflect the student's then-current levels of performance and needs; the annual goals included in the June 2011 IEP were inappropriate; the June 2011 IEP failed to "describe or provide the extent or intensity of direct, individual support from a teacher that [the student] required to stay on task"; the June 2011 CSE failed to recommend a sufficient level of related services; the June 2011 CSE failed to develop a transition plan to address the student's "transition and vocation developmental needs"; and the June 2011 CSE failed to recommend transitional support services to facilitate the student's transfer to the larger setting with decreased individual support. Furthermore, the parents assert that the IHO should have determined that the FNR was untimely and that the district did not prove that it could implement the June 2011 IEP at the assigned public school site.

In an answer to parents' cross-appeal, the district asserts that it timely served the parents with the notice and petition and that it was not required to provide a copy in the parents' native language. The district also asserts that the parents' cross-appeal allegations are improperly pled, in that they do not clearly identify the issues that the parents believe the IHO failed to decide and why. As to the merits, the district reiterates the procedural and substantive adequacy of the June 2011 CSE and resultant IEP, as well as the speculative nature of the parents' claims regarding the ability of the assigned public school to properly implement the student's June 2011 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 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. Translation of Documents**

Relevant to both the district's appeal of the IHO's order for translation of documents and the parents' procedural defense relating to the district's failure to serve a translated copy of the petition, I first turn to the district's obligations relative to the translation of documents in the parents' native language. In addition to the petition, the parents also assert that the district failed to provide the parents with translated copies of the June 2011 IEP, a procedural safeguards notice, and prior written notice.

Both federal and State regulations require that a district provide parents with certain educational documents in their native language, ensure that consent and procedural notices are provided in the parents' native language, and provide a translator at all times during the impartial hearing process (see, e.g., 34 CFR 300.9[a]; 300.503[c], 300.504[d]; 8 NYCRR 200.1[7][1], 200.4[a][9][ii], [b][6][xii], [g][2][ii], 200.5[a][4], [f][2], [j][3][vi]).

The IHO determined and the district does not dispute that the parents were not provided a copy of a procedural safeguards notice in their native language (IHO Decision at p. 5; see 34 CFR 300.504[d], citing 300.503[c]; 8 NYCRR 200.5[f][2]). Furthermore, although required, there is no evidence in the hearing record that the district provided a copy of a prior written notice or the

results of any assessment of the student to the parents in their native language (Tr. p. 159: see 34 CFR 300.503[c]; 8 NYCRR 200.4[b][6][xii], 200.5[a][4]). However, neither federal nor State regulations require that a district provide parents with a copy of the IEP in their native language (Letter to Boswell, 49 IDELR 196 [OSEP 2007] [noting that “[t]here is no requirement in IDEA or in its accompanying regulations that all IEP documents must be translated” and that schools are still required to provide parents with full information, in the native language, of all information relevant to activities for which consent is sought]; see 34 CFR 300.320; 8 NYCRR 200.4[d][2]).<sup>4</sup> Furthermore, as the district asserts, the parents failed to raise an issue relating to the translation or documents or request related relief in their due process complaint notice (see 20 U.S.C. § 1415[c][2][E][i], [f][3][B]; 34 CFR 300.508[d][3], 300.511[d]; 8 NYCRR 200.5[i][7][i], [j][1][ii]; R.E., 694 F.3d at 187-88 n.4 [noting the requirement that parents “state all of the alleged deficiencies in the IEP in their . . . due process complaint”]). Based on the foregoing, I will modify the IHO's order to the extent that it directs the district to provide translation of documents beyond the requirements of federal and State regulations. However, I will direct the district to comply with its obligations under federal and State law.

As to the parents' defense relating to the petition, although State regulations require that at all stages of an impartial hearing a district shall provide an interpreter fluent in a parent's native language at district expense when required (8 NYCRR 200.5[j][3][vi]), the parent cites to no authority requiring that the district, upon filing appeal with an administrative or judicial tribunal, must also provide parents with a copy of pleadings that have been translated from English into their native language and, upon searching, I have found nothing comparable (see Bethlehem Area School Dist. v. Zhou, 976 A.2d 1284, 1287 [Pa. Cmwlth. 2009] [overturning a state administrative due process decision requiring the translation of hearing transcripts into the parent's native language when such directive was upon the authority of a hearing policy manual that lacked the force of law]). In any event, as the district correctly points out, the parents are represented by counsel on appeal and timely served an answer to the petition in English and, therefore, even if there was such a requirement, there would be no prejudice to the parents in this instance due to any failure to provide a copy of the petition translated into the parents' native language.

### **B. Presence of an Interpreter at the June 2011 CSE Meeting**

With respect to the district's failure to provide an interpreter for the parent at the June 2011 CSE meeting, the district asserts that the omission of the interpreter, without other procedural violations, did not result in a denial of FAPE. The district also asserts that the parent actively participated in the CSE and was aided by a family friend who accompanied the parent at the meeting.

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. §1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's

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<sup>4</sup> Although not required to provide parents with a copy of an IEP in their native language, keeping within the spirit of the IDEA by doing so is one way to demonstrate that the parent has been "fully informed of the student's educational program" (Letter to Boswell, 49 IDELR 196 [OSEP 2007]).

IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). In addition, the district "must take whatever action is necessary to ensure that the parent understands the proceedings of the [CSE] meeting, including arranging for an interpreter for parents [who are hearing impaired] or whose native language is other than English" (34 CFR 300.322[e]; 8 NYCRR 200.5[d][5]; see also Application of the Dep't of Educ., Appeal No. 12-215; Application of a Child with a Disability, Appeal No. 05-119). However, State regulations only require that a district provide parents an interpreter fluent in their native language during a CSE meeting, when required, and not during "all meetings and discussions regarding [the student's] education program," as ordered by the IHO (IHO Decision at p. 16). As such, the IHO's corrective order, which had no discernable limits other than the duration of the student's IDEA eligibility, went far beyond the district's legal responsibilities and should have been more closely aligned with the district's obligations to provide the parents with interpreter services in conformance with the established regulatory scheme.<sup>5</sup>

In this case, the hearing record shows that the parents' native language is other than English (see Parent Exs. 7 at p. 1; 8 at p. 3). It is undisputed that the district knew of the parents' need for an interpreter at the time of the June 2011 CSE meeting and the IEP itself stated that requirement (Dist. Ex. 3 at p. 1). The hearing record shows that the district requested the presence of an interpreter but that it "couldn't get a translator in time" for the June 2011 CSE meeting (Tr. p. 157; see also Tr. p. 122). The parent also testified that, although an interpreter had been utilized in two prior CSE meetings, she did not speak up at the start of the June 2011 CSE meeting to request an interpreter because, having grown up in her native country, she was shy about asking and, further, she did not know that she had a right to an interpreter (Tr. pp. 568-69).

The district asserts that the parent's friend, who attended the June 2011 CSE meeting, acted as an interpreter and that the friend understood the proceedings. The district special education teacher testified that she knew that the family friend could interpret because "friends had been to prior meetings" and had interpreted the meetings (Tr. p. 122).<sup>6</sup> The special education teacher also testified that she did not inquire as to the friend's interpretation skills but that the friend said she would interpret and the June 2011 CSE ensured that the parent and her friend understood "what was going on" during the meeting (Tr. pp. 158, 202).

However, in contrast to the testimony of the district special education teacher, the parent, the friend, and the Cooke consulting teacher testified that the parents' friend never told the CSE members that she was fluent in the parents' native language or that she was comfortable acting as an interpreter (Tr. pp. 383, 441, 569). The Cooke consulting teacher also testified that the friend did not provide simultaneous interpretation and that some of the terms were not clear to her (Tr. p. 383). Furthermore, the Cooke consulting teacher testified that the parent was "quite mild

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<sup>5</sup> An IHO may have some discretion to craft equitable relief that goes outside a specific regulatory requirement so long as the relief is clearly related to one or more of the specific statutory objectives of the IDEA, but the basis for awarding any relief that goes beyond the regulatory scheme should be carefully explained, supported by record evidence, and cautiously tempered in light of the specific facts of the case at hand.

<sup>6</sup> The hearing record shows that the friend's husband was fluent in English and the parents' native language but that the friend who attended the June 2011 CSE meeting spoke English in her home and knew very few phrases in the parents' native language (Tr. pp. 445-46).

mannered and would not have raised further objection" to continuing the meeting without an interpreter (Tr. p. 411) and that the district did not offer the parent the opportunity to reschedule the meeting (Tr. p. 420).

Most importantly the parent's friend herself testified during the impartial hearing that, as she had in the past, she attended the June 2011 CSE meeting as a friend, not as an interpreter (Tr. pp. 440, 442). She further testified that she primarily communicated with the parent in English, with a few colloquial phrases in the parent's native language (Tr. p. 445). She testified regarding the limited nature of her abilities relative to speaking and understanding the parents' native language (*id.*). She indicated that, during the June 2011 CSE meeting, she tried to clarify some terms for the parent but that she lacked knowledge of educational terminology in the native language and that such a level of translation was beyond her abilities (Tr. pp. 441, 443-44).

The foregoing evidence does not establish that the district took whatever action was necessary to ensure that the parent understood the proceedings of the CSE. For example, the available evidence in the hearing record supports the conclusion that the district failed to inform the parent that she had the right to have an interpreter at the meeting or to offer to reschedule the meeting (Tr. pp. 443-45, 568). Furthermore, the district made inappropriate presumptions about the parent's ability to understand and express herself in English, about the friend's role at the June 2011 CSE meeting, and about the friend's capacity to effectively provide interpreter services for the parent (Tr. pp. 441-43, 453). Moreover, the evidence in the hearing record does not show that the June 2011 CSE made any effort to ascertain whether the parent understood what transpired during the meeting (*id.*).

The hearing record shows that the foregoing failure on the part of the district significantly impeded the parent's opportunity to participate in the development of the student's June 2011 IEP. The parent testified that she only understood about half of what happened at the June 2011 CSE meeting (Tr. p. 571). Although the hearing record reflects that the student's ELA and math teachers, and speech-language therapy provider from Cooke, as well as the Cooke consulting teacher, actively participated either in person or by telephone for at least part of the June 2011 CSE meeting relevant to their areas of expertise (Tr. p. 121; Dist. Exs. 3 at p. 2; 4), their participation, under the circumstances of this particular case, did little to overcome the district's failure to ensure the presence of an interpreter. The parent described the June 2011 CSE meeting as "very mechanical" (Tr. p. 571). She indicated that the other CSE members did not converse with her (*id.*). Instead, there was only conversation between the "other side" and the student's teachers on the phone (*id.*). In addition, the parent testified that she did not receive any documents from June 2011 CSE and she did not know that the district had prepared a draft IEP or was reading from it during the June 2011 CSE (Tr. p. 572).<sup>7</sup> Furthermore, review of the June 2011 IEP and the June 2011 CSE meeting minutes reveals no mention of any parental concerns or even whether the parent was asked if she had any concerns (see generally Dist. Exs. 3; 4).

Under these circumstances, the hearing record supports the IHO's finding that the district's failure to ensure the presence of an interpreter at the June 2011 CSE meeting constituted a

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<sup>7</sup> The parent testified that she requested a copy of the 2010-11 IEP during the June 2011 CSE meeting (Tr. p. 572). She indicated that she had not received the previous IEP because the district had sent it to an incorrect address (*id.*).

procedural violation that significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman, 550 U.S. at 525-26), and consequently, the district denied the student a FAPE.

### **C. Unaddressed Issues**

The parents assert a cross-appeal on the basis that the IHO should have addressed their additional claims, set forth in the due process complaint notice.<sup>8</sup> I agree that the IHO should have made determinations regarding the remaining issues in the first instance. In the event of an administrative or judicial review, in which the reviewing body might disagree with a singular finding, it is important to have the remaining issues and the rationales addressed, even briefly (cf. F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 (S.D.N.Y. 2013)). Also, such an analysis serves as a guide to the district as to whether it should undertake corrective action in the future in order to comply with the IDEA. However, I am also loath to remand for further proceedings in this instance, where both the IHO and this SRO agree that the district failed to offer the student a FAPE on the same ground. Therefore, the additional alternative findings are hereby provided without any analysis by the IHO actually heard the case or the parties' agreement with or challenges thereto.. A review of the parents' unaddressed claims, undertaken in the alternative, reveals that, but for the district's procedural violation that significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, the evidence in the hearing record would have supported a finding that the June 2011 CSE and the resulting IEP were procedurally and substantively adequate.

#### **1. February 2011 IEP**

When developing the student's June 2011 IEP, the CSE considered the student's April 2010 IEP, a December 2010 classroom observation, and a June 2011 progress report from Cooke, as well as updated information provided by the Cooke representatives who attended the CSE meeting (Tr. pp. 124-26, 128-29, 131, 133, 150-51, 199-200, 209-10, 391, 408-09; see generally Dist. Exs. 5; 6; Parent Ex. E).<sup>9, 10</sup> Review of the June 2011 Cooke progress report, the minutes of the June 2011 CSE meeting, and the June 2011 IEP reveal consistent information about the student's reading, writing, and math levels and skills, academic management needs, eagerness to participate, consistent completion of homework, and growth in maturity (see Dist. Exs. 3 at pp. 3-5; 4 at pp. 1-2; 6 at pp. 3-4, 6-7). In addition, the speech-language provider's comments for the third trimester,

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<sup>8</sup> Contrary to the district's argument, the parents' cross-appeals, when read in context with the parents' answer as a whole, are sufficiently pled (see 8 NYCRR 279.4).

<sup>9</sup> The district special education teacher testified that, prior to the June 2011 CSE meeting, she and the district school psychologist reviewed the student's June 2008 social history report and her October 2008 bilingual psychoeducational evaluation report in order to refresh their memories about the student (Tr. pp. 148-49).

<sup>10</sup> The hearing record is not definitive about the specific Cooke progress report the June 2011 CSE had available (Tr. p. 151). The Cooke progress report dated "June 2011" contained a notation about the student's attendance as of June 17, 2011, beyond the date of the June 3, 2011 CSE meeting (id.; Dist. Ex. 6 at p. 1). However, since both parties cite this report as the relevant document (see Pet ¶¶ 11, 35; Answer ¶¶ 10, 61, 65, 67-68), I will accept it as such.

included in the June 2011 Cooke progress report, contained content consistent with the June 2011 IEP and the meeting minutes of the June 2011 CSE, as was information from another Cooke provider's progress report specific to personal hygiene (Dist. Exs. 3 at pp. 4-5; 4 at p. 2; 6 at pp. 13-14). Furthermore, in comparing the student's June 2010 IEP with the June 2011 IEP, although much of the information in regards to the student's present levels of performance is the same, the June 2011 IEP contains updated information about the student, especially in the area of social/emotional performance (compare Dist. Ex. 3 at pp. 3-6, with Parent Ex. E at pp. 3-5).

With input from Cooke staff, the June 2011 CSE developed eight annual goals with 37 short-term objectives, aligned to the student's needs per her present levels of performance, in the areas of English language arts (ELA), written expression, mathematics, speech-language therapy, social/emotional functioning, and post-secondary transition (Tr. pp. 133-34; Dist. Exs. 3 at pp. 7-10, 13-14; 4).<sup>11</sup> The June 2011 IEP also included support for the student's management needs, including small group instruction, directions repeated and rephrased as needed, use of a multisensory approach, scaffolding, graphs/checklists/manipulative/graphic organizers, visual and verbal cues, preferential seating, use of highlighter, mask and markers, modeling, social scripts, teacher cues, and positive reinforcement for on-task behavior (Dist. Ex. 3 at pp. 3, 5). The district special education teacher testified that the particular supports for the student's management needs were generated by referring to the student's prior IEP and reading each support aloud and requesting input from the Cooke staff as to whether they were appropriate (Tr. p. 129).

Turning to the transition plan developed by the June 2011 CSE, review of the CSE meeting minutes reflects the CSE reviewed and made modifications to the transition plan included in the student's April 2010 IEP specific to the student's functional needs related to ADL skills, home management, and safety (Dist. Ex. 4 at p. 2). Comparison of the April 2010 IEP and the June 2011 IEP reveals that the transition plans were primarily the same in terms of long-term adult outcomes and the coordinated set of transition activities (compare Dist. Ex. 3 at pp. 14-15, with Parent Ex. E at pp. 13-14). However, consistent with the June 2011 CSE meeting minutes, the June 2011 IEP reflected the student's interests in art and shopping, as well as the student's experience in an internship at a bookstore where she alphabetized (Dist. Exs. 3 at p. 14; 4 at p. 2). The June 2011 IEP also noted that the student needed to continue with travel training in order to navigate herself around the community (Tr. pp. 140-41; Dist. Exs. 3 at p. 15).

With regard to the recommendation for a 12:1+1 special class placement in a specialized school, the hearing record indicates that the June 2011 CSE also considered a 15:1 placement in a community school, but rejected this option because it was insufficient to meet the student's academic, language, and cognitive needs (Dist. Ex. 3 at p. 12). The CSE also considered a 6:1+1, an 8:1+1, or a 12:1+4 special class placement in a specialized school, but rejected these options as inappropriate (id.).

The evidence and testimony within the hearing record shows that the student did not require the level of individualized support alleged by the parents. According to the Cooke progress report, the student either usually or always participated in class activities and discussions and worked

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<sup>11</sup> The district special education teacher testified that no one at the June 2011 CSE meeting raised any objection to the recommended goals and objectives (Tr. p. 136).

collaboratively with her peers, only required a moderate to minimum level of prompting when working in certain academic areas, and required a minimum amount of prompting in the social arena; however, the report indicated that she needed a moderate level of support with adaptive skills and speech language skills (see Dist. Ex. 6). The district special education teacher testified that the student would be supported in the recommended placement by a counselor and the speech-language provider, as well as by the supports in the classroom (Tr. p. 196).<sup>12</sup>

Furthermore the hearing record shows that the June 2011 CSE recommended related services of individual and small group speech-language therapy and small group counseling to address the student's needs with respect to pragmatic language skills and articulation fluency and social interaction (Tr. p. 132; Dist. Ex. 3 at p. 13). As to OT, beyond noting that the student received the related service at Cooke during the 2010-11 school year, there was no particular information before the CSE indicating that the student struggled with any skills that required OT services and the previous IEP did not include a recommendation for OT (see Dist. Ex. 6 at p. 1; Parent Ex. E at p. 12; see also Tr. pp. 132, 151-53, 200-01, 397). The district special education teacher indicated that Cooke "provide[d] OT through the school, not necessarily because it[ was] on the student's IEP" (Tr. p. 153). Moreover, the Cooke consulting teacher testified that OT supported the student at Cooke with her ADL skills, which, the CSE otherwise identified in the June 2011 IEP (Tr. p. 427; Dist. Ex. 3 at p. 5; see Dist. Ex. 6 at p. 15).

Finally, as to transitional support services, the IDEA does not require a "transition plan" as part of a student's IEP when a student moves from one school to another (A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at \*8 [S.D.N.Y. Mar. 19, 2013]; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at \*9 [S.D.N.Y. Oct. 16, 2012], aff'd, 2014 WL 53264 [2d Cir. Jan. 8, 2014]; see R.E., 694 F.3d at 195).

## 2. Assigned Public School Site

The parents also cross-appeal the IHO's failure to address their claims regarding the assigned public school site. As the district asserts, 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., 2014 WL 53264, at \*6 [2d Cir. Jan. 8, 2014]; B.K. v. New York City Dep't of Educ., 2014 WL 1330891, at \*20-\*22 [E.D.N.Y. Mar. 31, 2014]; E.H. v. New York City Dep't of Educ., 2014 WL 1224417, at \*7 [S.D.N.Y. Mar. 21, 2014]; 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

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<sup>12</sup> The district special education teacher testified that, at the time of the December 2010 classroom observation conducted at Cooke, nine students were present in the classroom (Tr. p. 197). She believed there could be up to 12 students in the Cooke classroom, but did not know if any students were out of the classroom for related services or due to absence (id.).

81, 87, 2013 WL 3814669 [2d Cir. July 24, 2013]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at \*12 [S.D.N.Y. Mar. 31, 2014]; 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]).

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 Scott v. New York City Dep't of Educ., 2014 WL 1225529, at \*19 [S.D.N.Y. Mar. 25, 2014] [finding that "[t]he proper inquiry . . . is whether the alleged defects of the placement were reasonably apparent" to the parent or the district when the parent rejected the assigned public school site]; D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 508-13 [S.D.N.Y. 2013] [holding that the district must establish that it can implement the student's IEP at the assigned school at the time the parent is required to determine whether to accept the IEP or unilaterally place the student]; B.R. v. New York City Dep't of Educ., 910 F.Supp.2d 670, 676-78 [S.D.N.Y. 2012] [same]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at \*11 [S.D.N.Y. Sept. 29, 2012] [holding that parents may prospectively challenge the adequacy of a "placement classroom" when a child has not enrolled in the school because districts are not permitted to assign a child to a public school that cannot satisfy the requirements of an IEP]). However, I continue to find it necessary to depart from those cases. Since a number of 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 [2d Cir. May 21, 2013]) and, even more clearly that "[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 530 Fed. App'x at 87 [rejecting as improper the parents claims related to how the proposed IEP would have been implemented]). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. 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]).<sup>13</sup>

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<sup>13</sup> The Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular school site or classroom location on a student's IEP, the district is not permitted to choose any school and provide services that deviate from the provisions set forth in the IEP (see R.E., 694 F.3d at 191-92; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [district does not have carte

As explained most recently, "[i]t would be inconsistent with R.E. to require the [district] to proffer evidence regarding the actual classroom [the student] would have attended, where it had become clear that the student would attend private school and not be educated under the IEP" (M.O. v. New York City Dept. of Educ., 2014 WL 1257924, at \*2 [S.D.N.Y. Mar. 27, 2014]). Instead, "[t]he Second Circuit has been clear . . . 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., 964 F. Supp. 2d 270, 286 [S.D.N.Y. 2013]; see R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at \*17 [S.D.N.Y. Sept. 27, 2013]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at \*26 [E.D.N.Y. Aug. 19, 2013]; M.R. v New York City Bd. of Educ., 2013 WL 4834856, at \*5 [S.D.N.Y. Aug. 14, 2013] [finding that the argument that the assigned school would not have been able to implement the IEP was "entirely speculative"]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 588-89 [S.D.N.Y. 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"]). When the Second Circuit spoke most recently with regard to the topic of assessing the district's offer of an IEP versus later acquired school site information obtained and rejected by the parent as inappropriate, the Court disallowed a challenge to a recommended public school site, reasoning that "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'" (F.L., 2014 WL 53264, at \*6, quoting R.E., 694 F.3d at 187 n.3).

In view of the foregoing, I find that the parents would not have prevailed on their claim that the district would have failed to implement the June 2011 IEP at the assigned public school site because a retrospective analysis of how the district would have executed the student's June 2011 IEP at the assigned public school site is not an appropriate inquiry under the circumstances of this case (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Here, it is undisputed that the parent rejected the assigned public school site that the student would have attended and instead chose to enroll the student at Cooke for the 2011-12 school year (see Parent Ex. A). Therefore, the district is correct that the issues raised and the arguments asserted by the parents with respect to the assigned public school site are speculative. 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 parents 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"]). Based on the foregoing, the district was not obligated to present retrospective evidence at the impartial hearing regarding the execution of the student's program or to refute the parents' claims (K.L., 530

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blanche to provide services to a child at a school that cannot satisfy the IEP's requirements]). The district has no option but to implement the written IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan.

Fed. App'x at 87; R.E., 694 F.3d at 186; R.C., 906 F. Supp. 2d at 273). Accordingly, the parents cannot prevail on their claim that the assigned public school site would not have properly implemented the June 2011 IEP.

#### **D. Equitable Considerations**

As noted above, the district does not appeal the IHO's determination that Cooke was an appropriate placement for the student; therefore this determination is final and binding and will not be addressed herein (see 34 CFR 300.514; 8 NYCRR 200.5[j][5][v]). As such, the inquiry turns next to the question of equitable considerations.

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; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 840 [2d Cir. 2014]; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). The IDEA also provides that reimbursement may be reduced or denied when parents fail to challenge the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; see 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, 192 Fed. App'x 62, 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 Voluntown, 226 F.3d at 69 n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]).

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

The district asserts that the parents did not establish that they were genuinely interested in having the student attend a public school. The evidence in the hearing record shows that the parents signed an enrollment contract with Cooke in April 2011 for the student's attendance during the 2011-12 school year and provided a deposit in order to reserve a spot for the student (Parent Ex. J at p. 1; see Tr. p. 584). Notwithstanding this, it appears that the parents acted reasonably under the circumstances of this case, and if parents cooperate with the district "in its efforts to meet its obligations under the IDEA . . . their pursuit of a private placement [is] not a basis for denying their [request for] tuition reimbursement, even assuming . . . that the parents never intended to keep [the student] in public school" (C.L., 744 F.3d at 840; see, e.g., A.R. v. New York City Dep't of Educ., 2013 WL 5312537, at \*9-\*10 [S.D.N.Y. Sept. 23, 2013]). Furthermore, the contract with Cooke allowed the parents to withdraw the student without financial penalty, except forfeiture of their initial deposit (Parent Ex. K at p. 2).

The district also asserts that the parents' 10-day notice was insufficient as a matter of law as it failed to set forth the parents' concerns relating to the June IEP and instead focused on issues relating to the assigned public school site. While the failure to provide notice may be a compelling argument in some cases, I find the district's assertions in this instance to be disingenuous, considering that CSE went ahead with the June 2011 CSE meeting without an interpreter and the district failed to provide the parents with a copy of a procedural safeguards notice or a prior written notice in their native language—flaws that, had they not occurred, may have resulted in a 10-day notice more to the district's liking. The equitable considerations weigh decidedly in favor of the parents in this case.

## **VII. Conclusion**

Based on the foregoing, the evidence in the hearing record supports the IHO's determination that the district failed to offer the student a FAPE for the 2011-12 school year and that equitable considerations weighed in favor of the parents' request for tuition reimbursement. However, to the extent that it IHO directed the district to provide an interpreter and ensure translation of documents beyond the mandates of federal and State regulations, the IHO's order will be reversed.

I have considered the parties' remaining contentions and find that it is not necessary to address them in light of my determinations herein.

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

**THE CROSS-APPEAL IS DISMISSED.**

**IT IS ORDERED** that the IHO's decision dated January 7, 2014 is modified by reversing those portions which directed that all IEPs, evaluations, and written notices be provided to the parents in their native language and that an interpreter be provided at district expense for all meetings and discussions regarding the student's education program for the duration of her IDEA eligibility; and

**IT IS FURTHER ORDERED** that, unless the parties shall otherwise agree, the district

shall provide the parents with 1) a copy of the procedural safeguards notice once per year; 2) interpreter services at each of the student's CSE meetings; and 3) prior written notice, in the parents' native language for a minimum of two years from the date of this decision.

**Dated:**        **Albany, New York**  
                  **April 30, 2014**

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